



[Release No. 34-90682; File No. SR-NASDAQ-2020-062]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend Listing Rules Applicable to Special Purpose Acquisition Companies whose Business Plan is to Complete One or More Business Combinations

December 16, 2020.

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 (“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 the proposed rule change to December 21, 2020.⁵ The Commission has received no comment letters on the proposed rule change. The Commission is instituting

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.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 90340, 85 FR 71704 (November 10, 2020).

proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

A SPAC is a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time.⁷ 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,⁸ 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.⁹ Following each business combination, the combined company must meet the requirements for initial listing on Nasdaq.¹⁰ If the combined company does not meet the initial listing requirements following a business combination, Nasdaq staff will issue a Staff Delisting Determination under Nasdaq Rule 5810.¹¹

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 asserts, however, that the rule does not provide a timetable for the company to demonstrate that it satisfies those requirements. Accordingly, Nasdaq proposes to

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (adopting the predecessor to IM-5101-2).

⁸ See Nasdaq IM-5101-2(a).

⁹ See Nasdaq IM-5101-2(b).

¹⁰ 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).

¹¹ See Nasdaq IM-5101-2(d).

modify the rule to specify if the SPAC demonstrates that it will satisfy all requirements except the applicable round lot shareholder requirement, then the SPAC will receive 15 calendar days following the closing to demonstrate that it satisfied the applicable round lot shareholder requirement immediately following the transaction's closing.¹²

Nasdaq states that it ordinarily determines compliance with the round lot 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.¹³ According to Nasdaq, if it cannot determine compliance using public information, it will typically request the company to provide 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 asserts 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 notes 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

¹² 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).

¹³ 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.

business combination.¹⁴ 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.

Accordingly, for a SPAC that has demonstrated that it will satisfy all of the initial listing requirements except for the round lot shareholder requirement before consummating the business combination, Nasdaq proposes to allow the SPAC 15 calendar days after the closing of the business combination, if necessary, to demonstrate that it also complied with the round lot requirement at the time of the business combination. Nasdaq stresses that 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 did. 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.”¹⁵ Nasdaq notes that if the company does not evidence compliance within the proposed time period, Nasdaq staff would issue a delisting determination, which the company could then appeal to an independent hearings panel.¹⁶

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2020-062 and Grounds for Disapproval Under Consideration

¹⁴ 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.

¹⁵ The Exchange also takes the position 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.

¹⁶ The Exchange has also proposed to eliminate a duplicative paragraph and add a new subsection enumeration to its existing rule.

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, 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, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”¹⁹

The Commission has consistently recognized the importance of the minimum number of holders and other similar requirements in exchange listing standards. Among other things, 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.²⁰

¹⁷ 15 U.S.C. 78s(b)(2)(B).

¹⁸ Id.

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ See, e.g., Securities Exchange Act Release Nos. 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 the [SPAC’s] securities have sufficient public float, investor base, and liquidity to promote fair and orderly markets”); 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (SR-Nasdaq-2008-013) (approving a proposal to adopt listing standards for SPACs); and 86117 (June 14, 2018), 84 FR 28879 (June 20, 2018) (SR-NYSE-2018-46) (disapproving a proposal

As discussed above, the Exchange is proposing to provide a SPAC 15 calendar days following the closing of a business combination to demonstrate that it satisfied the applicable round lot holder requirement immediately following the closing. The Exchange asserts that it can be difficult for a SPAC to obtain evidence demonstrating the number of holders it will have following the business combination because SPAC shareholders have the right to redeem or tender their shares until just before the time of such business combination. The Exchange, however, has provided no data or other evidence to support its position that SPACs have particular difficulties demonstrating compliance with the minimum number of holders requirements. For example, the Exchange has not provided any data showing the extent to which SPACs have been unable to meet the applicable minimum number of holders requirement immediately following the business combination, or the extent to which this was due to last minute redemptions by SPAC shareholders. The Exchange also has provided no data or other evidence showing how long it has taken SPACs that have been unable to meet the applicable minimum number of holders requirement, whether or not due to last minute shareholder redemptions, to come into compliance with such requirements.

Further, the Exchange has not explained how providing a SPAC an additional 15 days following the closing of the business combination simply to demonstrate that it complied with the applicable minimum number of holders requirement immediately following the closing, would address the substantive compliance concerns associated with last minute shareholder redemptions by SPACs that are close to the minimum requirement. The Exchange also has not addressed the risk that, by waiting for SPACs to demonstrate compliance with the minimum number of holders requirements 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

to reduce the minimum number of public holders continued listing requirement applicable to SPACs from 300 to 100).

completed. As a result, a SPAC could complete a business combination and very soon thereafter be subject to delisting proceedings, and during such time its securities may trade with a number of holders that is substantially less than the required minimum. The Exchange has not addressed the impact this could have on SPAC shareholders and other market participants, or explained why subjecting them to these risks is consistent with the protection of investors and the public interest, and the other requirements of Section 6(b)(5) of the Act.

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.”²¹ 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.²²

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not

²¹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

²² See id.

appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²³

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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. Please include File Number SR-NASDAQ-2020-062 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-2020-062. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies

²³ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2020-062 and should be submitted by **[INSERT DATE 21 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier,

Assistant Secretary.

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²⁴ 17 CFR 200.30-3(a)(57).