

Via Email

October 19, 2022

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

*Re: File Number SR-NASDAQ-2022-027.*

Dear Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. 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, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to respond to the Nasdaq Stock Market LLC (Exchange or Nasdaq) March 21, 2022, filing with the Securities and Exchange Commission’s (SEC) “a proposed rule change to allow companies to modify certain pricing limitations for companies listing in connection with a Direct Listing with a Capital Raise in which the company will sell shares itself in the opening auction on the first date of trading on Nasdaq.”<sup>2</sup>

Under the proposed rule change, as modified by Amendment No. 2, the Exchange would:

Propose[] to modify the Initial Proposal, as modified by Amendment No. 1, [<sup>3</sup>]to require that a company offering securities for sale in connection with a Direct

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<sup>1</sup> 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>.

<sup>2</sup> Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 2, To Modify Certain Pricing Limitations for Companies Listing in Connection With a Direct Listing With a Capital Raise, Exchange Act Release No. 95,811, 87 Fed. Reg. 57,951, 57,951 (Sept. 22, 2022), <https://www.federalregister.gov/documents/2022/09/22/2022-20503/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

<sup>3</sup> Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Modify Certain Pricing Limitations for Companies Listing in Connection with a Direct Listing with a Capital Raise,

Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.

Also in this Amendment, Nasdaq proposes to modify the Pricing Range Limitation, . . . such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can be executed in the Cross at a price that is above the highest price of the price range established by the issuer in its effective registration statement only if the execution price is at or below the price that is 80% above the highest price of the price range.<sup>4</sup>

The Exchange states that it believes the above proposed changes “address[] concerns raised in the comment letter submitted by CII dated August 8, 2022” (CII Letter).<sup>5</sup> We respectfully disagree.

The CII Letter raised a number of issues in response to the Exchange’s proposed rule change, as modified by Amendment No. 1.<sup>6</sup> Those issues included a reiteration of the following tracing problems raised by the SEC staff:

Given the limited judicial precedent addressing tracing requirements in the context of direct listings, and the typical absence of lock-up arrangements in connection with direct listings to date, we are considering whether the Exchange has met its burden of establishing that the proposal to allow a direct listing to proceed at a price outside of the disclosed price range is consistent with Section 6(b)(5) of the Exchange Act that requires the rules of the Exchange be designed to protect investors and the public interest.<sup>7</sup>

In response to these tracing issues the Exchange states:

Nasdaq believes that the requirement to retain a named underwriter *may* mitigate traceability concerns that may arise in a Direct Listing with a Capital Raise. As in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter retained in connection with a Direct Listing with a Capital Raise, as required by the Amendment, will be able to impose lock-up arrangements for the same reasons that make lock up agreements common in an IPO.<sup>8</sup>

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Exchange Act Release No. 95,220, 87 Fed. Reg. 41,780 (July 12, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14887.pdf>.

<sup>4</sup> 87 Fed. Reg. at 57,952 (footnotes omitted).

<sup>5</sup> *Id.* at n.11; see Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (Aug. 8, 2022), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2022/August%20-%202022%20NASDAQ%20letter%20\(final\)%20\(002\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/August%20-%202022%20NASDAQ%20letter%20(final)%20(002).pdf).

<sup>6</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 5 n.20.

<sup>7</sup> 87 Fed. Reg. at 41,786 n.90.

<sup>8</sup> 87 Fed. Reg. at 57,955 (emphasis added).

In our view, the Exchange’s *belief* that the proposed requirement to retain a named underwriter *may* mitigate traceability concerns that arise in a Direct Listing with a Capital Raise is not sufficiently responsive to our concerns. The Exchange provides no analysis to support its belief. Moreover, the Exchange continues to publicly promote on its website direct listings as a “different way to go public with . . . *no lock up period.*”<sup>9</sup> And its accompanying discussion of direct listings with a capital raise provides no indication that the “no lock up period” feature—what the Exchange and others tout as a key benefit of a direct listing over a traditional initial public offering—may no longer be available.<sup>10</sup>

CII continues to share the view of former SEC Commissioner Allison Herren Lee and current SEC Commissioner Caroline A. Crenshaw and other market experts that a direct listing with a capital raise may “exacerbate an existing concern regarding traceability by facilitating the sale of both shares that are, and are not, subject to a registration statement in the same public offering.”<sup>11</sup> Earlier this year, Commissioner Crenshaw observed:

[D]irect listings. . . raise questions around traceability. Courts have traditionally held that shareholders seeking to recover damages for false or misleading statements in a registration statement must show that the shares they purchased were sold pursuant to the misleading registration statement. But, in direct listings, shares issued pursuant to exemptions (such as Rule 144) and not subject to the registration statement of the newly public company, may be sold immediately following the direct listing. This makes it nearly impossible to determine whether any given shareholder purchased shares pursuant to a registration statement. The question therefore becomes whether these shareholders have standing to sue for misleading registration statements. Last year, in *Pirani v. Slack Technologies*, 13 F.4th 940 (9th Cir. 2021) the Ninth Circuit held that the plaintiff did in fact have standing to bring Sections 11 and 12 claims even though he did not know if he had purchased registered or unregistered shares in a direct listing. Nonetheless, this was a case of first impression and other courts could weigh in differently on this subject, potentially eroding an important means of holding companies to account for

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<sup>9</sup> Nasdaq Direct Listings offer a different way to do public with unrestricted liquidity and no lock up period, Nasdaq (last visited Oct. 19, 2022), <https://www.nasdaq.com/solutions/direct-listings> (emphasis added).

<sup>10</sup> *See id*; *see also* Alexander Osipovich, NYSE’s New Alternative to an IPO Wins a Green Light from SEC, Wall Str. J. (Aug. 27, 2020) (on file with CII) (“the process allows companies to avoid some customary restrictions of IPOs, such as lockup periods that prevent insiders from selling their stock for a set period”).

<sup>11</sup> Commissioner Allison Herren Lee & Commissioner Caroline A. Crenshaw, Statement on Primary Direct Listings (Dec. 23, 2020), <https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23>; *see, e.g.*, Nasdaq, Mayer|Brown, Morgan Stanley, Direct Listings, The New Offering Paradigm 37 (Nov. 3, 2021), <https://www.mayerbrown.com/-/media/files/perspectives-events/events/2021/11/direct-listings.pdf> (“Primary direct listings could exacerbate existing challenges investors face in recovering losses for false or inaccurate statements made in public offerings.”).

misstatements in direct listings.<sup>[12]</sup> But, these are just a few of the issues surrounding direct listings . . . .<sup>13</sup>

Finally, we note that the CII Letter also raised the issue that current data indicates that “among those three paths of entry to the public markets, direct listings may have the highest risk of creating public companies that violate a core principle of good corporate governance.”<sup>14</sup> We note that the Exchange does not address how the proposed changes might alleviate the poor corporate governance practices that appear endemic to companies that become public through a direct listing. We also note that the Exchange indicates that the number of direct listings could increase, perhaps significantly, if the SEC approves the proposed changes.<sup>15</sup>

For the above reasons, and other reasons described in the CII Letter, we believe the proposed changes may not be consistent with Section 6(b)(5) of the Securities and Exchange Act of 1934 and should be disapproved.<sup>16</sup>

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<sup>12</sup> See, e.g., Alison Frankel, Slack's backers warn SCOTUS of hit to capital markets from direct listing case, Reuters (Oct 6, 2022), <https://www.reuters.com/legal/transactional/slacks-backers-warn-scotus-hit-capital-markets-direct-listing-case-2022-10-06/> (reporting that “Slack petitioned the Supreme Court in August to review a 2021 ruling from the 9th U.S. Circuit Court of Appeals that said investors could proceed with Securities Act claims even though more than half of the shares in the offering were not covered by the allegedly misleading statement . . . [and] the U.S. Chamber of Commerce and the Securities Industry and Financial Market Association, the Cato Institute, the Washington Legal Foundation and Stanford Law School professor Joseph Grundfest weighed in with amicus briefs amplifying Slack’s assertion that the 9th Circuit ruling will not simply affect companies going public through direct listings”).

<sup>13</sup> Commissioner Caroline A. Crenshaw, Remarks at Virtual Roundtable on the Future of Going Public and Expanding Investor Opportunities: A Comparative Discussion on IPOs and the Rise of SPACs n.39 (Apr. 28, 2022), <https://www.sec.gov/news/speech/crenshaw-remarks-spac-symposium-042822>.

<sup>14</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 3-5; see generally Letter from Ash Williams, Chair, CII et al. to John Zecca, Senior Vice President, General Counsel, North America and Chief Regulatory Officer, NASDAQ Stock Market 1 (2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf) (“We are writing on behalf of the Council of Institutional Investors (CII) to petition the NASDAQ Stock Market to amend its listing standards to require the following on a forward-looking basis for companies going public that seek to list with multi-class common stock structures with differential voting rights: The company’s certificate of incorporation or equivalent document must specify provisions requiring the share structure to convert automatically to one-share, one vote no more than seven years after IPO date, subject to extension by additional terms of no more than seven years each, by vote of a majority of outstanding shares of each share class, voting separately, on a one-share, one-vote basis.”).

<sup>15</sup> See 87 Fed. Reg. at 57,953 (“While many companies are interested in alternatives to traditional IPOs, based on conversations with companies and their advisors Nasdaq believes that there may be a reluctance to use the existing Direct Listing with a Capital Raise rules because of concerns about the Pricing Range Limitation.”).

<sup>16</sup> See National Securities Exchange § 6(b)(5), 15 U.S.C. § 78(f)(b)(5) (1934), available at <https://www.law.cornell.edu/uscode/text/15/78f> (“The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange”).

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We appreciate your consideration of our comments. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeffrey P. Mahoney  
General Counsel