

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63239; File No. SR-NASDAQ-2010-137)

November 3, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend IM-5101-2 to Provide Acquisition Companies the Option to hold a Tender Offer in Lieu of a Shareholder Vote on a Proposed Acquisition

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 22, 2010, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to provide acquisition companies an option to hold a tender offer in lieu of a shareholder vote on a proposed acquisition. Proposed new language is in *italics*; proposed deletions are in brackets.³

IM-5101-2. Listing of Companies Whose Business Plan is to Complete One or More Acquisitions

Generally, Nasdaq will not permit the initial or continued listing of a Company that has no specific business plan or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

However, in the case of 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, Nasdaq will permit the listing if the Company meets all applicable initial listing requirements, as well as the conditions described below.

(a) – (c) No change.

(d) Until the Company has satisfied the condition in paragraph (b) above, if the Company holds a shareholder vote on a business combination for which the Company must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act in advance of the shareholder meeting, the[each] business combination must be approved by a majority of the shares of common stock voting at the meeting at which the combination is being considered. If a shareholder vote on the business combination is held,

[(e) Until the Company has satisfied the condition in paragraph (b) above,] 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 deposit account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated. A Company may establish a limit (set 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 of such Shareholder or any person with whom such shareholder is acting as a “group” (as such term is used in Sections 13(d) and 14(d) of the Act), may exercise such conversion rights. For purposes of this paragraph [(e)] (d), public Shareholder excludes officers and directors of the Company, the Company’s sponsor, the founding

Shareholders of the Company, and any Family Member or affiliate of any of the foregoing persons, or the beneficial holder of more than 10% of the total shares outstanding.

Until the Company completes a business combination where all conditions in paragraph (b) above are met, the Company must notify Nasdaq on the appropriate form about each proposed business combination. Following each business combination, the combined Company must meet the requirements for initial listing. If the Company does not meet the requirements for initial listing following a business combination or does not comply with one of the requirements set forth above, Nasdaq will issue a Staff Delisting Determination under Rule 5810 to delist the Company's securities.

(e) Until the Company has satisfied the condition in paragraph (b) above, if a shareholder vote on the business combination is not held for which the Company must file and furnish a proxy or information statement subject to Regulation 14A or 14C under the Act, the Company 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 (net of taxes payable and amounts distributed to management for working capital purposes), pursuant to Rule 13e-4 and Regulation 14E under the Act, which regulate issuer tender offers. The Company must file tender offer documents with the Commission containing substantially the same financial and other information about the business combination and the redemption rights as would be required under Regulation 14A of the Act, which regulates the solicitation of proxies.

Until the Company completes a business combination where all conditions in paragraph (b) above are met, the Company must notify Nasdaq on the appropriate form about each proposed business combination. Following each business combination, the combined Company must meet the requirements for initial listing. If the Company does not meet the requirements for initial

listing following a business combination or does not comply with one of the requirements set forth above, Nasdaq will issue a Staff Delisting Determination under Rule 5810 to delist the Company's securities.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In March 2009, Nasdaq adopted rules to permit the listing of companies whose business plan was 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 ("Acquisition Companies" or "SPACs").⁴ These listing requirements included additional protections designed to protect investors from certain risks unique to this type of company, including that the Acquisition Company obtain a vote of shareholders prior to consummating any acquisition and offer shareholders voting against the acquisition the ability to redeem their shares in exchange for a

⁴ IM-5101-2.

pro rata share of the cash held by the Acquisition Company.⁵ Similar protections have been voluntarily adopted by other Acquisition Companies that have not listed on Nasdaq.

As a result of the required vote, in a number of cases, hedge funds and other activist investors acquired an interest in an Acquisition Company and used their ability to vote against a proposed acquisition as leverage to obtain additional consideration not available to other shareholders. For example, they may negotiate the sale of their stake to an affiliate of the Acquisition Company's management for a price higher than their pro rata share of the deposit account. In other cases, the withheld votes caused the proposed acquisition to fail altogether. In order to prevent this type of "greenmail," recent Acquisition Companies, which went public and did not list on an exchange, adopted a modified structure under which they would not seek a vote on the acquisition, unless otherwise required by law. Instead, these Acquisition Companies would conduct a redemption offer pursuant to Rule 13e-4 and Regulation 14E under the Act after the public announcement and prior to the completion of the business combination, enabling shareholders who are opposed to the transaction to tender their shares in exchange for a pro rata share of the cash held by the Acquisition Company. This is the same outcome available to public Shareholders who vote against the acquisition pursuant to Nasdaq's existing rule.

Under this new alternative, shareholders would still maintain the ability to "vote with their feet" if they oppose a proposed transaction and would, as just noted, also obtain their pro rata share of the Acquisition Company's cash through the tender offer pursuant to Rule 13e-4

⁵ The Listing Rules also require that at least 90% of the gross proceeds from the SPAC's initial public offering and any concurrent sale of equity securities must be deposited in a trust account; that within 36 months of the effectiveness of the SPAC's IPO registration statement, the SPAC must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account; and, that each business combination must be approved by a majority of the SPAC's independent directors.

and Regulation 14E under the Act. As such, Nasdaq believes that the protections provided by the existing rule would continue to be available. Further, this tender offer alternative would help prevent shareholders who support the acquisition and elect to retain their shares from being denied the benefits of the transaction by the actions of the activist investors. Accordingly, Nasdaq proposes to modify IM-5201-2 to allow an Acquisition Company to conduct a tender offer for all shares of all Shareholders⁶ in exchange for a pro rata share of the cash held in trust by the Acquisition Company in compliance with Rule 13e-4 and Regulation 14E under the Act instead of soliciting a shareholder vote.

In addition, the proposed rule change would require an Acquisition Company that is not subject to the Commission's proxy rules to conduct a tender offer for shares in exchange for a pro rata share of the cash held in trust by the Acquisition Company in compliance with Rule 13e-4 and Regulation 14E under the Act and provide information similar to that required by the Commission's proxy rules, even if the Acquisition Company seeks a shareholder vote. This change will assure that investors, in all cases, get comparable information about the proposed transaction.

Last, Nasdaq is amending paragraph (d) of IM-5101-2 to include within the definition of "public Shareholder," for purposes of the paragraph, the beneficial holder of more than 10% of the total shares outstanding. The term "public Shareholder" was meant to closely mirror the defined term "Public Holders," but to also include Acquisition Company-specific classifications as well. Public Holders is defined by the Listing Rules as holders of a security that includes both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an Executive Officer, director, or the beneficial holder of more than 10% of the

⁶ The term "Shareholder" is defined broadly by Rule 5005(a)(37) as "a record or beneficial owner of a security listed or applying to list."

total shares outstanding.⁷ Accordingly, Nasdaq is making the rule clear by adding language consistent with the definition of Public Holders.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁸ in general and with Section 6(b)(5) of the Act,⁹ in particular in that it is 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. The proposed rule change is consistent with these requirements in that it provides an alternative mechanism for an acquisition vehicle to complete a transaction in a manner that minimizes the disruptive effect of certain shareholders, while maintaining protections which are designed to protect investors and the public interest and prevent fraudulent and manipulative acts and practices.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

⁷ Rule 5005(a)(34).

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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. Please include File Number SR-NASDAQ-2010-137 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2010-137. 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

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 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-2010-137 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).