

SECURITIES AND EXCHANGE COMMISSION
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April 13, 2022

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Modify Certain Pricing Limitations for Securities Listed on the Exchange Pursuant to a Primary Direct Floor Listing

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on April 7, 2022, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify certain pricing limitations for securities listed on the Exchange pursuant to a Primary Direct Floor Listing. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78s.

³ 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange recently amended Chapter One of the Listed Company Manual (the “Manual”) to modify the provisions relating to direct listings to permit a primary offering in connection with a direct listing and to specify how a direct listing qualifies for initial listing if it includes both sales of securities by the company and possible sales by selling shareholders (a “Primary Direct Floor Listing”).⁴ The Exchange also adopted Rule 7.31(c)(1)(D) defining the Issuer Direct Offering (“IDO”) Order for use by a company that wishes to sell its shares through a Primary Direct Floor Listing and modified Rule 7.35A to describe how the IDO Order would participate in a Direct Listing Auction, establish additional requirements for a DMM conducting a Direct Listing Auction for a Primary Direct Floor Listing, and specify how the Indication Reference Price would be determined for a security to be opened in a Direct Listing.⁵ Currently, under Rule 7.35A(g)(2), the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if (i) the Auction Price would be outside of the price range specified by the

⁴ See Securities Exchange Act Release No. 90768 (December 22, 2020), 85 FR 85807 (December 29, 2020) (SR-NYSE-2019-67) (Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings) (the “Approval Order”).

⁵ Id.

company in its effective registration statement (the “Price Range Limitation”)⁶ and (ii) if there is insufficient interest to satisfy both the IDO Order and all better-priced sell orders in full.

The Exchange now proposes to modify the Price Range Limitation to provide that a Direct Listing Auction for a Primary Direct Floor Listing may be conducted if the Auction Price is outside of the price range established by the company in its effective registration statement (the “Issuer Price Range”) but is either (i) at or above the price that is 20% below the lowest price or at or below the price that is 20% above the highest price of the Issuer Price Range⁷ or (ii) above the price that is 20% above the highest price of the Issuer Price Range. The Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing could proceed in these circumstances provided that the issuer has certified to the Exchange and publicly disclosed that: (i) it does not expect that the Auction Price would materially change the issuer’s previous disclosure in its effective registration statement; (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K; and (iii) such registration statement contains a sensitivity analysis explaining how the issuer’s plans would change if the actual proceeds from the offering differ from the amount assumed in the price range established by the issuer in its effective registration statement.

⁶ The Exchange notes that references in this rule filing to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. In addition, as explained in more detail below, the Exchange proposes that the 20% threshold be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

⁷ As discussed further below, the Exchange proposes to define the “Primary Direct Floor Listing Auction Price Range” as the price range that includes 20% below the lowest price and 20% above the highest price of the Issuer Price Range.

Background

The Exchange believes that, while many companies are interested in alternatives to the traditional initial public offering (“IPO”), companies and their advisors may be reluctant to use the Primary Direct Floor Listing under current Exchange rules because of concerns about the Price Range Limitation.

One potential benefit of a Primary Direct Floor Listing as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO, where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, the initial sale price in a Primary Direct Floor Listing is determined based on market interest and the matching of buy and sell orders in an auction open to all market participants.

In that regard, the Commission noted in the Approval Order that:

[B]ecause the price of securities issued by a company in a Primary Direct Floor Listing will be determined based on market interest and the matching of buy and sell orders, Primary Direct Floor Listings will provide an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus may allow for efficiencies in IPO pricing and allocation. . . . The opening auction in a Primary Direct Floor Listing provides for a different price discovery method for IPOs which may reduce the spread between IPO price and subsequent market trades, a potential benefit to existing and potential investors.⁸

⁸ See Approval Order, 85 FR at 85816-17 (footnote omitted).

A successful IPO of shares requires sufficient investor interest. If an offering cannot be completed due to lack of investor interest, a company is likely to receive negative publicity, and the offering may be delayed or cancelled. The Price Range Limitation—which is imposed on a Primary Direct Floor Listing but not on an IPO—increases the probability of a failed offering because it contemplates there also being too much investor interest. In other words, if investor interest is greater than the company and its advisors anticipated, an offering would need to be delayed or cancelled.

As the Commission has noted with respect to traditional firm commitment underwritten offerings, the IPO price, which is established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.⁹ The Exchange believes that the price range in a company’s effective registration statement for a Primary Direct Floor Listing is similarly determined by the company and its advisors and, therefore, there may be instances of offerings where the price determined by the Direct Listing Auction would exceed the highest price of the price range in the company’s effective registration statement.

As described above, under current Exchange Rules, the DMM would not conduct a Direct Listing Auction for a security subject to a Primary Direct Floor Listing if the Auction Price determined is above the highest price of the price range established by the issuer in its effective registration statement. In this case, the offering would be cancelled or postponed until the company amends its effective registration statement. At a minimum, such a delay could expose the company to risks associated with changing investor sentiment in the event of an

⁹ See, e.g., Approval Order, 85 FR at 85816, n. 113.

adverse market event. As a result, the Exchange believes that companies may be reluctant to use this alternative method of going public despite its expected potential benefits because of the restrictions of the Price Range Limitation.

Proposed Rule Change

In light of the above, the Exchange proposes to modify the Price Range Limitation such that a Direct Listing Auction for a Primary Direct Floor Listing could proceed even if the Auction Price is at or above the price that is 20% below the lowest price of the Issuer Price Range and at or below the price that is 20% above the highest price of such price range. Specifically, the Exchange proposes that the DMM could conduct the Direct Listing Auction, provided all other necessary conditions are satisfied, even if the Auction Price is outside of the Issuer Price Range, if the Auction Price would not be more than 20% below the lowest price or more than 20% above the highest price of such range and the company has, in its effective registration statement, specified the quantity of shares registered, as permitted by Securities Act Rule 457.¹⁰ The Exchange further proposes that a Direct Listing Auction could proceed if the Auction Price is a price that is greater than 20% above the highest price of the Issuer Price Range, provided that all other necessary conditions are satisfied, and the company has, in its effective registration statement, specified the quantity of shares registered, as permitted by Securities Act Rule 457. The Exchange also proposes that the 20% threshold be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430.

¹⁰ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. The Exchange proposes to require that companies selling shares through a Primary Direct Floor Listing will register securities by specifying the quantity of shares registered and not a maximum offering amount.

When the Auction Price is either (i) outside of the Issuer Price Range but not more than 20% above or below such price range, or (ii) greater than 20% above the highest price of the Issuer Price Range, the Exchange proposes that the Direct Listing Auction would not proceed unless the company has publicly disclosed and certified to the Exchange that (i) the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement; (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K; and (iii) the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering differ from the amount assumed in the price range established by the issuer in its effective registration statement.¹¹ In such cases, the Exchange also proposes to provide the issuer with the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering so that any such disclosures would be available to investors prior to the completion of the offering. Thus, the Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing would not take place until the issuer confirms to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.

The Exchange believes that the additional requirements to permit a Direct Listing Auction to take place at an Auction Price that is outside of the Issuer Price Range (whether it is at or within the Primary Direct Floor Listing Auction Price Range or above the highest price of

¹¹ Sensitivity analysis disclosure may include, but is not limited to, use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. A company could state, for example: "We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes."

such price range), as proposed, would provide sufficient disclosures to allow investors to evaluate whether to participate in the Direct Listing Auction for a Primary Direct Floor Listing, including the opportunity to see how changes in share price may impact the company's disclosures.

The Exchange believes that its proposal with respect to the Price Range Limitation for a Primary Direct Floor Listing is consistent with SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which generally allow a company to price a public offering 20% outside of the disclosed price range without regard to the materiality of the changes to the disclosure contained in the company's registration statement.¹² The Exchange believes such guidance would also allow for deviation of greater than 20% above the highest price of the price range in a company's registration, provided that such change would not materially change the previous disclosure. Accordingly, the Exchange believes that a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, if an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosures, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

¹² See Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at <https://www.sec.gov/corpfin/securities-act-rules>.

Given that, as proposed, there may be a Primary Direct Floor Listing that could price outside of the price range of the company's effective registration statement and that there may be no upper limit above which the Direct Listing Auction could not proceed, the Exchange proposes to support price discovery transparency by providing readily available, real time pricing information to investors. Specifically, the DMM's pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing would continue to be published via the securities information processor ("SIP") and proprietary data feeds. The Exchange would also make the Indication Reference Price available, free of charge, on a public website (such as www.nyse.com) on the day such Auction is anticipated to take place.

In addition, to protect investors and enhance disclosure in connection with a Primary Direct Floor Listing, the Exchange proposes to adopt certain requirements for member organizations with respect to Primary Direct Floor Listings. Specifically, the Exchange proposes to require member organizations to provide to a customer, before that customer places an order to participate in the Direct Listing Auction for a Primary Direct Floor Listing, a notice describing the mechanics of pricing a security subject to a Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the availability of pre-opening indications via the SIP and proprietary data feeds and the location of the public website where the Exchange will disseminate information relating to the Indication Reference Price.

The Exchange further proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Primary Direct Floor Listing, a regulatory bulletin that describes any special characteristics of the offering and the Exchange rules that apply to the pricing of a Primary Direct Floor Listing. The regulatory bulletin would also include information about the notice that member organizations would be required to

provide customers, as proposed, and remind member organizations of their obligations pursuant to the Exchange rules that:

- Require member organizations to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer (Rule 2090); and
- Require member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111).

These member organization requirements are intended to remind members of their obligations to “know their customers” and would also serve to increase transparency regarding the pricing mechanisms applicable to a Primary Direct Floor Listing and help provide investors with sufficient price discovery information.

For each Primary Direct Floor Listing, the Exchange proposes that its regulatory bulletin would also inform market participants that the Auction Price could be up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. The Exchange's regulatory bulletin would also indicate whether there is a price range outside of which the Direct Listing Auction for the Primary Direct Floor Listing could not proceed, based on the company's certification as described above.

Amendments to the Manual

Section 102.01B(E) of the Manual provides that companies may be listed on the Exchange through a Primary Direct Floor Listing. More specifically, a company that has not previously had its common equity securities registered under the Act may list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange. A Primary Direct Listing is any such listing in which either (i) only the company itself is selling shares in the opening auction on the first day of trading or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

Section 102.01B(E) of the Manual also provides that, with respect to a Primary Direct Floor Listing, the Exchange will deem a company to have met the applicable aggregate market value of publicly-held shares requirement if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. The Manual further provides that, where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement.

To effect the changes to the Price Range Limitation described above and facilitate the possibility of a Direct Listing Auction for a Primary Direct Floor Listing pricing up to 20%

below the price range disclosed in an issuer’s effective registration statement, the Exchange proposes to modify Section 102.01B(E) of the Manual to provide that the Exchange would calculate the market value of such company’s shares using a price per share equal to the lowest price of the price range established by the issuer in its registration statement, minus an amount equal to 20% of the highest price included in such price range, which will be referred to as the “Primary Direct Floor Listing Minimum Price.” As noted above, the Exchange proposes that a company listing its securities on the Exchange pursuant to a Primary Direct Floor Listing must have specified the quantity of shares registered, as permitted by Securities Act Rule 457, in its effective registration statement. Accordingly, the Exchange further proposes to amend Section 102.01B(E) to include this requirement.

Amendments to Exchange Rules

To implement the changes to the Price Range Limitation described above, the Exchange also proposes the following changes to Rules 7.31 and 7.35A.

Proposed Changes to Rule 7.31

The Exchange proposes to modify Rule 7.31(c)(1)(D), which defines the IDO Order. Rule 7.31(c)(1)(D) currently provides that an IDO Order is a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing, and Rule 7.31(c)(1)(D)(ii) currently provides that the limit price of an IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement. The Exchange proposes to modify Rule 7.31(c)(1)(D)(ii) to provide that the limit price of an IDO Order would be equal to the lowest price of the “Primary Direct Floor Listing Auction Price Range” and to redefine the “Primary Direct Floor Listing Auction Price Range” as 20% below the lowest price and 20% above the highest price of the price range established by the issuer in

its effective registration statement. The Exchange also proposes to define “Issuer Price Range” as the price range established by the issuer in its effective registration statement. Thus, Rule 7.31(c)(1)(D)(ii), as modified, would facilitate the proposed changes to the Price Range Limitation by providing that the limit price of an IDO Order would be equal to the price that is 20% below the lowest price of the Issuer Price Range.

The Exchange further proposes to specify in Rule 7.31(c)(D)(ii) that, for purposes of determining the Primary Direct Floor Listing Price Range, the 20% threshold would be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

Proposed Changes to Rule 7.35A

Rule 7.35A sets forth rules pertaining to Core Open Auctions and Trading Halt Auctions facilitated by a DMM. Rule 7.35A(d) sets forth Exchange rules relating to pre-opening indications published by a DMM in connection with a DMM-facilitated auction. This Rule currently provides that a pre-opening indication will include the security and the price range within which the Auction Price is anticipated to occur and that a pre-opening indication—including for a Direct Listing Auction for a Primary Direct Floor Listing—will be published via the securities information processor and proprietary data feeds.

Rule 7.35A(d)(2)(A) and the subparagraphs thereunder describe the Indication Reference Price for a security to be opened in a DMM-facilitated auction. The Exchange proposes to amend Rule 7.35A(d)(2)(A)(v), which currently provides that, for a security that is a Primary Direct Floor Listing, the Indication Reference Price will be the lowest price of the Primary Direct Floor Listing Auction Price Range. To effect the proposed requirement described above that the Exchange disseminate the Indication Reference Price on a public website, the Exchange

proposes to add this requirement to Rule 7.35A(d)(2)(A)(v). The Exchange also notes that, based on the proposed revision to the definition of Primary Direct Floor Listing Auction Price Range in Rule 7.31(c)(1)(D)(ii), the Indication Reference Price for a Primary Direct Floor Listing would be the price that is 20% below the lowest price of the Issuer Price Range, consistent with the proposed changes to the Price Range Limitation described above.

Next, the Exchange proposes to modify Rule 7.35A(g)(2), which specifies the circumstances under which a DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing. Structurally, the Exchange proposes to amend Rule 7.35A(g)(2) such that the rule would specify requirements for a Direct Listing Auction for a Primary Direct Floor Listing to proceed, rather than specifying circumstances under which a DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing.

Rule 7.35A(g)(2)(A) currently provides that the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price would be below the lowest price or above the highest price of the Primary Direct Floor Listing Auction Price Range. The Exchange proposes to modify this rule to specify that the Auction Price for a Direct Listing Auction for a Primary Direct Floor Listing may not be lower than the lowest price of the Primary Direct Floor Listing Auction Price Range. The Exchange notes that, based on the proposed revision to the definition of Primary Direct Floor Listing Auction Price Range in Rule 7.31(c)(1)(D)(ii), Rule 7.35A(g)(2)(A) would thus provide that the Auction Price for a Direct Listing Auction for a Primary Direct Listing would not be more than 20% below the lowest price of the Issuer Price Range, consistent with the proposed changes to the Price Range Limitation outlined above.

To effect the proposed changes described above that would permit the DMM to conduct a Direct Listing Auction for a Primary Direct Floor Listing when the Auction Price is either (i) at or within the Primary Direct Floor Listing Price Range but outside of the Issuer Price Range, or (ii) above the highest price of the Primary Direct Floor Listing Auction Price Range, the Exchange proposes to amend Rule 7.35A(g)(2)(B) to provide that the Direct Listing Auction could proceed in such circumstances if the issuer has previously certified to the Exchange and publicly disclosed that:

- The issuer does not expect that the Auction Price would materially change its previous disclosure in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(a));
- The price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K (proposed Rule 7.35A(g)(2)(B)(i)(b)); and
- The registration statement contains a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the offering differ from the amount assumed in the price range established by the issuer in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(c)).

Proposed Rule 7.35A(g)(2)(B)(ii) would further provide that, when the Auction Price determined by the DMM is at or within the Primary Direct Floor Listing Auction Price Range but outside of the Issuer Price Range or is above the highest price of the Primary Direct Floor Listing Auction Price Range, the issuer would be required to confirm to the Exchange that no additional disclosures are required under the federal securities laws based on such price. This proposed change would permit issuers to comply with their disclosure obligations under federal

securities laws and provide investors with access to the requisite disclosures before the offering would proceed, as detailed above. Upon receiving confirmation from the issuer that any such obligations have been met, the Exchange would relay that information to the DMM to proceed with the Direct Listing Auction.

Finally, the Exchange proposes to add new subparagraph (C) under Rule 7.35A(g)(2). Proposed Rule 7.35A(g)(2)(C)(i) would reflect the requirement set forth in current Rule 7.35A(g)(2)(B) that the DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing if there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full. The Exchange does not propose to change this requirement, other than adding clarifying text to specify that such orders would be satisfied at the Auction Price.

Proposed Rule 7.35A(g)(2)(C)(ii) would set forth an additional requirement that must be satisfied before the DMM could conduct a Direct Listing Auction for a Primary Direct Floor Listing. This proposed change would reflect the proposed requirements described above regarding the regulatory bulletin to be distributed by the Exchange. Proposed Rule 7.35A(g)(2)(C)(ii) would provide that the DMM would not proceed with a Direct Listing Auction for a Primary Direct Floor Listing until it has been notified by the Exchange that the additional conditions set forth in new Commentary .20 to Rule 7.35A have been satisfied. Proposed Commentary .20 to Rule 7.35A would provide that the Direct Listing Auction for a Primary Direct Floor Listing for a security may not be conducted until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading in such security, the Exchange has distributed a regulatory bulletin describing any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing; the obligations of member organizations pursuant to Exchange Rules 2090 and 2111; and the

requirement that a member organization provide its customers with a notice with information regarding the Direct Listing Auction for a Primary Direct Floor Listing. This proposed change would (i) facilitate the requirements described above to provide member organizations with sufficient information so that they may in turn inform their customers, (ii) remind member organizations of their obligations to “know their customers,” (iii) increase transparency around the pricing mechanisms of a Primary Direct Floor Listing, and (iv) help provide investors with sufficient price discovery information.

Proposed Rule 7.35A(g)(2)(C)(iii) would provide that the DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price is outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in proposed Rules 7.35A(g)(2)(B)(i) and (ii). The Exchange proposes this rule to reinforce that a Direct Listing Auction for a Primary Direct Floor Listing could not proceed in these circumstances unless the issuer has made the requisite disclosures described in proposed Rule 7.35A(g)(2)(B).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,¹³ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,¹⁴ in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed modification of the Price Range Limitation would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because the proposed approach is similar to the pricing of an IPO, where the issuer is permitted to price outside of the price range disclosed in its effective registration statement in accordance with the SEC Staff's guidance, as described above.¹⁵ Specifically, the Exchange believes that it is reasonable to permit the Direct Listing Auction for a Primary Direct Floor Listing to proceed if the Auction Price is at or within the Primary Direct Floor Listing Auction Price Range—that is, as low as 20% below the lowest price of the Issuer Price Range or as high as 20% above the highest price of such price range—because a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when the Auction Price is outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% noted in Rule 430A if such deviation would not materially change the previous disclosure, in

¹⁵ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 12. The Exchange also notes that, in a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See <https://www.sec.gov/news/speech/gensler-healthy-markets-associationconference-120921> (“Gensler Speech”).

each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

In addition, in the event that the Auction Price is within the Primary Direct Floor Listing Auction Price Range but outside of the Issuer Price Range or is higher than the highest price of the Primary Direct Floor Listing Auction Price Range (i.e., above the price that is 20% above the highest price of the Issuer Price Range), the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing could still proceed, but would not be conducted until the issuer has met disclosure requirements that would help provide investors with additional information regarding the offering, including a requirement that the issuer's effective registration statement contain a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the Primary Direct Floor Listing are lower or higher than the amount assumed by the price range set forth in the registration statement. The Exchange also proposes to require that an issuer must have confirmed to the Exchange that no additional disclosures are required under the federal securities laws based on the Auction Price determined. The issuer would thus have the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering prior to the completion of the offering. Accordingly, the Exchange believes that this proposed change is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market because it would allow an offering to proceed under certain circumstances when the Auction Price is outside of the Issuer Price Range—including where investor interest is greater than the company and its advisors anticipated (thereby promoting capital formation)—while protecting investors by requiring that a company listing shares through a Primary Direct Floor Listing make applicable disclosures under the federal securities laws.

The Exchange also believes that the proposed change is designed to promote investor protection because the Exchange would support price discovery transparency by providing readily available, real time pricing information to investors by disseminating pre-opening indications via the SIP and proprietary data feeds and publishing the Indication Reference Price on a public website on the day on which the Direct Listing Auction for a Primary Direct Floor Listing is anticipated to take place. Market participants would thus have ready access to up-to-date pricing information leading up to a Direct Listing Auction for a Primary Direct Floor Listing.

In particular, the Exchange believes that making pre-opening indications readily available to market participants would provide price transparency to the market in connection with Primary Direct Floor Listings. Pre-opening indications, which are based on the DMM's assessment of interest eligible to participate in the Direct Listing Auction for a Primary Direct Floor Listing, would provide notice of when price volatility has subsided and price equilibrium has been met with respect to the orders that wish to participate in such Auction. In addition, Exchange rules establishing pre-opening indication procedures already include requirements such as that set forth in Rule 7.35A(d)(4)(D), which provides that the DMM must wait for certain minimum specified periods after publishing a pre-opening indication and before opening a security. As the table below shows, the DMMs in the Selling Shareholder Direct Floor Listings that took place in 2020 and 2021 indicated very tight and reliable anticipated opening price ranges irrespective of the amount of time between the last indication and opening auction:

Date of Direct Listing Auction	Symbol	Last Pre-Opening Indication	Auction Price	Time Elapsed Between Last Pre-Opening Indication and Auction Open
9/30/2020	PLTR	9.95 - 10.05	10	10 minutes, 19 seconds
9/30/2020	ASAN	26.75 - 27	27	2 minutes, 24 seconds
3/10/2021	RBLX	64.25 - 64.75	64.5	3 minutes, 2 seconds
5/19/2021	SQSP	47.5 - 48	48	2 minutes, 31 seconds
5/26/2021	ZIP	19.75 - 20.25	20	16 minutes, 29 seconds
9/29/2021	WRBY	54 - 54.5	54.05	12 minutes, 31 seconds

The Exchange thus believes that its existing pre-opening indication process provides significant investor protection measures based on the judgment applied by the DMM in refining the anticipated price range of a security to be opened in a Direct Listing Auction as appropriate and in determining that the price has reached stability, such that the Direct Listing Auction should proceed.¹⁶

The Exchange believes that its proposal to issue a regulatory bulletin as outlined above would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and promote investor protection because it would provide member organizations with the necessary information to share with their customers regarding the

¹⁶ The Exchange believes that it would be appropriate to permit Market Orders and MOO Orders (as defined in Rules 7.31(a)(1) and 7.31(c)(1)(B)) to participate in a Direct Listing Auction for a Primary Direct Floor Listing, given the safeguards provided by the pre-opening indication process. Although Market Orders and MOO Orders are unpriced orders, the Exchange believes that Market Orders and MOO Orders that participate in a Direct Listing Auction for a Primary Direct Listing would not be subject to extreme price volatility due to the DMM's role in refining pre-opening indications and determining the Auction Price, as well as the DMM's obligation under Rule 7.35A(g) to fill all better-priced interest. Moreover, investors submitting Market Orders and MOO Orders would have the benefit of readily available, real time pricing information to inform their decision to participate in the Auction. The Exchange also notes that data from IPOs (which are not subject to the Price Range Limitation) that took place in the last six calendar months indicates that MOOs made up a significant portion of opening auction volume and thus believes that allowing MOOs to participate in a Direct Listing Auction for a Primary Direct Floor Listing could encourage investor participation.

Primary Direct Floor Listing. Specifically, the proposed regulatory bulletin would be distributed at least one business day prior to the commencement of trading in a security to be listed in connection with a Direct Listing Auction for a Primary Direct Floor Listing and would describe any special characteristics of the offering, as well as the Exchange Rules that apply to the pricing of a Direct Listing Auction for a Primary Direct Floor Listing. The regulatory bulletin would inform prospective participants in the Direct Listing Auction that the Auction Price could be up to 20% below the lowest price of the Issuer Price Range (and specify what that price is) and indicate whether there is a price range outside of which the Direct Listing Auction for a Primary Direct Floor Listing could not proceed based on the company's certification as described above. The Exchange also believes that the regulatory bulletin would further the protection of investors by reminding member organizations of their obligations pursuant to Exchange Rules 2090 and 2111 to "know their customers," providing member organizations and their customers with information regarding the pricing mechanism of a Direct Listing Auction for a Primary Direct Floor Listing, and helping investors receive sufficient price discovery information.

The Staff of the Commission in a Compliance and Disclosure Interpretation has indicated that pricing up to 20% below the lowest price and at a price above the highest price of the price range set forth in the company's effective registration statement is appropriate for a company conducting an IPO, notwithstanding that the price would be outside of the range stated in the company's effective registration. The Exchange believes that investors have become familiar with this approach at least since the Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.¹⁷ Accordingly, the Exchange believes that allowing Direct Listing

¹⁷ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 12.

Auctions in connection with a Primary Direct Floor Listing to similarly price up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement would be consistent with both Chair Gensler's recent call to treat "like cases alike"¹⁸ and the protection of investors.

The Exchange also believes that the proposed changes to the Manual are consistent with the protection of investors. Specifically, the proposed change to Section 102.01B(E) to specify that a company offering securities for sale in connection with a Primary Direct Floor Listing must register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a), would promote investor protection because it would provide certainty regarding the number of shares available in connection with the Primary Direct Floor Listing, even if the Auction Price of such shares may be outside of the price range specified in the issuer's effective registration statement. The Exchange also believes that the proposed change to Section 102.01B(E) to reflect that the market value calculation of a company's shares would be based on a price per share equal to the lowest price of the price range established by the issuer in its registration statement, less an amount equal to 20% of the highest price included in such price range, is consistent with the protection of investors because it would not modify any other applicable listing requirements and would update the Manual to align with the proposed changes to the Price Range Limitation described herein.

Finally, the Exchange believes that its proposed changes with respect to the Price Range Limitation would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would not change the existing process for a DMM-facilitated Direct Listing Auction for a Primary Direct Floor Listing, but would eliminate a

¹⁸ See Gensler Speech, supra note 15.

potential impediment to companies considering a Primary Direct Floor Listing, thereby encouraging capital formation. In addition, the proposed changes are designed to protect investors and the public interest because they would provide an expanded opportunity for a Primary Direct Floor Listing to proceed so that the issuer's securities can be listed and begin trading on the secondary market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed change would increase competition by continuing to facilitate new pathways for companies to access the public markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2022-14 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2022-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2022-14, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).