Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

December 20, 2017

Brent J. Fields
Securities and Exchange Commission
100 F Street NE.,
Washington, DC 20549-1090

Re: File Number SR-NYSE-2017-53

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (SEC) solicitation of comments on New York Stock Exchange LLC (NYSE) proposed rule change to amend the listing requirements related to Special Purpose Acquisition Companies (SPACs or Acquisition Companies) (Proposed Rule).[1] We note that on October 25, 2017, we provided a comment letter to the SEC in response to a similar proposal submitted by the NASDAQ Stock Market LLC (Nasdaq Proposal).[2] Like the Nasdaq Proposal when issued, we cannot support the Proposed Rule in its current form because it does not provide sufficient information for us to make a determination as to whether our members and the capital markets would benefit from the proposed changes.[3]

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $3 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $20 trillion in assets under management.[4]

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[1] Notice of Filing of Proposed Rule Change To Amend the Listed Company Manual for Special Purpose Acquisition Companies To Lower the Initial Holder Requirement From 300 to 150 Round Lot Holders and To Eliminate Completely the 300 Public Stockholders Continued Listing Requirement, To Require at Least $5 Million in Net Tangible Assets for Initial and Continued Listing, and To Impose a 30-Day Deadline To Demonstrate Compliance With the Initial Listing Requirements Following a Business Combination, Exchange Act Release No. 82,180, 82 Fed. Reg. 57,632 (Dec. 6, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-12-06/pdf/2017-26220.pdf.
[2] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission 1 (Oct. 25, 2017), http://www.cii.org/files/issues_and_advocacy/correspondence/2017/October%2025,%202017%20SEC%20letter.pdf.
[3] *Id.* ("We cannot support the Proposed Rule in its current form because it does not provide sufficient information for us to make a determination as to whether our members and the capital markets would benefit from the proposed changes").
[4] For more information about the Council of Institutional Investors ("CII"), including its members, please visit CII's website at http://www.cii.org/members.

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Reduction in Number of Round-Lot Holders

The Proposed Rule would "reduce the shareholder requirement for the initial listing of an Acquisition Company to 150 round lot shareholders for all Acquisition Companies, including IPOs, transfers and quotation listings, and to eliminate the 300 total [sic] holder continued requirement."[5] The statutory basis for this change states that it is "consistent with the investor protection provisions of the [Securities Exchange Act of 1934 (Act)] . . . because other protections help assure that market prices will not be distorted by any potential resulting lack of liquidity, which is the underlying purpose of the shareholder requirement."[6] Those "other protections" include "the ability of a shareholder to redeem shares for a pro rata share of the trust [helping to assure that SPACs] . . . will trade close to the value of the assets held in trust."[7]

There is some logic in the NYSE assertion that price distortions or illiquidity may be a lesser concern for SPACs given rules on placement of assets in trust. However, we would like to see some evidence on this point. We note that, in contrast to the Nasdaq Proposal,[8] the Proposed Rule provides no analysis of the trading history of SPACs on the NYSE to support the assertion that SPACs trade close to the redemption value of the assets held in trust.

Moreover, the Proposed Rule includes no estimate whatsoever of the number of companies that have been unable to use the SPACs option because of the 300 round-lot holder requirement, and does not even indicate how large were the number of companies that received some form of deficiency notifications for failing to meet the requirement. Nor does NYSE characterize at all (much less provide numbers) how far constituents of the deficiency group fell short (e.g., how many of those fell below 150 round lot shareholders?). With regard to the lack of specification on the number of potential SPACs blocked because of inability to meet or retain the 300 shareholder requirement, the Proposed Rule relies on assertion that SPACs "often have difficulty demonstrating compliance,"[9] which is too vague to make this change, particularly given historic problems with SPACs that led to the rules that NYSE and Nasdaq are now proposing to change.[10]

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[5] 82 Fed. Reg. at 57,633.
[6] *Id.*
[7] *Id.*
[8] Notice of Filing of Proposed Rule Change To Modify the Listing Requirements Related to Special Purpose Acquisition Companies Listing Standards To Reduce Round Lot Holders on Nasdaq Capital Market for Initial Listing From 300 to 150 and Eliminate Public Holders for Continued Listing From 300 to Zero, Require $5 Million in Net Tangible Assets for Initial and Continued Listing, and Impose a Deadline To Demonstrate Compliance With Initial Listing Requirements on All Nasdaq Markets Within 30 Days Following Each Business Combination, Exchange Act Release No. 81,816, 82 Fed. Reg. 47,269-70 n.8 (Oct. 10, 2017) (Nasdaq analysis of trading history of special purpose acquisition companies listed since 2010), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-10-11/pdf/2017-21814.pdf.
[9] 82 Fed. Reg. at 57,633.
[10] *See* Ben McLannahan,"Opinion on Wall Street, Boom in 'Blank Cheque' Companies as Wall Street Nears Record," Fin. Times, Dec. 15, 2017, at 1 (noting that sponsors of blank check companies were a "flaky bunch a decade ago") (subscription required), https://www.ft.com/content/8b45a494-e15d-11e7-a8a4-0a1e63a52f9c; Bill Meagher, "Another Way to Invest with the Smart Money: SPACs," TheStreet, Aug. 12, 2016, at 2 ("10 years ago, SPACs were sponsored by management teams who were short on expertise and the vehicle suffered from poor reputation among investors"), https://www.thestreet.com/story/13673877/1/another-way-to-invest-with-the-smart-money-spacs.html; Jim Fink, "Special Purpose Acquisition Companies (SPACs): Will Investors Live Long and Prosper?" Investing Daily, Apr. 10, 2012, at 2 (referencing the "blank-check penny stock scams of the late 1980s"), https://www.investingdaily.com/10914/special-purpose-acquisition-companies-spacs-will-investors-live-long-and-prosper.

Even more importantly, the basis for this proposed change appears to provide no substantive analysis of why having more listed SPACs benefits investors or the capital markets other than the statement that the proposed changes "will remove impediments to and perfect the mechanism of a free and open market by removing listing requirements that prohibit certain companies from listing or remaining listed without any concomitant investor protection benefits."[11] Again, given the mixed record of SPACs, we do not believe that this statement alone is sufficient either for the SEC to act,[12] or for CII to make a determination as to whether the proposed change would benefit our members or the capital markets generally.

Net Tangible Asset Requirement

The Proposed Rule would establish a new requirement that SPACs "have net tangible assets in excess of $5,000,000 at the time of initial listing and on a continuing basis," thereby assuring that the securities of such companies satisfy the exclusion from being a penny stock under the Act.[13] This proposed change would create a new exclusion to existing rules that operate to identify certain SPACs as a penny stock company and impose "additional disclosure and other requirements" on broker/dealers when effecting transactions in those securities.[14]

We note that, in contrast to the Nasdaq Proposal,[15] the Proposed Rule does not appear to be accompanied by any mechanism in which the NYSE facilitates compliance by broker-dealers with the penny stock rules through the monitoring SPACs that might no longer meet the penny stock exclusions. Moreover, the proposed change also raises a number of unanswered questions. Why do we need a new exclusion to the penny stock rules for SPACs? How many SPACs would likely fail the proposed $5 million net tangible asset requirement? How many SPACs would likely be delisted for failing the proposed requirement? And, how would this proposed change benefit investors and the capital markets?

Period for Company to Demonstrate That It Satisfies Requirements

The NYSE existing rules require that following an "Acquisition Company's Business Combination, the resulting company must satisfy all initial listing requirements [including the proposed 150 round lot shareholder requirement] . . . ."[16] The Proposed Rule would clarify those

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[11] 82 Fed. Reg. at 57,634.
[12] *See, e.g.,* Susquehanna Int'l Grp., LLP v. SEC, No. 16-1061, at 9-17 (D.C. Cir. Aug. 8, 2017) (describing the kind of "reasoned decisionmaking" required of the Securities and Exchange Commission when approving a proposed rule change by the Options Clearing Corporation), https://cases.justia.com/federal/appellate-courts/cadc/16-1061/16-1061-2017-08-08.pdf?ts=1502204457.
[13] 82 Fed. Reg. at 57,634 (footnote omitted).
[14] *Id*.
[15] 82 Fed. Reg. at 47,270 ("To facilitate compliance by broker-dealers, Nasdaq will monitor the Acquisition Companies that fail the net tangible assets test and will publishes [sic] on the Nasdaq Listing Center Web site a daily list of any such company that no longer meets the net tangible assets requirement of the penny stock exclusion, and which does not satisfy any other penny stock exclusion").
[16] 82 Fed. Reg. at 57,634.

rules "to allow a company to demonstrate that it meets the initial listing requirements with respect to shareholders within thirty days following the business combination."[17]

The NYSE explains that the proposed change is in response to "delays . . . associated with obtaining information about the number of shareholders holding shares in 'street name' accounts . . . ."[18] We question whether these delays should be burdensome if the street name share intermediation system is efficient, and in any case believe NYSE should be required to provide some evidence on the frequency and length of the delays that have been experienced.

We suspect that the undisclosed basis for this and the other two proposed changes is to more closely mirror the proposed changes contained in the Nasdaq Proposal. As a general principle, we believe it is a mistake for the NYSE to follow the actions of other exchanges in an effort to compete based on reduced standards around public listings.[19] We believe that reduced listing qualifications, particularly those related to corporate governance and voting rights, could have long-term negative consequences for the U.S. exchanges and, more importantly, for the long-term investment returns of the workers and retirees that are the beneficiaries of our member funds.[20]

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Thank you for consideration of our views. If we can answer any questions or provide additional information on this matter, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel

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[17] *Id.*
[18] *Id.*
[19] *See, e.g.*, Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Hong Kong Exchanges and Clearing Limited 2 (Aug. 4. 2017) ("We believe it is a mistake for HKEX to follow other exchanges, including those based in the United States, in a competition to offer reduced standards around public listings"), http://www.cii.org/files/issues_and_advocacy/correspondence/8-4-17%20CII%20response%20to%20HK%20Concept%20Paper.pdf.
[20] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 12 (Aug. 23, 2017) ("While weakening listing standards in the near term may succeed in attracting additional listings, fallout from the lack of accountability in our view is likely in the longer-term to harm investors, as well as the reputation of the U.S. exchanges as public company listing venues"), http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf.