FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIYYAZ PIRANI, *Plaintiff-Appellee*, v. SLACK TECHNOLOGIES, INC.; STEWART BUTTERFIELD; ALLEN SHIM; BRANDON ZELL; ANDREW BRACCIA; EDITH COOPER; SARAH FRIAR; JOHN O'FARRELL; CHAMATH PALIHAPITIYA; GRAHAM SMITH; SOCIAL+CAPITAL PARTNERSHIP GP II L.P.; SOCIAL+CAPITAL PARTNERSHIP GP II LTD.; SOCIAL+CAPITAL PARTNERSHIP GP III L.P.; SOCIAL+CAPITAL PARTNERSHIP GP III LTD.; SOCIAL+CAPITAL PARTNERSHIP OPPORTUNITIES FUND GP L.P.; SOCIAL+CAPITAL PARTNERSHIP OPPORTUNITIES FUND GP LTD.; ACCEL GROWTH FUND IV ASSOCIATES L.L.C.; ACCEL GROWTH FUND INVESTORS 2016 L.L.C.; ACCEL LEADERS FUND ASSOCIATES L.L.C.; ACCEL LEADERS FUND INVESTORS 2016 L.L.C.; ACCEL X ASSOCIATES L.L.C.; ACCEL INVESTORS 2009 L.L.C.; ACCEL XI ASSOCIATES L.L.C.; ACCEL	No. 20-16419 D.C. No. 3:19-cv-05857-SI OPINION

INVESTORS 2013 L.L.C.; ACCEL GROWTH FUND III ASSOCIATES L.L.C.; AH EQUITY PARTNERS I L.L.C.; A16Z SEED-III LLC,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted May 13, 2021
San Francisco, California

Filed September 20, 2021

Before: Sidney R. Thomas, Chief Judge, Eric D. Miller, Circuit Judge, and Jane A. Restani,* Judge.

Opinion by Judge Restani;
Dissent by Judge Miller

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY**

Securities Law

The panel affirmed the district court's order denying in part a motion to dismiss and ruling that Fiyyaz Pirani had standing to sue Slack Technologies, Inc., and individual defendants under §§ 11 and 12(a)(2) of the Securities Act of 1933 based on shares issued under a new rule from the New York Stock Exchange allowing companies to make shares available to the public through a direct listing.

Pirani alleged that Slack's registration statement was inaccurate and misleading under §§ 11 and 12(a)(2). Sections 11 and 12 refer to "such security," meaning a security issued under a specific registration statement. The panel held that, even though Pirani could not determine if he had purchased registered or unregistered shares in a direct listing, he had standing to bring a claim under §§ 11 and 12 because his shares could not be purchased without the issuance of Slack's registration statement, thus demarking these shares, whether registered or unregistered, as "such security" under §§ 11 and 12.

The panel held that because standing existed for Pirani's § 11 claim against Slack, standing also existed for a dependent § 15 claim against controlling persons. The panel concluded that statutory standing existed under §§ 11 and 15, and under § 12(a)(1) to the extent it paralleled § 11.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge Miller wrote that he would reverse the district court's order and remand with instructions to grant the motion to dismiss in full because Pirani could not prove that his shares were issued under the registration statement that he said was inaccurate, and he therefore lacked statutory standing.

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OPINION

RESTANI, Judge:

This case involves an interlocutory appeal from a dispute between Plaintiff-Appellee Fiyyaz Pirani (Pirani) and Defendants-Appellants Slack Technologies, Inc. (Slack) regarding whether Pirani had standing to sue under Section 11 and Section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77l(a)(2), based on shares issued under a new rule from the New York Stock Exchange (NYSE) that allows companies to make shares available to the public through a direct listing. *See* Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650, 5653–54 (Feb. 2, 2018) ("SEC Approval 2018"). Slack challenges the district court's ruling that Pirani had standing to sue under Section 11 and Section 12(a)(2) even though Pirani could not determine if he had purchased registered or unregistered shares in the direct listing. We conclude that Pirani had standing to bring a claim under Section 11 and Section 12(a)(2) because Pirani's shares could not be purchased without the issuance of Slack's registration statement, thus demarking these shares, whether registered or unregistered, as "such security" under Sections 11 and 12 of the Securities Act. We do not resolve the issue of whether Pirani has

sufficiently alleged the other elements of Section 12 liability. The decision of the district court is affirmed.

BACKGROUND

Typically, large companies who want to list their stock on a public exchange for the first time do so in a firm commitment underwritten initial public offering (IPO). In an IPO listing, a company issues new shares under a registration statement that registers those shares with the Securities and Exchange Commission (SEC). 15 U.S.C. § 77e(c). An investment bank then helps the company market these shares and, if necessary, commits to purchasing the new shares at a pre-determined price. Because the bank wants to ensure that the stock price remains stable, it typically insists on a lock-up period, a months-long period during which existing shareholders may not sell their unregistered shares. *See* 24 William M. Prifti et al., *Securities: Public and Private Offerings* § 4:7 (2d ed. 2021). If someone purchases a share of the company's stock during the lock-up period, the shares are necessarily registered because no unregistered shares can be sold during that period. This period, however, is not required by law. In addition, companies can make subsequent offerings of registered shares tied to new or updated registration statements. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013) (involving a company issuing a prospectus supplement in connection with a secondary offering of the company's stock).

In 2018, the NYSE introduced a rule, later approved by the SEC, that allows companies to go public (i.e. sell their shares on a national exchange) through a Selling Shareholder Direct Floor Listing (direct listing). *See* SEC Approval 2018, 83 Fed. Reg. at 5653–54; *NYSE Listed Company Manual – Section 102.01B Footnote E*, NEW YORK STOCK

EXCHANGE (Aug. 26, 2020), https://nyseguide.srorules.com/listed-company-manual ("*NYSE, Section 102.01B, Footnote E*"). Unlike in an IPO, in a direct listing the company does not issue any new shares and instead files a registration statement "solely for the purpose of allowing existing shareholders to sell their shares" on the exchange.[1] SEC Approval 2018, 83 Fed. Reg. at 5651; *NYSE, Section 102.01B, Footnote E*. The company must register its pre-existing shares before they can be sold to the public unless the shares fall within one of the registration exceptions enumerated in SEC Rule 144. 17 C.F.R. § 230.144. Another important distinction between an IPO and a direct listing is that a direct listing allows a company to list "without a related underwritten offering" from a bank. *NYSE, Section 102.01B, Footnote E*. Shares made available by a direct listing are sold directly to the public and not through a bank. *See id.* Therefore, there is no lock-up agreement restricting the sale of unregistered shares. Thus, from the first day of a direct listing, both unregistered and registered shares may be available to the public.

On June 20, 2019, Slack went public through a direct listing, releasing 118 million registered shares and 165 million unregistered shares into the public market for purchase. Pirani purchased 30,000 Slack shares that day and went on to purchase another 220,000 shares over several months. The initial offering price for Slack shares was

[1] In 2020, the NYSE amended its rule to create a second type of direct listing, a Primary Direct Floor Listing, which allowed a company itself to sell shares to the public instead of or in addition to existing shareholders selling their shares. *See NYSE, Section 102.01B, Footnote E*; *see also* Order Approving a Proposed Rule Change To Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807, 85,808 n.15 (Dec. 22, 2020).

$38.50. Over the next few months, Slack experienced multiple service disruptions that caused the share price to drop below $25. On September 19, 2019, Pirani brought a class action lawsuit against Slack, as well as its officers, directors, and venture capital fund investors, on behalf of himself and all other persons and entities who acquired Slack stock pursuant and/or traceable to the Company's registration statement and prospectus issued in the direct listing.

Pirani brought claims against Slack for violations of Section 11, Section 12(a)(2), and Section 15(a) of the Securities Act of 1933. Pirani alleges that Slack's registration statement was inaccurate and misleading because it did not alert prospective shareholders to the generous terms of Slack's service agreements, which obligated Slack to pay out a significant amount of service credits to customers whenever the service was disrupted, even if the customers did not experience the disruption. Nor did it disclose, according to Pirani, that these service disruptions were frequent in part because Slack guaranteed 99.99% uptime.[2] Finally, Pirani alleges that the statement downplayed the competition Slack was facing from Microsoft Teams at the time of its direct listing. Slack challenges whether Pirani has statutory standing to sue under Section 11 and Section 12(a)(2) because he cannot prove that his shares were registered under the allegedly misleading registration statement.

[2] Uptime refers to the time when a computer service is available to users without disruptions. Slack guarantees that 99.99% of the time, users will experience no service disruptions.

PROCEDURAL HISTORY

On January 21, 2020, Slack moved to dismiss the class action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). On April 21, 2020, the district court granted the motion in part and denied the motion in part.

The district court held that Pirani had standing under Section 11 because he could show that the securities he purchased, even if unregistered, were "of the same nature" as those issued pursuant to the registration statement. The district court adopted a broad reading of "such security" within Section 11 to account for the difficulty of distinguishing between registered and unregistered shares when both are sold simultaneously in a direct listing. The district court concluded that Pirani had standing to sue under Section 11 even though he did not know whether the shares he purchased were registered or unregistered.

The district court also held that Pirani had standing under Section 12(a)(2) to sue the individual defendants.[3] As with Section 11, the district court read Section 12(a)(2)'s requirement that the plaintiff purchase "such security" from a defendant who "offers or sells a security . . . by means of a prospectus," 15 U.S.C. § 77l(a)(2), to include registered or unregistered securities offered in the direct listing. The district court also held that Pirani had pled sufficient facts to support that the individual defendants had solicited Pirani's purchase of Slack shares by preparing and signing the

[3] The individual defendants are: Stewart Butterfield (Chief Executive Officer of Slack), Allen Shim (Chief Financial Officer of Slack), Brandon Zell (Chief Accounting Officer of Slack), and Andrew Braccia, Edith Cooper, Sarah Friar, John O'Farrell, Chamath Palihapitiya, and Graham Smith (Directors of Slack's Board).

offering materials while they were financially motivated to encourage sales of Slack shares. The district court dismissed the Section 12(a)(2) claim against Slack because Slack had not issued any new shares in the offering.

Finally, because Pirani had stated a claim against Slack under Section 11, the district court ruled that he had standing under Section 15 to sue the individual and venture capital defendants[4] for secondary liability.

On June 5, 2020, at the Defendants' request, the district court certified its April 21, 2020, order (regarding the motion to dismiss), for interlocutory appeal "because the question of whether shareholders can establish standing under Sections 11 and 12(a)(2) in connection with a direct listing is one of first impression on which fair-minded jurists might disagree." On July 23, 2020, we granted Slack's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

JURISDICTION & STANDARD OF REVIEW

We granted Slack's petition for interlocutory appeal on July 23, 2020, and thereby have jurisdiction under 28 U.S.C. § 1292(b) over the entire order. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (holding "the appellate court may address any issue fairly included within the certified order").

We review a district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) *de novo*. *See Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir.

[4] The venture capital defendants are three venture capital firms and the board members that they appointed to Slack's Board of Directors: Accel and Andrew Braccia, Andreessen Horowitz and John O'Farrell, and Social+Capital and Chamath Palihapitiya.

2011); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1079 (9th Cir. 1999). In deciding a motion to dismiss, "[t]he facts alleged in a complaint are to be taken as true and must 'plausibly give rise to an entitlement to relief.'" *Dougherty*, 654 F.3d at 897 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). A complaint must "state a claim to relief that is plausible on its face[.]" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

DISCUSSION

I. Section 11 Standing

Section 11 of the Securities Act of 1933 states:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not mis-leading, any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue—(1) every person who signed the registration statement . . . .

15 U.S.C. § 77k(a) (emphasis added). The meaning that has been applied in this circuit is that "such security" in Section 11 means a security issued under a specific registration statement, not some later or earlier statement. *See Hertzberg*, 191 F.3d at 1080 (holding that "such security" under Section 11 "means that the person must have

purchased a security issued under that, rather than some other, registration statement"); *Century Aluminum*, 729 F.3d at 1106 (holding that "[p]laintiffs need not have purchased shares in the offering made under the misleading registration statement . . . [purchasers in the aftermarket] have standing to sue provided they can trace their shares back to the relevant offering"). Past cases in this and other circuits have dealt with successive registrations, whereby a company issues a secondary offering to the public such that there are multiple registration statements under which a share may be registered, and other tracing challenges stemming from an IPO. *See e.g., Century Aluminum*, 729 F.3d at 1106; *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 972 (8th Cir. 2002); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 491, 496–97 (5th Cir. 2005). In those cases, the court has interpreted "any person acquiring such security" in Section 11 to mean "that the person must have purchased a security issued under that, rather than some other, registration statement." *Hertzberg*, 191 F.3d at 1080. When "all the stock ever publicly issued by [a company] was sold in the single offering at issue . . . . [t]he difficulties of tracing stock to a particular offering present in some cases are [] not present." *Id.* at 1082.

The district court is correct that this is a case of first impression. The issue before the court today is: what does "such security" mean under Section 11 in the context of a direct listing, where only one registration statement exists, and where registered and unregistered securities are offered to the public at the same time, based on the existence of that one registration statement? The words of a statute do not morph because of the facts to which they are applied. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005). Thus, we do not adopt, as the district court did, the broad meaning of Section 11 that Judge Friendly rejected in *Barnes v. Osofsky*, 373 F.2d 269, 271, 273 (2d Cir. 1967). Instead, to answer

this question we look directly to the text of Section 11 and the words "such security."

Slack was listed for the first time on the NYSE via a direct listing. The SEC declared Slack's registration effective on June 7, 2019, and Slack began selling shares on June 20, 2019. Per the NYSE rule, a company must file a registration statement in order to engage in a direct listing. *See NYSE, Section 102.01B, Footnote E* (allowing a company to "list their 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") (emphasis added); *see also* SEC Approval 2018, 83 Fed. Reg. at 5651. The SEC interprets this reference to a registration statement in the rule as an effective registration statement filed pursuant to the Securities Act of 1933. *See* Order Approving a Proposed Rule Change To Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807, 85,808 n.15 (Dec. 22, 2020) ("SEC Approval 2020"). As indicated, in contrast to an IPO, in a direct listing there is no bank-imposed lock-up period during which unregistered shares are kept out of the market. Instead, at the time of the effectiveness of the registration statement, both registered and unregistered shares are immediately sold to the public on the exchange. *See NYSE, Section 102.01B, Footnote E*. Thus, in a direct listing, the same registration statement makes it possible to sell both registered and unregistered shares to the public.

Slack's unregistered shares sold in a direct listing are "such securities" within the meaning of Section 11 because their public sale cannot occur without the only operative registration in existence. Any person who acquired Slack

shares through its direct listing could do so only because of the effectiveness of its registration statement.

Because this case involves only one registration statement, it does not present the traceability problem identified by this court in cases with successive registrations. *See Hertzberg*, 191 F.3d at 1082; *Century Aluminum*, 729 F.3d at 1106 ("When all of a company's shares have been issued in a single offering under the same registration statement, this 'tracing' requirement generally poses no obstacle.").[5] All of Slack's shares sold in this direct listing, whether labeled as registered or unregistered, can be traced to that one registration.

The legislative history of Section 11 supports this interpretation. The Securities Act of 1933 was motivated in part by the stock market crash of 1929, with a goal of "throw[ing] upon originators of securities a duty of

[5] Counsel for Slack raised for the first time in oral argument that Slack issued two registration statements in its direct listing, a Form S-1 (the traditional registration statement) and a Form S-8 (registering sales of shares to employees through their compensation packages). Both forms went into effect on the same day. The record before this court does not include the Form S-8. Rather, counsel pointed the court to the page in the S-1 that references the S-8. In any case, the court takes judicial notice of Slack's Form S-8, filed June 7, 2019, and available at https://sec.report/Document/0001628280-19-007750/. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (SEC filings subject to judicial notice). In addition, the S-8 explicitly incorporates the S-1 by reference, meaning that any allegedly misleading statements in the S-1 are necessarily present in the S-8, and that these two forms are part of the same registration package. Finally, to the extent that Slack is arguing that Pirani's shares could have been registered under a different registration statement (presenting the same exact traceability conundrum as in past cases), this factual scenario is not present here and is speculative.

competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies." H.R. Rep. No. 73-85, at 9 (1933) (Conf. Rep.). The House Conference Report explained that "[f]undamentally, [Sections 11 and 12] entitle the buyer of securities sold *upon a registration statement* including an untrue statement or omission of material fact, to sue for recovery. . . " *Id.* (emphasis added). The drafters noted "it is the essence of fairness to insist upon the assumption of responsibility for the making of these statements" when the "connection between the statements made and the purchase of the security is clear[.]" *Id.* at 10. Here, both the registered and unregistered Slack shares sold in the direct listing were sold "upon a registration statement" because they could only be sold to the public at the time of the effectiveness of the statement. *See NYSE, Section 102.01B, Footnote E*. The connection between the purchase of the security and the registration statement is clear.

Slack argues that past cases in this circuit and others limit the meaning of "such security" in Section 11 to only registered shares. Slack asks that the court apply Section 11 to direct listings in the same way it has in cases with successive registration statements, requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement. *See Century Aluminum*, 729 F.3d at 1106; *Barnes*, 373 F.2d at 273; *Lee*, 294 F.3d at 976. To interpret Section 11 in this way would undermine this section of the securities law.

In a direct listing, registered and unregistered shares are released to the public at once. There is no lock-up period in which a purchaser can know if they purchased a registered or unregistered share. Thus, interpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability for misleading or

false statements made in a registration statement in a direct listing for both registered and unregistered shares. While there may be business-related reasons for why a company would choose to list using a traditional IPO (including having the IPO-related services of an investment bank), from a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing.[6] Moreover, companies would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements.[7] This interpretation of Section 11 would create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception.[8]

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[6] This is particularly true now that the NYSE rule has been amended to allow a company to sell its own shares and raise capital through a Primary Direct Floor Listing. *See supra* note 2.

[7] The court notes that some SEC commissioners also voiced concerns about the Primary Direct Floor Listing rule. *See* Allison H. Lee, Caroline A. Crenshaw, *Statement on Primary Direct Listings*, SECURITIES AND EXCHANGE COMMISSION (Dec. 23, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23 (noting that the "NYSE has not met its burden to show that [] the proposed rule change is consistent with the Exchange Act"). Given the dearth of law on the subject, and the opportunity for manipulation, *see supra* note 6, the concern might be well-taken.

[8] The SEC must approve changes to NYSE rules to confirm that they are consistent with Section 6(b)(5) of the Exchange Act including ensuring that the rules "are designed to prevent fraudulent and manipulative acts and practices[.]" 15 U.S.C. § 78f(b)(5); *see* SEC

As indicated, most importantly, interpreting Section 11 in this way would contravene the text of the statute. Slack's shares offered in its direct listing, whether registered or unregistered, were sold to the public when "the registration statement . . . became effective," thereby making any purchaser of Slack's shares in this direct listing a "person acquiring such security" under Section 11. 15 U.S.C. § 77k(a). Pirani has pled facts sufficient to establish statutory standing under Section 11 and the court affirms the district court's denial of Slack's motion to dismiss with respect to Pirani's Section 11 claim.

II. Standing under Section 12

Section 12(a)(2) of the Securities Act of 1933 provides that:

> Any person who . . . *offers or sells a security* . . . by the use of any means or instrument of transportation or communication in interstate commerce or of the mails, *by means of a prospectus* or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements , . . . shall be liable . . . *to the person purchasing such*

Approval 2020, 85 Fed. Reg. 85,810. In its order approving the NYSE's direct listing rule, the SEC noted that while the direct listing rule "may present tracing challenges," it did not "expect any such tracing challenges . . . to be of such magnitude as to render the proposal inconsistent with the Act." *Id.* at 85,816. In fact, the SEC cited the district court opinion in this case to demonstrate how the judge-made traceability doctrine might evolve, and as evidence that there was no "precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims." *Id.* at 85,816 & n.112.

> *security from him*, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. § 77l(a)(2) (emphasis added). Under Section 12(a)(2), liability falls on a person who "offers or sells a security" to the public by means of a false or misleading prospectus or oral communication. *See Pinter v. Dahl*, 486 U.S. 622, 641–47 (1988). The Supreme Court has determined that "the word 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 584 (1994); *see also Century Aluminum*, 729 F.3d at 1106 (noting that a "prospectus. . . is treated as part of the company's registration statement for purposes of § 11").

For the purposes of our analysis, Section 12 liability (resulting from a false prospectus) is consistent with Section 11 liability (resulting from a false registration statement). 15 U.S.C. §§ 77k, 77l; *see Hertzberg*, 191 F.3d at 1081 ("Section 12 . . . permits suit against a seller of a security by prospectus"). It follows from the analysis of "such security" in Section 11, that the shares at issue in Slack's direct listing, registered and unregistered, were sold "by means of a prospectus" because the prospectus was a part of the offering materials (i.e. the registration statement and prospectus) that permitted the shares to be sold to the public. As previously determined, neither the registered nor unregistered shares would be available on the exchange without the filing of the offering materials. *See NYSE, Section 102.01B, Footnote E.*

Thus, Pirani has satisfied part of the statutory standing analysis under Section 12(a)(2) because all of Slack's shares in this direct listing were sold "by means of a prospectus."

Section 12 also includes an express privity requirement between the seller and the purchaser that is not present in Section 11. *See Hertzberg*, 191 F.3d at 1081 (noting that the text of Section 12 "'the person purchasing such security from him,' thus specif[ies] that a plaintiff must have purchased the security directly from the issuer of the prospectus"). Slack raises this issue in its briefing to the court, challenging Pirani's standing under Section 12(a)(2), asserting that none of the individual defendants are statutory sellers within the meaning of Section 12. Pirani does not challenge the district court's dismissal of his Section 12(a)(2) claim against Slack. On an interlocutory appeal, the court *may* reach any issues fairly raised in the certified district court order. *See Yamaha Motor*, 516 U.S. at 205 (holding "the appellate court may address any issue fairly included within the certified order"). This particular aspect of standing under Section 12(a)(2), however, does not appear to have motivated the district court's certification for interlocutory appeal and does not raise a novel issue or "involve[] a controlling question of law as to which there is substantial ground for difference of opinion[.]" 28 U.S.C. § 1292(b). The dispute is heavily fact dependent and we decline to address it at this juncture.

III. Section 15 Claims

Section 15 of the Securities Act of 1933 provides that "[e]very person who . . . controls any person liable under sections [Section 11 and 12] of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable[.]" 15 U.S.C. § 77o(a). Because standing

exists for Pirani's Section 11 claim against Slack, standing exists for the dependent Section 15 claim against controlling persons. 15 U.S.C. § 77o(a). The district court's determination that Pirani has pled sufficient facts to plausibly allege that the individual defendants and the venture capital defendants[9] are controlling persons under Section 15 is not challenged before us.[10]

CONCLUSION

For the reasons stated above, we affirm the district court's partial denial of Slack's motion to dismiss. Statutory standing exists under Sections 11 and 15, and under Section 12(a)(2) to the extent it parallels Section 11. **AFFIRMED.**

[9] The individual defendants do not argue that they are not controlling persons.

[10] The SEC defines control to be "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405. "The standards for liability as a controlling person under § 15 are not materially different from the standards for determining controlling person liability under § 20(a)." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568 n.4 (9th Cir. 1990). Under Section 20(a) (and therefore under Section 15) whether a party is a controlling person "is an intensely factual question." *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996) (citation omitted).

MILLER, Circuit Judge, dissenting:

This case involves the application of sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*, to a direct listing of shares on a stock exchange. Although the factual setting of the case may be novel, the legal issues it presents are not. The interpretation of sections 11 and 12 has been settled for decades, and applying that interpretation, I would reverse the district court's order and remand with instructions to grant the motion to dismiss in full.

In a traditional initial public offering (IPO), a company seeking to go public files a registration statement and then sells shares issued under that registration statement. Typically, the investment bank underwriting the offering insists on what is known as a "lock-up period," during which existing shareholders—such as the company's employees or its early investors, who may hold shares that were issued under an exemption to the registration requirement—may not sell their unregistered shares. Anyone purchasing shares on the stock exchange during the lock-up period can therefore be certain that the shares were issued under the registration statement.

In this case, Slack Technologies, Inc., went public through a direct listing, with no underwriters and no lock-up period. It did not issue any new shares; it simply filed a registration statement so that the shares already held by employees and early investors could begin to be traded publicly on the New York Stock Exchange. On the first day of the offering, 118 million registered shares and 165 million unregistered shares were available for purchase on the exchange, and Fiyyaz Pirani purchased 30,000 shares. He now asserts that the registration statement contained material omissions. But because brokers generally do not keep track of which shares were issued when, Pirani cannot prove that

his shares were issued under the registration statement that he says was inaccurate.

That failure of proof is significant and, as I will explain, outcome-determinative. Sections 11 and 12 impose strict liability for any "untrue statement of a material fact or [omission of] a material fact" in a "registration statement" or "prospectus," respectively. 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Strict liability is strong medicine, so the statute tempers it by limiting the class of plaintiffs who can sue. Section 11 provides statutory standing only to "any person acquiring such security," *id.* § 77k(a), while section 12 similarly provides standing only "to the person purchasing such security," *id.* § 77*l*(a). In that respect, both provisions are unlike section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, which allows a broad class of plaintiffs to sue for false statements in connection with the sale of a security, but only if the defendant acted with scienter. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 318–19 (2007).

I begin with section 11. As noted, that provision allows a suit only by a "person acquiring such security." 15 U.S.C. § 77k(a). Because the phrase "such security" has no antecedent in section 11, the statute is ambiguous as to what sort of security a plaintiff must acquire to have standing.

More than 50 years ago, the Second Circuit resolved that ambiguity in a landmark decision authored by Judge Friendly. *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967). In *Barnes*, the defendants had conducted a secondary offering—that is, the company's stock was already publicly traded under a previously filed registration statement, and the company filed a new registration statement so that it could sell more stock. *Id.* at 270. The plaintiffs purchased shares during the secondary offering, and they sought to

bring a section 11 action based on inaccuracies in the new registration statement. *Id.* The Second Circuit held that they could not do so because they could not prove that the shares they purchased had been issued under the new registration statement rather than the earlier one. *Id.* at 271–72. In reaching that conclusion, the court noted that the phrase "any person acquiring such security" lent itself to both a "narrower reading—'acquiring a security issued pursuant to the registration statement'" and "a broader one—'acquiring a security of the same nature as that issued pursuant to the registration statement,'" and it adopted the narrower reading, which it described as a "more natural" interpretation of the text. *Id.*

Until today, every court of appeals to consider the issue, including ours, has done the same. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768 & n.5 (1st Cir. 2011); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 975–78 (8th Cir. 2002); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999); *Joseph v. Wiles*, 223 F.3d 1155, 1159–60 (10th Cir. 2000), *abrogated on other grounds by California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007). In *Hertzberg*, we held that "such security" requires the plaintiff to "have purchased a security issued under that, rather than some other, registration statement." 191 F.3d at 1080. And in *In re Century Aluminum Co. Securities Litigation*, 729 F.3d 1104, 1106 (9th Cir. 2013), we reiterated that "such security" means that the shares were "issued under the allegedly false or misleading registration statement."

That principle ought to resolve this case. Because Pirani cannot show that the shares he purchased "were issued under the allegedly false or misleading registration statement," he lacks statutory standing to bring a section 11 claim. *Century Aluminum*, 729 F.3d at 1106. (The same reasoning also forecloses Pirani's claim under section 15, 15 U.S.C. § 77*o*, which is derivative of his section 11 claim.)

But the court declines to follow our precedent. In this, it follows the district court, which believed that the issue presented here "appears to be one of first impression" because prior section 11 cases arose in the context of successive registrations in IPO listings, while this case involves a direct listing. But nothing in the reasoning of the cases suggests that the distinction should matter. In cases involving successive registrations, we did not invent a requirement that a plaintiff's shares must have been issued under the registration statement because we thought it seemed like a good idea; we interpreted the statutory text to impose that requirement. The Supreme Court has reminded us that a statute is not "a chameleon, its meaning subject to change" based on the varying facts of different cases. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). If "such security" means that plaintiffs must have purchased shares "issued under the allegedly false or misleading registration statement" in successive-registration cases, *Century Aluminum*, 729 F.3d at 1106, then that is also what it means in direct-listing cases.

The court says that it is not adopting "the broad meaning of Section 11 that Judge Friendly rejected." But neither is it adopting the narrow reading that Judge Friendly accepted, or else it would have to reverse the district court. So what does "such security" mean? The court says that it "look[s] directly to the text of Section 11 and the words 'such security'" to

determine what "such security" means in the context of a direct listing. But the court never analyzes the text. Instead, it turns to the rules of the New York Stock Exchange. Because those rules did not allow Slack to sell its unregistered shares until the registration statement was filed, the court concludes that "such security" in section 11 must encompass any security whose "public sale cannot occur without the only operative registration in existence." That definition has no basis in the statutory text, which, as construed in *Barnes*, gives standing only to those "acquiring a security issued pursuant to the registration statement." 373 F.2d at 271. And although the court asserts that "[a]ll of Slack's shares sold in this direct listing, whether labeled as registered or unregistered, can be traced to that one registration," it does not suggest that all of the shares were issued under that registration statement. It cannot do so, given that most of the shares that began trading on the day of the listing had been issued well before the registration statement was filed.

Nor does the legislative history support the court's interpretation. To the contrary, the House Report explains that section 11 "entitle[s] the buyer of securities *sold upon a registration statement* . . . to sue for recovery." H.R. Rep. No. 73-85, at 9 (1933) (emphasis added). As the Second Circuit recognized, the phrase "securities sold upon a registration statement" plainly refers to registered securities. *Barnes*, 373 F.2d at 273. It does not refer to unregistered securities, even if those securities must wait until a registration statement becomes effective before they can be sold on an exchange.

What appears to be driving today's decision is not the text or history of section 11 but instead the court's concern that it would be bad policy for a section 11 action to be

unavailable when a company goes public through a direct listing. That policy concern is neither new nor particularly concerning. The plaintiffs in *Barnes* made precisely the same point about section 11 liability for secondary offerings, where, as they pointed out, it would be "impossible to determine whether previously traded shares are old or new." 373 F.2d at 272. The court acknowledged the point but concluded that it did not compel a broader interpretation of section 11 when such a "reading would be inconsistent with the over-all statutory scheme." *Id.* After all, in that context, as in this one, a company that can avoid strict liability under section 11 for inadvertent omissions or misleading statements in its registration statement will remain subject to liability under section 10(b) of the Securities Exchange Act for materially false statements made with scienter. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

More importantly, whatever the merit of the policy considerations, they are no basis for changing the settled interpretation of the statutory text. If we "alter our statutory interpretations from case to case, Congress [has] less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair." *Neal v. United States*, 516 U.S. 284, 296 (1996). Instead, "[t]he place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

For similar reasons, I also would hold that Pirani lacks standing under section 12. Section 12(a)(2) provides that any person who "offers or sells a security . . . by means of a prospectus" can be held liable for any untrue statements or omissions of material fact in the prospectus. 15 U.S.C.

§ 77*l*(a)(2). Just like section 11, section 12 limits standing to those who have "purchas[ed] such security." *Id.* § 77*l*(a).

We have not previously considered whether the phrase "purchasing such security" in section 12 requires plaintiffs to show that they purchased shares issued under the registration statement they are challenging. But the text of the statute resolves that question. Section 12 differs from section 11 because "such security" in section 12 has a clear antecedent: It is a security "offer[ed] or s[old] . . . by means of a prospectus." 15 U.S.C. § 77*l*(a)(2). "Prospectus," in turn, "is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 584 (1995). The unambiguous meaning of a security offered or sold "by means of a prospectus" is therefore a registered security sold in a public offering.

The court concludes otherwise because, as with section 11, it bases its interpretation on the rules of the New York Stock Exchange instead of the text that Congress enacted. In the court's view, securities sold "by means of a prospectus" include unregistered shares in a direct listing because those shares cannot be sold publicly until a registration statement is filed. But for a security to be offered or sold "by means of a prospectus," the registration statement must be the means through which the security is offered to the public. That is true only of registered securities. Even if the filing of the registration statement determines *when* an unregistered security can be offered to the public in a direct listing, the registration statement does not apply to the unregistered security and therefore is not the means through which it is offered or sold. Because the text of section 12 requires a plaintiff to have purchased a registered security to have standing, Pirani may not bring a section 12 claim.

"[N]o amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Both sections 11 and 12 require a plaintiff to show that he purchased a security issued under the registration statement he is challenging. Whether or not that is good policy in the context of a direct listing, our role is to interpret statutes as they are—not to shape them into what we wish they could be. *See Bostock*, 140 S. Ct. at 1738. Because Pirani cannot show that he purchased a registered security, I would hold that he lacks standing to bring claims under sections 11, 12, or 15 of the Securities Act.

NYSE

101.00 Introduction

101.00Introduction

A listing on the New York Stock Exchange is internationally recognized as signifying that a publicly owned corporation has achieved maturity and front-rank status in its industry---in terms of assets, earnings, and shareholder interest and acceptance. Indeed, the Exchange's listing standards are designed to assure that every domestic or non-U.S. company whose shares are admitted to trading in the Exchange's market merit that recognition.

The Exchange welcomes inquiries from corporate officials who wish to explore the advantages of listing with Exchange representatives. Discussions can be held at company headquarters, at the Exchange or over the telephone.

Prospective applicants for listing are invited to take advantage of the Exchange's free confidential review process to learn whether or not the company is eligible for listing and what additional conditions, if any, might first have to be satisfied. A company requesting such a review incurs no obligation whatever.

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A company that has qualified for listing can normally expect its shares to be admitted to trading within four to six weeks after filing its original listing application. (See Section 7 of this Manual for details concerning listing applications.)

The Exchange has broad discretion regarding the listing of a company. The Exchange is committed to list only those companies that are suited for auction market trading and that have attained the status of being eligible for trading on the Exchange. Thus, the Exchange may deny listing or apply additional or more stringent criteria based on any event, condition, or circumstance that makes the listing of the company inadvisable or unwarranted in the opinion of the Exchange. Such determination can be made even if the company meets the standards set forth below.

102.01 Minimum Numerical Standards—Domestic Companies—Equity Listings

102.01A A company must meet one of the following distribution criteria:

Number of holders of 100 shares or more or of a unit of trading if less than 100 shares	400 (A)
and	
Number of publicly held shares	1,100,000 shares (B)
Affiliated companies:	
Number of holders of 100 shares or more or of a unit of trading if less than 100 shares	400 (A)
and	
Number of publicly held shares	1,100,000 shares (B)
Companies listing following emergence from bankruptcy:	
Number of holders of 100 shares or more or of a unit of trading if less than 100 shares	400 (A)
and	
Number of publicly held shares	1,100,000 shares (B)
Companies listing in connection with a transfer or quotation or upon exchange of a common equity security for a listed Equity Investment Tracking Stock:	
Number of holders of 100 shares or more or of a unit of trading if less than 100 shares	400 (A)
or	
Total stockholders	2,200 (A)
Together with average monthly trading volume	100,000 shares (for most recent 6 months)
or	
Total stockholders	500 (A)

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Together with average monthly trading volume	1,000,000 shares (for most recent 12 months)
and	
Number of publicly held shares	1,100,000 shares (B)

(A) The number of beneficial holders of stock held in the name of Exchange member organizations will be considered in addition to holders of record. The Exchange will make any necessary check of such holdings.

(B) If the unit of trading is less than 100 shares, the requirements relating to number of publicly-held shares shall be reduced proportionately. 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.

102.01B A Company must demonstrate an aggregate market value of publicly-held shares of $40,000,000 for companies that list either at the time of their initial public offerings ("IPO) (C) or as a result of spin-offs or under the Affiliated Company standard or, for companies that list at the time of their Initial Firm Commitment Underwritten Public Offering (C), and $100,000,000 for other companies (DAE). A company must have a closing price or, if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, an IPO or Initial Firm Commitment Underwritten Public Offering price per share of at least $4 at the time of initial listing. A company listing a common equity security upon completion of an exchange of such security for a listed Equity Investment Tracking Stock must demonstrate an aggregate market value of publicly-held shares of $100,000,000 and a closing price per share of $4.00 and may demonstrate that it has met these requirements by reference to the trading price and publicly-held shares outstanding (D) of the Equity Investment Tracking Stock which is the subject of the exchange, basing those calculations on the exchange ratio between the two securities.

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(C) For companies that list at the time of their IPOs or Initial Firm Commitment Underwritten Public Offering, the Exchange will rely on a written commitment from the underwriter to represent the anticipated value of the company's offering in order to determine a company's compliance with this listing standard. Similarly, for spin-offs, the Exchange will rely on a representation from the parent company's investment banker (or other financial advisor) in order to estimate the market value based upon the as disclosed distribution ratio. For purpose of this paragraph, an IPO is an offering by an issuer which, immediately prior to its original listing, does not have a class of common stock registered under the Securities Exchange Act of 1934. An IPO includes a carve-out, which is defined for purposes of this paragraph as the initial offering of an equity security to the public by a publicly traded company for an underlying interest in its existing business (which may be subsidiary, division, or business unit). For purposes of this paragraph, a company is listing in connection with its Initial Firm Commitment Underwritten Public Offering if (i) such company has a class of common stock registered under the Exchange Act, (ii) such common stock has never been listed on a national securities exchange in the period since the commencement of its current registration under the Exchange Act, and (iii) such company is listing in connection with a firm commitment underwritten public offering that is its first firm commitment underwritten public offering of its common stock since the registration of its common stock under the Exchange Act.

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(D) Shares held by directors, officers, or their immediate families and other concentrated holding of 10 percent or more are excluded in calculating the number of publicly-held shares. If a company either has a significant concentration of stock, or changing market forces have adversely impacted the public market value of a company which otherwise would qualify for listing on the Exchange, such that its public market value is no more than 10 percent below $40,000,000 or $100,000,000, as applicable, the Exchange will generally consider $40,000,000 or $100,000,000, as applicable, in stockholders' equity as an alternate measure of size and therefore as an alternate basis on which to list the company.

(E) Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spinoff. However, the Exchange recognizes that some companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in one or more private placements, may wish to list their 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, where such 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 (a "Selling Shareholder Direct Floor Listing). In addition, in certain cases, a company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders (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). Consequently, the Exchange will, on a case by case basis, exercise discretion to list companies that are listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.

In exercising this discretion with respect to Selling Shareholder Direct Floor Listings, the Exchange will determine that such company has met the $100,000,000 aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation (a "Valuation") of the company 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"). 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, the Exchange will determine that such company has met its marketvalue of publicly-held shares requirement if the company provides a Valuation evidencing a market value of publicly-held shares of at least $250,000,000.

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In exercising the above-referenced discretion with respect to a Primary Direct Floor Listing, the Exchange will deem such 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.

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.

Any Valuation used for this purpose 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.

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* A valuation agent will not be deemed to be independent if:

• At the time it provides such valuation, the valuation agent or any affiliated person or persons beneficially own in the aggregate as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days.

• The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the valuation. For purposes of this provision, "investment banking services" includes, without limitation, acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or

acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions), or similar investments; serving as placement agent for the issuer; or acting as a member of a selling group in a securities underwriting.

• The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.

Calculations under the Distribution Criteria

When considering a listing application from a company organized under the laws of Canada, Mexico or the United States ("North America"), the Exchange will include all North American holders and North American trading volume in applying the minimum stockholder and trading volume requirements detailed above. When listing a company from outside North America, the Exchange may, in its discretion, include holders and trading volume in the company's home country or primary trading market outside the United States in applying the applicable listing standards, provided that such market is a regulated stock exchange. In exercising this discretion, the Exchange will consider all relevant factors, including: (i) whether the information is derived from a reliable source, preferably either a government-regulated securities market or a transfer agent that is subject to governmental regulation; (ii) whether there exist efficient mechanisms for the transfer of securities between the company's non-U.S. trading market and the United States; and (iii) the number of shareholders and the extent of trading in the company's securities in the United States prior to the listing. For securities that trade in the format of American Depositary Receipts ("ADR's"), volume in the ordinary shares will be adjusted to be on an ADR-equivalent basis.

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Amended: August 13, 2009 (NYSE-2009-80); January 21, 2010 (NYSE-2010-02); October 18, 2012 (NYSE-2012-52); February 2, 2018 (NYSE-2017-30); November 9, 2018 (NYSE-2018-55); August 26, 2020 (NYSE-2019-67).

102.01C A company must meet one of the following financial standards.

I. **Earnings Test**

1. Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for items specified in (3)(a) through (3)(j) below must total (x) at least $10,000,000 in the aggregate for the last three fiscal years together with a minimum of $2,000,000 in

each of the two most recent fiscal years, and positive amounts in all three years or (y) at least $12,000,000 in the aggregate for the last three fiscal years together with a minimum of $5,000,000 in the most recent fiscal year and $2,000,000 in the next most recent fiscal year.

A company that (i) qualifies as an emerging growth company as defined in Section 2(a)(19) of the Securities Act and Section 3(a)(80) of the Exchange Act and (ii) avails itself of the provisions of the Securities Act and the Exchange Act permitting emerging growth companies to report only two years of audited financial statements, can qualify under the Earnings Test by meeting the following requirements: Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for items specified in (3)(a) through (3)(j) below must total at least $10,000,000 in the aggregate for the last two fiscal years together with a minimum of $2,000,000 in both years.

2. Financial statements compliant with applicable SEC rules covering a period of nine to twelve months shall satisfy the requirement for the most recent fiscal year in those cases where the Company has changed its fiscal year or where there has been a significant change in the Company's operations or capital structure. Financial statements compliant with applicable SEC rules covering a period of six months shall satisfy the requirement for the most recent fiscal year in those cases where the Company has changed its fiscal year or where there has been a significant change in the Company's operations or capital structure, provided that the Company must include financial data as derived from financial statements that have been subject to an SAS 100 review in a public disclosure (either an SEC filing or a press release) prior to the date of listing that confirms that the Company continues to satisfy the applicable standard based on at least nine completed months of the current fiscal year. When qualifying companies for listing based on interim financial information from the current fiscal year, the Exchange must conclude that the Company can reasonably be expected to qualify under the regular earnings standard upon completion of its then current fiscal year. If the Company does not qualify under the regular earnings standard at the end of such current fiscal year or qualify at such time for original listing under another listing standard, the Exchange will promptly initiate suspension and delisting procedures with respect to the Company; and

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3. Adjustments (F)(G) that must be included in the calculation of the amounts required in paragraph (1) are as follows:

   a. Application of Use of Proceeds - If a company is in registration with the SEC and is in the process of an equity offering, adjustments should be made to reflect the net proceeds of that offering, and the specified intended application(s) of such proceeds to:

      i. Pay off existing debt or other financial instruments: The adjustment will include elimination of the actual historical interest expense on debt or other financial instruments classified as liabilities under generally accepted accounting principles being retired with offering proceeds of all relevant periods or by conversion into common stock at the time of an initial public offering occurring in conjunction with the company's listing. If the event giving rise to the adjustment occurred during a time-period such that *pro forma* amounts are not set forth in the SEC registration statement (typically, the *pro forma* effect of repayment of debt will be provided in the current registration statement only with respect to the last fiscal year plus any interim period in accordance with SEC rules), the company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the standards established by the American Institute of Certified Public Accountants.

      ii. Fund an acquisition:

         1. The adjustments will include those applicable with respect to acquisition(s) to be funded with the proceeds. Adjustments will be made that are disclosed as such in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. Adjustments will be made for all the relevant periods for those acquisitions for which historical financial information of the acquiree is required to be disclosed in the SEC registration statement; and

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2. Adjustments applicable to any period for which *pro forma* numbers are not set forth in the registration statement shall be accompanied by the relevant adjusted financial data to combine the historical results of the acquiree (or relevant portion thereof) and acquiror, as disclosed in the company's SEC filing. Under SEC rules, the number of periods disclosed depends upon the significance level of the acquiree to the acquiror. The adjustments will include those necessary to reflect (a) the allocation of the purchase price, including adjusting assets and liabilities of the acquiree to fair value recognizing any intangibles (and associated amortization and depreciation), and (b) the effects of additional financing to complete the acquisition. The company must prepare the relevant adjusted financial data to reflect the adjustment to its historical financial data, and its outside audit firm must provide a report of having applied agreed-upon procedures with respect to such adjustments. Such report must be prepared in accordance with the standards established by the American Institute of Certified Public Accountants;

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b. Acquisitions and Dispositions:

In instances other than acquisitions (and related dispositions of part of the acquiree) funded with the use of proceeds, adjustments will be made for those acquisitions and dispositions that are disclosed as such in a company's financial statements in accordance with Rule 3-05 "Financial Statements of Business Acquired or to be Acquired" and Article 11 of Regulation S-X. If the disclosure does not specify pre-tax earnings from continuing operations, minority interest, and equity in the earnings or losses of investees, then such data must be prepared by the company's outside audit firm for the Exchange's consideration. In this regard, the audit firm would have to issue an independent accountant's report on applying agreed-upon procedures in accordance with the standards established by the American Institute of Certified Public Accountants;

c. Exclusion of Merger or Acquisition Related Costs Recorded under Pooling of Interests;

d. Exclusion of nonrecurring Charges or Income Specifically Disclosed in the Applicant's SEC Filing for the Following -

i. In connection with exiting an activity for the following-

1. Costs of severance and termination benefits

2. Costs and associated revenues and expenses associated with the elimination and reduction of product lines

3. Costs to consolidate or re-locate plant and office facilities

ii. Loss or gain on disposal of long-lived assets

iii. Environmental clean-up costs

iv. Litigation settlements;

v. Loss or gain from extinguishment of debt prior to its maturity;

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e. Exclusion of impairment charges on Long-lived Assets (goodwill, property, plant, and equipment, and other long-lived assets);

f. Exclusion of Gains or Losses Associated with Sales of a Subsidiary's or Investee's Stock;

g. Exclusion of In-Process Purchased Research and Development Charges;

h. Regulation S-X Article 11 Adjustments

Adjustments will include those contained in a company's *pro forma* financial statements provided in a current filing with the SEC pursuant to SEC rules and regulations governing Article 11 "Pro forma information of Regulation S-X Part 210-Form and Content of and Requirements for Financial Statements;"

i. Exclusion of the Cumulative Effect of Adoption of New Accounting Standards (APB Opinion No.20)

j. Exclusion of the income statement effects for all periods of changes in fair value of financial instruments of the company classified as liabilities, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the company's listing or converted into or exercised for common equity securities of the company at the time of such listing.

OR

II) Global Market Capitalization Test*

At least $200,000,000 in global market capitalization.**

* Acquisition companies (as such term is defined in Section 102.06) are not permitted to list under the Global Market Capitalization Test. Such companies will only be listed if they meet the requirements of Section 102.06.

** In considering the listing under the Global Market Capitalization Test of current publicly-traded companies (including the listing a common equity security upon completion of an exchange of such security for a listed Equity Investment Tracking Stock), the Exchange will require such companies to meet the minimum $200,000,000 global market capitalization requirement and maintain a closing price of at least $4 per share in each case for a period of at least 90 consecutive trading days prior to receipt of clearance to make application to list on the Exchange and will also consider whether the company's business prospects and operating results indicate that the company's market capitalization value is likely to be sustained or increase over time.

cited in Piranty v. Slack Technologies, Inc. No. 20-16419, archived on September 14, 2021

In the case of companies listing in connection with an IPO or an Initial Firm Commitment Underwritten Public Offering, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the $200,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

A company listing a common equity security upon completion of an exchange of such security for a listed Equity Investment Tracking Stock may demonstrate that it has met the Global Market Capitalization Test by reference to the trading price and shares outstanding of

the Equity Investment Tracking Stock which is the subject of the exchange, basing those calculations on the exchange ratio between the two securities.

(F) Only adjustments arising from events specifically so indicated in the company's SEC filing(s) as to both categorization and amount can and must be made. Any such adjustment applies only in the year in which the event occurred except with regard to the use of proceeds or acquisitions and dispositions. Any company for which the Exchange relies on adjustments in granting clearance must include all relevant adjusted financial data in its listing application, and disclose the use of adjustments by including a statement in a press release (i) that additional information is available upon which the NYSE relied to list the company and is included in the listing application and (ii) that such information is available to the public upon request. This press release must be issued concurrently with any listing announcement issued by the company or, if a listing announcement is not issued, within 30 days from the date the company lists on the NYSE. The form of listing application and information regarding supporting documents required in connection with adjustments to historical financial data are available on the Exchange's website or from the Exchange upon request.

Not cited in Piranni v. Slack Technologies, Inc. 20-16419 archived on September 14, 2021

(G) Interested parties should apply the list of adjustments in accordance with any relevant accounting literature, such as that published by the Financial Accounting Standards Board ("FASB"), the Accounting Principles Board ("APB"), the Emerging Issues Task Force ("EITF"), the American Institute of Certified Public Accountants ("AICPA"), and the SEC. Any literature is intended to guide issuers and investors regarding the affected adjustment listed. If successor interpretations (or guidelines) are published with respect to any particular adjustment, the most recent relevant interpretations (or guidelines) should be consulted.

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Aside from the minimum numerical standards listed above, other factors are taken into consideration. The company must be a going concern or be the successor to a going concern. Although the amount of assets and earnings and the aggregate market value are considerations, greater emphasis is placed on such questions as the degree of national interest in the company, the character of the market for its products, its relative stability and position in its industry, and whether or not it is engaged in a expanding industry with prospects for maintaining its position.

Income deposit securities to be traded as a unit will as a general matter be listed if each of the component parts of the unit meets the applicable requirements for listing.

The Exchange is also concerned with such matters as voting rights of shareholder, voting arrangements and pyramiding of control, and related party transactions.

When there is an indication of a lack of public interest in the securities of a company evidenced, for example, by low trading volume on another exchange, lack of dealer interest in the over-the-counter market, unusual geographic concentration of holders of shares, slow growth in the number of shareholders, low rate of transfers, etc., higher distribution standards may apply. In this connection, particular attention will be directed to the number of holders of from 100 to 1,000 shares and the total number of shares in this category.

Amended: November 2, 2009 (NYSE-2009-109); January 21, 2010 (NYSE-2010-02); May 15, 2012 (NYSE-2012-12); August 15, 2013 (NYSE-2013-33); September 30, 2014 (NYSE-2014-52); November 9, 2018 (NYSE-2018-55).

102.01D Policy on restated financial statements due to change from an unacceptable to acceptable accounting principle or correction of errors.

Cited in Pirani v. Slack Technologies, Inc. No. 20-16419 archived on September 14, 2021

If at any time following the Exchange's initial determination that a company meets the Exchange's original listing criteria, the company restates its financial statements due to a change from an unacceptable to an acceptable accounting principle or a correction of errors, and the restatement encompasses financial statements included in its SEC filings at the time of application for listing on the Exchange, the Exchange will reevaluate the company's listing status. In this regard, the Exchange will determine whether, at the time of the original clearance, the company would have qualified under the Exchange's original listing standards utilizing the restated financial data. If not, unless the company meets original listing standards at the time of the restatement, the company will be notified that it does not meet the original listing standards and, if its securities have been listed, such securities will be suspended from trading and the company will immediately be subject to the delisting procedures in Para. 804.

102.01E Policy on reliance on the operating history of acquired companies.

In the event that a company has less than three years of operating history and is acquiring (either completed or committed) an entity with the requisite operating history, the Exchange will consider the combined operating history of the aquiror and acquiree for the preceding period(s) in conducting its financial eligibility review. If it is necessary to combine historical financial statements if the acquiree and acquiror in order to enable the Exchange to conduct its analysis (e.g., overlapping fiscal year), then the combined data would need to be

accompanied by an agreed upon procedures letter provided by the company's outside audit firm at the request of the company. The auditor's letter would state the procedures performed with respect to any necessary combination of historical data.

102.01F Policy on Listing Reverse Merger Companies

For purposes of this Section 102.01F, a "Reverse Merger" means any transaction whereby an operating company becomes an Exchange Act reporting company by combining directly or indirectly with a shell company which is an Exchange Act reporting company, whether through a reverse merger, exchange offer, or otherwise. However, a Reverse Merger does not include the acquisition of an operating company by a listed company which qualified for initial listing as an acquisition company under Section 102.06. In determining whether a company is a shell company, the Exchange will consider, among other factors: whether the Company is considered a "shell company" as defined in Rule 12b-2 under the Exchange Act; what percentage of the company's assets are active versus passive; whether the company generates revenues, and if so, whether the revenues are passively or actively generated; whether the company's expenses are reasonably related to the revenues being generated; how many employees work in the company's revenue-generating business operations; how long the company has been without material business operations; and whether the company has publicly announced a plan to begin operating activities or generate revenues, including through a near-term acquisition or transaction.

cited in Pirani v. Slack Technologies, Inc. No. 20-16419 archived on September 14, 2021

In order to qualify for initial listing, a company that is formed by a Reverse Merger (a "Reverse Merger Company") must comply with one of the initial listing standards set forth in Section 102.01C and the applicable requirements of Sections 102.01A and 102.01B. In addition to satisfying all of the Exchange's other initial listing requirements, a Reverse Merger Company shall be eligible to submit an application for initial listing only if the combined entity has, immediately preceding the filing of the initial listing application:

1. traded for at least one year in the U.S. over-the-counter market, on another national securities exchange, or on a regulated foreign exchange following the consummation of the Reverse Merger and (i) in the case of a domestic issuer, has filed with the Commission a Form 8-K containing all of the information required by Item 2.01(f) of Form 8-K, including all required audited financial statements, or (ii) in the case of a foreign private issuer, has filed all of the information described in (i) above on Form 20-F;

2. maintained a closing stock price of $4 or higher for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to the filing of the initial listing application, and

3. filed with the Commission all required reports since the consummation of the Reverse Merger, including the filing of at least one annual report containing all required audited financial statements for a full fiscal year commencing on a date after the date of filing with the Commission of the filing described in (1) above.

In addition, in order to qualify for listing, a Reverse Merger Company must have timely filed all required reports for the most recent 12-month period prior to the listing date, including at least one annual report containing all required audited financial statements.

In addition, a Reverse Merger Company will be required to maintain a closing stock price of $4 or higher for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to the date of the Reverse Merger Company's listing.

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The Exchange may in its discretion impose more stringent requirements than those set forth above if the Exchange believes it is warranted in the case of a particular Reverse Merger Company based on, among other things, an inactive trading market in the Reverse Merger Company's securities, the existence of a low number of publicly held shares that are not subject to transfer restrictions, if the Reverse Merger Company has not had a Securities Act registration statement or other filing subjected to a comprehensive review by the Commission, or if the Reverse Merger Company has disclosed that it has material weaknesses in its internal controls which have been identified by management and/or the Reverse Merger Company's independent auditor and has not yet implemented an appropriate corrective action plan.

A Reverse Merger Company will not be subject to the requirements of this Section 102.01F if it is listing in connection with an Initial Firm Commitment Underwritten Public Offering (as defined in Section 102.01B) where the proceeds to the Reverse Merger Company will be sufficient on a stand-alone basis to meet the aggregate market value of publicly-held shares requirement for Initial Firm Commitment Underwritten Public Offerings as set forth in Section 102.01B and the offering is occurring subsequent to or concurrently with the Reverse Merger. In addition, a Reverse Merger Company will not be subject to the requirement of this Section 102.01F that it must maintain a closing stock price of $4 or higher for at least 30 of the most recent 60 days prior to each of the filing of the initial listing application and the date of the Reverse Merger Company's listing, if it has satisfied the one-year trading

requirement contained in paragraph (1) above and has filed at least four annual reports with the Commission which each contain all required audited financial statements for a full fiscal year commencing after filing the information described in paragraph (1) above. However, such companies will be required to (i) comply with the stock price requirement of Section 102.01B at the time of each of the filing of the initial listing application and the date of the Reverse Merger Company's listing and (ii) not be delinquent in their filing obligations with the Commission. In either of the cases described in this paragraph, the Reverse Merger Company will only need to meet the requirements of one of the financial initial listing standards in Section 102.01C, in addition to all other applicable non-financial listing standard requirements, including, without limitation, the requirements of Sections 102.01A, 102.01B and 303A.

Adopted: November 8, 2011 (NYSE-2011-38). **Amended;** September 24, 2013 (NYSE-2013-62).

102.02 Alternate Listing Standards Companies Operating Primarily to Provide Venture Capital for Small and Medium Sized Businesses Equity Listings

(Applicable only to companies registered under the Investment Company Act of 1940 or the Small Business Investment Act of 1958.)

cited in Pirani v. Slack Technologies, Inc. No. 20-16419 archived on September 14, 2021

The Exchange believes that it is necessary to encourage the formation and growth of the private capital essential to finance the expansion of the U.S. economy. Companies operating primarily to provide venture capital for small and medium sized businesses help to serve such a purpose. These companies seek long-term growth rather than current earnings and, as a result, are often unable to meet the minimal annual earnings standards of the Exchange.

Nevertheless they require substantial working capital to do a significant and successful job of assisting small businesses. Therefore, the Exchange has adopted the following alternate size and earnings standards of such companies.

- The earnings requirement will be modified to the extent appropriate for companies of this character.

- Net tangible assets applicable to common stock shall be at least $18,000,000 including a minimum of $8,000,000 composed of paid-in capital or retained earnings.

- The company will be asked for an undertaking not to take action which would significantly reduce its net assets below the $18,000,000 level. In this connection, unusual and special circumstances will be considered on their merits.

All other original listing standards will be applicable.

102.03 Minimum Numerical Standards — Domestic Companies — Debt Listings

Market Value

The debt issue must have an aggregate market value or principal amount of no less than $5,000,000.

cited in Pirani v. Slack Technologies, Inc.
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Convertible Bonds

Debt securities convertible into equity securities may be listed only if the underlying equity securities are subject to real-time last sale reporting in the United States. The convertible debt issue must have an aggregate market value or principal amount of no less than $10,000,000.

Issuer or Bond Rating Status

For the Exchange to list a debt security, the security must be characterized by one of the following conditions:

(A) the issuer of the debt security has equity securities listed on the Exchange;

(B) an issuer of equity securities listed on the Exchange directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security;

(C) an issuer of equity securities listed on the Exchange has guaranteed the debt security;

(D) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or an equivalent rating by another NRSRO; or

(E) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned:

(i) an investment grade rating to a senior issue; or

(ii) a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a *pari passu* or junior issue.

cited in Pirani v. Slack Technologies, Inc.
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Form S-8 Slack Technologies, Inc.

Securities to be offered to employees in employee benefit plans

SEC.report (https://sec.report/) / Slack Technologies, Inc. (/CIK/0001764925) / Form S-8 (/Document/0001628280-19-007750/) / (Filer)

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About Form S-8 (/Form/S-8)

slacks-8.htm (https://sec.report/Document/0001628280-19-007750/slacks-8.htm) S-8

Zoom In Zoom Out

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As filed with the U.S. Securities and Exchange Commission on June 7, 2019 Registration No. 333-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM S-8 REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

Slack Technologies, Inc. (Exact Name of Registrant as Specified in Its Charter)

Delaware	26-4400325
(State or Other Jurisdiction of Incorporation or Organization)	(I.R.S. Employer Identification Number)

500 Howard Street San Francisco, California 94105 (Address of Registrant's Principal Executive Offices)

Amended and Restated 2009 Stock Plan, as amended 2019 Stock Option and Incentive Plan 2019 Employee Stock Purchase Plan (Full title of the plan)

Stewart Butterfield Chief Executive Officer Slack Technologies, Inc. 500 Howard Street San Francisco, California 94105 (855) 980-5920 (Name, address, and telephone number of agent for service)

Copies to:

Richard A. Kline David W. Van Horne Sarah B. Axtell Goodwin Procter LLP Three Embarcadero Center San Francisco, California 94111 (650) 752-3100	David Schellhase Gabe Stern Amanda Westendorf Slack Technologies, Inc. 500 Howard Street San Francisco, California 94105 (855) 980-5920

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ¨	Accelerated filer ¨
Non-accelerated filer ý	Smaller reporting company ¨
	Emerging growth company ý

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act. ¨

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CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	Amount to be Registered[(1)]	Proposed Maximum Offering Price Per Share	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Class A Common Stock, $0.0001 par value per share:				
—2019 Stock Option and Incentive Plan	60,200,000[(2)]	$1.68[(6)]	$101,136,000	$12,257.69
—2019 Employee Stock Purchase Plan[(10)]	9,000,000[(3)]	$1.43[(7)]	$12,852,000	$1,557.67
—Amended and Restated 2009 Stock Plan, as amended	99,992,706[(4)]	—[(8)]	—	—
Class B Common Stock, $0.0001 par value per share:				
—Amended and Restated 2009 Stock Plan, as amended	99,992,706[(5)]	$2.78[(9)]	$277,589,752	$33,643.88
TOTAL:	169,192,706		$391,577,751	$47,459.24

(1) Pursuant to Rule 416 of the Securities Act of 1933, as amended (the "Securities Act"), this Registration Statement shall also cover any additional shares of the Registrant's Class A Common Stock ("Class A Common Stock") or the Registrant's Class B Common Stock ("Class B Common Stock") that become issuable under the Registrant's 2019 Stock Option and Incentive Plan ("2019 Plan"), the Registrant's 2019 Employee Stock Purchase Plan ("2019 ESPP"), and the Registrant's Amended and Restated 2009 Stock Plan, as amended ("2009 Plan") by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without receipt of consideration that increases the number of outstanding shares of Class A Common Stock or Class B Common Stock.

(2) Represents 60,200,000 shares of Class A Common Stock reserved for issuance pursuant to future awards under the 2019 Plan. To the extent that any awards outstanding under the 2019 Plan or 2009 Plan expire, are forfeited, are held back upon exercise or settlement of an award to cover any exercise price, as applicable, or tax withholding, are reacquired by the Registrant prior to vesting, are satisfied without the issuance of stock or are otherwise terminated (other than by exercise) subsequent to the date of this Registration Statement, the shares reserved for issuance pursuant to such awards will become available for issuance as shares of Class A Common Stock under the 2019 Plan; provided, that any shares of Class B Common Stock will be first converted to shares of Class A Common Stock. See footnote 5 below.

(3) Represents 9,000,000 shares of Class A Common Stock reserved for issuance pursuant to future awards under the 2019 ESPP.

(4) Represents 99,992,706 shares of Class A Common Stock issuable upon conversion of shares of Class B Common Stock underlying equity awards outstanding under the 2009 Plan as of the date of this Registration Statement. To the extent that any such awards expire, are forfeited, are satisfied without the issuance of stock, are held back upon exercise or settlement to cover any exercise price or tax withholding, or are otherwise terminated (other than by exercise) subsequent to the date of this Registration Statement, the shares of Class B Common Stock reserved for issuance pursuant to such awards will become available for issuance as shares of Class A Common Stock under the 2019 Plan; provided, that any shares of Class B Common Stock will be first converted to shares of Class A Common Stock. See footnote 2 above.

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(5) Represents 99,992,706 shares of Class B Common Stock reserved for issuance pursuant to equity awards outstanding under the 2009 Plan as of the date of this Registration Statement. To the extent that any such awards expire, are forfeited, are satisfied without the issuance of stock, are held back upon exercise to cover any exercise price or tax withholding, or are otherwise terminated (other than by exercise) subsequent to the date of this Registration Statement, the shares of Class B Common Stock reserved for issuance pursuant to such awards will become available for issuance as shares of Class A Common Stock under the 2019 Plan; provided, that any

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shares of Class B Common Stock will be first converted to shares of Class A Common Stock. See footnote 2 above.

(6) Estimated solely for purposes of calculating the registration fee pursuant to Rule 457(a) of the Securities Act. Given that there is no proposed maximum offering price per share of Class A Common Stock, the registrant calculates the proposed maximum aggregate offering price by analogy to Rule 457(f)(2), based on the book value of the Class A Common Stock the registrant registers, which was calculated from its unaudited pro forma balance sheet as of January 31, 2019. Given that the registrant's shares of Class A Common Stock are not traded on an exchange or over-the-counter, the registrant did not use the market price of its Class A Common Stock in accordance with Rule 457(c).

(7) Estimated solely for purposes of calculating the registration fee pursuant to Rule 457(a) of the Securities Act. Given that there is no proposed maximum offering price per share of Class A Common Stock, the registrant calculates the proposed maximum aggregate offering price, by analogy to Rule 457(f)(2), based on 85% of the book value of the Class A Common Stock the registrant registers, which was calculated from its unaudited pro forma balance sheet as of January 31, 2019. Given that the registrant's shares of Class A Common Stock are not traded on an exchange or over-the-counter, the registrant did not use the market prices of its Class A Common Stock in accordance with Rule 457(c). Pursuant to the 2019 ESPP, the purchase price of the shares of Class A Common Stock reserved for issuance thereunder will be at least 85% of the lower of the fair market value of a share of Class A Common Stock on the first trading day pursuant to the initial public listing or on the exercise date.

(8) Pursuant to Rule 457(i), there is no fee associated with the registration of shares of Class A Common Stock issuable upon conversion of shares of Class B Common Stock (a convertible security) being registered under this Registration Statement because no additional consideration will be received in connection with the conversion of shares of Class B Common Stock.

(9) Estimated in accordance with Rule 457(h) solely for the purpose of calculating the registration fee on the basis of $2.78 per share, the weighted-average exercise price of stock option awards outstanding under the 2009 Plan as of the date of this Registration Statement.

(10) In addition, pursuant to Rule 416(c) under the Securities Act, this Registration Statement also covers an indeterminate amount of interests to be offered or sold pursuant to the 2019 ESPP. In accordance with Rule 457(h)(2), no separate fee calculation is made for plan interests.

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PART I INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS The information called for in Part I of Form S-8 to be contained in the Section 10(a) prospectus is not being filed with or included in this Registration Statement (by incorporation by reference or otherwise) in accordance with the rules and regulations of the Securities and Exchange Commission (the "Commission"). The documents containing the information specified in Part I of Form S-8 will be delivered to the participants in the equity benefit plans covered by this Registration Statement as specified by Rule 428(b)(1) under the Securities Act. PART II INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents filed with the Commission by the Registrant are incorporated by reference into this Registration Statement:

(a) The Registrant's Registration Statement on Form S-1, as amended, filed with the Commission on May 31, 2019 (File No. 333-231041), which contains the Registrant's audited financial statements for the latest fiscal year which such statements have been filed; and

(b) The description of the Registrant's Class A Common Stock contained in the Registrant's Registration Statement on Form 8-A (File No. 001-38926) filed with the Commission on June 3, 2019 under Section 12(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), including any amendments or reports filed for the purpose of updating such description.

All documents subsequently filed by the Registrant pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the filing of a post-effective amendment to the Registration Statement which indicates that all of the shares registered hereunder have been sold or which deregisters all of such shares then remaining unsold, shall be deemed to be incorporated by reference into this Registration Statement and to be a part hereof from the respective dates of filing of such documents; provided, however, that documents or information deemed to have been furnished and not filed in accordance with Commission rules shall not be deemed incorporated by reference into this Registration Statement. Any statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein, or in any other subsequently filed document that also is or is deemed to be incorporated by reference herein, modifies or supersedes such earlier statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

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Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

None.

Item 6. Indemnification of Directors and Officers.

Section 145 of the General Corporation Law of the State of Delaware (the "DGCL") authorizes a corporation to indemnify its directors and officers against liabilities arising out of actions, suits and proceedings to which they are made or threatened to be made a party by reason of the fact that they have served or are currently serving as a director or officer to a corporation. The indemnity may cover expenses (including attorneys' fees)

judgments, fines and amounts paid in settlement actually and reasonably incurred by the director or officer in connection with any such action, suit or proceeding. Section 145 permits corporations to pay expenses (including attorneys' fees) incurred by directors and officers in advance of the final disposition of such action, suit or proceeding. In addition, Section 145 provides that a corporation has the power to purchase and maintain insurance on behalf of its directors and officers against any liability asserted against them and incurred by them in their capacity as a director or officer, or arising out of their status as such, whether or not the corporation would have the power to indemnify the director or officer against such liability under Section 145. The Registrant has adopted provisions in the Registrant's amended and restated certificate of incorporation and amended and restated bylaws that limit or eliminate the personal liability of the Registrant's directors and executive officers to the fullest extent permitted by the DGCL, as it now exists or may in the future be amended. Consequently, a director or executive officer will not be personally liable to the Registrant or its stockholders for monetary damages or breach of fiduciary duty as a director, except for liability in limited circumstances. These limitations of liability do not alter director liability under the federal securities laws and do not affect the availability of equitable remedies such as an injunction or rescission. In addition, the Registrant's amended and restated bylaws provide that:

- the Registrant will indemnify its directors and executive officers and, in the discretion of its board of directors, certain employees and agents to the fullest extent permitted by the DGCL, as it now exists or may in the future be amended; and
- the Registrant will advance reasonable expenses, including attorneys' fees, to its directors and executive officers, and in the discretion of its board of directors, to certain employees and agents, in connection with legal proceedings relating to their service for or on behalf of the Registrant, subject to limited exceptions.

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The Registrant has or will enter into indemnification agreements with each of its directors, executive officers and certain other officers. These agreements provide that the Registrant will indemnify each of its directors, executive officers, certain other officers and, at times, their affiliates, to the fullest extent permitted by the DGCL. The Registrant also maintains general liability insurance which covers certain liabilities of its directors and officers arising out of claims based on acts or omissions in their capacities as directors or officers, including liabilities under the Securities Act. See also the Undertakings set forth in the response to Item 9 herein.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

		Incorporated by Reference				
Exhibit Number	Exhibit Title	Form	File No.	Exhibit	Filing Date	Filed Herewith
4.1	Form of Class A Common Stock Certificate of the Registrant. (https://sec.report/Document/1764925/000162828019004786/exhibit41-sx1.htm)	S-1	333-231041	4.1	4/26/19	
4.2	Amended and Restated 2009 Stock Plan, as amended. (https://sec.report/Document/1764925/000162828019006616/exhibit102-sx1a1.htm)	S-1/A	333-231041	10.2	5/13/19	
4.3	2019 Stock Option and Incentive Plan, and forms of agreements thereunder. (https://sec.report/Document/1764925/000162828019006616/exhibit104-sx1a1.htm)	S-1/A	333-231041	10.4	5/13/19	
4.4	2019 Employee Stock Purchase Plan. (https://sec.report/Document/1764925/000162828019006616/exhibit105-sx1a1.htm)	S-1/A	333-231041	10.5	5/13/19	

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5.1	Opinion of Goodwin Procter LLP. (https://sec.report/Document/0001628280-19-007750/#exhibit51-sx8.htm)	X
23.1	Consent of KPMG LLP, Independent Registered Public Accounting Firm. (https://sec.report/Document/0001628280-19-007750/#exhibit231-sx8.htm)	X
23.2	Consent of Goodwin Procter LLP (included in Exhibit 5.1). (https://sec.report/Document/0001628280-19-007750/#exhibit51-sx8.htm)	
24.1	Power of Attorney (contained on signature page hereto).	

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Item 9. Undertakings.

(a) The undersigned Registrant hereby undertakes: (1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement: (i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933; (ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20 percent change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective Registration Statement; (iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement; Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) of this section shall not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the

Registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Registration Statement. (2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. (3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

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(b) The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. (c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

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SIGNATURES Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in San Francisco, California, on June 7, 2019.

SLACK TECHNOLOGIES, INC.

By: /s/ Stewart Butterfield
Stewart Butterfield
Chief Executive
Officer and Director

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POWER OF ATTORNEY AND SIGNATURES KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Stewart Butterfield, Allen Shim and David Schellhase, and each of them, as his or her true and lawful attorneys-in-fact and agents, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign the Registration Statement on Form S-8 of Slack Technologies, Inc., and any or all amendments (including post-effective amendments), and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents full power and authority to do and perform each and every act and thing requisite or necessary to be done in connection therewith and about the premises, as fully to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or their substitute or substitutes, may lawfully do or cause to be done by virtue hereof. Pursuant to the requirements of the Securities Act of 1933, as amended, this Registration Statement on Form S-8 has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ Stewart Butterfield Stewart Butterfield	Chief Executive Officer and Director (Principal Executive Officer)	June 7, 2019
/s/ Allen Shim Allen Shim	Chief Financial Officer (Principal Financial Officer)	June 7, 2019
/s/ Brandon Zell Brandon Zell	Chief Accounting Officer (Principal Accounting Officer)	June 7, 2019
/s/ Andrew Braccia Andrew Braccia	Director	June 7, 2019
/s/ Edith Cooper Edith Cooper	Director	June 7, 2019
/s/ Sarah Friar Sarah Friar	Director	June 7, 2019
/s/ John O'Farrell John O'Farrell	Director	June 7, 2019
/s/ Chamath Palihapitiya Chamath Palihapitiya	Director	June 7, 2019

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/s/ Graham Smith
Graham Smith

Director

June 7, 2019

exhibit51-sx8.htm (https://sec.report/Document/0001628280-19-007750/exhibit51-sx8.htm)
EXHIBIT 5.1 OPINION OF GOODWIN PROCTER LLP

Zoom In Zoom Out

Exhibit 5.1

June 7, 2019 Slack Technologies, Inc. 500 Howard Street San Francisco, CA 94105

Re: Securities Being Registered under Registration Statement on Form S-8 Ladies and Gentlemen: We have acted as counsel to you in connection with your filing of a Registration Statement on Form S-8 (the "Registration Statement") pursuant to the Securities Act of 1933, as amended (the "Securities Act"), on or about the date hereof relating to an aggregate of 169,192,706 shares (the "Class A Shares") of Class A common stock, $0.0001 par value per share ("Class A Common Stock") and 99,992,706 shares (the "Class B Shares" and, together with the Class A Shares, the "Shares") of Class B common stock, $0.0001 par value per share ("Class B Common Stock" and, together with the Class A Common Stock, the "Common Stock"), of Slack Technologies, Inc., a Delaware corporation (the "Company"), that may be issued pursuant to the Company's Amended and Restated 2009 Stock Plan, as amended, 2019 Stock Option and Incentive Plan and 2019 Employee Stock Purchase Plan (collectively, the "Plans"). We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to the opinion set forth below, on certificates of officers of the Company. The opinion set forth below is limited to the Delaware General Corporation Law. For purposes of the opinion set forth below, we have assumed that no event occurs that causes the number of authorized shares of Common Stock available for issuance by the Company to be less than the number of then unissued Shares. Based on the foregoing, we are of the opinion that the Shares have been duly authorized and, upon issuance and delivery against payment therefor in accordance with the terms of the Plans, will be validly issued, fully paid and nonassessable. We hereby consent to the inclusion of this opinion as Exhibit 5.1 to the Registration Statement. In giving our consent, we do not admit that we are in the category of persons whose consent is required under Section 7 of the Securities Act or the rules and regulations thereunder.

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Very truly yours,

/s/ Goodwin Procter LLP

GOODWIN PROCTER LLP

exhibit231-sx8.htm (https://sec.report/Document/0001628280-19-007750/exhibit231-sx8.htm)
EXHIBIT 23.1 CONSENT OF KPMG LLP

Zoom In Zoom Out

Exhibit 23.1
Consent of Independent Registered Public Accounting Firm The Board of Directors Slack Technologies, Inc.: We consent to the use of our report with respect to the consolidated financial statements incorporated by reference herein. /s/ KPMG LLP San Francisco, California June 7, 2019

Additional Files

File	Sequence	Description	Type	Size
0001628280-19-007750.txt (https://sec.report/Document/0001628280-19-007750/0001628280-19-007750.txt)		Complete submission text file		135581

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SEC CFR Title 17 of the Code of Federal Regulations. (https://ecfr.io/Title-17/)

Public Statement

Statement on Primary Direct Listings



Commissioner Allison Herren Lee



Commissioner Caroline A. Crenshaw

Dec. 23, 2020

Cited in Piraino v. Slack Technologies, Inc. No. 20-16419 archived on September 14, 2021

Today, the Commission approved a new listing rule from the New York Stock Exchange ("NYSE") which fundamentally shifts how companies can access the public markets.[1] The new listing standard will allow primary direct listings of companies seeking to go public and, importantly, raise capital outside of the traditional initial public offering ("IPO") process.[2] NYSE's proposal represents what could have been a promising and innovative experiment. Unfortunately, the rule fails to address very real concerns regarding protections for investors. As a result, we are unable to support this specific approach.[3]

Before delving into the specifics, we believe it is important to acknowledge that the current IPO process is far from perfect. Among other things, the structure often imposes relatively high fees on issuers. Market participants and the Commission should continue to explore ways to innovate and modernize the IPO process, but it need not be at the expense of fundamental investor protections.

Part of the underlying problem we confront today is that the Commission has chipped away at the public securities market year after year. Exemption after exemption from foundational Securities Act requirements has allowed, if not incented, companies to remain in the private market longer.[4] Thus, today many companies go public later in their lifecycle, if at all.[5] For some that do go public, the primary motivation may be to allow insiders to exit their positions, rather than raising significant additional capital. This private market proliferation results in far fewer investment opportunities for retail investors in the public markets, where there is a more level playing field and where information asymmetries and other power imbalances are alleviated.

As a result, it is all the more important for the Commission to shift focus toward attracting more listings in the public market. Direct listings could meaningfully contribute to that effort. Unfortunately, investors in primary direct listings under NYSE's approach will face at least two significant and interrelated problems: first, the lack of a firm-commitment underwriter that is incentivized to impose greater discipline around the due diligence and disclosure process, and second, the potential inability of shareholders to recover losses for inaccurate disclosures due to so-called "traceability" problems.

* * *

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Loss of an Underwriter and Corresponding Due Diligence

The NYSE proposal would permit companies to raise new capital without using a firm-commitment underwriter.[6] Allowing companies to access the public markets for capital raising without the use of a traditional underwriter very well may have benefits, including allowing flexibility for companies in determining which services would be most useful for them as they go through the registration and listing process.[7]

However, we must also consider the risks to investors that could result from removing traditional underwriters from the equation. Most notably, underwriters provide an important independent check on the quality of the registration statement. They are incented to do their job well because if they do not, they are subject to strict liability under Section 11 and Section 12(a)(2) of the Securities Act,[8] not to mention reputational risk associated with the sale of these new securities to their clients. If underwriters are removed from the equation, investors will lose a key protection: a gatekeeper incented to ensure that the disclosures around these opportunities are accurate and not misleading.

We understand that certain financial advisors involved in a primary direct listing may meet the statutory definition of an underwriter and thus trigger the above incentives and concomitant protections. However, it is currently unclear what types of involvement would result in meeting the statutory definition. Sophisticated institutions that advise on primary direct listings may be incented to structure their participation to avoid such status. This would allow them to limit or avoid legal liability, thus greatly reducing their incentive to conduct robust due diligence.

Had we acted with greater deliberation, we could have considered or debated possible approaches to mitigating these increased risks to investors. In particular, we should have provided guidance addressing what might trigger status as a statutory underwriter for other market participants involved in a primary direct listing. This guidance could have been targeted to the anticipated roles of financial advisors involved in a primary direct listing offering, given their potential role as one of the main market participants to guide companies through the listing process.[9] We support considering what guidance is needed in the future as primary direct listing market practices evolve.[10]

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Diminished Ability for Shareholders to Recover Damages

Primary direct listings could also exacerbate existing challenges investors face in recovering losses for false or inaccurate statements made in public offerings. One crucial obstacle investors must overcome arises from a judicial doctrine known as "traceability." Courts have required that shareholders seeking to recover for false or inaccurate statements in a registration statement be able to "trace" the shares they own to those actually sold by the company pursuant to the relevant registration statement.[11] Because a primary direct listing may often also involve concurrent sales by other shareholders, tracing a trade directly back to the issuer becomes extremely difficult.[12] While traceability issues can exist in traditional IPOs,[13] there is an increased likelihood of such issues in a primary direct listing where there are no "lock-up" agreements precluding sales by insiders at the time of the IPO.[14] The rule proposal will 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.

* * *

Had we determined to grapple with these concerns, there are several measures that could and should have been considered to craft an order that would have protected investors while preserving the potential benefits of direct listings. For example, we could have required directors to retain a financial advisor, who would provide additional independent advice. Another possibility is precluding use of this process by any issuers that do not provide ongoing auditor attestations and reports about management's assessment of its internal controls (so called "non-404(b) issuers"), because such attestations provide an important investor protection.[15] There could be numerous other ideas here, but there has been little or no engagement or debate around potential mitigation.[16]

Unfortunately, the Commission has not candidly assessed the potential benefits and drawbacks participation in primary direct listing IPOs.[17] We should have engaged in a deeper debate an

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consider options for mitigating the risks to investors before approving today's order. There is no question that NYSE's proposal presents promising innovations, which makes the artificial rush to approval all the more regrettable. Revitalizing the public markets is not a zero-sum game between innovation and investor protection. As it stands, however, NYSE has not met its burden to show that that the proposed rule change is consistent with the Exchange Act.[18]

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[1] The Commission has found that NYSE has met its burden to show that the rule proposal is consistent with the Exchange Act. *See* Exchange Act Release No. 90768 (Dec. 22, 2020); File No. SR-NYSE-2019-67 ("Approval Order"). Section 6(b(5) of the Exchange Act requires that the rules of a national securities exchange be 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 the Exchange Act matters not related to the purposes of the Exchange Act or the administration of an exchange. *See* 15 U.S.C. § 78f(b)(5).

[2] NYSE's proposed rule would permit a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the exchange at the time of effectiveness of a registration statement pursuant to which the company would sell shares itself in the opening auction on the first day of trading on the exchange in addition to, or instead of, facilitating sales by selling shareholders. NYSE listing standards will impose certain requirements on these offerings, including thresholds for aggregate market value of publicly-held shares and parameters around its calculation, and a new order type (the "Issuer Direct Offering Order"). *See* Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 89148, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39246 (June 30, 2020).

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[3] Benefits cited for this proposed rule include the potential to broaden the scope of investors that are able to purchase securities in an initial public offering, at the initial public offering price; permitting an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus promote possible efficiency in IPO pricing and allocation; the orderly distribution and trading of shares; and the fostering of competition. We believe investor concerns implicated by this rule proposal include potential weakening of due diligence to be performed on direct listings, lack of guidance around the role of market participants who will assist companies in the listing process, and a further erosion of investors' ability to bring Section 11 claims with the absence of a statutory underwriter and facilitation of both unregistered and registered shares to be offered to the public at the same time.

[4] For a recent example of this trend, *see* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release Nos. 33-10884; 34-90300; IC-34082 (Nov. 2, 2020), available at https://www.sec.gov/rules/final/2020/33-10844.pdf.

[5] For an overview of this issue, *see* Frank Partnoy, "Death of the IPO" (Nov. 2018), available at https://www.theatlantic.com/magazine/archive/2018/11/private-inequity/570808/.

[6] Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 89148, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39246 (June 30, 2020).

[7] For an overview, *see* Robert Jackson Jr., "The Middle-Market IPO Tax" (April 25, 2018), available at https://www.sec.gov/news/speech/jackson-middle-market-ipo-tax.

[8] 15 U.S.C. § 77k; 15 U.S.C. § 77l(a).

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[9] The Commission did in fact receive public comment asking that we clarify that financial advisors and others involved in a direct listing do incur statutory liability as underwriters, but the Commission has failed to address those concerns and provide clarity on this critical issue. *See* Letter dated March 5, 2020 from Christopher A. Iacovella, American Securities Association to the Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission, available at https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967-6911312-211231.pdf.

Such guidance could, for example, have laid out salient factors the Commission would consider in determining whether someone was acting as an underwriter in the context of a primary direct listing and possible considerations market participants could take into account when assisting a company through the listing process.

[10] We have no doubt that the staff will carefully scrutinize primary direct listings for investor protection concerns going forward. However, even the most careful review of registration statements is no substitute for an underwriter's due diligence. The loss of this protection is our most urgent concern with today's order. The increased risks that a direct listing model poses to retail investors can and should be addressed now, before investors learn the hard way when these risks materialize.

[11] *See, e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013) (citing *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967)).

[12] To bring a claim under Section 11 or Section 12(a)(2), courts may require shareholders to "trace" their shares to the registration statement containing the alleged misrepresentations or omissions. This may be difficult, if not impossible, in the context of a primary direct listing when some shares are sold by the issuer pursuant to a registration statement and other shares, not covered by the registration statement, are concurrently sold by company insiders. We acknowledge that there have been longstanding concerns about investors' ability to seek remedy under Section 11 of the Securities Act as judicial precedent over the years has required that an investor be able to trace back shares to a particular registration statement. This has proven difficult as our markets have become electronic. *See, e.g., Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005).

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[13] *See* Commission Approval Order at 33 ("Petitioner's concerns regarding shareholders' ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in Primary Direct Floor Listings"). However, the fact that traceability obstacles already exist is not reason to further exacerbate this problem for shareholders.

[14] *See* Letter dated July 16, 2020 from Jeffrey P. Mahoney, Council of Institutional Investors to the Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission, available at https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967-7435112-220582.pdf.

[15] *See* 15 U.S.C. § 7262(b) (requiring public companies to have an auditor attestation and report management's assessment of the company's internal controls).

[16] The Commission's Approval Order notes that NYSE expects to issue guidance reminding financial advisors involved in primary direct listings that they must not act in a manner inconsistent with Regulation M and other anti-manipulation provisions of the federal securities. This generic reminder about obligations under the federal securities laws is simply inadequate to provide any additional level of investor protection, nor does it mitigate the range of concerns raised in a primary direct listing.

[17] One drawback that has not been holistically addressed is the potential for increased volatility. If early experience is any guide, primary direct listings could involve companies generating a great deal of media excitement, making the market more reactive to news about the company. This heightened attention may also draw interest from investors who typically do not participate in IPOs, which may further increase price volatility in these listings as these market participants buy and sell out of positions. Such volatility may be exacerbated by the lack of underwriter price support in the initial days of secondary market trading following the primary direct listing. It may be further exacerbated if companies allow their insiders to sell their shares in an IPO without being constrained by so-called "lock-up" agreements that often delay such selling in traditional IPOs. Listings Fall From Favor With Tech Cash Crunch Deeping", (March 25, 2020) (describing gener

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recent direct listings), available at https://www.bloomberg.com/news/articles/2020-03-25/direct-listings-fall-from-favor-with-tech-cash-crunch-deepening; *see also* "The Latest and Greatest on Direct Listings: Direct Listings + Capital Raise, Lock-up Agreements, COVID-19 and More", Fenwick (Aug. 31, 2020) (discussing recent market practice on this issue), available at https://www.fenwick.com/insights/publications/the-latest-and-greatest-on-direct-listings-direct-listings-capital-raise-lock-up-agreements-covid-19-and-more.

In addition, the order misapprehends a potential benefit to investors. The Commission states that primary direct listings may broaden the scope of investors, including retail investors, who are able to purchase securities in an IPO *at the IPO price*, rather than in after-market trading. True enough, but "the IPO price" under a primary direct listing is likely to offer retail investors no better a deal than they currently get with a firm-commitment offering because they will pay the opening price determined by the market. In most firm-commitment offerings, deals are structured to create a "pop" in the price once secondary trading occurs. As a result, clients of the underwriter who buy at the IPO price can have real economic advantages. And retail investors have traditionally been able to buy shares only after this "pop" occurs. Direct listings, however, are designed to begin trading at a price determined by the market immediately, rather than after initial sale to an underwriter and its clients. Thus, while retail investors will now be able to purchase at the initial offering price, they will not get the benefits that accrue to underwriters and their clients in a firm-commitment offering.

[18] We want to thank the staff in the Division of Corporation Finance, the Division of Trading and Markets, and the Office of the General Counsel for their hard work on this order.

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United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

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