

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63607; File No. SR-NASDAQ-2010-137)

December 23, 2010

Self-Regulatory Organizations, The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Amend IM-5101-2 to Provide Special Purpose Acquisition Companies the Option to Hold a Tender Offer in Lieu of a Shareholder Vote on a Proposed Acquisition and Other Changes to the SPAC Listing Standards

I. Introduction

On October 22, 2010, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to provide special purpose acquisition companies (“SPACs”) an option to hold a tender offer in lieu of a shareholder vote on a proposed acquisition and to make certain other changes to the SPACs listing requirements as discussed below. The proposed rule change was published in the Federal Register on November 9, 2010.<sup>3</sup> The Commission received three comment letters on the proposal.<sup>4</sup> This order approves the proposed rule change.

II. Description of the Proposal

As discussed in more detail below, the Exchange is proposing to amend its listing rules to provide SPACs an option to hold a tender offer in lieu of a shareholder vote on a proposed acquisition, to require SPACs, trying to complete a business combination, that are not subject to

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 63239 (November 3, 2010), 75 FR 68846.

<sup>4</sup> See Letters from Floyd I. Wittlin and Ann F. Chamberlain, Bingham McCutchen LLP, dated November 22, 2010 (“Bingham Letter”); David Alan Miller, Managing Partner and Jeffrey M. Gallant, Partner, Graubard Miller, dated November 22, 2010 (“Graubard Letter”); and Joel L. Rubinstein and Jonathan Rochwarger, McDermott Will & Emery, dated November 30, 2010 (“McDermott Letter”).

the Commission's proxy rules to conduct a tender offer allowing shareholders to redeem shares for cash and provide information similar to that provided under the Commission's proxy rules and to amend the definition of public shareholder for purposes of the SPAC conversion rights to also exclude beneficial holders of more than 10% of the total shares outstanding, consistent with the Exchanges existing definition of Public Holder.<sup>5</sup>

SPACs are companies that raise capital in an initial public offering ("IPO") to enter into future undetermined business combinations through mergers, capital stock exchanges, asset acquisitions, stock purchases, reorganizations or other similar business combinations with one or more operating businesses or assets. In the IPO, SPACs typically sell units consisting of one share of common stock and one or more warrants (or fraction of a warrant) to purchase common stock. The units are separable at some point after the IPO. Management of the SPAC typically receives a percentage of the equity at the outset and may be required to purchase additional shares in a private placement at the time of the IPO. Due to their unique structure, SPACs do not have any prior financial history like operating companies. In July, 2008 the Commission approved Nasdaq rules to permit the listing of securities of SPACs.<sup>6</sup> Prior to that time, the Exchange did not list securities of companies without a specific business plan or that indicated that their plan was to engage in a merger or acquisition with unidentified companies. In addition to requiring securities of SPACs to meet the Exchange's initial listing standards, Nasdaq's rules provided additional investor protection standards to provide safeguards to shareholders who invest in SPAC securities.

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<sup>5</sup> See Nasdaq IM-5101-2(e) and Nasdaq Rule 5005(a)(34).

<sup>6</sup> See Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008).

Currently, Nasdaq's rules for listing securities of SPACs provide at least 90% of the proceeds raised in the IPO and any concurrent sale of equity securities must be placed in a trust account.<sup>7</sup> Further, Nasdaq's listing rules specify that within 36 months or such shorter time period as specified by the SPAC, the SPAC must complete one or more business combinations having an aggregative fair market value of at least 80% of the value of the trust account.<sup>8</sup> Until the SPAC has completed a business combination of at least 80% of the trust account value, the SPAC must, among other things, submit the business combination to a shareholder vote.<sup>9</sup> Any public shareholders who vote against the business combination have a right to convert their shares of common stock into a pro rata share of the aggregate amount then in the trust account, if the business combination is approved and consummated.<sup>10</sup>

Nasdaq proposes three changes to the SPAC shareholder approval process. First, Nasdaq proposes to add an option for the SPAC to conduct a tender offer instead of a shareholder vote. Nasdaq proposes that until a SPAC has completed a business combination of at least 80% of the trust account value, if a shareholder vote on the business combination is not held for which the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act, in order to complete the business combination the 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 pursuant to Rule 13e-4 and Regulation 14E under the Act.<sup>11</sup> The SPAC must file tender offer documents with the Commission containing

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<sup>7</sup> See Nasdaq IM-5101-2(a).

<sup>8</sup> See Nasdaq IM-5101-2(b).

<sup>9</sup> See Nasdaq IM-5101-2(d).

<sup>10</sup> See Nasdaq IM-5101-2(e).

<sup>11</sup> See proposed Nasdaq IM-5101-2(e).

substantially the same information about the business combination and the redemption rights as required under Regulation 14A of the Act, which regulates proxy solicitations.

Second, Nasdaq proposes to require that the shareholder vote provisions currently in the rule requiring the business combination to be approved by a majority of the shares voting at the meeting apply to shareholder votes where the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act in advance of the shareholder meeting.<sup>12</sup> This part of the Exchange's proposal, taken together with the tender offer provisions discussed above, in essence require a SPAC, not required by law to file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act, to conduct a tender offer for shares in exchange for a pro rata share of the cash held in deposit in the trust account. As noted above, any issuer that elects to or is required to conduct a tender offer must comply with Rule 13e-4 and Regulation 14E under that Act, as well as 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 the federal proxy rules in Regulation 14A of the Act. This provision will assure that investors will receive comparable information about a proposed business combination irrespective of whether the company is conducting a tender offer with or without a vote, or a shareholder vote that requires the issuer to file and furnish a proxy or information statement in compliance with the Commission's proxy rules.

Finally, Nasdaq proposes to exclude beneficial holders of more than 10% of the total outstanding SPAC shares from those public shareholders entitled to receive conversion rights under paragraph (d) of IM-5101-2. According to Nasdaq, when it originally adopted the SPAC

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<sup>12</sup> See proposed Nasdaq IM-5101-2(d).

rules, Nasdaq intended to have the public shareholder exclusions closely mirror the defined term “Public Holders” as well as exclude certain categories specific to SPACs. However, the definition of public shareholder under the SPAC rules did not exclude beneficial holders of more than 10% of the total shares outstanding while the definition of Public Holders excludes this group. Nasdaq is amending the SPAC rules to ensure consistency between these two rules.<sup>13</sup>

### III. Summary of Comments

The Commission received three comments supporting the proposal. One commenter stated that the proposal “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.”<sup>14</sup>

While the three commenters support the proposal, they believed that Nasdaq should propose to change its shareholder approval rule in Nasdaq Rule 5635, which, among other things, require that a Nasdaq listed issuer obtain shareholder approval to issue securities in connection with an acquisition where the number of shares of common stock to be issued is equal to or more than 20% of the number of shares outstanding prior to the issuance.<sup>15</sup> One commenter believed that “adoption of the proposed change to Rule IM-5101-2 will not be sufficient to encourage SPACs to list on Nasdaq” and anticipated that “the proposed rule change, standing alone, will have no practical effect.”<sup>16</sup> The commenter stated that the value of the target for a SPAC is generally greater than the amount in the SPAC’s trust account, and thus, the SPAC

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<sup>13</sup> See proposed Nasdaq IM-5101-2(d).

<sup>14</sup> See Bingham Letter.

<sup>15</sup> See Nasdaq Rule 5635(a).

<sup>16</sup> See Bingham Letter.

would need to issue additional shares at the time of the business combination to raise capital.<sup>17</sup> According to the commenter, the greater number of shares issued, the lesser the dilutive impact of the founders' shares and the warrants. The commenter argues that any protection provided by Nasdaq's shareholder approval requirements is unnecessary since under Nasdaq's proposal, shareholders not subject to a vote are able to "vote with their feet" and get their investment back through the tender offer process. Accordingly, the commenter urged Nasdaq to exempt SPACs from Nasdaq's shareholder approval requirements in Rule 5635.

Another commenter stated that because "SPACs are often 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."<sup>18</sup> As a result, this commenter stated that SPACs often use stock as consideration for the business combination and cash in the trust account is used to redeem shareholders and possibly finance the operations of the target. As a result, the securities issued to do a business combination almost always represent more than 20% of the outstanding shares before the business combination. This commenter views the tender offer proposal providing even greater participation for shareholders than a vote alone under Nasdaq Rule 5635 since in the tender offer situation shareholders can receive their money back and therefore, believes that there should be an exception to the voting requirements in Nasdaq's rules.

Another commenter noted that most "SPAC business combination transactions involve the issuance by the SPAC of a significant number of shares, which typically triggers one or more

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<sup>17</sup> See Bingham Letter.

<sup>18</sup> See Graubard Letter.

shareholder approval requirements of Rule 5635.”<sup>19</sup> This commenter believes that by having the ability to redeem their shares and “vote with their feet”, shareholders do not need the additional protection of Nasdaq Rule 5635. The commenter also notes that the shareholder vote requirement currently in the SPAC rules has resulted in greenmail<sup>20</sup> tactics that the rule filing is meant to address, and that without an exception to the shareholder approval requirements the potential for greenmail to continue and other delays caused by the vote can narrow the pool of quality acquisition targets for the SPAC which would be contrary to shareholder interests.

Finally, two more additional comments were raised by the commenters. First, the Bingham Letter suggests Nasdaq’s rule be amended to make clear that the SPAC founders’ shares can be excluded from the pro rata calculation used to determine the per share redemption price in those cases where the sponsor has agreed not to exercise their redemption rights.<sup>21</sup> Second, the Graubard Letter states that Nasdaq should be allowed to amend its rule to permit it to list securities of SPACs with smaller size by eliminating the 2 year operating history in one of its Capital Market initial listing requirements.<sup>22</sup> In support of this, the commenter notes that all the other protections for SPACs in Nasdaq’s rules would apply and that this would recognize the current market environment for smaller offerings.

#### IV. Discussion and Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act and the rules and regulations

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<sup>19</sup> See McDermott Letter.

<sup>20</sup> See Section IV, infra.

<sup>21</sup> See Bingham Letter.

<sup>22</sup> See Graubard Letter.

thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>23</sup> which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>24</sup>

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have or, in the case of an IPO, will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained.

As noted above, SPACs are companies that raise capital in IPOs, with the purpose of purchasing operating companies or assets within a certain time frame. Because of their unique structure, and the fact that at the outset investors will not know the ultimate business of the company similar to a blank check company, the Commission approved Nasdaq listing standards

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<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c (f).



for SPACs that were similar in some respects to the investor protection measures contained in Rule 419 under the Securities Act of 1933.<sup>25</sup> One of the important investor protection safeguards, as noted above, is the ability of public shareholders to convert their shares for a pro rata share of the cash held in the trust account if they vote against a business combination. In approving this provision, the Commission noted that the conversion rights will help to ensure that public shareholders who disagree with management's decision with respect to a business combination have adequate remedies.<sup>26</sup>

As noted by Nasdaq in its rule filing, however, there have been certain abuses as a result of the vote requirement. According to Nasdaq, hedge funds and other activist investors would acquire an interest in a SPAC and use their ability to vote against a proposed acquisition as leverage to obtain additional consideration not available to other shareholders. In its filing, Nasdaq refers to these abuses as "greenmail" and is now proposing to add an option for the SPAC to conduct a tender offer instead of a shareholder vote. As described above, under the proposal the 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 pursuant to Rule 13e-4 and Regulation 14E under the Act.<sup>27</sup> The SPAC must file tender offer documents with the Commission containing substantially the same information about the business combination and the redemption rights as required under the Federal proxy solicitation

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<sup>25</sup> See 17 CFR 230.419. Rule 419 applies to blank check companies issuing penny stock as defined under rule 3a51-1(a) (2) of the Act. See 17 CFR 240.3a51-1(a) (2).

<sup>26</sup> The Commission also noted, among other things, that the requirement that a majority of the independent directors approve a business combination should also help to ensure that a business combination is entered into by the SPAC after a fair and impartial decision. See IM-5101-2 (c). This provision will continue to apply to all SPAC business combinations whether approved through a shareholder vote or conducted through a tender offer under the new provisions being adopted in this order.

<sup>27</sup> See proposed Nasdaq IM-5101-2(e).

rules. According to Nasdaq this is the same outcome available to public shareholders who vote against the acquisition pursuant to Nasdaq's existing rule and will allow shareholders to "vote with their feet" if they oppose a proposed acquisition by the SPAC while preventing activist shareholders from denying shareholders the benefit of the transaction.

The Commission notes that the commenters are supportive of this proposal and believe that the change should help to eliminate the abuses that have occurred in relation to the voting process on acquisitions by SPACs.<sup>28</sup> Nasdaq's rule would retain the option to hold a shareholder vote, and provide SPACs with a tender offer option, so long as the tender offer is consistent with Federal securities laws. Further, shareholders' right to redeem their shares would be preserved under either scenario. The Commission further notes that irrespective of whether a SPACs business combination is achieved through a tender offer or shareholder vote, shareholders, under Nasdaq's rule, will receive comparable financial and other information about the business combination and the redemption rights.

In summary, the Commission believes that shareholders who are not in favor of a business combination should continue to have an adequate remedy under Nasdaq's proposal if they disagree with management's decision with respect to a business combination, and that the Nasdaq's SPAC rules will continue to have safeguards to address investor protection, while at the same time allowing the greenmail abuses noted by Nasdaq to be addressed. Based on the above, the Commission finds that this proposal is consistent with the requirements of the Act and in particular the investor protection standards under Section 6(b)(5) of the Act.

Nasdaq is also proposing to add language to existing provision IM-5101-2 (d) which concerns the shareholder voting requirements applicable to business combinations. Under this

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<sup>28</sup> See Section III, *supra*. As noted above, while generally supportive of the proposal, the commenters raised concerns that Nasdaq's proposal does not go far enough.

change if a SPAC holds a shareholder vote to approve a business combination, the provisions, only apply where the SPAC must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act in advance of the shareholder meeting. This change, viewed together with the changes discussed above allowing a SPAC to do a business combination through a tender offer rather than a shareholder vote, basically ensures that certain SPACs that are not required under the federal securities laws to comply with the Commission's proxy solicitation rules when soliciting proxies, will have to follow the tender offer provisions under Nasdaq's rules. Under this provision, the tender offer documents are specifically required to contain substantially the same financial and other information about the business combination and redemption rights as would be required under the proxy rules in Regulation 14A of the Act.<sup>29</sup> The Commission notes that this proposal would clarify the manner in which a shareholder vote is held and the information that would be required by the SPAC to send to shareholders. Further, it ensures that all investors will be receiving the same information about a proposed business combination whether it is holding a vote and required by law to follow the proxy rules or conducting a tender offer under the conditions set forth in Nasdaq's rules. This provision also does not preclude a SPAC that does not have to comply with the federal proxy rules when soliciting proxies from having a shareholder vote, but just ensures, through the tender offer process, that the SPAC will be required to provide comparable information. Based on the above, the Commission finds that this portion of the proposal is consistent with the requirements of the Act, and in particular, the investor protections requirements under Section 6(b) (5) of the Act.

Finally, Nasdaq proposes to amend language in the SPAC rules to also include beneficial holders of more than 10% of the total outstanding SPAC shares to the groups of shareholders that

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<sup>29</sup> See proposed Nasdaq IM-5101-2(e).

are not entitled to convert their shares on a pro rata basis for cash if they vote against a business combination.<sup>30</sup> The SPAC definition was originally drafted, according to Nasdaq, to mirror the “Public Holder” definition under Nasdaq rules in addition to excluding other groups from having conversion rights such as the sponsors and founding shareholders. The Commission notes that the proposed change in the definition is consistent with Nasdaq’s definition of “Public Holders,” which is also excludes from its definition “the beneficial holder of more than 10% of the total shares outstanding.”<sup>31</sup> This will ensure consistency with the two rules and according to Nasdaq is consistent with its original intent. Based on this and the existing definition under Nasdaq’s rules, the Commission, finds that this proposal is consistent with the requirements of the Act.

The commenters also urge the Commission to permit Nasdaq to change its rules to exempt from the shareholder approval requirements in Nasdaq Rule 5635, SPACs that issue 20% or more of their outstanding shares to achieve an acquisition. As summarized above, the commenters believe that the proposed changes allowing a tender offer option to avoid “greenmail” situations will not be effective if there is a separate shareholder approval requirement for issuances of 20% or more of the SPACs common stock since most SPACs issue a large number of shares when conducting a business combination. The Commission notes that the instant proposal centers on the approval of shareholders with respect to a business combination and the recourse a shareholder may have should the shareholder disapprove the business combination. Nasdaq’s shareholder approval rules, on the other hand, are stand alone requirements that are meant to address different issues such as dilution of existing shareholders by the issuance of additional shares. While the commenters have attempted to address some of the concerns arguing that the shareholders don’t need the further protection of a vote since

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<sup>30</sup> See proposed Nasdaq IM-5101-2(d).

<sup>31</sup> See Nasdaq Rule 5005(a)(34).

shareholders in a SPAC will be fully aware of their redemption rights through disclosure and that dilution is not a concern since the SPAC must complete business combinations with a target having a fair market value of at least 80% of the value of the trust account, the Commission is not convinced that these factors alone adequately address the concerns underlying the shareholder approval rules.

In conclusion, the Commission notes that it has long recognized that the Exchange's shareholder approval requirements provide important protections to shareholders of listed companies from certain corporate transactions. These protections are central to a shareholder owning shares in a Nasdaq listed issuer. Based on this, the Commission is not prepared to state that a shareholder vote is unnecessary in situations where certain disclosures are made or there is only a possibility the issuance may not cause dilution. Any such determination would raise significant issues that would have to be fully considered by the Commission and published for public comment, and may raise issues that could potentially go beyond the listing of SPACs. The Commission further notes that since the Exchange has not proposed to change the shareholder approval rule at this time, that topic is not before the Commission and does not need to be separately considered at this time. Moreover, the commenters indicated that issuing additional shares is not a requirement, but rather a typical business practice for SPACs. The Commission notes, for example, that SPACs could seek out business combinations with a fair market value consistent with the value of the SPAC's trust account and possibly avoid the issuance of additional shares to trigger Nasdaq Rule 5635.

As to the two remaining comments, that the Nasdaq rule language should be amended to permit founders shares from being excluded from the pro rate calculation and that the Nasdaq listing rules should be amended to permit the listing of smaller sized SPACs, the Commission

notes that Nasdaq has not proposed such changes. As to the suggestion on the language concerning the pro rata calculation, the Commission notes that the current language states that the pro rata amount is calculated based on the aggregate amount in the deposit account. It is unclear if founders share funds are typically deposited in the deposit account. If they are, then it is possible a clarification may be helpful that the value of the founders shares and founders warrants should not be used in calculating the pro rata amount owed the shareholders in cases where the founders agree not to exercise their redemption rights. Nasdaq may wish to examine this issue further to see if a rule filing is necessary to clarify the issue. Finally, as to the suggestion that Nasdaq's initial listing standards be changed to accommodate the listing of smaller sized SPACs, the Commission notes that such SPACS can currently trade in the over-the-counter market. Any change to permit smaller sized SPACs to trade on Nasdaq would have to be separately proposed and considered and could only be approved if such a proposal was found to be consistent with the requirements of the Act.

V. Conclusion

Based on the foregoing, the Commission finds the proposal is consistent with the requirements of the Act. IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>32</sup> that the proposed rule change (SR-NASDAQ-2010-137) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>33</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>32</sup> 15 U.S.C. 78s(b)(2).

<sup>33</sup> 17 CFR. 200.30-3(a)(12).