

Via Email

March 25, 2021

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

*Re: File Number SR-NASDAQ-2020-062*¹

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

The purpose of this letter is to respond to the Securities and Exchange Commission (SEC or Commission) solicitation of comments on The Nasdaq Stock Market LLC (Nasdaq) “Notice of Filing of Proposed Rule Change, as Modified by Amendment, No. 1, To Amend Listing Rules Applicable to Special Purpose Acquisition Companies [(SPACs)] Whose Business Plan is To Complete One or More Business Combinations” (Amendment No. 1).³ Amendment No. 1 would provide that SPAC’s relying on the proposed 15 calendar day grace period from compliance with the Nasdaq round lot shareholder requirements⁴ to file a Form 8-K or issue a press release

¹ Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment, No. 1, To Amend Listing Rules Applicable to Special Purpose Acquisition Companies Whose Business Plan is To Complete One or More Business Combinations, Exchange Act Release No. 91,294, 86 Fed. Reg. 14,508 (Mar. 10, 2021), <https://www.federalregister.gov/documents/2021/03/16/2021-05345/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

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

³ 86 Fed. Reg. at 14,508.

⁴ The Nasdaq Stock Market LLC has three listing tiers, each of which require, among other things, a company to have a minimum number of shareholders in 100 share units (or round lots) in order to initially list on the exchange. See Nasdaq Rule 5315(f)(1) (adopted Mar. 12, 2009), <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5300-series> (with tiers ranging from a minimum of 300 to 550 round lot holders).

noting that the company is utilizing the grace period to demonstrate compliance with the Nasdaq listing standards.⁵ Amendment No. 1 identifies CII's January 7, 2021, letter (January Letter)⁶ in response to the December 16, 2020, Commission-instituted proceedings under Section 19(b)(2)(B) of the Securities Exchange Act of 1934 (Act)⁷ to determine whether to approve or disapprove the proposed rule change⁸ that is superseded by Amendment No. 1.⁹

We note that the January Letter highlighted that: “[A] . . . recent study of 47 SPACs that merged between January 2019 and June 2020 (Study)[¹⁰]includes a number of findings and conclusions that we believe should be evaluated as part of the Commission staff’s determination of whether to approve or disapprove” the proposed rule change.¹¹ We are thankful to SEC Acting Chair Allison Herren Lee for taking action consistent with the request in the January Letter.

At the March 11, 2021, meeting of the SEC Investor Advisory Committee, in which a co-author of the Study participated, Acting Chair Lee stated:

I also see that you've been very prescient in organizing a discussion on SPACs. Last fall I gave a speech in which I discussed the ways that we could help promote growth in our public markets, and at the time I noted that SPACs offer a potential avenue for bringing private issuers into the public market more quickly than would be possible in a traditional IPO.

But I noted at the time that as the commission evaluate this space we need to balance this against the risks to investors including potential misalignment of interest between sponsors and investors. *And lately, we are seeing more and more*

⁵ See 86 Fed. Reg. at 14,509 (“This Amendment No. 1 would require a company relying on this 15-day period to file a Form 8–K, w[h]ere required by SEC rules, or issue a press release noting that the company is relying upon the additional 15 calendar days available under Nasdaq rules to demonstrate compliance.”).

⁶ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (Jan. 7, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-062/srnasdaq2020062-8219910-227673.pdf>.

⁷ See National Securities Exchanges, 15 U.S.C. § 78f(b)(5) (2010), available at <https://www.law.cornell.edu/uscode/text/15/78f> (“The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices . . . and, in general, to protect investors and the public interest . . .”).

⁸ See Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Listing Rules Applicable to Special Purpose Acquisition Companies Whose Business Plan Is To Complete One or More Business Combinations, Exchange Act Release No. 90,682, 85 Fed. Reg. 83,113 (Dec. 16, 2020), <https://www.federalregister.gov/documents/2020/12/21/2020-28066/self-regulatory-organizations-the-nasdaqstock-market-llc-order-instituting-proceedings-to-determine>.

⁹ See 86 Fed. Reg. at 14,511 & n.17.

¹⁰ See Michael Klausner et al., A Sober Look at SPACs 6 (Oct. 2020) (L. & Econ. Research Paper Services, Working Paper No. 20-48), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720919; Special Purpose Acquisition Companies (SPACs) with Professor Michael Klausner, CII (Feb. 22, 2021), <https://www.cii.org/podcasts>.

¹¹ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 3 (emphasis added).

evidence on the risk side of the equation for SPACs as we see studies showing that their performance for most investors doesn't match the hype.

And as the volume of SPAC transactions reaches unprecedented levels, the staff is taking a close look at the structural and the disclosure issues surrounding these business combinations. And among the questions that I hope today's panel will help us think through are, how do we ensure that SPAC disclosures provide investors with a sufficient understanding of the target company's risks, operations or other factors? . . . And how can we ensure that SPAC sponsors and other financial advisors have sufficient incentives to perform robust due diligence.

. . . [H]ow do we help ensure that investors have adequate recourse against sponsors or underwriters in the event of inadequate or misleading disclosure?¹²

In addition, on March 24, 2021, it was reported that the SEC “has opened an inquiry into Wall Street’s blank check acquisition frenzy and is seeking information on how underwriters are managing the risks involved”¹³

We look forward to the results of the SEC staff’s “close look” at the issues surrounding SPAC’s. In the meantime, we note that one of the recommendations derived from the Study that may be

¹² Transcript, U.S. Securities and Exchange Commission Investor Advisory Committee, Bloomberg Gov’t (Mar. 11, 2021) (on file with CII) (emphasis added); see Matt Egan, Markets Now, A Major Player Taps the Brakes on Wall Street’s Latest Fad, CNN Bus. (Mar. 18, 2021), <https://www.cnn.com/2021/03/18/investing/wall-street-spacs-ubs/index.html> (“UBS advisers are not permitted to call their wealthy clients to encourage them to buy or sell specific SPACs trading on the open market . . . because of the limited availability of information and research on SPACs before they merge with private companies.”); Matt Egan, Markets Now, SPAC Fundraising Is Up An Insane 2,000% From A Year Ago, CNN Bus. (Mar. 17, 2021), <https://www.cnn.com/2021/03/17/investing/wall-street-spacs-stocks-rick-rieder/index.html> (BlackRock Executive Rick Rieder commenting that “some SPACs are going public with lofty valuations that value them at 40 or even 50 times their revenue [and] ‘[t]here’s no chance you could ever grow into that,’ he said.”); Yun Li, SPACs Are Becoming Less Of A Sure Thing As The Deals Get Stranger, Shares Roll Over, CNBC (Mar. 4, 2021), <https://www.cnbc.com/2021/03/04/spacs-are-becoming-less-of-a-sure-thing-as-the-deals-get-stranger-shares-roll-over.html> (“Many retail investors buy SPACs in the secondary market, which means they most likely would miss out on the early pop in common shares as well as the benefits associated with warrants [and] . . . for buy-and-hold investors who only get in after a deal is struck, they almost always lose money.”); Matt Levine, Money Stuff, Startups Sometimes Stretch the Truth, What’s the Big Deal?, Bloomberg Opinion (Feb. 26, 2021) (on file with CII) (“They [special purpose acquisition companies] are confident in their vision of the future, and act like it is already here [and] [t]hat’s not really what public companies are suppose to do.”); Jonathan Stempel, Charlie Munger Warns of Market ‘Frenzy’: Frown On Gambling Mentality, Bitcoin, SPACs, Reuters (Feb. 24, 2021), <https://www.reuters.com/article/us-dailyjournal-munger/charlie-munger-warns-of-market-frenzy-frowns-on-gambling-mentality-bitcoin-spacs-idUSKBN2AO2GY> (Charlie Munger commenting on special purpose acquisition companies: “The world would be better off without them,”. . . [t]his kind of crazy speculation in enterprises not even found or picked out yet is a sign of an irritating bubble,” . . . [i]t’s just that the investment banking profession will sell sh*t as long as sh*t can be sold.”).

¹³ Jody Godoy & Chris Prentice, Funds News, EXCLUSIVE-U.S. Regulator Opens Inquiry into Wall Street’s Blank Check IPO Frenzy-Sources, Reuters (Mar. 24, 2021), <https://www.reuters.com/article/usa-sec-spacs-idUSL1N2LM3CH>.

relevant to Amendment No. 1 is the suggestion that the regulatory treatment of SPACs should be generally equivalent to that for direct listings.¹⁴ In that regard, we believe the Commission staff should consider whether providing 15 calendar days to demonstrate compliance with the round lot shareholder requirement, as supplemented by the newly proposed Form 8-K filing requirement,¹⁵ equates to a listing standard preference for SPACs versus direct listings.¹⁶ It is unclear to us why the SEC staff would want to approve a listing standard that may introduce a pro-SPAC bias given the ongoing review of SPAC's and current market conditions,¹⁷ particularly when SPACs generally impose higher and less transparent costs to investors.¹⁸

Thank you for the opportunity to comment on Amendment No. 1. Please contact me with any questions.

Sincerely,



Jeffrey P. Mahoney
General Counsel

¹⁴ See Michael Klausner et al., A Sober Look at SPACs—Key Findings and Regulatory Suggestions (Mar. 11, 2021) (on file with CII) (“Regulate direct listings with an eye toward equalizing regulations with SPACs”).

¹⁵ 86 Fed. Reg. at 14,509.

¹⁶ See, e.g., Gibson Dunn, A Current Guide to Direct Listings (Jan. 8, 2021), <https://www.gibsondunn.com/a-current-guide-to-direct-listings/> (“The NYSE previously proposed a ‘Distribution Standard Compliance Period’ whereby, in a Primary Direct Floor Listing, the requirements to have 400 round lot shareholders and 1.1 million publicly held shares would be operative after a 90-day grace period [and] [u]nder the proposal approved by the SEC, companies conducting a Primary Direct Floor Listing must meet these and all other initial listing requirements at the time of initial listing.”); cf. 86 Fed. Reg. at 14,509 (“To be clear, the company must still demonstrate that it satisfied the round lot shareholder requirement immediately following the business combination; the proposal is merely giving the company 15 calendars days to provide evidence that it did.”).

¹⁷ See Jody Godoy & Chris Prentice, Funds News, EXCLUSIVE-U.S. Regulator Opens Inquiry Into Wall Street’s Blank Check IPO Frenzy—Sources, Reuters (“Wall Street’s biggest gold rush of recent years, SPACs have surged globally to a record \$170 billion this year, outstripping last year’s total of \$157 billion, Refinitiv data showed.”); see also Emily Graffeo & Will Daniel, The SPAC Market Is Booming, But There Are Plenty Of Bad Buys. Here’s What 8 Experts Say Investors Should Be Looking For In Their Next SPAC Investment, Mkt. Insider (Mar. 20, 2021), <https://markets.businessinsider.com/news/stocks/spac-investing-strategies-risks-expert-advice-commentary-analysis-2021-3-1030229612> (“**There have been \$166 billion in SPAC-led deals in 2021, while 2020 SPACs raised a record \$73 billion in 2020.**”).

¹⁸ See Michael Klausner et al., A Sober Look at SPACs at 52 (“[A] direct listing could thus provide the same transactional benefits as a SPAC, but at much lower cost.”); see also Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (Feb. 25, 2021), [https://www.cii.org/files/issues_and_advocacy/correspondence/2021/February%2025%202021%20SPAC%20letter-AB.docx%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/February%2025%202021%20SPAC%20letter-AB.docx%20(final).pdf) (“It is unclear to us why the SEC would want to advantage SPACs relative to direct listings, particularly when SPACs generally impose higher costs to investors.”).