

Via E-Mail

October 25, 2017

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

Re: File Number SR-NASDAQ-2017-087

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (SEC) solicitation of comments on NASDAQ Stock Market LLC (Nasdaq) proposed rule to modify the listing requirements related to Special Purpose Acquisition Companies (SPACs or Acquisition Companies) (Proposed Rule).¹ 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.

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.²

Reduction in Number of Round-Lot Holders Required for Initial Listing

The Proposed Rule would “reduce the number of round-lot holders required for initial listing on the NASDAQ Capital Market from 300 to 150”³ 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

¹ Notice of Filing of Proposed Rule Change to Modify the Listing Requirements Related to Special Purpose Acquisition Companies, Exchange Act Release No. 81,816, 82 Fed. Reg. 47,269 (Oct. 10, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-10-11/pdf/2017-21814.pdf>.

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

³ 82 Fed. Reg. at 47,269.

requirement.”⁴ 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.”⁵

There is some logic in the Nasdaq 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 better evidence on this point.

The Proposed Rule references a Nasdaq analysis of the trading history of SPACs since 2010 that indicates that SPACs trade close to the redemption value of the assets held in trust.⁶ The analysis, however, is vague. It includes no estimate whatsoever of the number of companies that have been unable to use the SPAC option because of the 300 round-lot holder requirement, and does not even indicate how large were the number of companies that received deficiency notifications for failing to meet the 300 shareholder requirement. Nor does Nasdaq 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 the 300 shareholder requirement, the Proposed Rule relies on assertion that SPACs “often have difficulty demonstrating compliance,”⁷ which is too vague to make this change, particularly given historic problems with SPACs that led to rules including this one.⁸

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.”⁹ Given the mixed record of SPACs, particularly before investor protections were strengthened, we do not believe that this statement alone is sufficient either for the SEC to act,¹⁰ or for CII to make a determination as to whether the proposed change would benefit our members or the capital markets generally.

⁴ *Id.* at 47,271.

⁵ *Id.*

⁶ *Id.* at 47,269-70 n.8 (“Nasdaq observed that shares of all reviewed Acquisition Companies traded, on average, close to the \$10 redemption value with the median of the average daily range equal to \$0.07.”).

⁷ *Id.* at 47,269.

⁸ See 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>.

⁹ 82 Fed. Reg. at 47,271.

¹⁰ *Cf.* *Susquehanna Int’l Grp., LLP v. SEC*, No. 16-1061, at 2 (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>.

Elimination of Number of Round-Lot Holders Required for Continued Listing

The Proposed Rule would also eliminate the *continued* listing requirement of 300 round-lot shareholders for SPACs on the Nasdaq Capital Market.¹¹ The Proposed Rule summarizes the basis for this change by observing that the requirement is unnecessary because of the protections afforded by: “[T]he short life of an Acquisition Company [36 months], the [aforementioned] trading characteristics of Acquisition Companies observed by Nasdaq, and the requirement to meet the initial listing standards at the time of the business combination . . .”¹² Again, the Proposed Rule provides no estimate of how many SPACs would be impacted by the proposed change.

Nasdaq does suggest identifying shareholders by tapping broker-dealers and third parties that distribute information such as proxy voting is burdensome.¹³ We question whether this should be burdensome if the street name share intermediation system is efficient, and in any case believe Nasdaq should provide some evidence on this point.

Requirement of Net Tangible Assets for Initial and Continued Listing

The Proposed Rule would establish a new requirement that SPACs “have \$5 million in net tangible assets for initial and continued listing on the Nasdaq Capital Market, thereby assuring that the securities of such companies satisfy the exclusion from being a penny stock [under the Act].”¹⁴ This new proposed rule is presented as creating an additional exception to rules that would identify a SPAC as a penny stock company, which imposes “additional disclosure and other requirements” on broker/dealers when effecting transactions.¹⁵ Those “other requirements” include the need for broker-dealers to review the current financial statement of SPACs to verify that the securities issued by the SPACs “meet the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records.”¹⁶

The Proposed Rule indicates that all SPACs currently listed would satisfy the newly proposed \$5 million in net tangible assets requirement.¹⁷ However, it also indicates that at some future date a SPAC could fail the proposed exclusion. As a result, the Proposed Rule indicates that Nasdaq would facilitate compliance by broker-dealers with the penny stock rules by monitoring SPACs and publishing “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.”¹⁸ In addition, if Nasdaq finds that a SPAC no

¹¹ 82 Fed. Reg. at 47,269.

¹² *Id.* at 47,270 (footnotes omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 47,270 n.16 (“Nasdaq believes that all Acquisition Companies currently listed satisfy this alternative.”).

¹⁸ *Id.* at 47,270.

longer “meets the applicable net tangible assets requirement following initial listing, Nasdaq would initiate delisting proceedings”¹⁹

The proposed change raises a number of unanswered questions. How many SPACs would likely fail the existing 300 round lot holder requirement and become subject to the penny stock rules? 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 was it determined that \$5 million was the appropriate amount for the requirement? What information, if any, does Nasdaq currently publish on SPACs to facilitate compliance by broker-dealers with the penny stock rules? How frequently do broker-dealers access the Nasdaq Listing Center Web site for information about SPACs? How would Nasdaq inform broker-dealers that the Nasdaq Listing Center Web site includes information designed to assist in their compliance with the penny stock rules? How many SPACs would likely be delisted for failing the proposed net tangible assets requirement? And how would this proposed change benefit investors and the capital markets?

Requirement that Initial Listing Requirements be met within 30 Days Following a Business Combination

The Proposed Rule would require that SPACs must demonstrate that they meet the initial listing requirements, including the round-lot shareholder requirement, within 30 days following a business combination.”²⁰ And if the SPACs have “not demonstrated that it meets the requirements for initial listing in that time, Nasdaq staff would issue a Delisting Determination”²¹

The Proposed Rule explains that existing rules do not provide a specific timetable for SPACs to demonstrate that they satisfy all of the initial listing requirements following a business combination and, therefore, the proposed 30 day deadline “enhance[es] investor protection.”²² We agree and support this proposed change.

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,



Jeffrey P. Mahoney
General Counsel

¹⁹ *Id.*

²⁰ *Id.* at 47,271.

²¹ *Id.*

²² *Id.*