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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89148; File No. SR-NYSE-2019-67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of 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

June 24, 2020

On December 11, 2019, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ a proposed rule change to amend Chapter One of the Listed Company Manual to modify the provisions relating to direct listings. On December 13, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on December 30, 2019.⁴ On February 13, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁶ On March 26, 2020,

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 87821 (December 20, 2019), 84 FR 72065 (December 30, 2019) (“Notice”). Comments received on the Notice are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967.htm>.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities and Exchange Act Release No. 88190 (February 13, 2020), 85 FR 9891 (February 20, 2020).

the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁷ On June 22, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as modified by Amendment No. 1, and is described in Items I and II below, which Items have been prepared by the Exchange. On June 24, 2020, the Commission extended the time period for approving or disapproving the proposal for an additional 60 days.⁸ The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

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

The Exchange proposes to (1) amend 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, (2) modify the definition of “Direct Listing” in Rule 1.1, (3) add a definition of Issuer Direct Offering (“IDO”) Order to Rule 7.31 and describe how it would participate in a Direct Listing Auction in Rule 7.35A, and (4) remove references to Direct Listing Auctions from Rule 7.35C.⁹

⁷ See Securities and Exchange Act Release No. 88485 (March 26, 2020), 85 FR 18292 (April 1, 2020).

⁸ See Securities and Exchange Act Release No. 89147 (June 24, 2020).

⁹ The Exchange has previously filed a proposed rule change to amend Chapter One of the Manual to modify the provisions related to direct listings. See SR-NYSE-2019-67 and Amendment No. 1 to that filing. Amendment No. 2 to SR-NYSE-2019-67 proposes to (1) delete from the filing the proposed amendment to Section 102.01A proposing to provide additional time under certain circumstances for companies listing in connection with a direct listing to meet the initial listing distribution standards and add provisions specifying how a direct listing qualifies for listing if it includes both sales of securities by the company and possible sales by selling shareholders, (2) amend Exchange Rules to add the IDO Order and describe how it would participate in a Direct Listing Auction for a

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 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 proposes to amend (1) Chapter One of 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, (2) Rule 1.1 (Definitions) to modify the definition of “Direct Listing,” (3) Rules 7.31 (Orders and Modifiers) and 7.35A (DMM-Facilitated Core Open and Trading Halt Auctions) to add a definition of Issuer Direct Offering (“IDO”) Order and describe how it would participate in a Direct Listing Auction, and (4) remove references to Direct Listing Auctions in Rule 7.35C.¹⁰

Primary Direct Floor Listing and remove references to Direct Listing Auctions from Rule 7.35C. This Amendment No.2 to SR-NYSE-2019-67 replaces Amendment No. 1 to SR-NYSE-2019-67 as originally filed and supersedes such filing in its entirety.

¹⁰ Trading in all securities on the Exchange, including any Direct Listing Auctions, is subject to the Pillar trading rules. The term “Direct Listing Auction” is defined in Rule 7.35(a)(1)(E) to mean a Core Open Auction for the first day of trading on the Exchange of a security that is a Direct Listing. The term “Core Open Auction” is defined in Rule

Amendments to the Manual

Section 102.01B of the Manual includes initial listing requirements for a company that has not previously had its common equity securities registered under the Act, to list its common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares (a “Selling Shareholder Direct Floor Listing”).¹¹ To allow a company to sell shares on its own behalf in connection with its initial listing upon effectiveness of a registration statement, without a traditional underwritten public offering, the Exchange proposes to amend Section 102.01B. The proposed change would allow a company that has not previously had its common equity securities registered under the Act, to 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 (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, is referred to herein as a “Primary Direct Floor Listing”).

In considering the initial listing of a company in connection with a Selling Shareholder Direct Floor Listing, Section 102.01B currently provides that the Exchange will determine that such company has met the applicable \$100 million aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation of the

7.35(a)(1)(A) to mean the Auction that opens trading at the beginning of the Core Trading Session, and for Exchange-listed securities, the term “Core Trading Session” is defined in Rule 7.34(a)(2)(B) to begin for each security with the Core Open Auction, which can take place during Core Trading Hours only, which, pursuant to Rule 1.1, begins at 9:30 a.m. Eastern Time through 4:00 p.m. Eastern Time.

¹¹ Securities Exchange Act Release No. 82627 (February 2, 2018), 83 FR 5650 (February 8, 2018) (SR-NYSE-2017-30).

company (a "Valuation") and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a "Private Placement Market").¹² The Exchange will attribute a market value of publicly-held shares to the company equal to the lesser of (i) the value calculable based on the Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market. Alternatively, in the absence of any recent trading in a Private Placement Market, Section 102.01B provides that the Exchange will determine that such company has met its market value of publicly-held shares requirement if the company provides a Valuation evidencing a market value of publicly-held shares of at least \$250 million.

In applying this requirement to a Primary Direct Floor Listing, the Exchange is proposing the following:

¹² Section 102.01B currently provides (and the Exchange does not propose to amend that provision) that any Valuation used for this purpose in connection with a Selling Shareholder Direct Floor Listing must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. The Valuation must be of a recent date as of the time of the approval of the company for listing and the evaluator must have considered, among other factors, the annual financial statements required to be included in the registration statement, along with financial statements for any completed fiscal quarters subsequent to the end of the last year of audited financials included in the registration statement. The Exchange will consider any market factors or factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of the Valuation and will continue to monitor the company and the appropriateness of relying on the Valuation up to the time of listing. In particular, the Exchange will examine the trading price trends for the stock in the Private Placement Market over a period of several months prior to listing and will only rely on a Private Placement Market price if it is consistent with a sustained history over that several month period evidencing a market value in excess of the Exchange's market value requirement. The Exchange may withdraw its approval of the listing at any time prior to the listing date if it believes that the Valuation no longer accurately reflects the company's likely market value.

- A company would qualify for listing in connection with a Primary Direct Floor Listing if it will sell at least \$100 million in market value of shares in the opening auction.
- If a company will sell less than \$100 million in market value of shares in the opening auction, a company would qualify for listing in connection with a Primary Direct Floor Listing if the aggregate of the market value of publicly-held shares immediately prior to listing together with the market value of shares the company will sell in the opening auction totals at least \$250 million 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.¹³

Officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company in the opening auction, provided that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. In addition, in the same way as for shares of a company listing following a traditional underwritten IPO, such an insider owner may purchase shares sold by other shareholders or sell its own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. Except as proposed for Primary Direct Floor Listings, shares held by these types of inside investors are not included in calculations of

¹³ For example, if the company is selling five million shares in the opening auction and there are 45 million shares issued and outstanding immediately prior to the listing that are eligible for inclusion as publicly-held shares based on disclosure in the company's registration statement, then the market value of publicly-held shares will be calculated based on a combined total of 50 million shares. If the lowest price of the price range disclosed in the company's registration statement is \$10 per share, the Exchange will attribute to the company a market value of publicly-held shares of \$500 million.

publicly-held shares for purposes of Exchange listing rules.¹⁴ The Exchange notes that such investors may acquire in secondary market trades shares sold by the issuer in a Primary Direct Floor Listing that were included when calculating whether the issuer meets the market value of publicly-held shares initial listing requirement. However, the Exchange believes that because of the enhanced publicly-held shares requirement for a listing in conjunction with a Primary Direct Floor Listing, which is much higher than the Exchange's minimum \$40 million requirement for a traditional underwritten IPO, and the neutral nature of the opening auction process, companies using a Primary Direct Floor Listing would have an adequate public float and liquid trading market after the completion of the opening auction.

Any company listing in connection with a Primary Direct Floor Listing or a Selling Shareholder Direct Floor Listing would continue to be subject to and meet all other applicable initial listing requirements, including the requirements of Section 102.01A to have 400 shareholders of round lots and 1.1 million publicly-held shares outstanding at the time of initial listing, and the requirement of Section 102.01B to have a price per share of at least \$4.00 at the time of initial listing.

In defining a Selling Shareholder Direct Listing in the proposed amended rule text, the Exchange proposes to include additional text specifying that the term Selling Shareholder Direct Listing is only used for listings where the company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. This proposed added text is intended to clarify the application of the existing rule and does not substantively change it.

¹⁴ Shares held by directors, officers, or their immediate families and other concentrated holdings of 10 percent or more are excluded in calculating the number of publicly-held shares under NYSE listing standards.

Amendments to Exchange Rules

Amendment to Definition of “Direct Listing”

Rule 1.1(f) currently defines the term “Direct Listing” to mean a security that is listed under Footnote (E) to Section 102.01B of the Manual, which currently only permits a company to list its common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares (i.e., a Selling Shareholder Direct Floor Listing). Because, as described above, the Exchange proposes to amend this Section of the Manual to describe both a Primary Direct Floor Listing and a Selling Shareholder Direct Floor Listing, the Exchange proposes to similarly amend Rule 1.1(f) to specify that a Direct Listing can be either a “Selling Shareholder Direct Floor Listing” or a “Primary Direct Floor Listing.”

Amendment to Rules 7.31, 7.35A, and 7.35C

The Exchange proposes to amend Rules 7.31 and 7.35A to add a new order type and describe how that new order type would participate in a Direct Listing Auction if a company chooses to list its common equity securities on the Exchange pursuant to a Primary Direct Floor Listing.

Currently, under Rule 7.35A, a Direct Listing Auction operates similarly to an IPO Auction, including that the Exchange does not disseminate Auction Imbalance Information¹⁵ and a Designated Market Maker (“DMM”) may not effect the auction electronically.¹⁶ In addition, Rule 7.35A establishes how to determine the Indication Reference Price for a security that is a

¹⁵ See Rule 7.35(c)(3).

¹⁶ See Rule 7.35A(c)(1)(C).

Direct Listing¹⁷ and a requirement for the DMM facilitating the opening on the first day of trading of a Direct Listing.¹⁸

Because a company would be offering shares in a Primary Direct Floor Listing, the Exchange proposes to modify the procedures for a Direct Listing Auction that would be used for a Primary Direct Floor Listing. These procedures would be applicable to any Primary Direct Floor Listing, as defined in Section 102.01B of the Manual. As proposed, to sell its shares in such an Auction, a company would use a proposed new order type, the IDO Order. As further proposed, a Primary Direct Floor Listing could be effected only if (i) the Auction Price would be within the price range specified by the company in its effective registration statement, and (ii) the full quantity of the IDO Order, i.e., the shares that the company seeks to sell in the Primary Direct Floor Listing, can be sold within that price range. In addition, all better-priced sell orders would need to be satisfied in such Auction as required by Rule 7.35A(g), and the shares being sold by the company would have priority over at-priced orders.¹⁹ Consistent with current rules, a

¹⁷ See Rule 7.35A(d)(2)(A)(iv). Under Rule 7.35A(d), the Indication Reference Price is used by the DMM to determine whether a pre-opening indication would be required under that Rule. Currently, for a security that is a Direct Listing that has had recent sustained trading in a Private Placement Market prior to listing, the Indication Reference Price is most recent transaction price in that market or, if none, a price determined by the Exchange in consultation with a financial advisor to the issuer of such security.

¹⁸ See Rule 7.35A(g)(1). Under Rule 7.35A(g), in addition to the DMM's responsibility for determining the Auction Price for Core Open Auction and selecting an Auction Price at which all better-priced orders on the side of any imbalance can be satisfied, a DMM facilitating the opening on the first day of trading of a Direct Listing that has not had recent sustained history of trading in a Private Placement prior to listing, is required to consult with a financial advisor to the issuer of such security in order to effect a fair and orderly opening of such security.

¹⁹ Pursuant to Rule 7.35(a)(5), the Auction Price is the price at which an Auction is conducted. A sell order is "better-priced" if it is priced lower than the Auction Price, and includes all sell Market Orders and Market-on-Open ("MOO") Orders. See Rule 7.35(a)(5)(A). A sell order is "at-priced" if it is priced equal to the Auction Price. See Rule 7.35(a)(5)(B).

Direct Listing Auction for a Primary Direct Floor Listing must be effected manually by the DMM, and, as provided for in Rule 7.35A(g), the DMM would be responsible for determining an Auction Price, provided that such price must be within the price range specified in the effective registration statement.

To effect these changes, the Exchange proposes to amend Rule 7.31(c)(1) to add new subparagraph (D) to describe the Issuer Direct Offering Order, which would also be referred to as an “IDO Order.”²⁰ As proposed, an IDO Order would be a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing. The Exchange also proposes that:

- only one IDO Order may be entered on behalf of the issuer and only one member organization may enter an IDO Order on behalf of an issuer (proposed Rule 7.31(c)(1)(D)(i));²¹
- the limit price of the IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement (“Primary Direct Floor Listing Auction Price Range”) (proposed Rule 7.31(c)(1)(D)(ii));
- the IDO Order must be for the quantity of shares offered by the issuer, as disclosed in the prospectus in the effective registration statement (proposed Rule 7.31(c)(1)(D)(iii));

²⁰ The IDO Order would be an Auction-Only Order. An Auction-Only Order is a Limit or Market Order that is to be traded only in an auction pursuant to the Rule 7.35 Series (for Auction-Eligible Securities) or routed pursuant to Rule 7.34 (for UTP Securities). See Rule 7.31(c). Rule 7.31(c)(1) specifies the Auction-Only Orders that are available for a Core Open Auction or Trading Halt Auction.

²¹ Because an IDO Order would not be entered by the DMM, the Exchange proposes to amend the last sentence Rule 7.31(c) to add the IDO Order to the list of order types not available to the DMM. The amended sentence would provide (new text underlined): “MOO, MOC, LOC, IDO, and Closing IO Orders are not available to DMMs.”

- an IDO Order may not be cancelled or modified (proposed Rule 7.31(c)(1)(D)(iv)); and
- an IDO Order must be executed in full in the Direct Listing Auction (proposed Rule 7.31(c)(1)(D)(v)).

Next, the Exchange proposes to amend Rule 7.35A to establish additional requirements for a DMM conducting a Direct Listing Auction for a Primary Direct Floor Listing.

First, the Exchange proposes that the Indication Reference Price applicable to a security that is a Primary Direct Floor Listing would be the lowest price of the price range established by the issuer in its effective registration statement. In a Primary Direct Floor Listing, a company would be issuing new shares and would be required to establish a price range for such securities in its effective registration statement. Because the Exchange proposes that a Primary Direct Floor Listing could not open below the lowest price of such price range, the Exchange proposes that the Indication Reference Price for such security would be the lowest price of that price range.²² To effect this change, the Exchange proposes to amend Rule 7.35A(d)(2)(A) to add new subparagraph (v) that would provide that, for a security that is a Primary Direct Floor Listing, the Indication Reference Price would be the lowest price of the Primary Direct Floor Listing Auction Price Range.

Second, the Exchange proposes to amend Rule 7.35A(g) regarding the Auction Price that the DMM is responsible for determining. As noted above, the Exchange proposes that a Primary Direct Floor listing must open at a price within the Primary Direct Floor Listing Auction Price Range, as set forth in the effective registration statement issued by the company. In addition, the Exchange proposes that such Auction would be conducted only if the IDO Order and all better-

²² For example, if the Primary Direct Floor Listing Auction Price Range is \$10.00 to \$20.00, the Indication Reference Price would be \$10.00.

priced sell orders can be satisfied at such price. To effect such changes, proposed Rule 7.35A(g)(2) would provide that a DMM would 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 (proposed Rule 7.35A(g)(2)(A));²³ or
- there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full (proposed Rule 7.35A(g)(2)(B)).

Because the DMM is responsible for determining the Auction Price, these proposed rule changes would make the DMM responsible for determining whether the Direct Listing Auction can proceed. If there is insufficient buy interest and the DMM cannot price the Auction and satisfy the IDO Order as required by this proposed rule, the Direct Listing Auction would not proceed and such security would not begin trading. If a Direct Listing Auction cannot be conducted, the Exchange would notify market participants via Trader Update that the Primary Direct Floor Listing has been cancelled and any orders for that security that have been entered on the Exchange, including the IDO Order, would be cancelled back to the entering firms.

Third, the Exchange proposes that when the limit price of the IDO Order (which is already required to be at the lowest price in Primary Direct Floor Listing Price Range) is equal to the Auction Price, i.e., an at-priced IDO Order, the IDO Order would have priority over other orders at that price. As noted above, under Rule 7.35A(g), all better-priced interest is guaranteed to participate in the opening auction for a Primary Direct Floor Listing. If the IDO Order is

²³ For example, if the Primary Direct Floor Listing Auction Price Range is \$10.00 to \$20.00, the Direct Listing Auction would not be conducted at a price below \$10.00 or above \$20.00.

better-priced, i.e., if the Direct Listing Auction is priced above the limit price of the IDO Order, the IDO Order would be a better-priced order guaranteed to participate in such Auction. However, under Rule 7.35A(h)(2), at-priced orders are not guaranteed to participate in an Auction and are allocated as provided for in Rule 7.35A(h)(2)(A) - (D). Because an IDO Order must be executed in full in order for the DMM to conduct the Direct Listing Auction, the Exchange does not believe that an at-priced IDO Order should be subject to the allocation process specified in Rule 7.35A(h)(2) because it may result in a partial execution of the IDO Order. Providing priority to an at-priced IDO Order would increase the potential for the IDO Order to be executed in full, and therefore for the Primary Direct Floor Listing to proceed. To effect such change, the Exchange proposes new subparagraph (4) in Rule 7.35A(h), regarding Auction Allocation, to provide that an IDO Order would be guaranteed to participate in the Direct Listing Auction at the Auction Price and that if the limit price of the IDO Order is equal to the Auction Price, the IDO Order would have priority at that price.

Fourth, unlike a Direct Listing Auction for a Selling Shareholder Direct Floor Listing, the registration statement for a Primary Direct Floor Listing would include a price range within which the company anticipates selling shares it is offering. Accordingly, Rules 7.35A(d)(2)(A)(iv)²⁴ and 7.35A(g)(1)²⁵ are not applicable to a Primary Direct Floor Listing and

²⁴ Rule 7.35A(d)(2)(A)(iv) currently provides what the Indication Reference Price will be “for a security that is a Direct Listing that has had recent sustained trading in a Private Placement Market prior to listing, the most recent transaction price in that market or, if none, a price determined by the Exchange in consultation with a financial advisor to the issuer of such security.”

²⁵ Rule 7.35A(g)(1) currently provides: “When facilitating the opening on the first day of trading of a Direct Listing that has not had recent sustained history of trading in a Private Placement prior to listing, the DMM will consult with a financial advisor to the issuer of such security in order to effect a fair and orderly opening of such security.” The Exchange proposes a non-substantive amendment to Rule 7.35A(g)(1) to add the word “Market” after “Private Placement.”

the Exchange proposes to provide that the requirements of those Rules would be applicable only to a Selling Shareholder Direct Floor Listing by amending the text of those Rules to replace the term “Direct Listing” with the term “Selling Shareholder Direct Floor Listing.”

The Exchange further notes that any services provided by a financial advisor to the issuer of a security listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing (the “financial advisor”) and the DMM assigned to that security must provide such services in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements. For example, when a financial advisor provides a consultation to the Exchange as required by Rule 7.35A(d)(2)(A)(iv), when the DMM consults with a financial advisor as required by Rule 7.35A(g)(1), or when a financial advisor otherwise assists or consults with the DMM as to pricing or opening of trading in Selling Shareholder Direct Floor Listing or Primary Direct Floor Listing, the financial advisor and DMM will not act inconsistent with Regulation M,²⁶ and other anti-manipulation provisions of the federal securities laws, or Exchange Rule 2020.²⁷ The Exchange has retained the Financial Industry Regulatory Authority, Inc. (“FINRA”) pursuant to a regulatory services agreement to monitor such compliance with Regulation M and other anti-manipulation provisions of the

²⁶ For example, in connection with the Selling Shareholder Direct Floor Listing of Spotify Technology S.A, the Commission’s Division of Trading and Markets provided a no-action letter relating to Regulation M that discussed, in part, the role of the financial advisor and the DMM in such listing. See Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, United States Securities and Exchange Commission to Ms. Dana G. Fleischman, Latham & Watkins LLP, dated March 23, 2018, available here: <https://www.sec.gov/divisions/marketreg/mr-noaction/2018/spotify-technology-032318-regm.pdf>.

²⁷ Exchange Rule 2020, which is identical to FINRA Rule 2020, provides that “[n]o member or member organization shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulation, deceptive or other fraudulent device or contrivance” (“Rule 2020”).

federal securities laws and Rule 2020.²⁸ To promote clarity and transparency in Exchange rules regarding the consultation requirements of Rules 7.35A(d)(2)(A)(iv) and 7.35A(g)(1), the Exchange proposes to add Commentary .10 to Rule 7.35A to provide:

In connection with a Selling Shareholder Direct Floor Listing, the financial advisor to the issuer of the security being listed (“financial advisor”) and the DMM assigned to such security are reminded that any consultation that the financial advisor provides to the Exchange as required by paragraph (d)(2)(A)(iv) of this Rule and any consultation between the DMM and financial advisor as required by paragraph (g)(1) of this Rule are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.

Finally, the Exchange proposes to amend Rule 7.35C to remove references to Direct Listing Auctions. Rule 7.35C sets forth the procedures for the Exchange to facilitate an Auction for one or more securities if a DMM cannot facilitate an Auction under Rules 7.35A or 7.35B and specifies how such Exchange-facilitated Auctions would function, including for a Direct Listing Auction. Because of the importance of the DMM to a Direct Listing Auction, the Exchange proposes that if a DMM is unable to manually facilitate a Direct Listing Auction, the Exchange would not proceed with either a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing. To effect this change, the Exchange proposes to amend Rule 7.35C(a) to specify that the Exchange would not facilitate a Direct Listing Auction and amend Rules

²⁸ The Exchange expects to issue regulatory guidance in connection with a company conducting a Primary Direct Floor Listing. Such regulatory guidance would include a reminder to member organizations that activities in connection with a Primary Direct Floor Listing, like activities in connection with other listings, must be conducted in a manner not inconsistent with Regulation M and other anti-manipulation provisions of the federal securities laws and Exchange Rule 2020.

7.35C(a)(3), (b)(1), and (b)(3) to delete references to a Direct Listing Auction.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,²⁹ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,³⁰ 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 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 amendment to the Manual is consistent with the protection of investors. The proposal would require that a company in a Primary Direct Floor Listing (1) sell at least \$100 million of its listed securities in the opening auction, or (2) have an aggregate market value of publicly-held shares immediately prior to listing together with the market value of shares the company sells in the opening auction total at least \$250 million, 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. The Exchange notes that a company may list on the NYSE in connection with its initial public offering with a market value of publicly-held shares of \$40 million and that, in the Exchange's experience in listing IPOs, a liquid trading market develops after listing for issuers with a much smaller value of publicly-held shares than the Exchange anticipates would exist after the opening auction in a Primary Direct Floor listing under the proposed market value of publicly-held shares requirements. Consequently, the

²⁹ 15 U.S.C. 78f(b).

³⁰ 15 U.S.C. 78f(b)(5).

Exchange believes that these requirements would provide that any company conducting a Primary Direct Floor Listing would be of a suitable size for Exchange listing and that there would be sufficient liquidity for the security to be suitable for auction market trading.

Officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company in the opening auction, in the event that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. In addition, in the same way as for shares of a company listing following a traditional underwritten IPO, such an insider owner may purchase shares sold by other shareholders or sell its own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. Except as proposed for Primary Direct Floor Listings, shares held by these types of inside investors are not included in calculations of publicly-held shares for purposes of Exchange listing rules. The Exchange notes that after initial listing such investors may acquire in secondary market trades shares sold by the issuer in a Primary Direct Floor Listing that were included when calculating that issuer's compliance with the market value of publicly-held shares initial listing requirement. However, the Exchange believes that because of the enhanced publicly-held shares requirement for a listing in conjunction with a Primary Direct Floor Listing, which is much higher than the Exchange's minimum \$40 million requirement for a traditional underwritten IPO, and the neutral nature of the opening auction process, companies using a Primary Direct Floor Listing will have an adequate public float and liquid trading market after the completion of the opening auction.

The Exchange believes that the proposed amendments to Exchange Rules to amend the definition of Direct Listing and Rules 7.31 and 7.35A to describe how an IDO Order would

participate in a Direct Listing Auction for a Primary Direct Floor Listing would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would guarantee that, if the Direct Listing Auction for a Primary Direct Floor Listing occurs, all shares offered by the company would participate.

Unlike an IPO, a company undergoing a Primary Direct Floor Listing would not have an underwriter to guarantee that a specified number of shares would be sold by the company within a price range established in the company's effective registration statement. To ensure that the Direct Listing Auction is conducted consistent with an issuer's effective registration statement, the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing under Section 102.01B of the Manual, would not proceed unless the quantity of shares specified in the IDO Order would be sold in such Auction within a price range specified by the company in its registration statement. This certainty would be effected in two ways. First, the proposed IDO Order would be required to be equal to the total number of shares disclosed as being offered by the company in the prospectus included in the effective registration statement filed in connection with its listing. If the IDO Order cannot be satisfied in full, then the Direct Listing Auction would not proceed. Second, the Direct Floor Auction for a Primary Direct Floor Listing would be required to be priced within the range established by the company in its effective registration statement.

The Exchange further believes that these proposed changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are designed to function seamlessly with the existing process for a DMM-facilitated Direct Listing Auction, including the requirement that such Auction be facilitated manually by a DMM, the process for publishing pre-opening indications, and the requirement that all better-priced sell

orders are guaranteed to participate in such Auction. In addition, the proposed changes are designed to protect investors and the public interest because they would provide an opportunity for the Primary Direct Floor Listing to proceed so that the issuer's securities can be listed and begin trading on the secondary market. Accordingly, the Exchange believes that it would be consistent with this goal for an at-priced IDO Order, which must be satisfied in full, to have priority over other at-priced orders if the limit price of the IDO Order is equal to the Auction Price. Proposed Rule 7.35A(h)(4) would eliminate the potential for a partial execution of the IDO Order and provide greater opportunity for the IDO Order to be executed in full, thus allowing the Direct Listing Auction to proceed.

The Exchange believes the proposed amendments to Rule 7.35C would remove impediments to and perfect the mechanism of a fair and orderly market and a national market system because the Exchange believes that having the DMM manually facilitate a Direct Listing Auction would promote a fair and orderly auction process for such an Auction. Therefore, if the DMM is unavailable to facilitate such Direct Listing Auction manually, the Exchange would not proceed with facilitating a Direct Listing Auction for either a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.

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. The proposed amendments would not impose any burden on competition, but would rather increase competition by providing 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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 2, 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-2019-67 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-2019-67. 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-2019-67, 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.³¹

J. Matthew DeLesDernier,
Assistant Secretary.

³¹ 17 CFR 200.30-3(a)(12).

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