Council of Institutional Investors®
The voice of corporate governance

Via Email

January 7, 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 commend the staff of the Securities and Exchange Commission (SEC or Commission) for its thorough review[3] of The Nasdaq Stock Market LLC (Nasdaq or Exchange) proposed rule change to amend its listing rules to permit companies whose business plan is to complete one or more business combinations to have an additional 15 calendar days following the closing of a business combination to demonstrate that the Special Purpose Acquisition Company (SPAC) has satisfied the applicable round lot shareholder requirement (Proposed Rule).[4]

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[1] 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-nasdaq-stock-market-llc-order-instituting-proceedings-to-determine.

[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] 85 Fed. Reg. at 83,114-15.

[4] Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of 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. 89,897, 85 Fed. Reg. 59,574 (Sept. 16, 2020),

We believe the following issues the Commission staff raises in its review of the Proposed Rule should lead to additional information that would be helpful to CII and the staff in making a determination of whether the Proposed Rule is consistent with the protection of investors and the public interest:[5]

- "The Exchange . . . has provided no data or other evidence to support its position that SPACs have particular difficulties demonstrating compliance with the minimum number of holders requirements";[6]
- "The Exchange also has provided no data or other evidence showing how long it has taken SPACs that have been unable to meet the applicable minimum number of holders requirement, whether or not due to last minute shareholder redemptions, to come into compliance with such requirements";[7]
- "[T]he Exchange has not explained how providing a SPAC an additional 15 days following the closing of the business combination simply to demonstrate that it complied with the applicable minimum number of holders requirement immediately following the closing, would address the substantive compliance concerns associated with last minute shareholder redemptions that are close to the minimum requirement";[8] and
- "The Exchange also has not addressed the risk that, by waiting for SPACs to demonstrate compliance with the minimum number of holders requirements until after the closing of the business combination, noncompliant companies could be listed on the Exchange despite not meeting initial listing standards, and have their securities continue to trade until the delisting process has been completed [and] . . . the impact this could have on SPAC shareholders and other market participants, or explained why subjecting them to [this risk] . . . is consistent with the protection of investors and the public interest."[9]

More broadly, we are concerned that the Proposed Rule is part of a long-running competition by the New York Stock Exchange (NYSE) and the Nasdaq to "lower the bar for what goes in the world of SPACs."[10] And we question whether a loosening of SPAC listing standards is consistent with the protection of investors and the public interest.

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https://www.federalregister.gov/documents/2020/09/22/2020-20839/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change.

[5] *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 . . . .").

[6] 85 Fed. Reg. at 83,114.

[7] *Id.*

[8] *Id.* at 83,114-15.

[9] *Id.* at 83,115.

[10] Stephen Gander, Why Is This Oil and Gas Company Playing Poker?, Bloomberg Op. (Jan. 11, 2019) (on file with CII); *see generally* Office of the Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2020 at 10 (Dec. 29, 2020), https://www.sec.gov/advocate/reportspubs/annual-reports/sec-

We note that a recent study of 47 SPACs that merged between January 2019 and June 2020 (Study) 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.[11] Two of the most notable findings and conclusions from the Study follow:

1. SPACs are generally insulated from liability to investors for material misstatements and omissions

The Study finds that in contrast to traditional initial public offerings (IPOs), SPACs and their officers and directors face limited liability to investors for misstatements or omissions contained in their registration statements.[12] The study explains:

> When a SPAC goes public, it has little to disclose and therefore little to misstate or omit. It is simply collecting cash that will be put in trust until it either finds a merger target or liquidates. Furthermore, since SPAC shares are redeemable and their shares trade at their redemption price, even if there were a misstatement, shareholders would bear no loss and therefore could collect no damages under Section 11 except perhaps after a merger. Not surprisingly, there have been no Section 11 suits against SPACs based on their IPOs, going back at least ten years.
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> When a SPAC merges, it registers shares that it issues to the target's shareholders and to private placement investors. This potentially exposes the SPAC and its officers and directors to Section 11 liability. *But because these issuances are not underwritten, no underwriter liability is involved. Furthermore, even the issuer, its officers and directors—and a bank that may serve as a financial advisor—face little liability risk*. This is true for two reasons. First, to the extent target shareholders are aware of a misstatement or omission, they have no standing to sue. This, in all likelihood, will preclude target management and major target shareholders from bringing a suit. *Second, after the shareholders of the target company sell their shares, the requirement that plaintiffs' shares be traced to a particular public offering creates a substantial hurdle for a plaintiffs' lawyer. Once the SPAC's newly issued shares mix in the market with the SPAC's IPO shares, they typically cannot be traced to the registration statement filed in connection with the merger.*
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investor-advocate-report-on-activities-2020.pdf ("Our Office has long been concerned about an apparent race-to-the-bottom in this area—with the primary listing exchanges proposing to voluntarily lower their . . . standards in an effort to attract issuers, but at the expense of the protections the original standards provided investors.").

[11] *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.

[12] *Id.* at 42-45.

> *. . . [P]rotection from Section 11 liability could lead to less due diligence and sloppier disclosure. The insulation of the underwriter in particular could reduce the discipline on the SPAC and its target to take care in its disclosures related to their merger. If Section 11 is viewed as important in the IPO context, it is difficult to see why it should not be applied in the context of a SPAC merger.*[13]

For similar reasons—the loss of an underwriter and corresponding due diligence and a diminished ability for shareholders to recover damages—SEC Commissioners Allison Herren Lee and Caroline A. Crenshaw recently concluded that the NYSE had failed to meet its burden that a proposed rule change to permit primary direct listings was "consistent with the Exchange Act."[14]

2. SPAC structures generally create losses for long-term investors

The Study describes in detail how the SPAC structure results in substantial dilution of the value of SPAC shares translating into losses for investors that hold the shares through the SPAC merger.[15] The Study concludes:

> We find that SPAC shares tend to drop by one third of their value or more within a year following a merger. This suggests that it is the investors that hold shares at the time of SPAC mergers, and for a period of time thereafter, that are footing most of the bill for SPAC costs. From the perspective of companies going public, therefore, SPACs have indeed been cheap. But we wonder whether this is a sustainable situation.[16]

While we acknowledge and welcome the recent disclosure guidance for SPACs issued by the Division of Corporation Finance,[17] for all of the above reasons, we cannot currently support approval of the Proposed Rule.

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[13] *Id.* at 44-45 (emphasis added and footnotes omitted).
[14] Commissioner Allison Herren Lee & Commissioner Caroline A. Crenshaw, Public Statement, Statement on Primary Direct Listings (Dec. 23, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23.
[15] Michael Klausner et al. at 18-31.
[16] *Id.* at 4.
[17] *See* Special Purpose Acquisition Companies, CF Disclosure Guidance: Topic No. 11, Division of Corporation Finance, Securities and Exchange Commission (Dec. 22, 2020), https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies.

Thank you for the opportunity to comment on the Proposed Rule. Please contact me with any questions.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel