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Brian L Schorr, Chair
Colleen Honigsberg, Secretary
Investor Advisory Committee
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Chair Schorr and Secretary Honigsberg:

I write to address questions presented in the wake of the Supreme Court's decision in *Slack Techs., LLC v. Pirani,* 143 S. Ct. 1684 (2023) regarding mechanisms the Commission might adopt to assure Section 11 liability in all public offerings, regardless of the form of the offering by which securities are introduced to the public market.

The Commission can address the challenge presented in *Pirani* either by amending Rule 461, 17 C.F.R. § 230.461 (2024), or by exercising its Section 8(a) authority, 15 U.S.C. § 77h-1 (2024). Either approach is superior to a Rule 144 amendment. 17 C.F.R. § 230.144 (2024). These observations expand on a position expressed in an *amicus* brief I filed jointly with former Securities and Exchange Commission Chairman Jay Clayton. See Brief of *Amici Curiae*, The Honorable Jay Clayton and The Honorable Joseph A. Grundfest, in Support of Petitioners, Slack Techs., LLC v. Pirani, 143 S. Ct. 1684 (2023) (No. 22-200).

Rule 461 defines prerequisites for accelerating effectiveness. As a practical matter, acceleration is a necessary condition for marketing any public offering, whether through traditional underwriting, direct offering, or other channels. Rule 461 can be amended to require that the offering mechanism be structured to ensure that persons liable under Section 11 retain all Section 11 liability at least as to initial purchasers in the public offering. More precisely, these purchasers would be the first purchasers from the underwriters in an underwritten offering, or the first generation of purchasers in a direct offering.

The amended rule can state this general principle, and then provide a list of non-exclusive safe-harbor techniques that satisfy the rule's requirements. The Commission can, as a matter of policy and practice, assure rapid staff response to proposals regarding alternative techniques for preserving Section 11 liability that are not already listed among the expressly recognized safe harbors. Indeed, the Rule can and should be amended over time to reflect additional approaches that allow for innovation in the offering process while not avoiding Section 11 liability in its entirety.

Initial safe harbors could include:

(1) Offerings that apply a time stamp mechanism sufficient to identify and distinguish the initial trade as occurring at a specific time, t, then imposing a trading half of duration ε, with trading resuming at time t+ε. Only shares covered by the registration statement would be available at time t. Unregistered shares would be permitted to enter the market only at or after t+ε. Thus, every stockholder with a transaction time stamped as of t will have Section 11 standing, whereas, under *Pirani*, holders acquiring at t+ε, or thereafter will not have standing; and

(2) Undertakings by issuers, officers, directors, underwriters, auditors, experts, and all other persons with potential Section 11 liability, assuring that they will not assert a Section 11 standing defense at least as against initial purchasers in an offering, or as against any larger group of purchasers as the Commission might consider necessary or appropriate after formal rulemaking. As precedent, Item 512 (h) of Regulation S-K, 17 C.F.R. § 229.512(h) (2024), already contains litigation-related undertakings related to requests for acceleration and can serve as a template for a safe harbor generated by an undertaking. Additional research to assure that the question of Section 11 "standing" is not jurisdictional, and can be waived by an undertaking, would be beneficial.

Alternatively, Section 8(a) of the Securities Act grants to the Commission discretion to condition acceleration on "the facility with which the nature of the securities to be registered" is brought to market and "the public interest and protection of investors." It is easy for the Commission to conclude that Section 11 liability should not be contingent on the mechanics of the initial offering mechanism because Congress never intended that Section 11 liability could be entirely avoided simply by structured a different offering mechanism. The Commission could, therefore, avoid rulemaking and impose conditions substantively identical to those that would be expressed in an amended Rule 461 simply by exercising its Section 8(a) authority.

Public policy considerations, in my view, support the rulemaking approach over the direct exercise of Section 8(a) authority unless the question presents itself prior to the conclusion of the rulemaking process. The public comment process will allow potential Section 11 plaintiffs and defendants alike to express their views regarding the optimal balance of Section 11 liability. Public comment would also allow for a more refined definition of potential safe harbors, the addition of new safe harbors not anticipated by the Commission, and debate over the extent, if any, as to which the safe harbors should allow for Section 11 claims by aftermarket purchasers.

Some commentators have suggested that amendments to Rule 144 can achieve similar objectives. This approach, however, fails to consider the fact that holders can sell into the public aftermarket in reliance on "Section 4 (1 ½)" and need not rely on the Rule 144 safe harbor. Indeed, Rule 144 itself expressly states that "Rule 144 is not an exclusive safe harbor," and that persons who fail to satisfy Rule 144's constraints "still may claim any other available exemption under the act for the sale of the securities." *See,* Preliminary Note to Rule 144. Amending Rule 144 will therefore not solve the problem at the root of the challenge created by *Pirani.*

Sincerely,

Joseph A. Grundfest

Cc: Mark Uyeda, Acting Chairman
Hester Peirce, Commissioner
Caroline Crenshaw, Commissioner