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Our File No.: 0000981001

November 22, 2010

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: ***Notice of Filing of Proposed Rule Change to Amend IM-5101-2 to Provide Acquisition Companies the Option to hold a Tender Offer in Lieu of a Shareholder Vote on a Proposed Acquisition. Release No. 34-63239; File No. SR-NASDAQ - 2010-137 (Nov. 3, 2010)***

Ladies and Gentlemen :

This letter is submitted by Bingham McCutchen LLP in response to the request for comments by the Securities and Exchange Commission (the "Commission") on the Commission's Release Number 34-63239 (Nov. 3, 2010) (the "Release") regarding a proposed rule change filed by The NASDAQ Stock Market LLC ("Nasdaq") with the Commission pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 19b-4 thereunder. This proposed rule change would amend Nasdaq Rule IM-5101-2 by granting SPACs[1] and other acquisition companies the option to conduct a tender offer in lieu of a shareholder vote on a proposed acquisition.

Our firm has represented issuers and underwriters in over 40 initial public offerings ("IPOs") of SPACs and has been involved in several acquisitions by SPACs. In our view, if adopted, the proposed rule change would represent a major step toward elimination of the abuses that have plagued the shareholder voting process relating to acquisitions by SPACs while continuing to enable shareholders to make a fully informed voting decision on proposed acquisitions by SPACs. Unfortunately, in the absence of a corresponding exemption from the shareholder voting requirement of Nasdaq Listing Rule 5635, we believe adoption of the proposed change to Rule IM-5101-2 will not be sufficient to encourage SPACs to list on Nasdaq. Thus, although laudable in its intent, we anticipate the proposed rule change, standing alone, will have no practical effect. To make the proposed rule change meaningful, it should be coupled with an amendment to Listing Rule 5635 to exempt the issuance of shares in connection with the initial acquisition by a SPAC from the shareholder approval requirement of such rule.

[1] Capitalized terms used but not defined in this letter have the meanings ascribed to them in the Release.

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In a typical SPAC, units consisting of one share of common stock and one warrant are offered to the public. Prior to an IPO by a SPAC, the individuals or entities who organize the SPAC, known as "sponsors", purchase founders' shares for nominal consideration. These founders' shares generally represent between 10% and 20% of the outstanding shares of the SPAC after completion of its IPO. The sponsors also typically purchase warrants from the SPAC contemporaneously with the SPAC's IPO. Substantially all of the proceeds of the SPAC's IPO, together with the purchase price for the warrants purchased by the sponsors, are deposited in a separate account (the "Deposit Account").

IMPACT OF LISTING RULE 5635 ON SPAC ACQUISITIONS IN WHICH A TENDER OFFER IS CONDUCTED

Our experience has been that the typical acquisition by a SPAC entails the merger of a private company into a newly-formed, wholly-owned subsidiary of the SPAC, as a result of which the target company becomes a subsidiary of the SPAC. Although some of the acquisition consideration may be paid in cash, generally, the majority of the transaction consideration is in the form of shares of the SPAC's common stock.

Most SPAC's (and all SPACs subject to the current Nasdaq listing rules) must acquire control of a target whose fair market value is at least 80% of the value of the Deposit Account (excluding deferred underwriting fees and taxes payable). In practice, the value of the target generally is greater than that of the Deposit Account and SPAC shareholders generally prefer transactions in which the value of the target is substantially higher than that of the Deposit Account. The reason for this preference is readily apparent. The larger the target's value as compared with that of the Deposit Account, the greater the number of the SPAC's shares that may be issued to the target's shareholders in the acquisition. The greater the number of shares issued, the lesser the dilutive impact of the founders' shares and the overhang from the sponsors' warrants and the warrants issued to the public in the IPO.

Nasdaq Listing Rule 5635 requires Nasdaq listed companies to obtain shareholder approval for any issuances in an acquisition transaction of a number of shares of common stock equal to or greater than 20% of the issuer's outstanding shares of stock prior to the acquisition. For the reason discussed above, a SPAC generally will seek to issue as acquisition consideration a number of shares that is greater than 20% of its outstanding shares prior to the acquisition. Without an exception from the shareholder approval requirement of Listing Rule 5635 to the initial acquisition by a SPAC, a SPAC that otherwise would seek to list its shares on Nasdaq would be discouraged from doing so for fear of exposing itself to exactly the same abusive practices identified in the Release, which have in some cases tainted the shareholder voting process.

Listing Rule 5635 offers no greater protection to shareholders of SPACs than that provided by IM-5101-2, assuming adoption of the proposed rule change. As provided in proposed paragraph (e) of IM-5101-2, a SPAC *"must provide all Shareholders with the opportunity to redeem all their shares for cash equal to their pro rata share of the aggregate amount then in the Deposit Account...."* This is essentially the same right that

a shareholder who votes against an acquisition by a SPAC and elects to convert his interest into a pro rata share of the aggregate amount then in the deposit account has under current IM-5101-2. In either case, a shareholder would have the opportunity to get back the same portion of its original investment. As noted in the Release, *"shareholders would still maintain the ability to 'vote with their feet' if they oppose a proposed transaction...."*

Under the proposed rule change, not only would shareholders continue to be able to vote with their feet, but they would continue to be able to base their decision on the same information they would have received if there were a shareholder vote. Proposed paragraph (e) of IM-5101-2 would require a SPAC *"to file tender offer documents with the Commission containing substantially the same financial and other information about the business combination and redemption rights as would be required under Regulation 14A of the Act, which regulates the solicitation of proxies."*[2] In addition to the filing obligation imposed by the proposed rule, Exchange Act Rule 13e-4(d) mandates disclosure to security holders of information with respect to the tender offer. Accordingly, under proposed paragraph (e), shareholders of a SPAC who do not support an acquisition would have the same protections as would have been available to them if they were given the right to vote on an acquisition. That being the case, there is no rational basis for applying a shareholder vote requirement based exclusively on the percentage of the SPAC's shares to be issued in an acquisition.

Having acknowledged the problem with the shareholder vote process, FINRA and the Commission have the opportunity to use the proposed rule change to address the problem in a meaningful way. Adoption of the proposed rule change without exempting initial acquisitions by SPACs from the shareholder approval requirement of Listing Rule 5635 would squander that opportunity.

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[2] The tender offer documents would not be the first documents in which investors are apprised of their redemption rights in connection with an acquisition by a SPAC. Disclosure of the redemption rights would have been made previously in documents filed by the SPAC with the Commission. With respect to investors in the SPAC's IPO, such disclosure would be contained in the registration statement filed by the SPAC. With respect to investors in the secondary market, the IPO registration statement as well as certain reports filed by the SPAC under the Exchange Act would contain this information. Thus, prior to making a decision to invest in the SPAC, investors will know that they may not be entitled to vote on an acquisition. If they nonetheless purchase shares of the SPAC, they will have tacitly agreed to do so despite the absence of a shareholder vote.

CALCULATION OF "PRO RATA SHARE" FOR PURPOSES OF PARAGRAPH (e) OF THE PROPOSED RULE.

Our experience has been that in the typical SPAC sponsors agree not to exercise their redemption rights with respect to their founders' shares in connection with an acquisition proposal, whether the redemption is in conjunction with a shareholder vote or pursuant to a tender offer. The founders' shares are thus excluded from the pro rata calculation used to determine the per share redemption price. Because paragraph (e) of the proposed rule specifies that the redemption price in the tender offer context must be "*equal to [the] pro rata share of the aggregate amount in the deposit account ...* ", the proposed rule arguably would not permit the exclusion of the founders' shares in calculating the per share redemption price. In order to accommodate this feature, we suggest FINRA and the Commission add a sentence to paragraph (e) of the proposed rule which would permit a Company, if it so elects, to exclude the founders' shares from the calculation of the per share redemption price.

We would be pleased to discuss the matters contained in this letter with the Commission and its staff and to respond to any questions.

Respectfully yours,

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