

November 22, 2010

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-NASDAQ-2010-137

Dear Ms. Murphy:

Graubard Miller appreciates the opportunity to comment on the proposal by the NASDAQ Stock Market (“Nasdaq”) that would provide an acquisition company with the option of conducting a tender offer in lieu of seeking a shareholder vote on a proposed acquisition.¹ If adopted, the proposal (“Proposed Rule Change”) would constitute an amendment to Nasdaq Listing Interpretation IM-5101-2 (“Listing Rule”).²

Graubard Miller pioneered the concept of specified purpose acquisition companies, or SPACs, in 1993 and has been lead counsel on more SPAC transactions, including IPOs and post-IPO business combinations, than any other law firm in the United States or abroad. SPACs are the most common form of acquisition companies that utilize the Listing Rule to become listed on Nasdaq in connection with their initial public offerings.³ Accordingly, we believe Graubard Miller is in a unique and highly qualified position to comment on the Proposed Rule Change.

Generally, we support the principal objectives of the Proposed Rule Change – to minimize “the disruptive effect of certain shareholders, while maintaining protections which are designed to protect investors and the public interest and prevent fraudulent and manipulative acts and practices.”⁴ However, we believe the Proposed Rule Change as currently drafted will be of little use without a corresponding

¹ See Securities and Exchange Commission, Regulatory Organizations; 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, Exchange Act Release No. 34-63239; File No. SR-NASDAQ-2010-137 (Nov. 3, 2010) [hereinafter, “Proposed Rule Change”].

² See Nasdaq Rule 5101; IM-5101-2: Listing of Companies Whose Business Plan is to Complete One or More Acquisitions.

³ For purposes of this comment letter, we hereafter refer to all acquisition companies as “SPACs.”

⁴ Page 7 of the Proposed Rule Change.

exception to Nasdaq's existing requirement that stockholder approval be obtained when a company seeks to issue more than 20% of its outstanding stock in a proposed transaction.

We also believe that Nasdaq should go a step further in its efforts and modify its initial listing criteria to allow for the listing of smaller SPACs in connection with their initial public offerings. We believe such a modification would allow Nasdaq to better address the desires of investors in today's capital markets without compromising investor protection.

I. Proposed Rule Change Will be of No Use Without A Corresponding Exception to 20% Shareholder Approval Requirement

The Proposed Rule Change provides that a SPAC may avoid the need to hold a shareholder meeting in connection with any proposed acquisition transaction if the SPAC offers public shareholders the right to obtain their pro rata share of the amount then held in a SPAC's trust account through a tender offer conducted pursuant to Rule 13e-4 and Regulation 14E under the Securities Exchange Act of 1934, as amended ("Exchange Act"). However, pursuant to Nasdaq Rule 5635(a)(1), the SPAC would still be required to hold a shareholder meeting in order to obtain approval of the acquisition transaction if it provided for the issuance to the target company of more than 20% of the number of shares of common stock of the SPAC outstanding before the transaction.

While a SPAC has the ability to utilize the funds held in its trust account as the consideration it pays in connection with any proposed acquisition transaction, it is not the norm. Because SPACs are unable to determine with accuracy the amount of funds that will be required to pay shareholders that ultimately elect to convert their shares into cash, the funds held in the trust account are typically not used as consideration to effect the acquisition transaction. Instead, SPACs commonly utilize their capital stock as consideration to effect the transaction, leaving the proceeds held in the trust account to pay converting shareholders their pro rata share of the trust funds, with the remaining funds, if any, to be used as working capital to finance the operations of the target on a going forward basis. In such a situation, the securities issued in the transaction will almost always represent more than 20% of the number of shares of common stock of the SPAC outstanding before the transaction.

As a result of the foregoing, if there is no corresponding exception to the shareholder approval requirement of Nasdaq Rule 5635(a)(1) in this limited situation, the ability to engage in a tender offer and avoid the need for a shareholder meeting and vote will be rendered useless, as the SPAC will still need to hold a stockholder meeting to obtain approval of the issuance of stock.

The purpose of Nasdaq Rule 5635(a)(1) is to "provide to shareholders of NASDAQ/NMS issuers a greater level of participation in corporate affairs" and to provide "further shareholder protections concomitant with the stature of the issuers comprising that market."⁵ We believe that these purposes are completely satisfied in a tender offer process involving a SPAC. A SPAC engaging in this type of tender offer will be required to deliver to shareholders the same information that would be required to be delivered had the SPAC engaged in a proxy solicitation. Additionally, Nasdaq Rule 5635(a)(1) only requires a shareholder be given an opportunity to vote on a proposed transaction whereas in the proposed

⁵ See Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Eligibility Criteria for NASDAQ National Market System Securities, Release No. 26433, Exchange Act Release No. 34-26433; File No. SR-NASD-88-36.

tender offer structure, a shareholder will be given the opportunity to both “say no” with respect to the proposed transaction and receive his or her money back by converting shares. Accordingly, the tender offer provides shareholders with an even greater level of participation than is currently required by Rule 5635(a)(1).

We therefore do not believe that a separate vote to satisfy Nasdaq Rule 5635(a)(1) should be required in situations where a SPAC is engaging in these types of tender offers and suggest the adoption of a corresponding formal exception to Rule 5635(a)(1).

II. Nasdaq Should Allow for Smaller SPACs to be Listed on its Exchange

We believe that in addition to allowing SPACs to engage in tender offers in lieu of shareholder meetings as described above, in order to truly benefit the capital markets generally and SPACs specifically, the Proposed Rule Change should be coupled with modifications to Nasdaq’s initial listing standards. Specifically, we believe that an exception to the operating history requirement of the applicable Nasdaq listing standard would allow for a greater number of SPACs to be listed on Nasdaq without compromising investor protection or the public interest and further enhance the attractiveness of Nasdaq to SPAC issuers.

Since all SPACs, regardless of the size of the initial public offering undertaken, employ the same investor safeguards, there should be greater flexibility in Nasdaq’s initial listing requirements to allow smaller SPACs to become listed, as the investing public is still protected from potential abuses. One of Nasdaq’s Capital Market Initial Listing Requirement standards requires the company to have a market value of publicly held shares of only \$15 million (without any additional requirement for the company to have a certain market value of its listed securities) provided it has a two-year operating history. We submit that Nasdaq should provide for a one-time exception for SPACs from this two-year operating history requirement in connection with their initial public offerings, provided such SPACs employ the same investor safeguards required of other listed SPACs. Since the SPAC in such a situation will have to include all the other investor safeguards and comply with all the other corporate governance requirements mandated by Nasdaq, allowing them to list without satisfying the operating history requirement would not lead to additional abuses, especially since an operating history is meaningless in the context of a SPAC. Furthermore, the SPAC will still need to satisfy all the regular initial listing requirements upon consummation of its acquisition transaction in order to remain listed on Nasdaq.

Over the last six months, most SPAC IPOs coming to market have been downsized from their initial filing. This contrasts sharply with the trend from 2005-2008, when most SPAC IPOs were upsized from their initial filing. The trend is now towards smaller SPACs. Nasdaq should recognize this by granting SPACs an exception to the two-year operating history requirement discussed above.

Conclusion

While we support the idea behind the Proposed Rule Change, we do not believe it will produce the desired effect as currently drafted. We encourage the Commission to adopt the Proposed Rule Change with an exception to Nasdaq Rule 5635(a)(1) as discussed above. Moreover, we urge the Commission to consider an additional exception to Nasdaq’s listing requirements to allow smaller SPACs to be listed on Nasdaq. We believe such a proposal to be in the investing public’s best interest in today’s

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current market environment, while not resulting in any greater burden on, and potential abuses against, the investing public.

If you have any questions or would like to discuss these matters further, please do not hesitate to contact either of the undersigned.

Respectfully submitted,

David Alan Miller
Managing Partner
(212) 818-8661

Jeffrey M. Gallant
Partner
(212) 818-8638