

Via E-Mail

March 13, 2019

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number SR-NASDAQ-2019-001

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (Commission) solicitation of comments on the Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Listing Standards for Direct Listings and Clarify Related Rules (Proposed Rule).¹

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$35 trillion in assets under management.²

CII generally agrees with the Nasdaq Stock Market LLC that the changes contained in the Proposed Rule:

[A]s required by Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listing in connection with a Direct Listing.³

¹ Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Listing Standards for Direct Listings and Clarify Related Rules, Exchange Act Release No. 85,156, 84 Fed. Reg. 5,787 (Feb. 22, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-22/pdf/2019-030335,787.pdf>.

² For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at <http://www.cii.org>.

³ 84 Fed. Reg. at 5,790.

CII generally supports permitting direct listings.⁴ We believe that direct listings have the potential for certain companies to be more cost-effective than a traditional initial public offering (IPO) while still providing necessary investor protections.⁵

More specifically, some companies that want to do a public listing understandably may not want to pay the high costs to underwriters required for an IPO. As one corporate lawyer recently explained: “[One] reason[] to do a direct offering [is] . . . to gain access to the public markets without having to pay fees to investment banks, which can be substantial.”⁶

The Proposed Rule includes a number of provisions that provide important investor protections in connection with a direct listing, including requiring:

- That the company be “subject to all initial listing requirements applicable to equity securities and . . . the corporate governance requirements set forth in the Rule 5600 Series;”⁷
- “[E]ither that there be sustained recent trading in the Private Placement Market or that the Company provide a Valuation demonstrating \$250 million market value of publicly held shares [an amount that is more than double the applicable listing standard requirement];”⁸ and
- That the company has a “registration statement filed under the Securities Act of 1933 solely for the purpose of allowing existing shareholders to sell their shares . . . designed . . . [to] ensure such companies satisfy the rigorous disclosure requirements under the Securities Act of 1933 and are subject to review by Commission staff.”⁹

We note that in April 2018 Spotify Technology S.A. went public through a direct listing of its shares on the New York Stock Exchange (NYSE).¹⁰ That high profile direct listing was viewed by most experts as quite successful.¹¹ We note that the Proposed Rule “adopts changes similar to those already approved for [the NYSE].”¹²

⁴ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Securities and Exchange Commission 1 (Feb. 22, 2018), [https://www.cii.org/files/issues_and_advocacy/correspondence/2018/February%2022,%202018%20NYSE%20direct%20listing%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/February%2022,%202018%20NYSE%20direct%20listing%20(final).pdf).

⁵ *Id.*

⁶ See, e.g., Alison Griswold, Pay Day, What’s a Direct Listing and Why Would a Company Do It?, Quartz, Dec. 20, 2018 (quoting Sam Dribble, a partner at law firm Baker Botts), <https://qz.com/1498472/whats-a-direct-public-offering-and-why-would-a-company-do-it/>.

⁷ 84 Fed. Reg. at 5,790.

⁸ *Id.*

⁹ *Id.*; see Letter from Jeffrey P. Mahoney at 2 (“We believe requiring a concurrent Securities Act registration is critical to ensuring that direct listings do not compromise investor protections.”).

¹⁰ See, e.g., Marc D. Jaffe, Latham & Watkins LLP et al., Spotify Case Study: Structuring and Executing a Direct Listing, Harv. L. Forum on Corp. Governance & Fin. Reg., July 5, 2018, <https://corpgov.law.harvard.edu/2018/07/05/spotify-case-study-structuring-and-executing-a-direct-listing/>.

¹¹ See, e.g., Erika Beras, Business, Direct Listings Bypass Traditional IPO Process, Marketplace, Jan. 14, 2019 (quoting Jay Ritter, finance professor at the University of Florida that “‘Spotify . . . [direct listing is] widely viewed as quite successful’”), <https://www.marketplace.org/2019/01/11/business/bypassing-ipo-process-direct-listing>.

¹² 84 Fed. Reg. at 5,790 & n.25.

Finally, we continue to believe that direct listings may provide a broader range of institutional investors and retail investors with the opportunity to acquire the equity of a certain class of companies—including unicorns—which traditionally have been limited to a narrow group of institutional investors.¹³ Thus, direct listings can potentially facilitate the continued and important role of public stock markets in democratizing access to equity while providing necessary investor protections.¹⁴

Thank you for consideration of our views. If we can answer any questions or provide additional information with respect to this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeffrey P. Mahoney
General Counsel

¹³ Letter from Jeffrey P. Mahoney at 2; *see, e.g.*, Robert Pozen, Opinion, Markets Insight, Spotify’s Direct Listing Is a Template for Unicorns Riding High, *Fin. Times*, Jan. 30, 2018, (“private companies like Spotify have a lot of name recognition with individual investors, who will have a chance to buy a stake in a successful start-up — as opposed to the select group of institutional investors who are allowed to buy shares in unicorns”), <https://www.ft.com/content/46a35692-01ce-11e8-9650-9c0ad2d7c5b5>.

¹⁴ *See, e.g.*, Robert Pozen (“Thus, direct listings will continue the role of public stock markets in democratizing access to the equity of successful companies.”).