

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58228; File No. SR-NASDAQ-2008-013)

July 25, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to Proposed Rule Change, as modified by Amendment No. 1, to Adopt Additional Initial Listing Standards to list Securities of Special Purpose Acquisition Companies

I. Introduction

On March 14, 2008, 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 adopt additional initial listing standards to list securities of special purpose acquisition companies (“SPACs”). The proposed rule change was published in the Federal Register on April 24, 2008.<sup>3</sup> The Commission received two comment letters on the proposal.<sup>4</sup> On June 16, 2008, the Exchange responded to the comment letters.<sup>5</sup> On July 10, 2008, the Exchange filed Amendment No. 1. In Amendment No. 1, the Exchange proposed to: (1) amend the amount of gross proceeds that must be deposited from 100% to 90%; (2) clarify the period in which the SPAC must complete one or more business combinations; and (3) require that all listed SPACs contain provisions allowing public shareholders to convert their shares into cash if they vote against a business combination.

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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. 57685 (April 18, 2008), 73 FR 22191.

<sup>4</sup> See Letters from Messrs. Steven Lofchie and Tim Geller, Cadwalader, Wickersham & Taft LLP, dated May 14, 2008 (“Cadwalader Letter”) and Mark Connolly, Chair, NASAA Corporate Finance Section Committee, North American Securities Administrator Association, dated May 15, 2008 (“NASAA Letter”).

<sup>5</sup> See Letter from Arnold P. Golub, Associate General Counsel, The Nasdaq Stock Market LLC, dated June 16, 2008 (“Nasdaq Response”).

The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Description of Proposal

The Exchange proposes to adopt a new interpretative material to Nasdaq Rule 4300 to permit the initial listing of securities of SPACs.<sup>6</sup> In the past, the Exchange has denied initial listings of securities of companies without a specific business plan or that have indicated that their plan is to engage in a merger or acquisition with unidentified companies.

Proposed IM-4300-2 would permit the Exchange to list securities of SPACs under the Exchange's existing initial listing standards, provided certain conditions are satisfied. First, at least 90% of the gross proceeds from the IPO and any concurrent sale by the SPAC of equity securities must be deposited in a deposit account.<sup>7</sup> Second, within 36 months of the effectiveness of the IPO registration statement or such shorter period that the SPAC specifies in the registration statement, the SPAC must complete one or more business combinations having

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<sup>6</sup> SPACs raise capital in an 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.

<sup>7</sup> Proposed IM-4300-2(a) defines deposit account as: (1) a trust account maintained by an independent trustee; (2) an escrow account maintained by an "insured depository institution" as such term is defined in Section 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(2); or (3) a separate bank account established by a registered broker or dealer.

an aggregate fair market value of at least 80% of the value of the deposit account<sup>8</sup> at the time of the agreement to enter into the initial business combination. Third, each business combination must be approved by a majority of the SPAC's independent directors and approved by a majority of the shares of common stock, until the SPAC has completed business combinations of at least 80% of the fair market value of the deposit account at the time of the initial business combination. Finally, until the SPAC has completed business combinations of at least 80% of the fair market value of the deposit account at the time of the initial business combination, each public shareholder voting against a business combination must have the right to convert his or her shares into a pro rata share of the aggregate amount then in the deposit account<sup>9</sup> if the business combination is approved and consummated.<sup>10</sup> In addition, until the SPAC has completed business combinations of at least 80% of the fair market value of the deposit account at the time of the initial business combination, it must notify the Exchange of each proposed business combination. Following each business combination, the resulting entity must meet the Exchange's initial listing standards to remain listed on the Exchange.

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<sup>8</sup> Proposed IM-4300-2(b) would exclude any deferred underwriters fee and taxes payable on the income earned on the deposit account from the 80% of the value of the deposit account.

<sup>9</sup> Proposed IM-4300-2(e) would exclude taxes payable and amounts distributed to management for working capital purposes from the aggregate amount in the deposit account.

<sup>10</sup> Proposed IM-4300-2(e) would allow a SPAC to establish a limit (no lower than 10% of the shares sold in the IPO) as to the maximum number of shares with respect to which any shareholder, together with any affiliate or any person with whom such shareholder is acting as a group may exercise this conversion right. Proposed IM-4300-2(e) would exclude officers, directors, the SPAC's sponsor, the founding shareholders, and any Family Member (defined in Nasdaq Rule 4200(a)(14)) or affiliate of such persons as public shareholder.

### III. Summary of Comments and Nasdaq Response

The Cadwalader Letter supports the proposal and suggested that Nasdaq require SPACs to notify the public at least ten days in advance of a record date. The Cadwalader Letter noted that certain listed SPACs have not publicly announced the record date for shareholders to vote on the business combination until after passage of the record date. The Cadwalader Letter noted that the right to vote to approve a business combination is central to ownership of SPAC securities, due to the SPAC's structure.

In its response, the Exchange noted that other listing markets do not require issuers to notify the public of the record date of a shareholder meeting in advance, either for SPACs or any other listed companies. Nasdaq further notes that the rules of other markets only require disclosure of the record date for a meeting of shareholders to the exchange, not the public. The Exchange believes that any public notification requirement should be adopted across all listing markets.

The NASAA Letter opposes the proposal. The NASAA Letter notes that historically, the structure of blank check companies makes the offerings risky for investors.<sup>11</sup> The NASAA Letter notes that while disclosure for blank check companies has improved under Rule 419 under the Securities Act of 1933 ("Securities Act"),<sup>12</sup> concerns remain because investors have to make their purchase decision prior to knowledge of the make-up of the post-business combination company. The NASAA Letter further notes that SPAC securities have been highly promoted at the IPO stage and in aftermarket trading. The NASAA Letter concludes that listing these securities on the major trading markets is inappropriate.

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<sup>11</sup> A blank check company is a development stage company that has no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies, other entity, or person.

<sup>12</sup> See 17 CFR 230.419.

The Exchange responds that it is mindful of the historical concerns regarding blank check companies and notes that while SPAC securities currently could qualify for listing under Nasdaq’s listing standards, the Exchange has in the past determined not to list them due to such concerns. The Exchange further notes that the proposal would impose additional criteria intended to protect investors and that it would review each SPAC that applies to list and evaluate the reputation of the SPAC’s sponsors and underwriters. With respect to the NASAA Letter’s statement that SPAC securities are subject to highly promotional marketing, the Exchange responds that the offer and sale of SPAC securities are subject to Federal securities laws, and that broker-dealers who recommend these securities are subject to investor suitability and “know your customer” requirements of the self-regulatory organizations.<sup>13</sup>

#### IV. Discussion

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 thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>14</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

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<sup>13</sup> In the Nasdaq Response, the Exchange notes that, among other things, SPACs typically allow investors that vote against the business acquisition to convert their shares into a pro rata share of the trust or escrow account. As discussed below, Nasdaq subsequently amended the proposal to require SPACs to provide public shareholders these conversion rights.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>15</sup>

The development and enforcement of adequate standards governing the initial 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.

SPACs are companies that raise capital in IPOs, with the purpose of purchasing operating companies or assets within a certain time frame. The proceeds of the IPOs are placed in an escrow account during this period. SPACs usually require a majority of shareholders to approve any business combination. If shareholders do not approve a deal within the relevant time frame, shareholders generally have the option to demand their investment be returned from the escrow account. Management of the SPAC typically invests its own money in the SPAC—typically 2% to 4%—which generally is forfeited if a business combination is not consummated. If a business combination is consummated, management typically receives up to a 20% interest in the resulting company. The securities sold in the IPO generally consist of a unit made up of one share of common stock and a warrant (or fraction of a warrant) to purchase common stock. The common stock and warrants may be traded separately after the IPO.

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<sup>15</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).

The proposal would permit Nasdaq to reverse its historical practice of not listing securities of SPACs; as proposed, Nasdaq would list securities of SPACs that meet Nasdaq's initial listing standards and the proposed additional initial listing criteria. The Commission believes that the Exchange's proposed initial listing standards to list SPAC securities are consistent with the requirements of the Act, including the protection of investors and the promotion of fair and orderly markets. SPACs that list securities on Nasdaq would have to meet Nasdaq's current initial listing standards.<sup>16</sup> In addition, SPACs that list securities on Nasdaq would need to comply with the proposed additional conditions.<sup>17</sup>

First, the SPAC must deposit at least 90% of the IPO proceeds and any concurrent sale in a deposit account. Second, the SPAC must complete, within 36 months of the effectiveness of the IPO registration statement or such shorter period as specified in the registration statement, one or more business combinations that have a fair market value equal to at least 80% of the deposit account at the time of the initial business combination.<sup>18</sup> Third, until the SPAC has completed one or more business combinations that have a fair market value of at least 80% of the deposit account at the time of the initial business combination, each business combination must be approved by a majority of the SPAC's independent directors and a majority of the shares of the common stock. Finally, until the SPAC has completed one or more business combinations that have a fair market value of at least 80% of the deposit account at the time of the initial business combination, public shareholders who vote against a business combination have the

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<sup>16</sup> See proposed Nasdaq IM-4300-2. SPAC securities could qualify for initial listing under the Nasdaq Global Select Market, Nasdaq Global Market, or the Nasdaq Capital Market.

<sup>17</sup> The Commission notes that depending on which Nasdaq listing market the SPAC securities are initially listed, the securities would need to comply with the applicable continued listing standards.

<sup>18</sup> This amount excludes the amount of any deferred underwriting fee and taxes payable on the income earned on the deposit account.

right to convert their shares to cash if the business combination is approved and consummated. Moreover, following each business combination, the combined entity must meet Nasdaq's initial listing standards to remain listed.

The Commission notes that some of the proposed requirements, such as the deposit account requirement and the public shareholder conversion rights, are similar in some respects to the investor protection measures contained in Rule 419 under the Securities Act.<sup>19</sup> The Commission believes that these proposed investor protection requirements would provide additional safeguard for investors who invest in SPAC securities. The proposed initial listing standards would require that SPACs allow public shareholders to convert their shares to cash if they vote against a business combination. The Commission believes 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. Moreover, the Commission believes that the proposal to require that a majority of the independent directors approve a business combination should help to ensure that a business combination is entered into by the SPAC after a fair and impartial decision. Finally, the Commission believes that requiring satisfaction of Nasdaq's initial listing quantitative standards following each business combination would help to ensure that trading in the securities of the combined entity is consistent with the maintenance of fair and orderly markets and investor expectations.

The Commission believes that these safeguards should help to ensure that SPACs that list securities on Nasdaq will have taken certain additional steps to address investor protection and

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<sup>19</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). Rule 419 is not applicable to SPAC securities. See Securities Act Release No. 7024 (October 25, 1993), 58 FR 58099 (October 29, 1993).



other matters. The Commission expects Nasdaq to thoroughly review potential listings of SPAC securities to ensure that its initial listing standards have been met.<sup>20</sup>

As discussed above, the Commission received two comment letters on the proposal, one in favor and one in opposition. The Cadwalader Letter, while supporting the proposal, urges the Exchange to require SPACs to publicly disclose the record date for shareholders to vote on the business combination ten days prior to such date. The Commission notes that while exchanges have rules requiring listed issuers to notify the exchanges of their record date for shareholder meetings, there are no similar rules requiring listed issuers to notify the public of such record date in advance.<sup>21</sup> Further, the Commission notes that Rule 419 under the Securities Act does not require blank check companies to publicly notify their shareholders of the record date for a shareholders vote. The Commission believes that any consideration of a public notice requirement of record dates should be conducted outside the context of a particular SRO rule filing.

The NASAA Letter, as summarized above, opposes the proposal due to the historical abuses of blank check companies. The Exchange states that it would conduct a regulatory review of each SPAC that applies to list securities on the Exchange. Further, the Exchange states that it would evaluate the reputation of the SPAC's sponsors and underwriters to determine whether initial listing is appropriate. Moreover, the Exchange amended the proposal to include conversion rights for public shareholders, should they vote against a business combination. The

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<sup>20</sup> See Nasdaq Rule 4300. In the Nasdaq Response, the Exchange states that it will evaluate the reputation of the SPAC's sponsors and underwriters under Nasdaq Rule 4300 to determine whether initial listing is appropriate.

<sup>21</sup> See Amex Company Guide Sections 502 and 703 and NYSE Listed Company Manual Section 401.02.

Commission believes that the additional investor protection standards, in addition to Nasdaq's initial listing standards, should help to ensure that investors are adequately protected.

V. Accelerated Approval

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. In Amendment No. 1 the Exchange proposed to: (1) amend the amount of gross proceeds that must be deposited from 100% to 90%; (2) clarify the period in which the SPAC must complete one or more business combinations; and (3) require that all listed SPACs contain provisions allowing public shareholders to convert their shares into cash if they vote against a business combination. The Commission believes that Amendment No. 1 raises no new or novel regulatory issues. The Commission notes that the amendment to the amount of the deposit account is consistent with Rule 419 under the Securities Act and NYSE initial listing standards for SPAC securities.<sup>22</sup> The Exchange also clarified the time period in which SPACs must complete business combinations. Finally, the Commission notes that the public shareholder conversion right is consistent with the NYSE initial listing standards for SPAC securities and provides further investor protections for investors in SPAC securities.<sup>23</sup> The Commission finds that the filing, as modified by Amendment No. 1, is consistent with the protection of investors and the public interest. Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>24</sup> to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

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<sup>22</sup> See NYSE Listed Company Manual Section 102.06.

<sup>23</sup> See id.

<sup>24</sup> 15 U.S.C. 78s(b)(2).

## VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the filing, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2008-013 on the subject line.

### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-013. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does

not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2008-013 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Conclusion

Based on the foregoing, the Commission finds the proposal is consistent with the requirements of the Act and should provide for the initial listing of securities of SPACs with baseline investor protection and other standards.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> that the proposed rule change, as modified by Amendment No. 1 (SR-NASDAQ-2008-013) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Florence E. Harmon  
Acting Secretary

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<sup>25</sup> 15 U.S.C. 78s(b)(2).

<sup>26</sup> 17 CFR 200.30-3(a)(12).