Council of Institutional Investors®
The voice of corporate governance

Via Email

February 25, 2021

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

Re: File Number SR–NYSE–2020–90[1]

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $35 trillion in assets under management.[2]

The purpose of this letter is to commend the staff of the Securities and Exchange Commission (SEC or Commission) for its thorough review of New York Stock Exchange LLC's (NYSE or Exchange) proposed rule change "to amend its listing requirements applicable to special purpose acquisition companies ('SPACs' or 'Acquisition Companies') upon consummation of a business combination by allowing such companies 15 calendar days following the closing of a business combination to demonstrate compliance with the Exchange's round lot shareholder requirement" (Proposed Rule).[3]

We believe the following issues the Commission staff raises in its review of the Proposed Rule should lead to additional information that would be helpful to CII and the staff in making a

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[1] Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Requirement Applicable to Special Purpose Acquisition Companies Upon Consummation of a Business Combination Concerning Compliance With the Round Lot Shareholder Requirement, Exchange Act Release No. 91,120, 86 Fed. Reg. 10,379 (Feb. 12, 2021), https://www.federalregister.gov/documents/2021/02/19/2021-03337/self-regulatory-organizations-new-york-stock-exchange-llc-order-instituting-proceedings-to-determine.
[2] For more information about the Council of Institutional Investors (CII), including its board and members, please visit CII's website at http://www.cii.org.
[3] 86 Fed. Reg. at 10,379.

determination of whether the Proposed Rule is consistent with the protection of investors and the public interest:[4]

- "The Exchange . . . 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";[5]
- "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";[6]
- "[T]he 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 that are close to the minimum requirement";[7] and
- "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, noncompliant companies could be listed on the Exchange despite not meeting initial listing standards or those relating to a 'back door listing,' and have their securities continue to trade until the delisting process has been completed [and] . . . 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)(3) of the [Securities Exchange Act of 1934(Act)]."[8]

In addition, we believe the Commission staff should consider why the proposed grace period for demonstrating compliance with the Exchange's round lot shareholder requirement is necessary and appropriate for a SPAC when a grace period for direct listings was proposed by the NYSE and apparently rejected by the SEC.[9] It is unclear to us why the SEC would want to advantage

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[4] *See* National Securities Exchanges, 15 U.S.C. § 78f(b)(5) (2010), *available at* https://www.law.cornell.edu/uscode/text/15/78f ("The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices . . . and, in general, to protect investors and the public interest . . . .").
[5] 86 Fed. Reg. at 10,380.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 10,380-81.
[9] *See*, *e.g.*, Gibson Dunn, A Current Guide to Direct Listings (Jan. 8, 2021), https://www.gibsondunn.com/a-current-guide-to-direct-listings/ (The NYSE previously proposed a 'Distribution Standard Compliance Period' whereby, in a Primary Direct Floor Listing, the requirements to have 400 round lot shareholders and 1.1 million publicly held shares would be operative after a 90-day grace period [and] [u]nder the proposal approved by the SEC, companies conducting a Primary Direct Floor Listing must meet these and all other initial listing requirements at the time of initial listing.").

SPACs relative to direct listings, particularly when SPACs generally impose higher costs to investors.[10]

More broadly, we are concerned that the Proposed Rule is part of a long-running competition by the NYSE and The Nasdaq Stock Market LLC to "lower the bar for what goes in the world of SPACs."[11] And we question whether a loosening of SPAC listing standards in the current environment is consistent with the protection of investors and the public interest.

We note the recent comments of market experts that SPACs and their targets may be providing unrealistic financial forecasts presumably in order to lure investors into declining to redeem their shares prior to merger.[12] For example, veteran venture capitalist Steve Jurvetson recently commented:

> "I don't get it," . . . Don't get me wrong; they [SPACs] aren't all fraudulent." But many are "early-stage venture companies," . . . "and they don't need to meet the forecasting requirements that the SEC normally requires of an IPO, *so [SPAC sponsors are] specifically looking for companies that don't have any operating numbers to show [because they] can make any forecasts they want . . .That's the whole racket."*[13]

In addition to the more lenient regulatory treatment of Acquisition Companies with respect to SEC forecasting requirements,[14] SPACs have relatively greater insulation from liability to

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[10] *See* Michael Klausner et al., A Sober Look at SPACs 52 (Oct. 2020) (L. & Econ. Research Paper Services, Working Paper No. 20-48), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720919 ("[A] direct listing could thus provide the same transactional benefits as a SPAC, but at much lower cost.").

[11] Stephen Gander, Why Is This Oil and Gas Company Playing Poker?, Bloomberg Op. (Jan. 11, 2019) (on file with CII); *see generally* Office of the Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2020 at 10 (Dec. 29, 2020), https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf ("Our Office has long been concerned about an apparent race-to-the-bottom in this area—with the primary listing exchanges proposing to voluntarily lower their . . . standards in an effort to attract issuers, but at the expense of the protections the original standards provided investors.").

[12] *See* Michael Klausner et al., A Sober Look at SPACs at 55 ("There is no way to know whether SPAC investors are lured into declining to redeem their shares prior to a merger because of the freedom SPACs and their targets enjoy to provide projections and other forward-looking statements to potential investors.").

[13] Connie Loizos, As the SPAC Frenzy Continues, Questions Arise About How Much the Market Can Absorb, TC (Feb. 20, 2021), https://techcrunch.com/2021/02/20/as-the-spac-frenzy-continues-questions-surface-about-how-much-the-market-can-absorb/ (emphasis added); *see also* Adam Shapiro, Why Some SPAC Investors May Get Burned, Yahoo Fin. (Feb. 18, 2021), https://finance.yahoo.com/news/why-some-spac-investors-may-get-burned-192802863.html ("And after a SPAC acquires a company, . . . [Jared Woodard, investment & ETF strategist at Bank of America Securities] warns 'lenient rules' can impose heavy costs on individual investors."); Kevin Stankiewicz, Sam Zell Calls SPAC Craze Largely 'Rampant Speculation' reminiscent of 1990s Dot-com Bubble, CNBC (Feb. 9, 2021), https://www.cnbc.com/2021/02/09/sam-zell-calls-spac-craze-largely-rampant-speculation-reminiscent-of-1990s-dot-com-bubble.html (quoting Sam Zell: "This is rampant speculation again, very much like the dot-com boom.").

[14] *See* Michael Klausner et al., A Sober Look at SPACs at 42-43 (explaining the "loophole for SPACs" regarding financial projections for merger targets).

investors as compared to traditional initial public offerings (IPOs).[15] As explained in a recent research paper entitled "A Sober Look at SPACs":

> When a SPAC goes public, it has little to disclose and therefore little to misstate or omit. It is simply collecting cash that will be put in trust until it either finds a merger target or liquidates. Furthermore, since SPAC shares are redeemable and their shares trade at their redemption price, even if there were a misstatement, shareholders would bear no loss and therefore could collect no damages under Section 11[[16]]except perhaps after a merger. Not surprisingly, there have been no Section 11 suits against SPACs based on their IPOs, going back at least ten years.
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> When a SPAC merges, it registers shares that it issues to the target's shareholders and to private placement investors. This potentially exposes the SPAC and its officers and directors to Section 11 liability. *But because these issuances are not underwritten, no underwriter liability is involved. Furthermore, even the issuer, its officers and directors—and a bank that may serve as a financial advisor—face little liability risk.* This is true for two reasons. First, to the extent target shareholders are aware of a misstatement or omission, they have no standing to sue. This, in all likelihood, will preclude target management and major target shareholders from bringing a suit. *Second, after the shareholders of the target company sell their shares, the requirement that plaintiffs' shares be traced to a particular public offering creates a substantial hurdle for a plaintiffs' lawyer. Once the SPAC's newly issued shares mix in the market with the SPAC's IPO shares, they typically cannot be traced to the registration statement filed in connection with the merger.*
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> . . . *[P]rotection from Section 11 liability could lead to less due diligence and sloppier disclosure. The insulation of the underwriter in particular could reduce the discipline on the SPAC and its target to take care in its disclosures related to their merger. If Section 11 is viewed as important in the IPO context, it is difficult to see why it should not be applied in the context of a SPAC merger*.[17]

For similar reasons—the loss of an underwriter and corresponding due diligence and a diminished ability for shareholders to recover damages—now Acting SEC Chair Allison Herren Lee and Commissioner Caroline A. Crenshaw concluded that the NYSE had failed to meet its

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[15] *Id.* at 43-45.
[16] *See* Civil Liabilities on Account of False Registration Statement, 15 U.S C. § 77K (1933), available at https://www.law.cornell.edu/uscode/text/15/77k ("In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue . . . .").
[17] Michael Klausner et al., A Sober Look at SPACs at 44-45 (emphasis added and footnotes omitted).

burden that a proposed rule change to permit primary direct listings was "consistent with the Exchange Act."[18] And for all of the above reasons, we respectfully request that the SEC staff reach the same conclusion with respect to the Proposed Rule.

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Thank you for the opportunity to comment on the Proposed Rule. Please contact me with any questions.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel

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[18] Commissioner Allison Herren Lee & Commissioner Caroline A. Crenshaw, Public Statement, Statement on Primary Direct Listings (Dec. 23, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23.