Council of Institutional Investors®
The voice of corporate governance

Via Email

December 9, 2021

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

Re: File No. SR-NASDAQ-2021-092[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 $40 trillion in assets under management.[2]

The purpose of this letter is respond to the staff of the Securities and Exchange Commission's (SEC) solicitation of comments in response to the Nasdaq Stock Market LLC (Nasdaq) proposed rule change to adopt alternative listing requirements that would allow special purpose acquisition companies (SPACs) to initially list their primary equity security on the Nasdaq Global Market with "at

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[1] Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Alternative Initial and Continued Listing Requirements for Acquisition Companies Listing on the Nasdaq Global Market, Exchange Act Release No. 93,622; 86 Fed. Reg. 67,512 (Nov. 24, 2021), https://www.federalregister.gov/documents/2021/11/26/2021-25750/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-and-immediate.
[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.

least 300 Round Lot Holders (rather than 400 Round Lot Holders as is the case currently)"[3] and remain listed if they have at least 300 public stockholders, provided that they meet certain additional requirements for initial and continued listing.[4] Nasdaq also proposes to adopt continued listing standards for SPACs that initially listed under the proposed alternative standard and align them with the proposed initial listing standards (proposed initial and continued listing requirements, collectively the Proposed Rule).[5]

In evaluating whether the Proposed Rule is consistent with the protection of investors and the public interest pursuant to Section 6(b)(5) of the Securities Exchange Act of 1934 (Act),[6] we note that Nasdaq has not provided any data to support its position that SPACs have difficulty demonstrating compliance with the 400 Round Lot Holders requirement for the Nasdaq Global Market.[7] Moreover, Nasdaq has provided at least two justifications for the Proposed Rule that we believe may not be consistent with the protection of investors and the public interest: (1) it would permit some SPACs to continue to list on Nasdaq despite having insufficient equity as a result of the proper accounting for warrants;[8] and (2) it would permit some SPACs to continue to list on Nasdaq because they may currently be eligible to list on the NYSE.[9] The latter justification appears to be but

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[3] 86 Fed. Reg. at 67,513; *see id.* at 67,513-14 n.9 ("'Round Lot' . . . means 100 shares of a security . . . [and] 'Total Holders' means holders of a security that includes both beneficial holders and holders of record").
[4] *See id.* at 67,513-14 (describing proposed "Initial Listing Requirements").
[5] *Id.* at 67,514-15 (describing proposed "Continued Listing Requirements").
[6] *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 . . . .").
[7] *See* 86 Fed. Reg. at 67,512 ("More recently, certain Acquisition Companies have sought to list on the Nasdaq Global Market [and] [i]n particular, Nasdaq notes that a recent SEC statement about accounting treatment by Acquisition Companies and subsequent and more recent accounting comments to Acquisition Companies has resulted in some Acquisition Companies adopting different accounting practices and, as a result, having insufficient equity to qualify for initial listing on the Nasdaq Capital Market.").
[8] *See id.; see also* John Coates, Acting Director, Division of Corporation Finance & Paul Munter, Acting Chief Accountant, Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (SPACs) (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs ("We are issuing this statement to highlight the potential accounting implications of certain terms that may be common in warrants included in SPAC transactions and to discuss the financial reporting considerations").
[9] *See, e.g.,* 86 Fed. Reg. at 67,515 ("Nasdaq also notes that Acquisition Companies have been listing on the NYSE for a number of years subject to initial and continued requirements substantially identical to those included in this proposal.").

another consequence of a long-running competition by NYSE and Nasdaq to "lower the bar for what goes in the world of SPACs."[10]

More broadly, as the leading voice for corporate governance, we would be remiss if we failed to identify the poor governance practices that appear endemic to SPAC structures. We note that CII's membership-approved corporate governance policies include the following best practices for independent boards and director compensation:

Independent Boards

> At least two-thirds of the directors should be independent; their seat on the board should be their only non-trivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer.[11]

Director Compensation

> Director compensation policies should accomplish the following goals: (1) attract highly qualified candidates, (2) retain highly qualified directors, (3) align directors' interests with those of the long-term owners of the corporation and (4) provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation.
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[10] Stephen Gander, Why Is This Oil and Gas Company Playing Poker?, Bloomberg Op. (Jan. 11, 2019) (on file with CII); *see, e.g.*, Usha Rodrigues & Michael A. Stegemoller, SPACs: Insider IPOs 40-41 (U. Ga. Sch. L., Res. Paper Series, Paper No. 2021-09, 2021), *available at* https://ssrn.com/abstract=3906196 ("In recent years, the exchanges have consistently moved for more relaxation of the rules pertaining to SPACs [and] [p]erhaps the most striking proposed changes were in the context of how many shareholders a company needed in order to list on one of the national exchanges."); *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-investor-advocate-report-on-activities-2020.pdf ("Our Office has long been concerned about an apparent race-to-the-bottom . . . —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] Council of Institutional Investors, Corporate Governance Policies, § 2.3 Independent Board (updated Sept. 22, 2021), https://www.cii.org/files/09_22_21_corp_gov_policies.pdf.

> Companies should have flexibility within certain broad policy parameters to design and implement director compensation plans that suit their unique circumstances. To support this flexibility, investors must have complete and clear disclosure of both the philosophy behind the compensation plan as well as the actual compensation awarded under the plan. Without full disclosure, it is difficult to earn investors' confidence and support for director and executive compensation plans.
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> Although non-employee director compensation is generally immaterial to a company's bottom line and small relative to executive pay, director compensation is an important piece of a company's governance. Because director pay is set by the board and has inherent conflicts of interest, care must be taken to ensure there is no appearance of impropriety. Companies should pay particular attention to managing these conflicts.[12]

We observe that SPACs appear to have challenges in complying with these two important and related corporate governance principles and we believe those challenges have significant implications for the protection of investors and the public interest. As explained in a recent research paper by Professors Michael Klausner and Michael Ohlrogge:

> The SPAC is a corporation formally governed by a board of directors. If the merger decision is placed in the hands of independent directors that act in the interest of the public shareholders, the shareholders can be protected from a sponsor's incentive to enter into a value-decreasing merger.
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> Some sponsors, however, design their SPAC's governance with the opposite in mind. They fill their boards with individuals with whom they have strong financial ties. Moreover, they compensate directors by granting them "founder shares" or by granting them membership interests in the sponsor entity itself (typically an LLC), which owns founder shares. . . . [F]ounder shares do not participate in a liquidation. So, the directors' financial interests are aligned with the interests of the

[12] *Id.* § 6.1 Introduction.

> sponsor, not the public shareholders. They would prefer a merger that is good for all, but they would still profit from a value-decreasing merger – especially in comparison to a liquidation. Consequently, a SPAC governed by directors who have ties with a sponsor and who are compensated in this way is equivalent to a SPAC governed by a sponsor – that is, the epitome of bad governance.
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> Sponsors could instead have their SPACs compensate directors with cash. Alternatively, they could compensate directors with the same class of shares that the SPAC issues to public shareholders, and put cash in the trust to cover the liquidation of those shares. Either of these approaches would better align the interests of the board with the interests of shareholders.[13]

CII generally agrees with Professors' Klausner's and Ohlrogge's analysis. And for all of the above reasons, we respectfully request that the SEC staff find that the Proposed Rule *is not* consistent with Section 6(b)(5) of the Act.

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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

[13] Michael D. Klausner & Michael Ohlrogge, SPAC Governance: In Need of Judicial Review 6-7 (Nov. 19, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967693; *see, e.g.*, Brief of Council of Institutional Investors as Amici Curie Supporting Plaintiffs at 12-13, Assad v. E.Merge Tech. Acquisition Corp. (U.S. D.C. S.D.N.Y 2021) (No. 1: 21-CV-7072 (JPO)), https://www.cii.org/files/issues_and_advocacy/legal_issues/CII%20Amicus%20-%20Assad%20v_%20E_Merge%20Technology%20Acquisition%20Corp_%20et%20al.pdf ("Although the Sponsor's members are nominally directors of a publicly traded company, such compensation is out of line with what one would expect for directors of a publicly traded operating company [and] [t]here is no alignment between the directors' interests and shareholder interests, and this conflict of interest is inherent in the SPAC structure.").