

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91961; File No. SR-NASDAQ-2020-062)

May 20, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Listing Rules Applicable to Special Purpose Acquisition Companies whose Business Plan is to Complete One or More Business Combinations

I. INTRODUCTION

On September 3, 2020, 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 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its listing rules to permit companies whose business plan is to complete one or more business combinations (“SPACs” or “Acquisition Companies”) 15 calendar days following the closing of a business combination to demonstrate that the SPAC has satisfied the applicable round lot shareholder requirement. The proposed rule change was published for comment in the Federal Register on September 22, 2020.³

On November 4, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89897 (September 16, 2020), 85 FR 59574 (“Notice”). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-062/srnasdaq2020062.htm>. See also, infra, note 8.

⁴ 15 U.S.C. 78s(b)(2).

the proposed rule change.⁵ On December 16, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change (“OIP”).⁷ On February 25, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. Amendment No. 1 was published for comment in the Federal Register on March 16, 2021.⁸ On March 18, 2021, the Commission designated a longer period for Commission action on the proposed rule change.⁹

This order disapproves the proposed rule change, as modified by Amendment No. 1, because, as discussed below, Nasdaq has not met its burden under the Exchange Act and the Commission’s Rules of Practice to demonstrate that its proposal is consistent with the requirements of Section 6(b)(5) of the Exchange Act, and, in particular, the requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.¹⁰

II. DESCRIPTION OF THE PROPOSAL, AS MODIFIED BY AMENDMENT NO. 1

⁵ See Securities Exchange Act Release No. 90340, 85 FR 71704 (November 10, 2020). The Commission designated December 21, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 90682, 85 FR 83113 (December 21, 2020).

⁸ See Securities Exchange Act Release No. 91294 (March 10, 2021), 86 FR 14508 (March 16, 2021) (“Notice II”). Comments received in response to Amendment No. 1 to the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-062/srnasdaq2020062.htm>.

⁹ See Securities Exchange Act Release No. 91348, 86 FR 15747 (March 24, 2021).

¹⁰ 15 U.S.C. 78f(b)(5).

A SPAC is a company with no operations whose business plan is to complete an initial public offering and then subsequently engage in a merger or acquisition with one or more unidentified operating companies within a specific period of time.¹¹ Nasdaq listing rules, among other things, require a SPAC to keep at least 90% of the proceeds from its initial public offering in an escrow account,¹² and to complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the escrow account within a specified period of time.¹³ Following each business combination, the combined company must meet the requirements for initial listing on Nasdaq¹⁴ including those requiring a minimum number of round lot shareholders (the “Shareholder Requirement”).¹⁵ If the combined company does not

¹¹ See Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (order approving the predecessor rule to IM-5101-2).

¹² See Nasdaq IM-5101-2(a).

¹³ See Nasdaq IM-5101-2(b).

¹⁴ See Nasdaq IM-5101-2(d). If a shareholder vote on the business combination is held, public shareholders voting against a business combination must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the escrow account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated. Id. If a shareholder vote on the business combination is not held, the company must provide all shareholders with the opportunity to redeem their shares for cash equal to their pro rata share of the aggregate amount then in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes). See Nasdaq IM-5101-2(e).

¹⁵ Nasdaq has three listing tiers, each of which require, among other things, a company to have a minimum number of shareholders in order to initially list on the Exchange. See Nasdaq Rule 5315 (f)(1) (on Global Select, an issuer must have at least 550 Total Holders with a minimum average monthly trading volume over the prior 12 months, 2,200 Total Holders, or 450 Round Lot Holders with 50% of holders holding Unrestricted Securities); Nasdaq Rule 5405(a)(3) (on Global, an issuer must have at least 400 Round Lot Holders with 50% of holders holding Unrestricted Securities); and Nasdaq Rule 5505(a)(3) (on Capital, an issuer must have at least 300 Round Lot Holders with at least 50% of holders holding Unrestricted Securities).

meet all the initial listing requirements following a business combination, Nasdaq listing rules currently provide that Nasdaq staff will issue a Staff Delisting Determination.¹⁶

In its proposal, Nasdaq acknowledges that its existing rules require that, “following each business combination” with a SPAC, the resulting company must satisfy all initial listing requirements. Nasdaq states, however, that the rule does not provide a timetable for the company to demonstrate that it satisfies those requirements. Accordingly, Nasdaq proposes to modify the rule to specify if the SPAC demonstrates that it will satisfy all requirements except the applicable Shareholder Requirement, then the SPAC will receive 15 calendar days following the closing to demonstrate that it satisfied the applicable Shareholder Requirement immediately following the transaction’s closing. In addition, Nasdaq proposes to require that a company relying on this 15-day grace period publicly announce, prior to the business combination, on a Form 8-K, where required by SEC rules, or by issuing a press release, that it has not yet demonstrated compliance with the Shareholder Requirement and is subject to delisting if it cannot do so within the requisite time frame.¹⁷ Finally, Nasdaq proposes to halt trading in the securities if the company fails to make this public announcement.¹⁸

Nasdaq states that it ordinarily determines compliance with the Shareholder Requirement at the time of a business combination by reviewing a company’s public disclosures and information provided by the company about the transaction.¹⁹ According to Nasdaq, if it cannot determine compliance using public information, it will typically request the company to provide

¹⁶ See Nasdaq IM-5101-2(d).

¹⁷ See Notice II of Amendment No. 1, supra note 8.

¹⁸ See id.

¹⁹ Nasdaq states, for example, that the merger agreement may result in the Acquisition Company issuing a round lot of shares to more than 300 holders of the target of the business combination at closing.

additional information such as registered shareholder lists from the company's transfer agent, data from Cede & Co. about shares held in street name, or data from broker-dealers and third parties that distribute information such as proxy materials for the broker-dealers. If the company can provide information demonstrating compliance before the business combination closes, Nasdaq states that no further information would be required.

However, Nasdaq states that it has observed that in some cases it can be difficult for a company to obtain evidence demonstrating the number of shareholders that it has or will have following a business combination. Nasdaq states that shareholders in a SPAC may redeem or tender their shares until just before the time of the business combination, and the SPAC may not know how many shareholders will choose to redeem until very close to the consummation of the business combination.²⁰ Nasdaq states that this could impact its ability to determine compliance before the business combination closes, in cases where the number of round lot shareholders is close to the applicable requirement.

Nasdaq states that under its proposal the SPAC must still demonstrate that it satisfied the round lot shareholder requirement immediately following the business combination, and that the proposal merely would give the SPAC 15 calendar days to provide evidence that it had met the Shareholder Requirement. Nasdaq also states that it believes that the proposed public disclosure requirement will help provide transparency to investors about the status of the company during the additional time period it has to evidence compliance with the Shareholder Requirement.²¹

²⁰ The Exchange notes that SPACs are unlike other newly listing companies which do not face redemptions and are not already listed and trading at the time they must demonstrate compliance.

²¹ See Notice II of Amendment No. 1, supra note 8.

Nasdaq believes that the proposal “balances the burden placed on the Acquisition Company to obtain accurate shareholder information for the new entity and the need to ensure that a company that does not satisfy the initial listing requirements following a business combination enters the delisting process promptly.”²² Nasdaq states that if the company does not evidence compliance within the proposed time period, Nasdaq staff would issue a Staff Delisting Determination, which the company could then appeal to an independent hearings panel.²³

The Commission received two comment letters opposing the proposal from the Council of Institutional Investors.²⁴ The commenter stated that additional information from Nasdaq in response to the OIP would be helpful in determining whether the proposed rule change is consistent with the Exchange Act, and questioned whether a loosening of SPAC listing standards is consistent with the protection of investors and the public interest.²⁵ More broadly, the commenter referenced a recent study that it believes finds that SPACs and their officers and directors face limited liability to investors for material misstatements in, or omissions from, their registration statements, and that SPAC structures generally create losses for long-term investors.²⁶ Finally, the commenter referenced the study’s suggestion that the regulatory treatment for SPACs should be generally equivalent to that for direct listings and questioned

²² The Exchange also states that shareholders of the SPAC would be harmed if Nasdaq issued a delisting determination at a time when the company did, in fact, satisfy all initial listing requirements but could not yet provide proof.

²³ The Exchange has also proposed to eliminate a duplicative paragraph and add a new subsection enumeration to its existing rule.

²⁴ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 7, 2021) (“CII Letter I”); Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (March 25, 2021) (“CII Letter II”).

²⁵ See CII Letter I, supra note 24.

²⁶ Id.

whether Nasdaq’s proposal would lead to a pro-SPAC bias.²⁷ The Exchange responded to CII Letter I that the proposal would not loosen SPAC listing standards because under its proposal SPACs would still have to comply with the Shareholder Requirement at the time of the business combination and would just be provided an additional 15 days after completing their business combination to demonstrate such compliance.²⁸ The Exchange further stated that its proposal will provide transparency and does not pose any additional risk to the protection of shareholders.²⁹

III. DISCUSSION AND COMMISSION FINDINGS

The Commission must consider whether Nasdaq’s proposal is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, including Section 6(b)(5) of the Exchange Act, which requires, in relevant part, that the rules of a national securities exchange be designed “to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”³⁰ Under the Commission’s

²⁷ See CII Letter II, supra note 24.

²⁸ See Letter from Arnold Golub, Vice President and Deputy General Counsel, (February 25, 2021) (“Nasdaq Letter”).

²⁹ Id.

³⁰ 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that “[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters

Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization [‘SRO’] that proposed the rule change.”³¹

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³² and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.³³ Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.³⁴

The Commission has consistently recognized the importance of the minimum number of holders and other similar requirements stating that such listing standards help ensure that exchange listed securities have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.³⁵ The

not related to the purposes of this title or the administration of the exchange.” 15 U.S.C. 78(f)(b)(5).

³¹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³² See id.

³³ See id.

³⁴ Susquehanna Int’l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 447 (D.C. Cir. 2017).

³⁵ The Commission considers distribution standards, including minimum number of holders and number of shares outstanding requirements, to be important means of promoting fair and orderly markets. See, e.g., Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR-NYSE-2008-17) (stating that the distribution standards, which includes exchange holder requirements “... should help to ensure that

Shareholder Requirement also helps to ensure that trading in exchange-listed securities is not susceptible to manipulation.³⁶

As discussed above, Nasdaq is proposing to: (1) allow a SPAC 15 calendar days following the closing of a business combination to demonstrate that it satisfied the applicable Shareholder Requirement immediately following the transaction's closing, and (2) require a SPAC relying on the additional 15 day period to publicly announce, prior to the listing of the combined company, that it has not demonstrated compliance with the Shareholder Requirement and is subject to delisting if it cannot do so within the requisite time period. Nasdaq states that it can be difficult for a SPAC to obtain evidence demonstrating the number of holders the SPAC will have following its business combination because SPAC shareholders have the right to redeem or tender their shares until just before the time of such business combination. Further, Nasdaq states that, given the uncertainty around the number of redemptions and ongoing trading through the closing of the business combination, it may not be possible for the SPAC to definitively establish that it will satisfy the Shareholder Requirement before completing the combination. In addition, Nasdaq states that, while other companies cannot become listed until they demonstrate compliance with the Shareholder Requirement, SPACs completing business combinations are already listed and, without more time, would be the only type of company to face immediate delisting as a result of these difficulties. Finally, Nasdaq states that 21 of the 49

the [Acquisition Companies'] securities have sufficient public float, investor base, and liquidity to promote fair and orderly markets"); Securities Exchange Act Release No. 86117 (June 14, 2019), 84 FR 28879 (June 20, 2018) (SR-NYSE-2018-46) (disapproving a proposal to reduce the minimum number of public holders continued listing requirement applicable to Acquisition Companies from 300 to 100).

³⁶ See, e.g., Securities Exchange Act Release Nos. 91236 (March 2, 2021), 86 FR 13414 (March 8, 2021) (SR-NYSEArca-2020-56) and 90819 (December 29, 2020), 86 FR 332 (January 5, 2021) (SR-CboeBZX-2020-036).

SPAC business combinations processed by Nasdaq during 2019 and 2020 needed additional time to demonstrate compliance with the Shareholder Requirement.

Nasdaq emphasizes that, under its proposal, the SPAC must still demonstrate that it satisfied the applicable Shareholder Requirement immediately following the business combination, and is simply being provided 15 calendar days to provide evidence that it did. However, Nasdaq has not explained the extent to which the 21 SPACs that needed additional time to demonstrate compliance in 2019 and 2020 actually were in compliance with the shareholder requirement immediately following the closing of the business combination, or instead were not in compliance and needed additional time to acquire the requisite number of shareholders. If the former, Nasdaq has not explained why, like newly-listed companies in advance of their public offerings, the SPAC could not provide preliminary evidence of its compliance with the Shareholder Requirement in advance of the business combination, or why last minute shareholder redemptions would impact that evidence. If the latter, then the SPACs in fact were not in compliance with the Shareholder Requirement at the time of the business combination, and do not provide support for Nasdaq's proposal, which is premised on the assumption that such SPACs simply needed additional time to evidence their compliance.

More broadly, Nasdaq does not explain how its proposal addresses the regulatory risks to fair and orderly markets, investor protection and the public interest, and the manipulation concerns if companies initially list, and can continue to trade, on the Exchange without meeting the Shareholder Requirement. Notably, and as discussed in the OIP, Nasdaq has not addressed the risk that, by waiting for SPACs to demonstrate compliance with the Shareholder Requirement until after the closing of the business combination, non-compliant companies could be listed on the Exchange despite not meeting initial listing standards, and have their securities

continue to trade until the delisting process has been completed. In such circumstances, a SPAC could complete a business combination and very soon thereafter be subject to delisting proceedings, and during such time its securities may continue to trade with a number of holders that is substantially less than the required minimum raising concerns about the maintenance of fair and orderly markets and investor protection.

While Nasdaq has amended its proposal to require certain public disclosure, the Commission does not believe the disclosure required by the proposed rule adequately addresses the potential risks associated with trading during a time period in which the minimum number of round lot shareholders may not be present, nor has Nasdaq explained why subjecting shareholders to this potential risk is consistent with the protection of investors and the public interest, and the other requirements of Section 6(b)(5) of the Exchange Act.³⁷

As stated above, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder...is on the self-regulatory organization ['SRO'] that proposed the rule change."³⁸ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.³⁹ For the reasons discussed above, the Commission concludes

³⁷ The Commission notes that the commenter continued to oppose the proposal after Nasdaq amended it to require this public disclosure. See CII Letter II, supra note 24.

³⁸ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁹ See id.

that, because Nasdaq has not demonstrated that its proposal is designed to prevent fraudulent and manipulative acts and practices or to protect investors and the public interest, Nasdaq has not met its burden to demonstrate that its proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular Section 6(b)(5) of the Exchange Act.⁴⁰ For this reason, the Commission must disapprove the proposal.

IV. CONCLUSION

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act,⁴¹ that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.⁴²

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR-Nasdaq-2020-062 is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

J. Matthew DeLesDernier
Assistant Secretary

⁴⁰ In disapproving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴¹ 15 U.S.C. 78s(b)(2).

⁴² 15 U.S.C. 78f(b)(5).

⁴³ 17 CFR 200.30-3(a)(12).