SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving a Proposed Rule Change To Modify Nasdaq IM–5101–2 To Permit an Acquisition Company To Contribute a Portion of Its Deposit Account to Another Entity in a Spin-Off or Similar Corporate Transaction

March 9, 2022.

I. Introduction

On June 24, 2021, 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”) and Rule 19b–4 thereunder, a proposed rule change to modify Nasdaq IM–5101–2 to permit an acquisition company to contribute a portion of the amount held in its deposit account to a deposit account of a new acquisition company in a spin-off or similar corporate transaction. The proposed rule change was published for comment in the Federal Register on July 13, 2021. On August 25, 2021, pursuant to Section 19(b)(2) of the Act, 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. On September 30, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change. On January 3, 2022, the Commission extended the period for consideration of the proposed rule change to March 10, 2022.

II. Discussion

On January 14, 2022, New York Stock Exchange LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) and Rule 19b–4 thereunder, a proposed rule change to permit the listing and trading of certain exchange traded products that include in their portfolios a NMS Stock listed on the Exchange, or that are based on or represent an interest in an underlying index or reference asset that includes a NMS Stock listed on the Exchange. The proposed rule change was published for comment in the Federal Register on January 31, 2022. Section 19(b)(2) of the Act provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is March 17, 2022.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, pursuant to Section 19(b)(2) of the Act, the Commission designates May 1, 2022 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSE–2022–04).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.13

J. Matthew DeLesDernier,
Assistant Secretary.
This order disapproves the proposed rule change because, as discussed below, the Exchange has not met its burden under the Act and the Commission’s Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirements 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, and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.9

II. Description of the Proposed Rule Change

Generally, the Exchange 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.10 However, the Exchange currently will permit the listing of a company whose business plan is to complete an initial public offering (“IPO”) and engage in a merger or acquisition with one or more unidentified companies within a specific period of time (“Acquisition Company” or “SPAC”), if the company meets all applicable initial listing requirements, as well as certain conditions described in Nasdaq IM–5101–2.11 Among other things, Nasdaq IM–5101–2 requires that at least 90% of the gross proceeds from the IPO and any concurrent sale by the Exchange (or “deposit account”) at the time of the IPO are payable on the income earned on the deposit account (net of taxes payable and amounts distributed to management for working capital purposes) if the deposit account is approved and consummated.12 If a shareholder votes against the business combination, the Acquisition Company must provide all shareholders with the opportunity to redeem all or a portion of their shares for cash equal to their pro rata share of the aggregate amount 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.13 The Exchange now proposes to modify Nasdaq IM–5101–2 to allow a SPAC listed under that rule to contribute a portion of its deposit account to a deposit account of a new entity in a spin-off or similar corporate transaction (“SpinCo SPAC”).

According to the Exchange, when a SPAC conducts its IPO, it raises the amount of capital that it estimates will be necessary to finance a subsequent business combination with its ultimate target; however, the Exchange believes that because a SPAC cannot identify or select a specific target at the time of its IPO, often the amount raised is not optimal for the needs of a specific target.14 The Exchange states that it is proposing to modify Nasdaq IM–5101–2 to permit what it believes is a more efficient structure whereby a SPAC can raise in its IPO the maximum amount of capital it anticipates it may need for a business combination transaction and then “rightsize” itself by contributing any amounts not needed to a SpinCo SPAC, which would be subject to the provisions of Nasdaq IM–5101–2, in the same manner as the original SPAC, and spun off to the original SPAC’s shareholders.15

Specifically, proposed Nasdaq IM–5101–2(f) would provide that a SPAC will be permitted to contribute a portion of the amount held in the deposit account to a deposit account of another entity (the “Contribution”) in a spin-off or similar corporate transaction, subject to the following conditions:

(i) The requirements set forth in Nasdaq IM–5101–2(d) and (e) that shareholders of a SPAC must have the right to convert or redeem their shares of common stock into a pro rata share of the aggregate amount in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes) at the times specified in such paragraphs may be based on the amounts in the deposit account of the SPAC at such times after having been reduced by the Contribution provided that, in connection with the Contribution, the SPAC’s public shareholders shall have had the right, through one or more corporate transactions, to redeem a portion of their shares of common stock (or, if units were sold in the SPAC’s IPO, units) for their pro rata portion of the amount of the Contribution in lieu of being entitled to receive shares or units in the SpinCo SPAC;

(ii) the public shareholders of the SPAC receive shares or units of the SpinCo SPAC on a pro rata basis, equal to the extent they have elected to redeem a portion of their shares of the SPAC in lieu of being entitled to receive shares or units in the SpinCo SPAC;

(iii) the amount distributed to the SpinCo SPAC will remain in a deposit account for the benefit of the shareholders of the SpinCo SPAC in the same manner as described in Nasdaq IM–5101–2(a);

(iv) the SpinCo SPAC meets all applicable initial listing requirements, as well as the conditions described in Nasdaq IM–5101–2(a) through (e); it being understood that, following such spin-off or similar corporate transaction: (A) For purposes of Nasdaq IM–5101–2(b) the 80% described therein shall,16 in the case of the SPAC, be calculated based on the aggregate amount remaining in the deposit account of the SPAC at the time of the agreement to enter into the initial combination after the Contribution to the SpinCo SPAC, and, in the case of the SpinCo SPAC, be calculated based on the aggregate amount in its deposit account at the time of its agreement to enter into its initial combination, and (B) for purposes of

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9 See Nasdaq IM–5101–2(b).
10 See Nasdaq IM–5101–2(c).
11 See Nasdaq IM–5101–2(d).
12 See Nasdaq IM–5101–2(e).
13 See Notice, supra note 3, at 36841. The Exchange further states that “[i]t has resulted in the inefficient, current practice of SPAC sponsors creating multiple SPACs of different sizes at the same time, with the intention to use the SPAC that is closest in size to the amount a particular target needs.” Id.
14 See id. The 36-month period to complete a business combination under Nasdaq IM–5101–2 would, however, be calculated for each SpinCo SPAC based on the date of the original SPAC’s effective registration statement.
15 See supra note 13 and accompanying text, for a description of the requirements of Nasdaq IM–5101–2(b).
16 As the Exchange states, this amount would be calculated after giving effect to the SpinCo SPAC’s contribution to a subsequent SpinCo SPAC, if any. See Notice, supra note 3, at 36842.
Nasdaq IM–5101–2(d) and (e), the right to convert and opportunity to redeem shares of common stock on a pro rata basis, respectively, shall, in the case of the SPAC, be deemed to apply to the aggregate amount remaining in the deposit account of the SPAC after the contribution to the SpinCo SPAC, and, in the case of the SpinCo SPAC, be deemed to apply to the aggregate amount in its deposit account; (v) in the case of the SpinCo SPAC, and any additional entities spun off from the SpinCo SPAC, each of which will also be considered a SpinCo SPAC, the 36-month period described in Nasdaq IM–5101–2(b)(i) or such shorter period that the original SPAC specifies in its registration statement) will be calculated based on the date of effectiveness of the SPAC’s IPO registration statement; and (vi) in the aggregate, through one or more opportunities by the SPAC and one or more SpinCo SPACs, public shareholders will have the ability to convert or redeem shares, or receive cash in liquidation, for the full amount of the deposit account established by the SPAC as described in Nasdaq IM–5101–2(a)(ii) (excluding any deferred underwriters fees and taxes payable on the income earned on the deposit account).22

The Exchange states that, under the proposal, it expects that the new structure will be implemented in the following manner. If a listed SPAC (the “Original SPAC”) determines that it will not need all the cash in its deposit account for its initial business combination, the Original SPAC will designate the excess cash for a new deposit account of a SpinCo SPAC (the “SpinCo Deposit Account,” and the amount retained in the deposit account of the Original SPAC, the “Retained SPAC Deposit Account”).23 The Exchange states that the amount designated for the SpinCo Deposit Account must continue to be held for the benefit of the shareholders of the Original SPAC until the completion of the spin-off transaction and, following the spin-off of the SpinCo SPAC to the Original SPAC’s shareholders, the SpinCo Deposit Account would be subject to the same requirements as the deposit account of the Original SPAC.24

According to the Exchange, the SpinCo SPAC would file a registration statement under the Securities Act of 1933 for purposes of effecting the spin-off of the SpinCo SPAC, and, prior to the effectiveness of the registration statement, the Original SPAC would provide its public shareholders through one or more corporate transactions with

the opportunity to redeem a pro rata amount of their holdings equal to the amount of the SpinCo Deposit Account divided by the per share amount in the Original SPAC’s deposit account (the “redemption price”). The Exchange further states that, after completing the tender offer for the redemption and the effectiveness of the SpinCo SPAC’s registration statement, the Original SPAC would contribute the SpinCo Deposit Account to a deposit account held by the SpinCo SPAC in exchange for shares or units of the SpinCo SPAC, which the Original SPAC would then distribute to its public shareholders on a pro rata basis through one or more corporate transactions pursuant to the SpinCo SPAC’s effective registration statement.26

According to the Exchange, the Original SPAC would then continue to operate as a SPAC until it completes its business combination and would offer redemption rights to its public shareholders in connection with that business combination in the same manner as a traditional SPAC, while the SpinCo SPAC would operate in the same manner as a traditional SPAC, except that it could effect a subsequent spin-off prior to its business combination like the Original SPAC.27

The Exchange states that if SpinCo SPAC does not elect to effect a spin-off, it would proceed to complete an initial business combination and offer redemption rights in connection therewith like a traditional SPAC.28

The Commission received comments broadly supporting the proposed rule change. Specifically, one commenter stated that the proposed rule change would introduce a “more efficient, cost-effective[,] and flexible” structure than the current one.29

The Commission must consider whether the Exchange’s proposal is consistent with the Act, including Section 6(b)(5), 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 protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.31

According to the Exchange, the redemption could occur, for example, through a partial cash tender offer for shares of the Original SPAC pursuant to Rule 13e–4 and Regulation 14E of the Act, and the redemption may be a separate class of shares distributed to unitholders of the Original SPAC for the purpose of facilitating the redemption. See id. at 36842 n.4.

According to the Exchange, theSpinCo SPAC would file a registration statement under the Securities Act of 1933 for purposes of effecting the spin-off of the SpinCo SPAC, and, prior to the effectiveness of the registration statement, the Original SPAC would provide its public shareholders through one or more corporate transactions with
change is consistent with the Act and the applicable rules and regulations. Moreover, “unquestioning reliance” on a self-regulatory organization’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.\(^{36}\)

The Commission has consistently recognized the importance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. With respect to SPACs, Nasdaq’s current listing standards provide important investor protections,\(^{38}\) including that at least 90% of the SPAC’s IPO proceeds be held in a deposit account;\(^{39}\) that within 36 months of the effectiveness of its IPO registration statement (or such shorter time period specified in the registration statement) the SPAC complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account;\(^{40}\) and that public shareholders have a right to redeem their pro rata share of the full amount of the deposit account prior to any proposed business combination.\(^{41}\)

As discussed above, Nasdaq now proposes to amend its listing standards to allow the SPAC to contribute a portion of the funds held in its deposit account to the deposit account of a new SpinCo SPAC, rather than use those funds for a business combination with the Original SPAC. While Nasdaq would provide shareholders in the original SPAC redemption rights with respect to the funds contributed to the SpinCo SPAC, such rights would not extend to the funds retained by the Original SPAC. Instead, shareholders would be required to make a separate, later redemption decision with respect to the remaining funds in the Original SPAC’s deposit account in connection with its business combination once one is identified. Because Nasdaq proposes to permit successive SpinCo SPACs, shareholders could be required to evaluate multiple potential spin-offs and business combinations, and engage in multiple redemption processes if they desire to redeem their pro rata share of the full amount originally deposited in the SPAC’s deposit account.

In support of its proposal, Nasdaq acknowledges this difference, but states its belief that it “does not adversely affect shareholder protections. The shareholders will still have the opportunity to redeem for the entire pro rata share of the trust account prior to completion of the business combination,” although “the redemption right may be effected through two decisions.”\(^{42}\)

Current SPAC listing standards provide important protections for investors in SPACs, where the business plan is to engage in mergers or acquisitions with unidentified companies. As discussed above, Nasdaq’s current SPAC listing standards require that SPAC IPO proceeds be held in a deposit account to be used for business combination purposes, and provide shareholders an efficient mechanism to redeem their entire pro rata share of those proceeds in a single transaction. This permits investors who do not support a business combination or otherwise lose faith in the abilities of the SPAC sponsors to fully redeem their pro rata share of the proceeds when a business combination is first presented to them. Under the Exchange’s proposal, shareholders would lose this ability, and instead would have to wait until business combinations are presented by all successive SpinCo SPACs to fully redeem their pro rata share of the proceeds. By proposing to permit funds in the deposit account to be used to create new SPACs and to require shareholders to engage in a series of redemption processes in order to fully redeem their pro rata share of the funds originally deposited in the trust account, the efficiency of shareholder redemption rights and the effectiveness of the investor protections they were designed to provide could be undermined.

Further, by proposing to permit successive SpinCo SPACs, shareholders could be required to make assessments of a series of proposed business combinations of varying sizes as a result of their investment in the Original SPAC, rather than doing so once. As discussed above, SPACs are subject to heightened listing standards because of the special risks presented by an investment in a company where the business plan is to engage in a merger or acquisition of an unidentified company, and to ensure that appropriate investor protections are in place.\(^{44}\)
increasing the number of decisions with respect to unidentified companies that SPAC investors would be required to make, and determine whether or not to exercise redemption rights, the Exchange’s proposal could add considerable complexity to the structure and business combination strategies of SPACs, and exacerbate the investor protection concerns presented by companies where the business plan is to combine with another company that is unidentified at the time of investment.44 Nasdaq has not addressed these risks or how its proposal is consistent with Section 6(b)(5) of the Exchange Act in light of them, other than to state that shareholders will not be adversely affected because they still have the right to redeem their full pro rata share of the deposit account through more than one transaction.45 Based on the above, the Commission cannot find that the proposal is consistent with the requirement under Section 6(b)(5) of the Act that the proposal be designed, among other things, to protect investors and the public interest. 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 thereunder applicable to a national securities exchange, and in particular, Section 6(b)(5) of the Exchange Act. It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR–NASDAQ–2021–054) be, and hereby is, disapproved. For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.50
J. Matthew DeLaSDernier, Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Further Extend the Regulatory Relief and Permit Dealers To Conduct Office Inspections Remotely Until December 31, 2022 Pursuant to MSRB Rule G–27, on Supervision

March 9, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)
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and Rule 19b–4 thereunder,5 notice is hereby given that on March 1, 2022, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which items have been prepared by the MSRB. 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 Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to amend Supplementary Material .01, Temporary Relief for Completing Office Inspections, of MSRB Rule G–27, on supervision, to further extend the regulatory relief and permit brokers, dealers and municipal securities dealers (collectively, “dealers”) to conduct office inspections, due to be completed during calendar year 2022, remotely until December 31, 2022 (the “proposed rule change”).

The MSRB has designated the proposed rule change as constituting a “noncontroversial” rule change under Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder, which renders the proposal effective upon receipt of this filing by the Commission. The MSRB proposes an operative date of May 2, 2022.

The text of the proposed rule change is available on the MSRB’s website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2022-Filings.aspx, at the MSRB’s principal office, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the MSRB 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. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

44 See supra note 43 (describing how Nasdaq’s listing standards for SPACs were designed to address additional investor protection concerns presented by SPAC issuers given their unique structure). See also Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 25977, 25979 (May 13, 2008) (SR–NYSE–2008–17) (approving listing standards for SPACs on NYSE and stating that SPACs are “essentially shell companies” and that the additional investor protection concerns on NYSE, which are comparable to those in IM–5101–2, “should further the ability of investors to protect and monitor their investment pending a [business combination]”).
45 See Notice, supra note 3, at 38433; proposed IM–5101–2(b)(i)(ii).
46 17 CFR 201.700(b)(3).
47 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). As described above, two commenters expressed their belief that the proposal would result in a more efficient SPAC structure and use of capital. See supra notes 29–31 and accompanying text. For the reasons discussed throughout, however, the Commission is disapproving the proposed rule change because it does not find that the proposed rule change is consistent with the Exchange Act.