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Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failure?

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SPOTIFY'S DIRECT LISTING: IS IT A RECIPE FOR GATEKEEPER FAILURE?

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ABSTRACT

On April 3, 2018, Spotify Technology S.A.—a music streaming company valued in excess of $20 billion—went public by direct listing on the New York Stock Exchange (NYSE). A direct listing is distinguishable from the more traditional initial public offering (IPO) in a number of ways, but the most important for purposes of this Article is that it foregoes the traditional underwriter.

First, this Article explains direct listings, why a company would choose to go public by direct listing, and the mechanics of a direct listing. Second, this Article explains that a direct listing—with its reliance on a financial advisor to shepherd the transaction to completion (as opposed to the underwriter-shepherded IPO)—is a danger to investors. In a traditional IPO, underwriters are incentivized to act as gatekeepers. Underwriters allow worthy companies to enter the public exchanges, and, conversely, exclude unworthy companies.

Financial advisors to a direct listing do not have the same incentives to act as gatekeepers. Financial advisors do not market or sell shares in a direct listing, and as such, are less likely to be held reputationally responsible for a flop. Neither do financial advisors face Securities Act liability, which would make them think twice before thrusting a troubled company on potential investors. The fact that financial advisors are less likely to be effective gatekeepers is an important finding. Several tech unicorns are likely to go public soon—they will attract billions of dollars of investors' money—and are considering doing so by direct listing (Airbnb, Pinterest, and Uber are the prime candidates).

Finally, this Article assumes that direct listings are here to stay. As such, this Article presents for discussion some ideas for making direct listings safer for investors. The first, is to align the profitability of the financial advisor with the profitability of the company that is direct listing (deferred fees tied to long-term company performance is one possibility). Or second, financial advisors could be required to "opt in" to liability under Section 11 of the Securities Act of 1933.

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I. INTRODUCTION

ON April 3, 2018, Spotify Technology S.A.—a music streaming company valued in excess of $20 billion—went public by direct listing on the New York Stock Exchange (NYSE).[1] A direct listing is distinguishable from the more traditional initial public offering (IPO) in several ways,[2] but the most important for purposes of this Article is that it does not involve an underwriter.[3]

Spotify's direct listing—minus the underwriter—sent shockwaves through Wall Street where underwriting accounts for twenty-five percent of investment bank revenue.[4] The *Wall Street Journal* reported that it was "bad news"[5] for underwriters, and "a blow to the already beleaguered [underwriting] business."[6]

I believe that the hand-wringing over the possible demise of the underwriter is unwarranted. Underwriting is far from dead, or to loosely quote Mark Twain, "rumors of its demise are greatly exaggerated."[7] That being said, Spotify's direct listing—especially if it is followed by other large tech firms—may begin a trend of eliminating underwriters from a significant number of going public transactions (or at least a significant number of

1. The story of Spotify's direct listing is told by a series of articles in the *Wall Street Journal*. *See* Maureen Farrell & Telis Demos, *Spotify's Debut May Not Be Music to Bankers' Ears*, WALL ST. J., Apr. 7, 2017, at A1 [hereinafter Farrell & Demos, *Spotify's Debut*]; Alexander Osipovich & Maureen Farrell, *NYSE Pins Hopes on 'Spotify Rule'—To Woo 'Unicorns,' the Big Board Seeks Tweak Involving Direct Listings, an Alternative to IPOs*, WALL ST. J., May 27, 2017, at B1 [hereinafter Osipovich & Farrell, *NYSE Pins Hopes*]; Maureen Farrell & Anne Steele, *Spotify Registers for NYSE Listing*, WALL ST. J., Jan. 4, 2018, at B3 [hereinafter Farrell & Steele, *Spotify Registers*]; Maureen Farrell, *Spotify Challenges Bankers on IPOs*, WALL ST. J., Jan. 16, 2018, at A1 [hereinafter Farrell, *Spotify Challenges*]; Maureen Farrell, *Spotify to Sell About a Third of Shares*, WALL ST. J., Mar. 21, 2018, at B14 [hereinafter Farrell, *Spotify to Sell*]; Maureen Farrell, Alexander Osipovich & Anne Steele, *Spotify's Splashy Debut Pressures Banks*, WALL ST. J., Apr. 4, 2018, at A1 [hereinafter Farrell, Osipovich & Steele, *Spotify's Splashy Debut*]; Maureen Farrell & Chelsey Dulaney, *Spotify's Slump Raises Listing Questions*, WALL ST. J., Apr. 5 2018, at B1 [hereinafter Farrell & Dulaney, *Spotify's Slump*].

2. For a direct listing: (1) no new capital is raised; (2) no new shares are sold; and (3) no underwriter is used. *See infra* Part III. For a direct listing, already issued, but heretofore privately traded shares, are listed. *Id.* Because a direct listing does not aim to raise capital, it is distinguishable from other forms of underwriter-less offerings, such as the direct public offerings (DPOs) and Dutch Auction IPOs. *See* Peter B. Oh, *The Dutch Auction Myth*, 42 WAKE FOREST L. REV. 853, 855 (2007). Another source of confusion is that "direct listing" is sometimes used to refer to cross listing of foreign stock. *See* Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions*, 2000 COLUM. BUS. L. REV. 51, 58 (2000).

3. John C. Coffee, Jr., *The Spotify Listing: Can an "Underwriter-less" IPO Attract Other Unicorns?*, THE CLS BLUE SKY BLOG (Jan. 16, 2018), http://clsbluesky.law.columbia.edu/2018/01/16/the-spotify-listing-can-an-underwriter-less-ipo-attract-other-unicorns/ [https://perma.cc/5HQW-CFHF].

4. Farrell, *Spotify Challenges*, *supra* note 1.

5. Farrell & Demos, *Spotify's Debut*, *supra* note 1.

6. Farrell, *Spotify Challenges*, *supra* note 1.

7. *See* DEATH, http://www.twainquotes.com/Death.html [https://perma.cc/9QET-R8QQ] (last visited Jan. 7, 2019).

large going public transactions).[8] This Article argues that eliminating underwriters from even a portion of going public transactions is bad for investors.[9]

Investment banks—as underwriters—have traditionally played a key gatekeeping role in the going public process.[10] They allowed worthy companies to enter a public exchange (like the NYSE) and conversely, barred the unworthy.[11] In so doing, they protected investors from immediate risks (i.e., protecting investors from outright frauds, which quality underwriters will not countenance) and less immediate risks (i.e., protecting investors from companies that are unlikely to generate long-term profits).[12]

However, in a direct listing, investment banks are relegated to the role of financial advisor.[13] An investment bank acting as a financial advisor is less motivated to be an effective gatekeeper.[14] It has less reputational capital at stake.[15] It is less financially tied to the success of the direct listing.[16] It is less likely to face liability under the Securities Act.[17]

My argument is organized as follows: Part II and Part III compare and contrast the traditional IPO and a direct listing, pointing out when a direct listing can be used (i.e., by unicorn tech firms[18]), as well as possible advantages to a direct listing; Part IV uses the Spotify direct listing as a case study, to see if it actually worked as intended; Part V discusses the gatekeeping role that investment banks play in going public transactions, and how that role is compromised when the investment bank's role changes from underwriter (in an IPO) to financial advisor (in a direct listing); and finally, Part VI concludes and makes some recommendations for moving forward.

8. *Legislative Proposals to Help Fuel Capital and Growth on Main Street or The Irrepressible Myth that SEC Overregulation Has Chilled IPOs: Hearing Before the Subcomm. on Capital Mkts., Sec., and Inv. of the Comm. on Fin. Servs. of the U.S. H.R.*, 115th Cong. 2–3, 17 (2018) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Univ. Law Sch.), https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-jcoffee-20180523.pdf ("To be sure, high-tech 'unicorns' do go public [via IPO] (as Dropbox exemplified this year), but . . . [o]ther private companies may follow Spotify and do a 'direct listing'.").

9. It is true the vast majority of companies still go public by IPO, with the accompanying underwriter to perform the gatekeeping role. However, it is also true that several tech unicorns are likely to go public soon—they will attract billions of dollars of investors' money—and are considering doing so by direct listing. These include Airbnb, Pinterest and Uber. *See* Andrew Osterland, *The IPO Bypass*, GLOBAL FIN., Mar. 2018, at 16.

10. *See infra* Section V.

11. *See id.*

12. *See id.*

13. *See infra* Section III.C.

14. *See infra* Part V.

15. *See infra* Section V.B.

16. *See infra* Section V.C.

17. *See infra* Section V.D.

18. A unicorn is a private company with a valuation greater than $1 billion privately. They are called "unicorns" in recognition of their relative rarity. *See* Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 584 (2016) (defining unicorn).

This Article concludes that investment banks acting as financial advisors—due to the limitations on their role—are less effective gatekeepers than investment banks acting as underwriters.[19] That means that investors in a direct listing are less protected.[20] This Article focuses on explaining direct listings, and explaining why foregoing the traditional reliance on underwriters—and the gatekeeping role they play—is bad for investors. Nonetheless, this Article presents some possibilities for making direct listings safer for investors (the intent here is to begin the scholarly debate). One possibility is to tie the fees of the financial advisor to the success of the directly listed company (i.e., deferred fees tied to long-term company performance).[21] Alternatively, financial advisors could be required to "opt in" to liability under Section 11 of the Securities Act of 1933.[22]

This is (to my knowledge) the first journal article to explain direct listings, and the possible harm to investors. However, the topic has recently garnered significant attention on various well-respected legal blogs, including the *CLS Blue Sky Blog*,[23] the *Business Law Prof Blog*,[24] and the *Harvard Law School Forum on Corporate Governance and Financial Regulation*.[25]

II. GOING PUBLIC BY TRADITIONAL IPO

The best way to understand direct listings is to compare them to traditional IPOs, in terms of: (1) purpose, (2) required SEC filings, (3) restric-

19. *See infra* Parts V, VI.
20. *See id.*
21. *See infra* Part VI.
22. *See infra* Section V.D and Part VI.
23. Coffee, *supra* note 3; Dan W. French, Andrew E. Kern, Thibaut G. Morillon & Adam S. Yore, *How Exchange Listing Affects Corporate Governance*, THE CLS BLUE SKY BLOG (June 25, 2018), http://clsbluesky.law.columbia.edu/2018/06/25/how-exchange-listing-affects-corporate-governance/ [https://perma.cc/HAL5-VKVW]; Ambrus Kecskés, *Spotify's Direct Listing in the U.S. and Lessons from the UK*, THE CLS BLUE SKY BLOG (Mar. 1, 2018) http://clsbluesky.law.columbia.edu/2018/03/01/spotifys-direct-listing-in-the-u-s-and-lessons-from-the-uk/ [https://perma.cc/T9W8-MGPK].
24. Jeremy R. McClane, *Spotify IPO This Week May Upend How Startups Raise Capital: Guest Post*, BUSINESS LAW PROF. BLOG (Apr. 2, 2018), http://lawprofessors.typepad.com/business_law/2018/04/spotify-ipo-this-week-may-upend-how-startups-raise-capital-guest-post.html [https://perma.cc/82EK-R5B9].
25. Nicolas Grabar, David Lopez & Andrea Basham, *A Look Under the Hood of Spotify's Direct Listing*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 26, 2018), https://corpgov.law.harvard.edu/2018/04/26/a-look-under-the-hood-of-spotifys-direct-listing/ [https://perma.cc/N6C2-RPAF]; Andrew Brady, Phyllis Korff & Michael Zeidel, *New NYSE Rules for Non-IPO Listings*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 24, 2018), https://corpgov.law.harvard.edu/2018/02/24/new-nyse-rules-for-non-ipo-listings/ [https://perma.cc/2H65-9KDR]; Marc D. Jaffe, Greg Rodgers, and Horacio Gutierrez, *Spotify Case Study: Structuring and Executing a Direct Listing*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (July 5, 2018), https://corpgov.law.harvard.edu/2018/07/05/spotify-case-study-structuring-and-executing-a-direct-listing/ [https://perma.cc/L5HG-ZACU]. Further, Attorney David N. Feldman does devote a chapter in his book on Regulation A+ to the mechanics of a direct listing. *See* DAVID N. FELDMAN, REGULATION A+ AND OTHER ALTERNATIVES TO A TRADITIONAL IPO: FINANCING YOUR GROWTH BUSINESS FOLLOWING THE JOBS ACT 117 (2018).

tions on communications, (4) required NYSE filings, (5) role of investment banks, and (6) cost. Those elements are set out in detail in Parts II and III below and are summarized in Chart 1 below (together with a column setting out how Spotify's direct listing differed from a pure direct listing[26]).

Chart 1. Traditional IPO and Direct Listing Compared[27]

	IPO	Direct Listing (Pure)	Direct Listing (Spotify)
Purpose	Raise capital, liquidity, consideration for later acquisitions	Liquidity, consideration for later acquisitions	Liquidity, consideration for later acquisitions
Required SEC filings	Securities Act registration statement (S-1) followed by Exchange Act registration statement (8-A)	Exchange Act registration statement (Form 10)	Securities Act registration statement (F-1) followed by Exchange Act registration statement (8-A)
Restrictions on communications	Quiet period applies	No restrictions	Quiet period applies
Required NYSE filings	Listing application	Listing application	Listing application
Role of investment banks	Underwriter	Financial advisor	Financial advisor
Amount exceptionally large company pays to investment bank	$130.5 million[28] (large companies pay on average $37 million)[29]	N/A	$35 million

A. Why Go Public by Traditional IPO?

There are three reasons that a company goes public by IPO: (1) to raise capital, (2) liquidity, and (3) the public shares can be used for later acquisitions.

- *Capital*. The primary reason that a company engages in an IPO is to

26. For a definition of "pure direct listing," see *infra* Section III.B.1.

27. Column "IPO" summarizes the characteristics of a traditional IPO, as explained in more detail *infra* Part II. There are two columns for direct listing. The column labelled "Direct Listing (Pure)" summarizes how a direct listing should work in theory as explained in more detail *infra* Part III. The column labelled "Direct Listing (Spotify)" summarizes how Spotify's direct listing worked, as explained in more detail. *See infra* Part IV.

28. This number is the average of amounts paid to underwriters in the Snap Inc., IPO and the Facebook Inc., IPO. *See* Snap Inc., Prospectus (Form 424B4) 1 (March 1, 2017) ($85 million paid to underwriters); Facebook Inc., Prospectus (Form 424B4) 1 (May 17, 2012) ($176 million paid to underwriters).

29. PwC Deals, Considering an IPO? An Insight into the Costs post-JOBS Act 10 (2015).

raise capital.[30] A typical company can raise $100 million.[31] Of course, some IPOs are much, much larger. Snap, Inc.—the parent of Snapchat, a picture messaging application— is a good example.[32] Its March 2017 IPO raised $3.4 billion.[33]

- *Liquidity*. Once a company goes public, early investors have a marketplace—*e.g.,* NYSE or NASDAQ—where they can sell their shares.[34] This ability to readily transform stock into cash is called liquidity.[35] A market is considered more liquid when shares can be sold without causing a major drop in price (i.e., there must be a large number of units traded on the given exchange, or more precisely, a large float).[36]
- *Consideration for Acquisitions*. Because publicly listed shares are liquid, they can be used like cash. This is important if a company wants to acquire another company.[37]

B. The Role of the Underwriter[38]

The mechanics of an IPO are governed by the Securities Act of 1933.[39] They are well understood, and I will simply provide a brief summary here, focusing on the role of the underwriter.

The statutory definition of "underwriter" paints a picture of a middle man.[40] According to the Securities Act of 1933, an underwriter is a person that "offers or sells for an issuer."[41] In the traditional firm commitment underwriting, the "underwriter purchases the securities from the issuer . . . at a discount and then resells them to the public at a set public offering price."[42]

But the underwriter is more than a passive middle man.[43] First, the

30. A. C. Pritchard, *Revisiting "Truth in Securities" Revisited: Abolishing IPOs and Harnessing Private Markets in the Public Good*, 36 Seattle U. L. Rev. 999, 1001 (2013).
31. Lia Der Marderosian, *2017 IPO Report*, Harv. L. Sch. F. on Corp. Governance. & Fin. Reg. 3 (May 25, 2017), https://corpgov.law.harvard.edu/2017/05/25/2017-ipo-report/ [https://perma.cc/AH9N-BW64].
32. Snap Inc., Prospectus, *supra* note 28.
33. *Id.*
34. Richard A. Booth, *Going Public, Selling Stock, and Buying Liquidity*, 2 Entrepreneurial Bus. L.J. 649, 661–62 (2008).
35. Alessio M. Pacces, *Illiquidity and Financial Crisis*, 74 U. Pitt. L. Rev. 383, 390 (2013).
36. Ariel Yehezkel, *Foreign Corporations Listing in the United States: Does Law Matter? Testing the Israeli Phenomenon*, 2 N.Y.U. J.L. & Bus. 351, 370 (2006).
37. Coffee, *supra* note 3.
38. This section discusses the role of the underwriter vis-à-vis duties and obligations to the issuer. For a discussion of the role of underwriter vis-à-vis duties and obligations to the investor, see the discussion of underwriter as gatekeeper, *infra* Part V.
39. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012).
40. 15 U.S.C. § 77b(11).
41. *Id.*
42. Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability Under Section 11 of the Securities Act of 1933*, 1996 Wis. L. Rev. 217, 218 n.5 (1996).
43. *See* Robert B. Thompson, *Market Makers and Vampire Squid: Regulating Securities Markets After the Financial Meltdown*, 89 Wash. U. L. Rev. 323, 335–36 (2011).

underwriter must engage in "book building."[44] It is called book building because the underwriter reaches out to potential purchasers (most of whom are institutional investors that have a prior relationship with the underwriter) to gauge interest in the offering (how many shares they will purchase, and at what price), and "records this information in a metaphorical 'book'."[45] The underwriter and issuer use the book to decide at what price to offer the securities.[46]

Further, the shares (usually) don't sell themselves. Many times, the company going public is not a household name.[47] As such, the underwriter actively markets the issuer's shares in a series of meetings with large institutional investors (including road shows).[48] The road show is an opportunity for the underwriter to educate prospective investors about the company, and the company's prospects going forward.[49]

The underwriter also assists with the required filings.[50] It assists the issuing company as it prepares its Securities Act registration statement (Form S-1).[51] Only after the registration statement is filed with the Securities and Exchange Commission (SEC) may the shares be offered for sale (but still not sold).[52] And only after the registration statement is declared effective by the SEC may the shares actually be sold.[53]

Finally, the underwriter is instrumental in setting the price for the IPO.[54] This is a difficult task.[55] The underwriter "must consider the size of the offering, the nature and prospects of the issuer's business, its assets and earnings, management expertise, and the markets in which it competes."[56] Of course, another important factor is demand for the security, which the underwriter is in the best position to gauge (remember it is the underwriter that is gauging demand during road shows).[57] The underwriter will work with the issuing company to set a final price.[58]

44. Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1594 (2006).

45. William K. Sjostrom, Jr., *The Untold Story of Underwriting Compensation Regulation*, 44 U.C. DAVIS L. REV. 625, 629 (2010).

46. Dale A. Oesterle, *The High Cost of IPOs Depresses Venture Capital in the United States*, 1 ENTREPRENEURIAL BUS. L.J. 369, 373 (2007).

47. Sjostrom, *supra* note 45.

48. Sean J. Griffith, *Spinning and Underpricing: Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 613 (2004).

49. Sjostrom, *supra* note 45, at 629 n.13.

50. Jeremy McClane, *The Agency Costs of Teamwork*, 101 CORNELL L. REV. 1229, 1240 (2016).

51. *Id.* at 1242.

52. Securities Act of 1933 § 5, 15 U.S.C. § 77e (2012).

53. *Id.*

54. Shane A. Corwin & Paul Schultz, *The Role of the IPO Underwriting Syndicates: Pricing Information Production, and Underwriter Competition*, 60 J. FIN. 443, 448 (2005).

55. Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 654 (1988).

56. *Id.*

57. *Id.*

58. Jeremy R. McClane, *The Sum of Its Parts: The Lawyer-Client Relationship in Initial Public Offerings*, 84 FORDHAM L. REV. 131, 142 (2015).

In return for its work, the underwriter earns its fee (sometimes referred to as "the spread, the difference between the price that the dealer (underwriter) acquired the stock from the issuer and the amount it receives when selling that same stock to the public").[59] That fee, which can be as high as seven percent,[60] as well as the other costs to the issuer of going public, will be discussed in the following section.

C. The Cost

According to PricewaterhouseCoopers (PwC), the average costs associated with a large IPO (defined as offerings greater than $301 million) total over $44 million.[61] The lion's share of the cost, $37 million, goes to the underwriter for its work.[62] And those fees can go substantially higher (consider that Facebook paid over $176 million to its underwriters).[63] Substantial fees are also paid to the accountants for auditing work, and the attorneys that assist the company in preparing the disclosure documents, ferreting out omissions or misstatements.[64] The particulars are set forth in the chart below.

Chart 2. Average Large IPO Costs[65]

SEC Registration Fee	$200,000
Listing Fee	$250,000[66]
Printing Costs	$600,000
Auditors' Fees	$1,700,000
Legal Fees and Expenses	$3,100,000
Transfer Agent and Registrar Fees	N/A
Underwriter Fee	$37,000,000
Miscellaneous Fees and Expenses	$1,600,000
TOTAL	$44,350,000

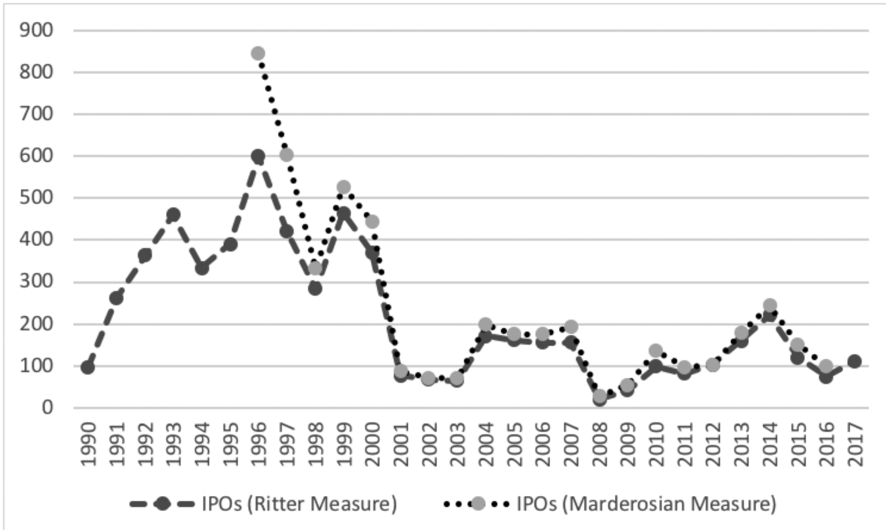
D. The Decrease in Traditional IPOs

The IPO craze reached its zenith in the 1990s (peaking in 1996).[67] Today, fewer companies are going public by IPO.[68] The decrease in IPOs is

59. Thompson, *supra* note 43, at 336.
60. *Id.*; *see* Hsuan-Chi Chen & Jay R. Ritter, *The Seven Percent Solution*, 55 J. Fin. 1105, 1105 (2000) (underwriters usually charge a seven percent commission).
61. PwC Deals, *supra* note 29.
62. *Id.*
63. Facebook, Inc., Prospectus, *supra* note 28.
64. McClane, *supra* note 58, at 140.
65. PwC Deals, *supra* note 61, at 10.
66. *Id.* at 8.
67. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 Cornell L. Rev. 1019, 1077 n.244 (2012).
68. John C. Coffee, Jr., *The Irrepressible Myth that SEC Overregulation Has Chilled IPOs*, The CLS Blue Sky Blog (May 29, 2018), http://clsbluesky.law.columbia.edu/2018/

illustrated by the chart below.

Chart 3. IPOs By Year[69]



Numerous authors have discussed the possible reasons for the reduction in IPOs.[70] One reason is that companies can raise large amounts of capital in private placements.[71] Professor de Fontenay describes the change thus: "[b]y repeatedly loosening the restrictions on capital raising and trading on the private side, securities regulators have given birth to a

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05/29/the-irrepressible-myth-that-sec-overregulation-has-chilled-ipos [https://perma.cc/2E7W-9Q6Q]; *see* Gerald F. Davis, *What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise*, 39 Seattle U. L. Rev. 501, 503 (2016) ("It has been almost twenty years since the peak of the 1990s IPO wave, but there is no reason to expect a revival. There were fewer IPOs in the six years from 2009 to 2014 than there were in 1996 alone.").

69. This chart includes number of IPOs as measured by Professor Ritter at University of Florida, Jay R. Ritter, Initial Public Offerings: Updated Statistics 22, tbl. 6 (2018), https://site.warrington.ufl.edu/ritter/files/2018/01/IPOs2017Statistics_January17_2018.pdf [https://perma.cc/9VBR-PL6F], and as measured by Lia Der Marderosian. *See* Marderosian, *supra* note 31, at 2. The difference appears to be caused by the fact that Professor Ritter excludes IPOs with an offer price under $8.00, ADRs, unit offers, closed-end funds, REITs, natural resource limited partnerships, small best efforts offers, banks and S&Ls, and stocks not listed on CRSP (CRSP includes Amex, NYSE, and NASDAQ stocks).

70. The most plausible explanation is deregulation of private offerings coupled with over-regulation of public offerings. *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 Hastings L.J. 445, 447 (2017). Others discount the role of over-regulation. *See* Coffee, *supra* note 67, at 1076–77 ("neither the Dodd-Frank Act nor Section 404 of SOX could have caused this decline in IPOs, which dates back, at least, to the burst of the Internet IPO bubble in 2001"); Paul Rose & Steven Davidoff Solomon, *Where Have All the IPOs Gone? The Hard Life of the Small IPO*, 6 Harv. Bus. L. Rev. 83, 87 (2016) (finding that the decline of IPOs is a result of market forces independent of regulation).

71. De Fontenay, *supra* note 70; *see* Davis, *supra* note 68, at 504 (discussing the growing ease of raising capital privately).

contradiction in terms: private securities markets."[72] She traces the growth of the private securities markets from the promulgation of Regulation D in 1982, which allowed companies to offer unregistered securities to accredited investors, to the promulgation of Rule 144 in 1990, which allowed those securities to trade on the secondary market.[73] She also points to 1996 amendments to the Investment Company Act that allowed for the creation of "mega private equity funds."[74]

At the same time that it was getting easier to raise capital on the private securities markets, public companies were facing increased costs of complying with disclosure requirements. Sarbanes-Oxley increased disclosure obligations, and therefore costs.[75] CEO and CFO certification requirements added significant expense to the disclosure process.[76] Dodd-Frank also added expense.[77]

In short, raising capital became easier via the private markets, at the same time it became more difficult (and more expensive) via the public markets.[78] The result is that companies that traditionally used IPOs to raise large amounts of capital now use private placements.[79] For example, in 2015, Airbnb raised $1.5 billion in a private funding round.[80] In 2016, Spotify raised $1 billion in a private funding round.[81]

An interesting corollary is that as IPOs have decreased, so have the total number of listed firms. As IPOs have not kept pace with firms leaving the exchanges through going-private transactions, delisting, bankruptcy, etc., the total number of publicly traded firms has declined.[82]

III. GOING PUBLIC BY DIRECT LISTING

As discussed above, less companies are engaging in IPOs to raise capi-

72. De Fontenay, *supra* note 70, at 448.
73. *Id.* at 467–68.
74. *Id.*
75. *Id.* at 463–64.
76. *Id.*
77. Carlos Berdejo, *Going Public After the JOBS Act*, 76 OHIO ST. L.J. 1, 3 (2015) (citing Oesterle, *supra* note 46, at 370). Companies report to the Treasury that increased regulation, including Dodd-Frank, made IPOs less attractive. *See* U.S. DEP'T. TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES—CAPITAL MARKETS 26 (2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf [https://perma.cc/SB6L-96A5].
78. De Fontenay, *supra* note 70.
79. *Id.*
80. Telis Demos, *Airbnb Raises $1.5 Billion in One of Largest Private Placements*, WALL ST. J. (June 26, 2015), https://www.wsj.com/articles/airbnb-raises-1-5-billion-in-one-of-largest-private-placements-1435363506.
81. Coffee, *supra* note 3.
82. *See* de Fontenay, *supra* note 70, at 456–57 ("[B]etween 1977 and 2012 the number of U.S. exchange-listed firms fell in absolute terms from 4710 to 4102 firms, representing a decline of almost thirteen percent. However, both the U.S. population and the total number of U.S. firms grew significantly during this time.") (citing Craig Doidge et. al., The U.S. Listing Gap 5 (Sept. 2016) (unpublished manuscript) (on file with the Journal of Financial Economics)).

tal.[83] Instead they are raising capital in private placements.[84] Yet these companies still must go public at some point, if not to raise capital, then to provide liquidity to early investors (and some key employees) as well as to obtain consideration to use in future acquisitions.[85] It is these companies—tech unicorns like Spotify—that are prime candidates for direct listings on a national exchange.

A. Why Go Public by Direct Listing?

Part II of this Article explained that one of the primary reasons to go public by IPOs is to raise capital.[86] But in a direct listing, no capital is raised (the company already raised large amounts of capital in private placements).[87] Instead, the primary motivation for a direct listing is liquidity.[88] Liquidity is more than shareholders being able to sell their stock for cash (after all, even those that received their stock in private offerings can sell their shares pursuant to Rule 144 if they have been held for in excess of six months, or twelve months, as the case may be).[89] Instead, liquidity is the ability to sell stock for cash *easily*.[90]

Private securities markets (an admittedly self-contradictory term)[91] have never been entirely workable.[92] While there are some private placement markets, such as NASDAQ Private Market, which "clear[ ] trades and confirm[ ] accredited-investor status"[93] it is limited to mostly institutional investors (i.e., they want to buy huge blocks of shares).[94] Further, the success of these private markets has been limited.[95] As one commentator wrote:

> The idea of relying on a Private Placement Market dates back to 2008, when Private Placement Markets seemed like they would be the Next Big Thing, because they would provide a venue for the resale of shares in companies that were not ready or not inclined to go public. But they have not flourished, and Spotify—a hot pre-IPO ticket if ever there was one—said in its prospectus that there has not been a recent sustained history of trading its shares in a private placement market.[96]

83. *See supra* Section II.D.
84. *See id.*
85. Coffee, *supra* note 3.
86. *See supra* Section II.A.
87. Coffee, *supra* note 3.
88. *Id.*
89. 17 C.F.R. § 230.144(d)(1)(i)–(ii) (2017).
90. Pacces, *supra* note 35.
91. *See* de Fontenay, *supra* note 70, at 448 ("By repeatedly loosening the restrictions on capital raising and trading on the private side, securities regulators have given birth to a contradiction in terms: private securities markets.").
92. Grabar, Lopez & Basham, *supra* note 25, § 10.
93. De Fontenay, *supra* note 70, at 470.
94. Robert Pozen, *Spotify's Direct Listing Strikes Right Note for Unicorns Riding High*, Fin. Times, Jan. 31, 2018, at 18.
95. Grabar, Lopez & Basham, *supra* note 25, § 10.
96. *Id.*

And so, as Professor de Fontenay points out, when it comes to liquidity, there is really no substitute for the public markets.[97] If a firm wants to achieve true liquidity, they need to be listed on a national exchange, if not by IPO, then by direct listing.

Second, as explained below, a direct listing allows a company to achieve liquidity for its stock at a significantly lower cost than an IPO, because the company does not need to hire an underwriter.[98]

Third, once a company goes public by direct listing, it can raise capital later on favorable terms.[99] Firms that go public by IPO often leave capital on the table, suffering from on average twenty percent underpricing (that is what gives rise to the typical first day "pop").[100] On the other hand, "when firms whose stock is already traded publicly raise capital, their underpricing is essentially negligible."[101]

Fourth, once the company's stock is publicly traded, it can "buy it back, on the stock exchange, at the market price, without negotiating privately with investors."[102] The advantages of a stock buyback by a cash rich firm are well documented.[103]

Considering all of the foregoing, the best candidates for direct listings are tech unicorns that already raised massive amounts of capital in private placements.[104] They don't need to raise more capital, but they do want to provide liquidity to their investors.[105] I add to those considerations that they need to have sufficient shares to maintain a liquid market, be mature and "sufficiently well known to garner equity research coverage after [their] listing."[106]

Candidates for direct listing going forward include Airbnb, Pinterest, and Uber.[107] When one considers their valuations ($31 billion, $12.3 billion, and $62.5 billion, respectively),[108] it is clear that billions of dollars in investor cash (both institutional and individual) will be implicated.[109]

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97. *See* de Fontenay, *supra* note 70, at 470 ("The fundamental characteristic of publicly traded stock, that . . . could never be replicated with private company stock, is liquidity").

98. *See infra* Section III.D (discussing cost savings in theory); *see also infra* Section IV.C (discussing whether cost savings materialized in the Spotify direct listing).

99. Kecskés, *supra* note 23.

100. *Id.*

101. *Id.*

102. Matt Levine, *Going Public to Buy Back Stock*, BLOOMBERG (Nov. 6, 2018, 10:31 AM), https://www.bloomberg.com/opinion/articles/2018-11-06/going-public-to-buy-back-stock.

103. Ok-Rial Song, *Hidden Social Costs of Open Market Share Repurchases*, 27 IOWA J. CORP. L. 425, 431–51 (2002).

104. Coffee, *supra* note 3.

105. *Id.*

106. James Dean, *Spotify Calls the Tune with Low-Cost Float*, THE TIMES, Jan. 29, 2018, at 40. Although on this last point, it may be provided by the financial advisor to the direct listing.

107. Osterland, *supra* note 9.

108. Andrew Ross Sorkin, *Seeking the True Value of Unicorns*, N.Y. TIMES, Oct. 17, 2017, at B1.

109. Osterland, *supra* note 9.

B. Direct Listing Mechanics

1. The Securities Laws (A "Pure" Direct Listing)

Securities law scholars well understand the mechanics of the traditional IPO. As Jeff Schwartz stated, "[t]he traditional IPO, which launches a company onto the NYSE or NASDAQ and into the sweet-spot of securities regulation, is well-trodden and familiar."[110] On the other hand, the mechanics of a direct listing? Not so well-trodden. Not so familiar.

To understand the mechanics of a direct listing, one must understand that the Securities Laws call for numerous kinds of registration statements.[111] Below, I provide some clarification:

(1) The Securities Act registration statement (Form S-1) is used when a company is conducting an IPO.[112]

(2) The Securities Act registration statement (Form S-1) may also be used when a person receives shares in a private placement and wants to resell them (which, depending on the timing, the SEC may consider a distribution).[113] In this case, it is referred to as a "resale registration statement" or "selling shareholder registration statement."[114]

(3) The Exchange Act registration statement (Form 10) is used when a company is listing shares on an exchange pursuant to Section 12(b) of the Exchange Act of 1934.[115] Note that to *not* be considered a distribution, these shares must have been held for the applicable holding period set forth in Rule 144.[116]

(4) A shortened Exchange Act registration statement (Form 8-A) may be used if a company already filed a Securities Act registration statement (Form S-1).[117]

In this Article, I will refer to Securities Act registration statements (numbers 1 and 2 above), and Exchange Act registration statements (numbers 3 and 4 above).

For a "pure" direct listing, the company files an Exchange Act registra-

110. Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 Cardozo L. Rev. 531, 564 (2012).

111. For a discussion of the role of various filings in the direct listing, *see* Feldman, *supra* note 25, at 117–27 (referring to a direct listing as a self-filing).

112. *See* 17 C.F.R. § 239.11 (2017) ("This Form [S-1] shall be used for the registration under the Securities Act of 1933 of securities of all registrants for which no other form is authorized or prescribed").

113. William K. Sjostrom, Jr., *PIPEs*, 2 Entrepreneurial Bus. L.J. 381, 394 (2007).

114. Brady, Korff & Zeidel, *supra* note 25.

115. *See* 17 C.F.R. § 249.210 (2017) ("This form shall be used for registration pursuant to section 12(b) or (g) of the Securities Exchange Act of 1934 of classes of securities of issuers for which no other form is prescribed."); *see also* William K. Sjostrom, Jr., *The Truth About Reverse Mergers*, 2 Entrepreneurial Bus. L.J. 743, 753–54 (2008) ("any company can go public . . . through a 'self-filing,' i.e., voluntarily filing an Exchange Act registration statement with the SEC").

116. Coffee, *supra* note 3 (citing Rule 144(c)(1) (codified at 17 C.F.R. § 230.144(c)(i))); *see also* Feldman, *supra* note 25, at 119–20 (discussing the role of Rule 144 in direct listings).

117. WilmerHale, IPO Report 25 (2018), https://www.wilmerhale.com/-/media/fc137 5c8e4cd4719b3a97b713e3632b8.pdf [https://perma.cc/73NJ-T66R].

tion statement only, a Form 10.[118] In fact, in writing about direct listings, Professor Coffee points out that "there is no inherent statutory obligation to register these shares under the Securities Act of 1933, because the issuer is not making any sale."[119] The shares begin trading immediately upon the Exchange Act registration statement's effectiveness.[120] (It is worth pointing out that Spotify's direct listing, for reasons discussed below, was not pure. It was required by the NYSE and SEC to do much more than file an Exchange Act registration statement.[121])

From a paperwork perspective, an Exchange Act registration statement is just as time-consuming as a Securities Act registration statement.[122] As Professor Sjostrom points out:

> An Exchange Act registration statement requires extensive disclosures including a description of the company's business operations, risk factors, finances, properties, and management. Additionally, the registration statement must include audited financial statements for the last two or three years. Putting together this disclosure for an operating company takes some time—typically, at least sixty days. Further, the registration statement does not become effective until sixty days after filing and may be scrutinized by the SEC prior to effectiveness, resulting in required revisions. Hence, it will take a company at least four months from deciding to pursue a self-filing to the registration statement becoming effective and various securities regulation clocks tied to effectiveness will not start running.[123]

Further, if a company goes public with an Exchange Act registration statement (as compared to a Securities Act registration statement) similar amounts are paid to lawyers and accountants.[124] The difference—and the savings—comes from the fact that a direct listing does not require an expensive underwriter.[125]

Another difference is that using an Exchange Act registration statement may avoid the Securities Act's limits on communications.[126] Compare this with a traditional IPO, where the issuing company is subject to a quiet period during which it cannot make any statements that condition the mind of the investing public.[127]

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118. Coffee, *supra* note 3.
119. *Id.*
120. *Id.*
121. *See infra* Section III.B.2.
122. Sjostrom, *supra* note 115.
123. *Id.* at 754.
124. Robert Pozen, Shiva Rajgopal & Robert Stoumbos, *Here's How a Hot Company Can Go Public Without an IPO*, MarketWatch (Dec. 7, 2017, 3:27 PM), https://www.marketwatch.com/story/heres-how-a-hot-company-can-go-public-without-an-ipo-2017-12-07 [https://perma.cc/PM4X-GX64].
125. Farrell, Osipovich & Steele, *Spotify's Splashy Debut*, *supra* note 1 ("[Spotify] saved tens of millions of dollars in fees while still giving its employees and early investors the chance to cash out.").
126. *See* Osipovich & Farrell, *NYSE Pins Hopes*, *supra* note 1, at B1 (stating there is no quiet period for a direct listing); Lionel Barber, *Spotify: Shush*, Fin. Times, Mar. 26, 2018, at 1 (suggesting that Spotify is using a direct listing to avoid a quiet period).
127. Securities Act of 1933, 15 U.S.C. § 77e(c) (2012).

2. *NYSE Listed Company Manual and the SEC (Moving Away From a "Pure" Direct Listing)*

A plain reading of the Exchange Act gives the appearance that a direct listing is a fairly simple procedure.[128] It appears that a company could simply (1) file an Exchange Act registration statement, and (2) file a listing application with the NYSE.[129] However, as to the second point, the NYSE Listed Company Manual was far from clear on the procedure.[130] It did "not make any provision for a company listing in connection with the effectiveness of an Exchange Act registration statement."[131]

In early 2017, NYSE readily went to work amending rule 102.01B,[132] to explicitly provide that it allows a company to list upon effectiveness of an Exchange Act registration statement.[133] However, the NYSE cannot change its rules without the approval of the SEC.[134] It is here that the matter gets more complicated and moves away from what I will call a pure direct listing.

On March 13, 2017, the NYSE filed with the SEC a proposed rule change.[135] The NYSE proposed that the text of Footnote (E) to Section 102.01B be changed to add the following italicized language:

> (E) Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO . . . . 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 a private placement, 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. *Similarly, some companies that have not previously had their common equity securities registered under the Exchange Act may wish to list immediately upon effectiveness of an Exchange Act registration statement without any concurrent IPO or Securities Act registration.* Consequently, the Exchange will, on a case by case basis, exercise discretion to list companies whose stock is not previously registered under the Exchange Act, where such a company is listing without a related underwritten offering *(i)* upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements *or (ii) upon effectiveness of an Ex-*

128. Coffee, *supra* note 3.
129. *Id*.
130. *See* NYSE, Inc., Listed Company Manual § 102.01B (2003) [hereinafter Listed Company Manual].
131. *See* Notice of Filing of Proposed Rule Change to Amend Section 102.01B, Exchange Act Release No. 34-80313, 2017 WL 1132113, *4 (Mar. 27, 2017) [hereinafter Notice of Proposed Rule Change].
132. *See* Farrell, Osipovich & Steele, *Spotify's Splashy Debut*, *supra* note 1 ("The New York Stock Exchange . . . worked closely with Spotify over the past year to enable the unorthodox listing").
133. Notice of Proposed Rule Change, *supra* note 131.
134. Exchange Act of 1934 § 19(b)(1), 15 U.S.C. § 78s(b)(1) (2012); Exchange Act Rule 19b-4, 17 C.F.R. § 240.19b–4(f), (n) (2017).
135. Notice of Proposed Rule Change, *supra* note 131, at *1.

> *change Act registration statement without any concurrent IPO or Securities Act registration.*[136]

The italicized amendments (if approved by the SEC) would have allowed a company to begin trading upon the approval of an Exchange Act registration statement (what I refer to as a pure direct listing above).[137] However, the SEC believed that in order to protect investors,[138] a Securities Act registration statement should be filed (even though there was no sale by the company) before an Exchange Act registration statement.[139] It was this more stringent process—requiring a Securities Act registration statement be filed *and then* an Exchange Act registration statement be filed—that was eventually adopted.[140] The SEC explained that this more stringent process was a compromise meant to protect investors in two ways.[141] First, by requiring a Securities Act registration statement, the issuer is made subject to Section 11 liability for material misstatements (although, as discussed below, there is no underwriter to hold liable).[142] Second, by requiring a Securities Act registration statement, the Securities Act's limits on communications while the company is waiting for approval from the SEC also apply.[143] The Council of Institutional Investors applauded the compromise:

> We strongly support the NYSE's decision to remove a provision from an earlier version of the proposed rule "that would have allowed a company to list immediately upon effectiveness of an [Securities] Ex-

136. E-mail from Martha Redding, Assoc. Gen. Counsel, NYSE, to Brent J. Fields, Sec'y, SEC (Aug. 1, 2017), at Exhibit 5 (setting out proposed rule text), https://www.sec.gov/comments/sr-nyse-2017-30/nyse201730-2161992-157779.pdf [https://perma.cc/SSL3-XQ7Y].

137. Brady, Korff & Zeidel, *supra* note 25.

138. Farrell & Steele, *Spotify Registers*, *supra* note 1 ("The SEC had concerns that Spotify's direct listing could open the door for other companies with potentially risky financial profiles to access the public markets without giving investors sufficient protection").

139. Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of Proposed Rule Change, Exchange Act Release No. 34-82627, 3 n.11 (Feb. 2, 2018) [hereinafter Order Granting Accelerated Approval] ("Amendment No. 3 revised the proposal to eliminate the proposed changes to Footnote (E) that would have allowed a company to list immediately upon effectiveness of an Exchange Act registration statement only, without any concurrent IPO or Securities Act of 1933 ("Securities Act") registration.").

140. *See id.* at 18–20.

141. *Id.* at 12–14 ("[T]he proposed rule change will provide a means for a category of companies with securities that have not previously been traded on a public market and that are listing only upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, and without recent trading in a Private Placement Market, to list on the Exchange.").

142. E-mail from Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Inv'rs, to Brent J. Fields, Sec'y, SEC (Feb. 22, 2018) [hereinafter Mahoney Letter], https://www.sec.gov/comments/sr-nyse-2017-30/nyse201730-3128154-161930.pdf [https://perma.cc/X39P-NCL4]; *see* Robert Anderson IV, *Employee Incentives and the Federal Securities Laws*, 57 U. MIAMI L. REV. 1195, 1264 (2003) ("While a typical issuer focuses disproportionately more attention on preparing a Securities Act registration statement than Exchange Act registration statements or reports, that disparity reflects the difference in potential liability exposure, not the difference in the comprehensiveness of the 'disclosure obligations.'").

143. Mahoney Letter, *supra* note 142; *see* Brady, Korff & Zeidel, *supra* note 25 ("[The] resale registration statement . . . will be subject to traditional review and comment process of the SEC staff.").

> change Act [of 1934] registration statement only, without any concurrent . . . Securities Act of 1933 . . . registration." This change in the proposed rule would appropriately require a company in a direct listing to file a resale registration that "will be subject to traditional review and comment process of the SEC staff . . . [and] issuers . . . will need to consider the application of the gun-jumping and liability provisions of the Securities Act." We believe requiring a concurrent Securities Act registration is critical to ensuring that direct listings do not compromise investor protections.[144]

Another reason that the SEC may have required a Securities Act registration statement—although this is somewhat foggy in the back-and-forth regarding adoption of the rule—is that a pure direct listing presupposes that the stock is being sold by a person other than an issuer, underwriter or dealer.[145] However, for some companies interested in a direct listing, a portion of the stock held by the selling shareholders may not have been held for the required amount of time (a person that has not held for the required amount of time is deemed an underwriter).[146] The SEC may have felt that to avoid this pitfall, it is advisable to require a direct listing company to use a Securities Act resale registration statement (Form S-1) for a direct listing.[147] This bifurcated approach was summed up by one commentator:

> Thus, under the amended rules, a direct listing will require a company to file a resale registration statement for at least some amount of its outstanding shares, which will be subject to traditional review and comment process of the SEC staff . . . . Public resales . . . not covered by the resale registration statement must be conducted in accordance with the applicable conditions of Securities Act Rule 144.[148]

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144. Mahoney Letter, *supra* note 142.

145. Securities Act of 1933 § 4(a)(1), 15 U.S.C. § 77d(a)(1) (2012) (exempting from registration a sale "by any person other than an issuer, underwriter or dealer"); Rule 144(d), 17 C.F.R. § 230.144(d) (2017) (safe harbor clarifying that an underwriter is not a person that holds for longer than six months, or one year, as the case may be). This view is reflected in a letter from Cleary Gottlieb Steen & Hamilton LLP to the SEC:

> We begin by addressing the SEC's question regarding "the role of various distribution participants." That assessment should be made within the framework for registration established by the Securities Act and the rules thereunder, including in particular Rule 144. Where the only stockholders eligible to sell their shares following a direct listing are non-affiliates that have held their shares at least one year, those sales and any related offering activity should be exempt from Securities Act registration under Section 4(a)(1), as implemented, in the case of restricted securities, by the non-exclusive safe harbor provided by Rule144(b)(1).

Letter from Cleary Gottlieb Steen & Hamilton LLP, to Brent J. Fields, Sec'y, SEC (Oct. 12, 2017), https://www.sec.gov/comments/sr-nyse-2017-30/nyse201730-2638121-161267.pdf [https://perma.cc/7VRR-G2CR].

146. Rule 144(d), 17 C.F.R. § 230.144(d).

147. Brady, Korff & Zeidel, *supra* note 25. If the company is foreign, it would use a Form F-1 (this was the case for Spotify). *See infra* Section IV.A. One upside, "if a Form S-1 [or F-1] is filed, the company may file a [much simpler] Form 8-A instead of a Form 10 to register its common stock under the Exchange Act." WILMERHALE, *supra* note 117.

148. Brady, Korff & Zeidel, *supra* note 25.

C. From Underwriter to Financial Advisor

While a direct listing does not require an underwriter, the NYSE rules do require the continued participation of investment banks as financial advisors. As a result, the paradigm shift is not so much away from investment banks altogether, as it is a change in the role played by the investment bank—from underwriter to financial advisor.

First, the financial advisor assists with valuation.[149] The NYSE Listed Company Manual provides that for a company to direct list, it must first submit a valuation in excess of $250 million.[150] The Listed Company Manual further provides that the valuation must be provided by an entity that has "experience" and "demonstrable competence" in providing valuations.[151] That is to say, it must be provided by an investment bank.

Second, the financial advisor must assist and advise the designated market maker (DMM) in setting an opening price.[152] Rule 104 states that "the DMM will consult with a financial advisor to the issuer of such security in order to effect a fair and orderly opening of such security."[153]

Financial advisors do serve other purposes. They provide advice and assistance in filing the S-1, and drafting investor presentations.[154] However, that is the extent of the financial advisor's role. The financial advisor does not perform traditional underwriting duties such as book building, marketing and selling, or stabilizing.[155] As discussed below, this has major implications regarding whether the financial advisor is incentivized to perform its gatekeeper role.[156]

D. Cost

One of the purported advantages of a direct listing is that it is less expensive than an IPO. That is because no new shares are being issued, and thus no expensive underwriter is needed to make a market.[157] (Remember, the underwriter accounts for 83% of the cost of a large IPO.[158]) This claim is complicated by the fact that, while it is true that an investment bank is not needed to act as underwriter, investment banks are still involved as financial advisors to the company engaged in the direct listing.[159] However, advising is not as involved (or risky) as acting as an underwriter, meaning that in a direct listing, the investment bank "will

149. Listed Company Manual, *supra* note 130, at § 102.01B n.(E).
150. *Id.*
151. *Id.*
152. NYSE, Inc., Rules 104(a)(2) (2008), *available at* http://wallstreet.cch.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_2&manual=/nyse/rules/nyse-rules/ [https://perma.cc/N8YY-Z339].
153. *Id.*
154. That is what they did for Spotify. *See infra* Section IV.A.
155. *See infra* Part V.
156. *See id.*
157. Coffee, *supra* note 3.
158. *See* discussion *supra* Section II.C.
159. Listed Company Manual, *supra* note 130, at § 102.01B n.(E); NYSE, Inc., Rules, *supra* note 152, at Rules 15, 104.

not have any justification for the standard 7 percent discount when it is not selling any shares."[160]

IV. SPOTIFY'S DIRECT LISTING

In this Part, Spotify's direct listing is used as a case study. Spotify was a perfect candidate for a direct listing.[161] Pre-direct listing it had 178.1 million shares outstanding—privately traded—and was valued in excess of $20 billion.[162] It had no need to raise any additional capital, but it did need to go public in order to provide liquidity to early investors (and some key employees), as well as to obtain consideration to use in future acquisitions.[163]

While I classify providing liquidity for early investors as the primary driver of Spotify's direct listing, Professor Coffee writes that the ability to use stock for future acquisitions was likely the primary driver:

> After a stock is listed on the NYSE (either by a traditional IPO or a direct listing), an issuer seeking to acquire a rival in a merger will only need to file a Form S-4 registration statement (and should be able to qualify for automatic shelf registration). In the hyper-competitive environment in which many unicorns find themselves, it is eat or be eaten, acquire or be acquired, and the capacity to use stock for a merger may be the leading reason that unicorns will eventually decide to go public.[164]

Whatever the primary reason—liquidity or consideration for acquisitions—on April 3, 2018, Spotify went public by direct listing its existing shares on the NYSE.[165] To date, Spotify is the only large company to have done so (prior direct listings involved small companies, and usually resulted in the company trading on the over the counter (OTC) market[166]

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160. Coffee, *supra* note 3.

161. *See supra* Section III.A (discussing who can use a direct listing).

162. *See* Farrell & Steele, *Spotify Registers*, *supra* note 1 (reporting the valuation at $20 billion); Farrell, *Spotify to Sell*, *supra* note 1 (reporting 178.1 million shares outstanding); McClane, *supra* note 24 (discussing Spotify's $20 billion valuation).

163. Coffee, *supra* note 3.

164. *Id.*

165. Farrell, Osipovich & Steele, *Spotify's Splashy Debut*, *supra* note 1.

166. Alexander Panisch, *Spotify's IP-Faux: Direct Listings and the Future of Initial Public Offerings*, FORDHAM J. CORP. & FIN. L. BLOG (Apr. 19, 2018), https://news.law.fordham.edu/jcfl/2018/04/19/spotifys-ip-faux-direct-listings-and-the-future-of-initial-public-offerings [https://perma.cc/4RQB-4BR9]; *see* Schwartz, *supra* note 110, at 569–70 ("Up until very recently, engaging in [direct listing] meant a company's shares would trade on the OTC Bulletin Board"). One notable example of a company engaging in a direct listing and then trading on the OTC Bulletin Board is OvaScience: "To date, few companies have completed Form 10 IPOs, and the extent to which this market will broaden remains to be seen. One notable Form 10 IPO success story is that of OvaScience, a life sciences company developing proprietary products to improve the treatment of female infertility. Shortly after formation in April 2011, OvaScience raised $6.2 million in venture capital financing. In March 2012, OvaScience raised an additional $37.2 million through a placement agent. OvaScience filed a Form 10 registration statement in April 2012, becoming a public reporting company in June 2012, and a Form S-1 resale registration statement in August 2012, and its common stock began to trade on the OTC Bulletin Board in November 2012." David Westenberg et. al., *2013 IPO Report*, MONDAQ, http://www.mondaq.com/united

or NASDAQ[167]).

A. Mechanics

Spotify was subject to the more complicated direct listing rules discussed above (i.e., it was not a pure direct listing).[168] It was required to file a Securities Act registration statement followed by an Exchange Act registration statement.[169] As such, Spotify began by filing a Securities Act registration statement (Form F-1 because it is domiciled in Luxembourg) on February 28, 2018.[170] It then worked with the SEC over the course of the next month to make changes to its Securities Act registration statement.[171]

To finalize the direct listing, on March 21, 2018, Spotify filed an Exchange Act registration statement (Form 8-A), registering its securities under Section 12(b) of the Exchange Act.[172] Its shares began trading on April 3, 2018.[173]

Spotify hired Goldman Sachs Group Inc., Morgan Stanley, and Allen & Co. as financial advisors (hereinafter Goldman et. al.).[174] They provided advice and assistance in preparing the SEC filings, and drafting investor presentations.[175] Related to the second, Spotify conducted an investor day on March 15, 2018 that looked like a traditional IPO roadshow.[176] Executives talked about the company's history, as well as its plans moving forward.[177] They discussed the company's finances and an-

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states/x/239184/acquisitionînance+LBOs+MBOs/2013+IPO+Report [https://perma.cc/PYN4-MF8J] (last updated May 15, 2013). Spotify's direct listing was very different from OvaScience. For Spotify, listing on the OTC market would have been inappropriate. First, Spotify is a much, much bigger company. Spotify did a direct listing when it was valued at $20 billion, making it too large for the OTC markets. The typical OTC traded company has a market cap around $10 million. J.W. Verret, *Uber-ized Corporate Law: Toward a 21st Century Corporate Governance for Crowdfunding and App-Based Investor Communications*, 41 J. Corp. L. 927, 954 n.111 (2016).

167. "Nasdaq, the technology exchange, has overseen seven [direct listings] since 2006. Of the seven only three are still traded—four have been delisted, two because they were acquired." Dean, *supra* note 106.

168. *See supra* Section III.B.2.

169. Order Granting Accelerated Approval, *supra* note 139, at 19–20.

170. Spotify Technology S.A., Registration Statement (Form F-1) (Feb. 28, 2018). It should be noted that it had also taken advantage of the SEC's confidential review policy and submitted draft registration statements on December 18, 2017, and again (amended) on January 31, 2018. Grabar, Lopez & Basham, *supra* note 25, at § 3.

171. Letter from Josephine J. Tao, Assistant Dir., SEC Div. of Trading & Mkts, to Dana G. Fleischman, Lathan & Watkins LLP (Mar. 23, 2018) (including appended Request Letter from Fleischman to Tao (Mar. 23, 2018)) [hereinafter No Action Letter], https://www.sec.gov/divisions/marketreg/mr-noaction/2018/spotify-technology-032318-regm.pdf [https://perma.cc/3GWV-8LX5].

172. Spotify Technology S.A., Exchange Act Registration Statement (Form 8-A) (Mar. 21, 2018).

173. Farrell, Osipovich & Steele, *Spotify's Splashy Debut*, *supra* note 1.

174. Spotify Technology S.A., Prospectus (Rule 424B4) 186 (Mar. 23, 2018).

175. No Action Letter, *supra* note 171, at 8–9.

176. *Id.*

177. *Id.*

swered investor questions.[178]

On a parallel track with Spotify's SEC filings was its NYSE filing.[179] It filed a listing application with the NYSE.[180] Likewise, it had to meet the minimum valuation of $250 million required by the new NYSE Listed Company Manual section 102.01B, footnote (E).[181] Spotify easily met that requirement (it was valued in excess of $20 billion before the direct listing).[182]

Taking all the foregoing together, as to mechanics, Spotify's direct listing looked like a traditional IPO. Spotify conducted an investor day (much like a roadshow), filed a Securities Act registration statement, an Exchange Act registration statement, and filed a listing application with the NYSE.[183] The major contrast with an IPO—besides the obvious fact that no capital was raised—was the fact that no underwriter was used.

B. Liquidity

The primary reason that Spotify went public was to provide early investors (those that had purchased in private placements) with increased liquidity.[184] Ironically, prior to the direct listing, some analysts were concerned that existing shareholders would not sell.[185] One analyst wrote: "We are anticipating unusual trading dynamics in the days and weeks following the April 3 listing and are unsure how long before adequate liquidity will be established."[186] This possibility was not lost on Spotify. Its prospectus stated as the first risk of owning the shares: "[Y]our ability to sell your ordinary shares [may be compromised by] . . . the failure of an active, liquid, and orderly market for our ordinary shares to develop or be sustained."[187]

In fact, when Spotify's shares first started trading on April 3, 2018, it appeared that few shareholders wanted to sell (at least not at the quoted

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178. *Id.*

179. Listed Company Manual, *supra* note 130, at § 701.00.

180. John Hancock, *What's Really So Different About Spotify's Going Public?*, Foley Hoag LLP: IPO, Then What? (May 1, 2018), http://ipo.foleyhoag.com/2018/05/01/whats-really-so-different-about-spotifys-going-public/ [https://perma.cc/S3K4-3AY9].

181. Listed Company Manual, *supra* note 130.

182. McClane, *supra* note 24; Farrell & Steele, *Spotify Registers*, *supra* note 1.

183. Hancock, *supra* note 180.

184. Farrell & Steele, *Spotify Registers*, *supra* note 1 ("The listing is being used as a way for Spotify to give existing investors the chance to cash out but not to raise additional funds."); Spotify Technology S.A., Prospectus (Form 424B4) 185 (Mar. 23, 2018) ("there has not been a recent sustained history of trading in our ordinary shares in a private placement market prior to listing").

185. Jeran Wittenstein & Drew Singer, *Spotify Analysts Are Falling for a Stock that Hasn't Traded Yet*, Bloomberg (Mar. 29, 2018, 3:25 PM) https://www.bloomberg.com/news/articles/2018-03-29/spotify-analysts-are-falling-for-a-stock-that-hasn-t-traded-yet [https://perma.cc/2LMK-G2UY].

186. *Id.*

187. Spotify Technology S.A., Prospectus (Form 424B4) 7 (Mar. 23, 2018).

price).[188] However, that changed when several large investors warmed on the idea.[189] An orderly market in Spotify's shares did eventually develop, and its stock price increased from $135 to $178 over the six month period from April 3 to October 3, 2018, with a healthy daily volume ranging between 1 and 10 million shares.[190] To put that number in context, exchanges define "low volume" as an average daily volume of fewer than 200,000 shares per day.[191] Volume can be a good proxy for liquidity.[192]

C. Cost

An important question is, did Spotify save money by engaging in a direct listing? While there is some debate here,[193] it does appear that Spotify saved a significant amount of money by cutting out the underwriter.[194] We must determine the difference between what Spotify would have paid (for an underwriter in a traditional IPO), and what a financial advisor is paid for handling a direct listing.

First, how much would Spotify have paid underwriters if it engaged in an IPO? A large company (defined as a company making an offering in excess of $300 million) pays on average $37 million.[195] However, Spotify is an exceptionally large company. As such, a better comparison is Snap or Facebook. Snap, which is about half the size of Spotify—but still huge—paid $85 million to its underwriters.[196] Facebook, which was about three times the size of Spotify, paid over $176 million to its underwrit-

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188. Tiernan Ray, *Spotify's Inefficient Market Could Persist for a While*, BARRON'S (Apr. 4, 2018 5:27 PM), https://www.barrons.com/articles/spotifys-inefficient-market-could-persist-for-a-while-1522877241 [https://perma.cc/Q66K-RZBQ].

189. Farrell & Dulaney, *Spotify's Slump*, *supra* note 1 ("On Wednesday, Sony Music Entertainment, one of Spotify's biggest shareholders, disclosed that it had sold 17.2% of its 10.2 million-share stake—or roughly 1% of Spotify's shares outstanding—during the first day of trading Tuesday.").

190. *Spotify Technology S.A. Ordinary Shares SPOT*, NYSE, https://www.nyse.com/quote/XNYS:SPOT (last visited Jan. 7, 2019).

191. Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Fees, Exchange Act Release No. 34-56905, 2007 WL 4793068, *2 (Dec. 5, 2007).

192. Yakov Amihud & Haim Mendelson, *A New Approach to the Regulation of Trading Across Securities Markets*, 71 N.Y.U. L. REV. 1411, 1428 n.101 (1996).

193. *Compare* McClane, *supra* note 24 ("Another big advantage of avoiding bookbuilding is that Spotify will save on underwriting fees"), *with* Matt Levine, *Spotify Will Pay Banks to Cut Out the Banks*, BLOOMBERG (Jan. 16, 2018, 8:25 AM), https://www.bloomberg.com/view/articles/2018-01-16/spotify-will-pay-banks-to-cut-out-the-banks [https://perma.cc/XUZ9-23T4] ("[T]he average U.S. IPO pays its bankers about $12 million. Spotify will pay almost triple that *not* to IPO.").

194. Spotify Technology S.A., Prospectus (Form 424B4) 187 (Mar. 23, 2018); *see* French, Kern, Morillon & Yore, *supra* note 23 ("The so-called 'direct listing' presented the opportunity for Spotify to save millions of dollars in underwriter fees (and possibly substantially more in underpricing) while also providing liquidity for its existing shareholders and increasing the prestige and reputation of the company.").

195. PwC DEALS, *supra* note 29.

196. Snap Inc., Prospectus (Form 424B4) 1 (Mar. 1, 2017); Farrell, *Spotify Challenges, supra* note 1 (" Snap Inc.['s] . . . valuation was about the same as Spotify's currently, but it paid banks a total of nearly $100 million. That was roughly 2.5% of what Snap raised, a fairly typical fee for a marquee IPO, which is smaller than the overall average of as much as 7%.").

ers.[197] In comparison, Spotify probably would have paid somewhere around $130 million (an average of the foregoing), although some have suggested as high as $209 million,[198] or even $300 million.[199]

Second, how much did Spotify pay to its financial advisors? That is disclosed in Spotify's prospectus.[200] The cost paid to "other advisors"—which presumably included the investment banks—was $35 million.[201]

Chart 4. Cost of Spotify Direct Listing[202]

	Dollars
SEC Registration Fee	$55,357
Listing Fee	$320,000
Printing Costs	$875,000
Auditors' Fees	$1,848,900
Legal Fees and Expenses	$5,544,965
Transfer Agent and Registrar Fees	$73,806
Other Advisors Fees	$35,000,000
Miscellaneous Fees and Expenses	$2,000,972
TOTAL	$45,719,000

In short, it appears that Spotify paid substantially less than what other exceptionally large firms pay for an IPO, or as one commentator stated, "Wall Street's banks still made money—just not nearly as much as they would have if the company had done a traditional IPO."[203]

D. Some Conclusions About Direct Listings in General, and Spotify's Direct Listing in Particular

Before moving on to why cutting out the underwriter from the going public process endangers investors, it is important to list some takeaways from Parts II and III:

(1) While a plain reading of the Exchange Act would seem to indicate that a direct listing could be done relatively simply (by filing a Form 10),

197. Facebook, Inc., Prospectus (Form 424B4) 1 (May 17, 2012).

198. Professor McClane calculated the savings as follows: "The average commission is around 7%, although marquee companies like Spotify can often negotiate lower rates (for example, Facebook famously negotiated a fee of 1.1%, unheard of at the time). If, as some have speculated, Spotify's stock is worth $20 billion, a 7% commission would mean $1.3 billion to the underwriters. Even a 1.1% fee would mean[ ] that Spotify would be giving up $209 million to underwriters. That seems quite high compared to the $30 million that the company is paying Morgan Stanley and its other financial advisors." McClane, *supra* note 24.

199. Stephen Wilmot, *Spotify, Like Google, Wants to Reinvent the Tech IPO*, Wall St. J. (Dec. 5, 2017, 7:20 AM), https://www.wsj.com/articles/spotify-like-google-wants-to-reinvent-the-tech-ipo-1512476451.

200. Spotify Technology S.A., Prospectus (Form 424B4) 187 (Mar. 23, 2018).

201. *Id.*

202. *Id.*

203. Farrell, Osipovich & Steele, *Spotify's Splashy Debut*, *supra* note 1.

the reality is that the SEC used its power over the NYSE to increase what is required.[204] As a result—at least from the perspective of what must be filed—a direct listing is similar to a traditional IPO.[205] The primary differences that remain is that *no capital is raised*, and that *no underwriter is needed.*[206]

(2) While underwriters are not used, *investment banks are still needed to act as financial advisors.* They (1) assist with valuation, (2) assist the designated market maker (DMM) in setting an opening price, (3) provide advice and assistance in preparing filings, and (4) assist with drafting investor presentations.[207]

(3) A company can *save a significant amount of money* by engaging in a direct listing.[208] However, there is some disagreement here.[209] Estimates range from nothing to hundreds of millions of dollars.[210] The reality is probably somewhere in the middle.[211]

(4) While small in number, *the companies that can use a direct listing represent a significant amount of investment banking business*.[212] Direct listing is really only appropriate for unicorns (private companies valued in excess of $1 billion). However, while few, these companies have outsized influence based on their size.[213]

V. IS SPOTIFY'S DIRECT LISTING A RECIPE FOR GATEKEEPER FAILURE?

A. Gatekeepers and Investor Protection

Underwriters act as gatekeepers to the public exchanges.[214] They allow

204. *See supra* Section III.B.2.
205. *See supra* Sections III.B.2, IV.A.
206. *See supra* Section III, III.C.
207. *See supra* Section III.C.
208. *See supra* Sections III.D, IV.C.
209. *See supra* Section IV.C.
210. *See supra* Sections III.D, IV.C.
211. *See supra* Section IV.C.
212. *See supra* Part III.
213. *See id.*
214. This view of underwriter as gatekeeper accepts that underwriters have a great deal of power. In so doing, it rejects the "one-sided" view of negotiations between underwriter and issuer, where the issuer has all the power to choose among several different underwriters. *See* Chitru S. Fernando, Vladimir A. Gatchev & Paul A. Spindt, *Two-Sided Matching: How Corporate Issuers and Their Underwriters Choose Each Other*, 25 J. Applied Corp. Fin. 103, 103 (2013) [hereinafter *Two-Sided Matching*] (arguing that investment banks are selective when deciding which offerings to underwrite); Chitru S. Fernando, Vladimir A. Gatchev & Paul A. Spindt, *Wanna Dance? How Firms and Underwriters Choose Each Other*, 60 J. Fin. 2437, 2437–38 (2005) [hereinafter *Wanna Dance?*] (the more natural model is one of mutual choice); *see also* Sharon Hannes, *Private Benefits of Control, Antitakeover Defenses, and the Perils of Federal Intervention*, 2 Berkeley Bus. L.J. 263, 309 (2005) ("[A]ll issuers value the services of the best underwriters, while those underwriters select only the best issuers to represent."). For a general discussion of gatekeeping and underwriters, see Peter B. Oh, *Gatekeeping*, 29 J. Corp. L. 735, 741 (2004) (discussing the definition of gatekeeper), and Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 Minn. L. Rev. 323, 328 (2007) (discussing the same).

worthy companies to enter.[215] Conversely, they exclude unworthy companies.[216] Unworthy companies are those that will not generate long-term profits for investors (or in rare circumstances, are outright frauds).[217] That is to say, gatekeepers help reduce the chance of financial loss to investors.[218]

Professor Hass compares the gatekeeping role of the underwriter to merit review: "Perhaps the most important service that an underwriter performs is a cold-hearted review of the merits of a proposed offering: Should the securities of this particular issuer be offered to the public in the first instance?"[219] Professor Hass also explains the gatekeeping role in terms of protecting investors from financial loss: "[T]he merit review performed by underwriters centers around profit: Will the proposed offering prove profitable to . . . its investor clientele . . . ?"[220]

Why do underwriters act as gatekeepers? Self-interest. Underwriters are motivated by a desire to: (1) protect their reputational capital, (2) avoid contractual liability, and (3) avoid statutory liability.[221] I will discuss each of these motivations in the sections that follow.

On the other hand, an investment bank acting as a financial advisor *is less incentivized* to carefully scrutinize the merits of a company (or a particular offering) that it is helping to list on a public exchange.[222] See the comparison in the chart below.

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215. *See* Jeffrey J. Hass, *Small Issue Public Offerings Conducted Over the Internet: Are They "Suitable" for the Retail Investor?*, 72 S. CAL. L. REV. 67, 96–97 (1998) (discussing the merit review that underwriters perform); Jeffrey A. Brill, *"Testing The Waters"—The SEC's Feet Go From Wet to Cold*, 83 CORNELL L. REV. 464, 528 (1998) (describing underwriters as "filters").

216. *See* Hass, *supra* note 215; Brill, *supra* note 215, at 528–29.

217. *See* Hass, *supra* note 215.

218. Of course, the public exchanges also perform a gatekeeping role, refusing to list companies that they find unworthy. *See supra* Part III.B.2 (discussing the NYSE listing application process). Further, I am not saying that underwriters guaranty the profitability of an offering they underwrite. Although some legal scholars suggest they should. *See* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 540 (2001) ("[I]mpose strict liability on gatekeepers for material misstatements and omissions in offering documents and remove any due diligence-based defenses from securities regulation."); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 349 (2004) ("the most direct and practical means to this end would be to convert the gatekeeper into the functional equivalent of an insurer").

219. Hass, *supra* note 215, at 96.

220. *Id.* at 96–97.

221. *See infra* Sections V.B, C, D.

222. *See* Farrell & Steele, *Spotify Registers*, *supra* note 1 ("The SEC had concerns that Spotify's direct listing could open the door for other companies with potentially risky financial profiles to access the public markets without giving investors sufficient protection"); McClane, *supra* note 24 ("Spotify won't have the benefit of such a mark of quality, at least not in the traditional sense.")

Chart 5. Incentives to Act as a Gatekeeper[223]

	Role of the Investment Bank	
	Underwriter	Financial Advisor
Does the investment bank face *reputational pressure* to act as a gatekeeper?	**Yes,** the underwriter risks its reputation by actively marketing and selling IPO shares to stable of repeat investors.	**Minimal,** the financial advisor does not actively market or sell, and as such, risks less reputational capital.
Does the investment bank face *contractual pressure* to act as a gatekeeper?	**Yes,** the underwriter has a contractual duty to stabilize, meaning that its own money is on the line.	**No,** the financial advisor faces no contractual duty to stabilize.
Does the investment bank face *statutory pressure* to act as a gatekeeper?	**Yes,** Securities Act § 11 makes an underwriter liable for post offering losses to shareholders (where there is a misstatement in the registration statement).	**No,** it is unlikely that a financial advisor would be considered a statutory underwriter, and as such, would likely not face liability under Securities Act § 11.

B. Reputational Pressure to Act as a Gatekeeper

1. *Underwriters*

Reputational pressure—i.e., the desire to build reputational capital—drives underwriters to be effective gatekeepers.[224]

Underwriters are under tremendous pressure to maintain and increase their reputational capital.[225] An underwriter's reputational capital increases when it underwrites successful IPOs (defined as IPOs that result in both short- and long-term gains for the underwriter's clients, usually institutional investors).[226] An underwriter's reputational capital decreases when it underwrites flops.[227] The underwriter is able to "reap returns on this reputational capital through higher fees charged to issuers seeking access to the . . . stable of repeat investors."[228]

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223. This Chart summarizes material contained *infra* Sections V.B, C, D.

224. Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 891 (1984).

225. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 953 (1996).

226. Hass, *supra* note 215, at 96; O'Hare, *supra* note 42, at 255.

227. *See* McClane, *supra* note 24 ("[N]obody would invest in, say, Goldman Sachs led IPOs if they were mostly flops."); Maher Kooli & Siham Meknassi, *The Survival Profile of U.S. IPO Issuers: 1985-2005*, 10 J. WEALTH MGMT. 105, 112 (2007) ("[P]restigious underwriters have a lot to lose in terms of reputation from a failed underwriting.").

228. Bohn & Choi, *supra* note 225. The "reputational capital" theory for underwriters is supported by empirical evidence that underwriters with good reputations are able to charge more, *see* Kenneth A. Carow, *Underwriting Spreads and Reputational Capital: An Analysis of New Corporate Securities*, 22 J. FIN. RES. 15, 16 (1999), and provide better returns to investors. *See* Anita Indira Anand, *The Efficiency of Direct Public Offerings*, 7 J. SMALL & EMERGING BUS. L. 433, 437 (2003) (citing Richard B. Carter et. al., *Underwriter*

To guard its reputational capital, the underwriter will conduct large amounts of due diligence.[229] Before it agrees to underwrite an offering:

> [T]he underwriter will want to interview senior executives and key management members, review financial statements, consider financial forecasts, meet with auditors, evaluate the issuer's products and market share, and consider the proposed use of the proceeds from the IPO *before* deciding whether it is interested in negotiating the terms under which it would underwrite the offering.[230]

The foregoing should be distinguished from the due diligence that the underwriter performs during preparation of the registration statement in order to avoid Section 11 liability.

2. *Financial Advisors*

A financial advisor handling a direct listing risks less reputational capital. Unlike an underwriter that risks reputational capital by actively marketing IPO stock to its "stable of repeat investors,"[231] a financial advisor is largely passive.[232]

For the Spotify direct listing, Goldman et. al. were not even listed on the bottom of the second page of the F-1 (the location traditionally reserved for listing underwriters).[233] Goldman's name only appeared once, on page 181.[234] As such, it is probable that many investors did not even know about the financial advisor's role (that is to say, it is doubtful that

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Reputation, Initial Returns, and the Long-Run Performance of IPO Stocks, 53 J. Fin. 285 (1998)).

229. O'Hare, *supra* note 42, at 255 ("Before the traditional underwriter agrees to underwrite an offering, it will undertake an extensive review of the issuer. The investing public is aware of this investigation and assumes that if the traditional underwriter agreed to underwrite the offering, the issuer and the issuer's securities must be both legitimate and a reasonably safe investment.").

230. Dentons, *Technology Initial Public Offerings - Part 2*, Mondaq [hereinafter *Tech IPOs*], http://www.mondaq.com/article.asp?article_id=43150 [https://perma.cc/79V7-DWXM] (last updated Oct. 10, 2006) (emphasis added). All of these considerations are clues as to how profitable the offering will be for the institutional investors that are the underwriter's clients. If the institutional investors are happy, the underwriter stands to make more money (in the form of repeat business) in the future. There are also more direct financial considerations for the underwriter: the size of the issuer, size of the offering (of which they will get a percentage up to 7%), and the likelihood the offering will sell. *Two-sided Matching*, *supra* note 214, at 103–04.
Of course, I am not arguing that the desire to maintain reputational capital makes underwriters perfect gatekeepers. Sometimes even reputable underwriters sponsor offerings that turn out to be failures, harming investors. For example, Goldman Sachs agreed to underwrite the Blue Apron IPO in 2017, which turned out to be a flop. Maureen Farrell & Corrie Driebusch, *Debut by ADT Fails to Impress*, Wall St. J., Jan. 20, 2018, at B1 (listing Blue Apron as one of the biggest flops of 2017). Initial investors purchased at $10.00, *see* Blue Apron Holdings, Inc., Prospectus (Form 424B4) (June 28, 2017), and the stock is now trading at less than one-fifth that amount, or around $1.75. *Blue Apron Holdings, Inc. Class A APRN*, NYSE, https://www.nyse.com/quote/xNYS:APRN (last visited Jan. 8, 2019).

231. Bohn & Choi, *supra* note 225.

232. *See supra* Section III.C.

233. Spotify Technology S.A., Registration Statement (Form F-1) 2 (Feb. 28, 2018).

234. *Id.* at 181.

all investors understood that Goldman et. al. were acting as financial advisors).

I am not arguing that there is absolutely no reputational pressure in the absence of active efforts to market and sell—Goldman et. al. would likely take some reputational hit if Spotify fails—but that reputational hit is certainly less that what an underwriter would suffer, comparatively.

C. Contractual Pressure to Act as a Gatekeeper

1. Underwriters

The underwriting agreement often requires the underwriter to step in and make stabilizing bids if the market price drops below the offering price[235] (e.g., "if the public offering price for a security is $10 per share, and the market price before the completion of the distribution falls to $9 per share, the manager may enter a stabilizing bid of $10 per share to prevent persons interested in the security from purchasing securities in the open market at a price below the public offering price").[236]

Stabilization can result in a financial loss to the underwriter[237] because the underwriter is buying shares at a price above what the public is willing to pay.[238] If the price of the stock does not react to the underwriter's effort, and recover, the underwriter will suffer a loss when they sell.[239]

A good example of stabilization is provided by the Facebook IPO.[240] There, Morgan Stanley's underwriting agreement required it to engage in stabilizing transactions and purchases in the event of "downward pressure on the price of the common stock in the open market."[241] The prospectus explained that such stabilizing transactions and purchases are intended to "prevent or retard a decline in the market price of the common stock."[242]

Unfortunately, a perfect storm of problems—including a last-minute cut in projected earnings—placed downward pressure on Facebook's stock price as it began to trade.[243] It fell eleven percent after the open-

235. Alexander Hamilton Frey, *Federal Regulation of the Over-the-Counter Securities Market*, 106 U. Pa. L. Rev. 1, 26 (1957).

236. Samuel N. Allen, *A Lawyer's Guide to the Operation of Underwriting Syndicates*, 26 New Eng. L. Rev. 319, 349 (1991). One issue here is the line between permissible stabilization and manipulation. *See* Richard A. Booth, *Discounts and Other Mysteries of Corporate Finance*, 79 Calif. L. Rev. 1053, 1090 n.110 (1991) (citing 17 C.F.R. § 240.10b-7(c) (2017)) ("No stabilizing bid or purchase shall be made except for the purpose of preventing or retarding a decline in the open market price of a security.").

237. Frey, *supra* note 235.

238. Allen, *supra* note 236.

239. Frey, *supra* note 235.

240. Lowinger v. Morgan Stanley & Co. LLC, 841 F.3d 122, 127 (2d Cir. 2016).

241. Facebook, Inc., Prospectus (Form 424B4) 165 (May 17, 2012).

242. *Id*.

243. Michael J. de la Merced, Evelyn M. Rusli & Susanne Craig, *As Facebook's Stock Struggles, Fingers Start Pointing*, N.Y. Times, May 22, 2012, at B1.

ing.[244] Morgan Stanley had to step in to help stabilize the price.[245] Fortunately for Morgan Stanley, Facebook shares ended the day almost at the same place they started.[246]

How does stabilization implicate gatekeeping? The underwriter will not agree to underwrite the offering—i.e., will close the gate to the public markets—absent confidence that the contractual duty to stabilize will not be triggered (or in the event that it is triggered, economic loss will be minimal).

2. *Financial Advisors*

The financial advisors to the Spotify direct listing did not face an obligation to make stabilizing bids.[247] Indeed, it appears that they were forbidden from making stabilizing bids by the terms of a no-action letter from the SEC Division of Markets and Trading regarding Regulation M.[248] The no action letter from the SEC is specifically premised on the representation that "none of the Financial Advisors have been engaged or requested, directly or indirectly, by the Company (whether before or after the NYSE Opening Time) to stabilize or support the price of the Shares."[249]

Spotify's prospectus explained to investors that the non-duty of the financial advisors to stabilize or support the price of the shares is a significant risk of investing:

> Additionally, because there are no underwriters, there is no underwriters' option to purchase additional shares to help stabilize, maintain, or affect the public price of our ordinary shares on the NYSE immediately after the listing. . . . [Without such stabilization,] [t]he public price of our ordinary shares may be volatile, and could, upon listing on the NYSE, decline significantly and rapidly.[250]

D. Statutory Pressure to Act as a Gatekeeper

1. *Underwriters*

Section 11 of the Securities Act makes underwriters liable for misstate-

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244. Jacob Bunge, Aaron Lucchetti & Gina Chon, *Investors Pummel Facebook—Stock Falls 11% in First Full Day of Trading; Complaints of Too Many Shares*, Wall St. J., May 22, 2012, at A1.
245. *Id*.
246. *Id*.
247. Nicole Bullock & Anna Nicolaou, *Spotify's Offbeat Direct Approach to Investors Makes for Easy Listing*, Fin. Times, Apr. 5, 2018, at 19 ("By opting for an innovative direct listing, instead of a traditional initial public offering, the music streaming company had . . . no banks to stabilize its share price if things went awry").
248. No Action Letter, *supra* note 171, at 4. Financial Industry Regulatory Authority (FINRA) explains that "Regulation M is designed to prevent manipulation by individuals with an interest in the outcome of an offering, and prohibits activities and conduct that could artificially influence the market for an offered security." *Regulation M Filings*, FINRA, http://www.finra.org/industry/regulation-m-filings [https://perma.cc/ZS4U-FS9W] (last visited Jan. 8, 2019).
249. No Action Letter, *supra* note 171, at 9.
250. Spotify Technology S.A., Prospectus (Form 424B4) 45 (Mar. 23, 2018).

ments in the registration statement.[251] To avoid liability, underwriters must show that they exercised due diligence while preparing the registration statement.[252] However, avoiding liability does not mean that the underwriter will conduct due diligence *only after* it becomes underwriter (although that is generally how it is viewed).[253] It also means that the underwriter will conduct due diligence *before* agreeing to underwrite the offering.[254]

An investment bank will avoid agreeing to underwrite an offering that could result in a loss to shareholders post-offering (after all, it is that loss that often gives rise to the Section 11 action; finding a material misstatement is usually an afterthought).[255] By being selective about the offerings it will underwrite—to avoid statutory liability—the underwriter performs its essential gatekeeping duty of preventing unworthy companies from entering the public markets.

2. *Financial Advisors*

Financial advisors to a direct listing do not face the same statutory pressure to act as a gatekeeper. The participants in the Spotify direct listing were careful not to label Goldman et. al. as underwriters, but instead as financial advisors.[256] Spotify's F-1 it states:

> We have engaged Goldman Sachs & Co. LLC, Morgan Stanley, and Allen & Company LLC as our financial advisors to advise and assist the Company with respect to certain matters relating to our listing. However, the financial advisors have not been engaged to participate in investor meetings . . . .[257]

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251. Securities Act of 1933 § 11(a)(5), 15 U.S.C. § 77k(a)(5) (2012). As the court stated in *Escott v. BarChris*, "[t]he purpose of Section 11 is to protect investors. To that end the underwriters are made responsible for the truth of the prospectus." Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 697 (S.D.N.Y. 1968); *see* Poonam Puri, *Taking Stock of Taking Stock*, 87 CORNELL L. REV. 99, 148–150 (2001) (discussing gatekeeping role of underwriter in securities offering through the lens of Section 11 liability).

252. Securities Act § 11(b)(3), 15 U.S.C. § 77k(b)(3) (2012). How much due diligence depends on the type of misstatement contained in the registration statement. *Id.* For non-expertized portions of the registration statement, the underwriter must show that it conducted a reasonable investigation into the fact, and that it had reasonable grounds to believed it was true. 15 U.S.C. § 77k(b)(3)(A). For an expertized portion, like the balance sheet or income statement, the underwriter simply need show that it had no reasonable ground to believe that it was untrue. 15 U.S.C. § 77k(b)(3)(C).

253. Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 675, 710–12 (1999).

254. John H. Langmore and Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1084 (1991) ("[P]restigious underwriters can be selective and avoid issuers that present legal risks"); Candida P. Jose, *Section 11 of The Securities Act of 1933: The Disproportionate Liability Imputed to Accountants*, 27 DEL. J. CORP. L. 565, 567 (2002) (to avoid section 11 liability, accountants are selective in the offerings they handle).

255. And it is relatively easy to find some material misstatement in a 100-page registration statement.

256. Spotify Technology S.A., Prospectus (Form 424B4) 186 (Mar. 23, 2018).

257. *Id.*

Likewise, Spotify's lawyers, Latham & Watkins, were careful to avoid labelling Goldman et. al. as underwriters. They write in a letter to the SEC:

> Notably, the Advisory Engagement Letters do not engage any of the Financial Advisors to act in an underwriting capacity in respect of any offers or sales made by the Registered Shareholders pursuant to the Form F-1 and expressly provide that the Financial Advisors will not further assist the Company in the planning of, or actively participate in, investor meetings.[258]

The scope of the engagement appears designed to avoid Goldman et. al. being labelled as underwriters.[259] However, even if an investment bank is a financial advisor in the view of all parties to the transaction, it could still be deemed a statutory underwriter by a court, that is to say, an underwriter for purposes of Section 11 of the Securities Act.[260] The starting point must be the plain language of the Act.[261] It defines underwriter as:

> [A]ny person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.[262]

Goldman et. al. did not purchase any shares from Spotify as part of their financial advisor duties, and thus can avoid underwriter designation under the language "purchased from an issuer with a view to . . . the distribution of any security."[263] However, the definition of underwriter also includes "offers or sells for an issuer."[264] Are Goldman et al. engaged in offering and selling? More precisely, is not directing investor meetings (as both the F-1 and the Latham Letter emphasize)[265] enough to avoid "offer[ing] or sell[ing] for an issuer in connection with, the distribution of any security"?[266] Clearly, it depends on what else the financial advisor is doing. I would point to the fact that while they are not directing the investor meetings, they are apparently helping to prepare the slides that are used at those meetings, as possible support for underwriter status.[267]

258. No Action Letter, *supra* note 171, at 9.

259. *Id.*; *see* Grabar, Lopez & Basham, *supra* note 25 ("This limitation may have been intended in part to support the view that the financial advisors are not underwriters under the Securities Act, and do not have potential liability under Section 11, with respect to all sales under the registration statement.").

260. Securities Act of 1933 § 2(11), 15 U.S.C. § 77b(11) (2012).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Spotify Technology S.A., Prospectus (Form 424B4) 186 (Mar. 23, 2018); No Action Letter, *supra* note 171, at 4.

266. Securities Act § 2(11), 15 U.S.C. § 77b(11) (2012).

267. No Action Letter, *supra* note 171, at 9.

Second, what does it mean to "participate", either "directly or indirectly"? On this point, Professor Coffee, writing about the Spotify offering, questions whether Goldman et. al. can avoid underwriter liability, citing the case of *Harden v. Raffensperger, Hughes & Co., Inc*.[268] The issue in *Raffensperger* was whether a firm that "recommend the yield" at which debt securities would be issued was a statutory underwriter subject to Section 11 liability.[269] The Seventh Circuit found that Raffensperger was an underwriter, agreeing with the district court that "because Raffensperger's actions were 'necessary to and a substantial factor in' the distribution of the Firstmark notes, Raffensperger 'participated,' at least indirectly, in their distribution."[270] Similarly, in the Spotify direct listing, Goldman et. al. were required to recommend an opening price to the DMM (however, the "DMM would not be bound by the input he or she receives from the financial advisor").[271]

I believe *Raffensperger* can be distinguished on two grounds. First, important to the court's decision was the fact that Raffensperger called itself an underwriter (specifically, a qualified independent underwriter).[272] That is not the case in the Spotify direct listing, where Goldman et. al. diligently avoided the underwriter label.[273] Second, under NASD rules Reffensperger was deemed "to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act of 1933, specifically including those inherent in Section 11 thereof."[274] Goldman et. al., as far as I am aware, did not make any similar representation.

Basham, Lopez and Grabar explained the quandary thus: "[A]s Spotify illustrates, there is not necessarily any party that could be described as an underwriter, and in the absence of underwriters, there may not be any party with a persuasive statutory motive to perform due diligence."[275] I agree. For purposes of this discussion, it is assumed that Goldman et. al. were not acting as an underwriter for the direct listing.[276] However, the reader should recognize that, as set forth above, this is not settled law.

If they are not acting as underwriters, the financial advisors have no liability under Section 11 of the Securities Act.[277] This greatly reduces the

268. Coffee, *supra* note 3 (citing Harden v. Raffensperger, Hughes & Co., 65 F.3d 1392 (7th Cir. 1995)).
269. *Raffensperger*, 65 F.3d at 1397.
270. *Id.* at 1396.
271. No Action Letter, *supra* note 171, at 10.
272. *Raffensperger*, 65 F.3d at 1396.
273. Spotify Technology S.A., Prospectus (Form 424B4) 186 (Mar. 23, 2018); No Action Letter, *supra* note 171, at 9.
274. *Raffensperger*, 65 F.3d at 1398 (citing *NASD Compliance Manual,* (CCH) ¶ 1882, Sch. E, § 2(o)(7) (1994)).
275. Grabar, Lopez & Basham, *supra* note 25.
276. It is worth noting that the SEC accepted for purposes of the letter, but did not necessarily concur in, the representation that: "The Company will engage the Financial Advisors solely to provide advice and assistance to the Company with respect to the filing of the Form F-1 and the Listing of the Shares on the NYSE but *not to provide underwriting*, solicitation, or distribution services with respect to any offers or sales made under the Form F-1." No Action Letter, *supra* note 171, at 3 (emphasis added).
277. Securities Act of 1933 § 11, 15 U.S.C. § 77k (2012).

motivation for them to act as diligent gatekeepers. So while they will still help in the preparation and filing of the F-1, without liability attaching thereto, they are less likely to be selective in deciding who they will underwrites in the first place. Financial advisors are less concerned in determining if the issuer is engaged in the kind of loose recordkeeping (or taking liberties with facts) that would lead to liability for an underwriter.

VI. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

Investment banks, acting as underwriters, play an important gatekeeping role. Before assisting a company with an IPO, they perform a merit review.[278] They do so to protect their reputation (they do not want to be associated with a flop), as well as for more direct financial reasons (i.e., avoiding possible contractual or statutory liability).[279]

The role of investment banks in direct listings is different. They act as mere financial advisors.[280] Financial advisors do not face the same reputational risk (they do not actively market or sell the stock to their institutional clients), and therefore, are less likely to conduct the same level of merit review.[281]

Some might argue that, even absent active marketing and selling, reputational capital is implicated.[282] However, as Professor Partnoy points out, "there has emerged an unrebutted theoretical argument that gatekeepers might rationally decide to deplete their reputational capital (just as they would deplete any other capital asset) in an attempt to maximize expected profits."[283] This is likely to be especially true, in cases like the one before us, where the financial advisors' reputational capital is only minimally implicated (recall that that as financial advisors, Goldman et. al. were not actively marketing Spotify stock to their "stable of repeat investors," and their name was hidden deep within the prospectus).[284]

Nor do investment banks acting as financial advisors face the same risk of liability.[285] They face no contractual liability if they fail to stabilize falling shares (and thus face no financial pressure to prevent an unworthy candidate from entering the public market in the first place).[286] They face no Section 11 liability.[287] And so, to return to the question posed by the title of this Article: "Is Spotify's direct listing a recipe for gatekeeper failure?" The answer is yes.

278. Hass, *supra* note 215; Brill, *supra* note 215.
279. *See supra* Sections V.B, C, D.
280. *See supra* Section III.B.
281. *See supra* Section V.B.
282. DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990) (In a related context, Judge Easterbrook wrote, "[a]n accountant's greatest asset is its reputation for honesty.").
283. Frank Partnoy, *Strict Liability for Gatekeepers: A Reply to Professor Coffee*, 84 B.U. L. Rev. 365, 367 (2004) (citing Coffee, *supra* note 218, at 326).
284. Bohn & Choi, *supra* note 225.
285. *See supra* Part V.
286. *See supra* Section V.C.
287. *See supra* Section V.D.

The second logical question is, "Do we care?" Or, phrased differently, "If few companies go public by direct listing, does it harm enough investors to justify changing how direct listings are done?" It is true that few companies are planning on going public by direct listing. However, those companies that are considering going public by direct listing are very large; they will attract billions of dollars of investors' money.[288] Airbnb and Uber, both valued in the tens of billions of dollars, are considering direct listing.[289] Should they go public, and fail, the loss to investors would be enormous.

Further, the companies considering direct listing are mostly technology companies. The price of tech company stock tends to run up without any relation to company profits or profitability to investors.[290] Indeed, looking back at the 2000 tech bubble,[291] tech companies often had multi-billion valuations before they even turned a profit, as was the case with eToys.[292] eToys went public in 1999 at $20 per share (and shot up to $78 per share) despite the fact that its profits were a negative $28.6 million.[293] It eventually went bankrupt.[294]

In short, if more tech unicorns follow a direct listing model, (1) large sums of investor cash will be implicated, and (2) those investors face a heightened danger of inflated stock prices, followed by rapid decline. That is not the time to reduce the role of gatekeepers in ferreting out problem companies.

And so, the third logical question, "How can investment banks (specifically, those that are acting as financial advisors to a direct listing) be encouraged to be more effective gatekeepers?" The answer to that could fill an additional law review article (the intent here is simply to begin the scholarly debate).

One possibility is to align the success of the financial advisor with the success of the company that is direct listing. Here, deferred fees tied to the direct listing company's future stock long-term performance comes to mind. The financial advisor's fees could be paid into trust, and paid out over time, as the company meets specified benchmarks.

288. Osterland, *supra* note 9.

289. *Id.*; Sorkin, *supra* note 108.

290. ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 199–200 (3d ed. 2015).

291. *See* Heather Long, *It Feels 'Like 2006'—Why that's Unsettling*, WASH. POST, Feb. 4, 2018, at G.1 ("More than 100 U.S. start-ups are valued at over $1 billion each"); Jamie Powell, *Regulatory Axe can Chop Tech Stocks Down to Size*, FIN. TIMES, June 12, 2018, at 23 ("Over the past few years noted market oracles have claimed we are in the midst of another tech bubble, only to see the technology groups shoot higher."). Analysts at Goldman Sachs can't seem to make up their mind. In June 2017 they stated that tech stocks were riding on a "valuation air pocket." Reinhardt Krause, *FANG Stocks, Apple Take Hit; Goldman Sachs Calls Out 'Air Pocket'*, INV.'S BUS. DAILY (June 9, 2017), https://www.investors.com/news/technology/forget-fang-goldman-adds-apple-microsoft-faamg-to-tech-leaders/. Then, in June 2018, they published a note entitled "Why tech is not a bubble." Jamie Powell, *supra*.

292. SHILLER, *supra* note 290.

293. *Id.*; *see* eToys Inc., Prospectus (Form 424B4) 1 (May 19, 1999).

294. SHILLER, *supra* note 290, at 199.

Perhaps the most obvious solution is to deem a financial advisor to be an underwriter for purposes of the Securities Act of 1933.[295] As mentioned in the main body of this Article, *Raffensperger* was decided (at least partially) on the basis that NASDAQ rules required that a qualified independent underwriter (a person with many characteristics akin to a financial advisor) agree "to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act of 1933, specifically including those inherent in Section 11 thereof."[296] Similar wording in the NYSE Listed Company Manual regarding financial advisors to direct listings would place a great deal of pressure on them to avoid associating with any direct listing that could result in a loss to the investing public.

VII. POSTSCRIPT

In the summer of 2018, it was not clear if Spotify marked the beginning of a trend toward more direct listings, or was instead a one-off. I believed Spotify was the beginning of a trend. That belief was vindicated just prior to publication. On February 4, 2019, Slack Technologies, Inc.—Slack produces an intra-office messaging app that provides a single place for coworkers to message and share files[297]—announced that it expected to conduct a direct listing in the second quarter of 2019.[298] The parallels between Slack's direct listing and Spotify's direct listing are unmistakable:

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295. *See supra* Section IV.D.2.

296. Harden v. Raffensperger, Hughes & Co., 65 F.3d 1392, 1398 (7th Cir. 1995) (citing *NASD Compliance Manual*, (CCH) ¶ 1882, Sch. E, § 2(o)(7) (1994)).

297. *Why Slack?*, SLACK, https://slack.com/features (last visited Feb. 16, 2019).

298. Slack Team, *Slack Announces Confidential Submission of Draft Registration Statement for Proposed Public Listing*, SLACK (Feb. 4, 2019), https://slackhq.com/slack-announces-confidential-submission-of-draft-registration-statement-for-proposed-public-listing; *see* Maureen Farrell, *Slack is Second to File for Direct IPO*, WALL ST. J., Feb. 5, 2019, at B1 (discussing Slack's announcement).

Chart 6. Spotify and Slack

	Spotify	Slack
Valuation (Pre-Listing)	$20 billion	Between $7 and $13 billion[299]
Capital Raised Privately (Pre-Listing)	$2.7 billion[300]	$1 billion[301]
Motivation	Provide liquidity to early investors; no need to raise new capital[302]	Provide liquidity to early investors; no need to raise new capital[303]
Investment Advisors	Goldman Sachs Group, Inc., Morgan Stanley and Allen & Co.[304]	Goldman Sachs Group, Inc., Morgan Stanley and Allen & Co.[305]
Exchange	NYSE	Unknown

More information will be available once Slack's filing with the SEC become public.[306] However, it appears that the SEC is insisting—like it did with Spotify—that Slack file a form S-1, meaning it (as the issuer) is still subject to Section 11 liability for material misstatements, and that the company will face limits on communications while waiting for approval from the SEC.[307] Those are important safeguards.

However, it is clear that Goldman et. al. will be acting as financial advisors, not underwriters. As the foregoing Article lays out in detail, financial advisors face less incentives to be effective gatekeepers (as compared to underwriters), whether in the form of reputational incentives, or direct financial incentives.[308] It is true that the danger of an underwriter-less offering did not lead to bad results in the case of Spotify, and an underwriter-less offering may not lead to bad results in the case of Slack. How-

299. Erin Griffith, *Slack Quietly Joins the Stampede of Start-Ups Bound for the Market*, N.Y. Times, Feb. 5, 2019, at B5.

300. Katie Roof, *Spotify Opens at $165.90, Valuing Company at Almost $30 billion*, TechCrunch (Apr. 3, 2018), https://techcrunch.com/2018/04/03/spotify-opens-at-165-90-valuing-company-at-30-billion/. Early private investors included Tencent, Tiger Global, Sony Music and Technology Crossover Ventures. *Id.*

301. Griffith, *supra* note 299. Those early investors include SoftBank Vision Fund, General Atlantic, Dragoneer Investment Group, and T. Rowe Price Associated. *Id.*

302. Farrell & Steele, *Spotify Registers*, *supra* note 1.

303. Felix Salmon, *Slack Eyes a Direct Listing*, Axios (Jan. 13, 2019), https://www.axios.com/slack-direct-listing-ipo-63cb8bf0-71a1-45ee-8472-99a036c229c8.html ("A lot of people would love the opportunity to invest in Slack, while many others, including employees, would love the opportunity to be able to sell their stock at will and diversify their investments.").

304. Spotify Technology S.A., Prospectus (Rule 424B4) 186 (Mar. 23, 2018).

305. Maureen Farrell, *Slack Plans Direct-Listing Deal: Instant Message Company Looks at Same Route for Going Public as Spotify*, Wall St. J., Jan. 12, 2019, at B3.

306. For now, the filing is confidential. Griffith, *supra* note 299.

307. The company appears to be following such restrictions. Its press release announcing it had filed its S-1 was bare bones, stating that it was not an offer to sell a security, and that it was being issued in accordance with Rule 135 under the Securities Act. *See* Slack Team, *supra* note 298.

308. *See supra* Section V.

ever, the danger of an underwriter-less offering should not be ignored as direct listings proliferate—which they now appear to be doing—in the future.