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May 31, 2022

Ms. Vanessa A. Countryman, Secretary
Securities and Exchange Commission,
100 F Street NE
Washington, DC 20549-1090.

Reference: File Number S7-13-22
Title: **Special Purpose Acquisition Companies, Shell Companies, and Projections**

Dear Secretary Countryman,

CFA Institute hereby submits this comment letter to the Securities and Exchange Commission ("SEC" or "Commission") in response to its published notice of proposed rules for SPACs and related matters (the "Proposed Rules" or "Proposing Release.")

CFA Institute[1] is a global, not-for-profit professional association with more than 80,000 U.S.-based members who function as chief investment officers, investment advisers, and portfolio managers on the buy side of the market; as brokers, investment bankers, and financial analysts on the sell side; and as consultants, chief financial officers, regulators, and academics elsewhere in the financial markets. Our membership is bound by a common commitment to the CFA Institute Code of Ethics and Standards of Professional Conduct ("Code and Standards") that requires all members and candidates to "place their clients' interests before their employer's or their own interests."[2] CFA Institute speaks on behalf of its members and advocates for investor protection and market integrity before standard setters, regulatory authorities, and legislative bodies worldwide.

CFA Institute has recently completed a comprehensive report (the "Report") on the SPAC process, markets and stakeholders that contains seven (7) recommendations for regulatory consideration. The Report, The New Age of Special Purpose Acquisition Companies-What Investors Should Know , has been provided to the Commission under separate cover. In addition to offering the Report in response to the Proposing Release, we provide more specific comments on various elements of the Proposed Rules as noted below.

[1] CFA Institute membership includes more than 185,000 investment analysts, advisers, portfolios managers, and other investment professionals in 163 countries, with more than 178,500 holding the Chartered Financial Analyst (CFA®) designation.
[2] CFA Institute Code of Ethics and Standards of Professional Conduct: https://www.cfainstitute.org/-/media/documents/code/code-ethics-standards/code-of-ethics-standards-professional-conduct.pdf

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CFA Institute Report Background.

In its Report, CFA Institute recommends a pragmatic approach that increases disclosures to benefit retail investors, while keeping SPACs as a flexible tool for private companies to enter the public markets. In support of this, CFA Institute created a SPAC working group which conducted a year-long review of the history and evolving practices relating to the SPAC structure and process. We begin with a short background on the matters the working group considered.

The Recent SPAC Gold Rush. In 2013, SPACs represented an insignificant portion of the market for new, public offerings. They grew to a quarter of this market by 2019, and then exploded: 53% of the market in 2020; 61% in 2021. To understand the market for public offerings it is crucial now to understand how SPACs operate. Today, the statistics on the number of SPAC IPOs and the follow-on merger transactions known as a de-SPAC, tell the story of the dramatic surge of the SPACs through 2021. While equity market conditions overall for IPOs and de-SPAC have changed significantly over the first four months of 2022, we believe the SPAC structure will remain a viable alternative to the traditional IPO process and welcome efforts to make the SPAC process more transparent and comprehensible to investors of all types.

Volume of IPOs. Since 1996, there has been a steady move of capital formation out of public markets and into private markets in the United States. The number of public companies has declined from 8,000 to 4,000, even as total market capitalization has grown. Ninety-five percent (95%) of these firms did not go out of business but were acquired by other firms as part of the great consolidation.[3] With attributes like generous fee structures for promoters, venture capital-like investment opportunities for retail, flexibility as to financial structure and expanded access to public markets for target companies, it is not surprising that SPACs emerged as the most utilized route for firms to go public in 2020 and 2021. Notwithstanding recent market declines for all equities and the cyclical nature of IPOs generally, the fundamental drivers for using the SPAC structure remain.

SPACs Have a Distinct and Complex Structure. There are three distinct phases to a SPAC (the initial SPAC IPO stage; the de-SPAC stage; the post-merger stage). There are also distinct types of securities involved in a SPAC transaction (equity and warrants). In addition, there are more categories of participants compared to regular IPOs (sponsors, regular SPAC shareholders, Private Investment in Public Equity [PIPE] investors). This mixture of structural options and a wider universe of financial participants, creates a network of changing and conflicting incentives. It has also created the opportunity for regulatory arbitrage between the SPAC process and regular-way IPOs.

SPACs Impact Retail Access to Riskier, Emerging-Growth Opportunities. Historically, the SEC's regulatory architecture has employed a lighter touch for investment vehicles targeted to institutional investors (hedge funds, private equity, venture capital) and a more rigorous

[3] *See* Vartika Gupta, Tim Koller, and Peter Stumpner, "Reports of corporates' demise have been greatly exaggerated," McKinsey & Co., (Oct. 21, 2021), available at https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/reports-of-corporates-demise-have-been-greatly-exaggerated.

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framework for retail investors who may not have comparable sophistication or resources to evaluate investments. At present, the amount of retail investor participation in the SPAC market is unclear but one research report asserts that "institutional investors contribute the vast majority of investment dollars in SPACs."[4] However, if SPACs remain a major path for companies to enter the public markets and retail demand for emerging growth opportunities persists, retail investors may increasingly participate in these opportunities.

Executive Summary – Comments on SEC's Proposed Rules

- New Subpart 1600. We are in general agreement with the proposal to add new Subpart 1600 of Regulation S-K and note the similarities with the SPAC Crib Sheet we developed in the context of the Report.

- Amended Item 10(b) of Regulation SK. CFA Institute supports the use of projections based on non-GAAP measures but agrees such non-GAAP information should be clearly identified, explained and referenced (but not reconciled) to the most closely related GAAP measures.

- Leveling the Regulations for de-SPACs with Regular IPOs. Better alignment of procedural protections for investors in de-SPAC transactions with those for investors in traditional IPOs makes good sense, but demanding they be identical or creating even higher liability and more restrictive procedural protections on de-SPACs, may run counter to capital formation goals.

- Private Company Mergers v. Traditional Mergers. The Commission should ensure the proposed de-SPAC procedural protections do not result in other confusions, trip wires and new uncertainty with established merger practice.

- Twenty-Day Advance Dissemination of de-SPAC Merger/Proxy Vote Documents. The Commission should consider whether federal securities laws should override the laws of the jurisdiction of incorporation or organization if such jurisdictions allow less than 20 calendar days advance dissemination for de-SPAC merger/proxy vote documentation where such de-SPAC will be trading on SEC regulated markets.

- Target as a Co-Registrant in the de-SPAC Registrations. CFA Institute supports this idea but suggests full clarity and regulatory certainty as to whether the related liabilities indicated here intentionally or mistakenly extend to anyone other than unaffiliated, non-redeeming SPAC shareholders.

- Roll Back of the Safe Harbor on Forward Looking Statements (FLS). Both the regular IPO and de-SPAC approaches for taking a new, emerging company public should be treated similarly in this critical area -- the legitimacy of forward-looking projections. We urge the Commission to monitor the effects of the safe harbor removal for de-SPACs on the

[4] Committee on Capital Market Regulation, *Retail Investors and SPACS*, October 19, 2021. https://www.capmktsreg.org/2021/10/19/nothing-but-the-facts-retail-investors-and-special-purpose-acquisition-companies/

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availability and quality of forward-looking information critical for SPAC investor decisions on merger approval votes and exercising redemption rights.

- De-SPAC Transaction "Fairness" Statements. This proposal is confusing. The accuracy, subjectiveness, and usefulness of such a statement as a procedural protection is doubtful. Depending on the intended sponsor liability ascribed to this fairness process and statement, it could extend well beyond a leveling of the de-SPAC with regular IPOs. Item 1606 does not seem well designed or fit for purpose in its current format.

- Underwriter Liability in de-SPAC Transactions. We support the SEC in its efforts to address the expected gold-rush of de-SPAC mergers in the pipeline. In proposing that a de-SPAC be treated as a sale of stock for cash to non-redeeming SPAC shareholders and thereby declaring that advisory parties to the de-SPAC transaction be subject to Section 11 and Section 12 of the Securities Act of 1933 is a bold approach. As we note, we encourage the SEC to properly calibrate application of underwriter status in this context.

- SEC Proposes a Safe Harbor for SPACs to Avoid being Regulated Under the Investment Company Act. CFA institute supports the idea of ensuring SPACs do not venture into activities that should be regulated by the ICA. We support this idea and propose a simplification of time thresholds to find and complete a de-SPAC merger without running afoul of the safe harbor.

- Transition Period for New SPAC Proposals - Addressing Looming Market Risk. In the context of the number of approaching de-SPAC mergers and considering the unique incentives and conflicts of a Sponsor to avoid a "no deal," there are current and immediate market integrity risks looming. To the extent possible, we encourage a rapid implementation of the Proposed Rules on improving disclosures, transparency of dilution and accountability for forward looking statements.

Detailed Comments on the Proposed Rules.

Subpart 1600. We are in general agreement with the proposal to add new Subpart 1600 of Regulation S-K and note the similarities with the SPAC Crib Sheet we developed in the context of the Report. It is important to improve the prominence and clarity of disclosures involving the range of complexities posed by SPAC lifecycle and its numerous stakeholders. The intricacies of these multi-phase transactions is unique in the experience of many investors, particularly retail investors. Beginning with the SPAC initial public offering , followed by the SPAC / target merger (the de-SPAC transaction) and concluding with the trading of the merged entity as a new public company, the path is complicated and nuanced.

The new disclosure proposals for Subpart 1600 is a useful approach to providing decision-useful information about the sponsor, actual and potential conflicts of interest, and importantly, how much a non-redeeming SPAC investor's interest will be diluted in the new public company. We support the idea of the enhanced disclosures being featured prominently on the prospectus cover page and in the summary of registration statements for both the SPAC IPO and de-SPAC. The

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Commission should consider requiring that intermediaries provide such information in a separate, Key Risks and Conflicts form that is detached from the dense, complicated and often discarded prospectus. A standalone summary with proper labeling will receive more investor attention and focus.

Amended Item 10(b) of Regulation SK. With respect to the proposed amendments to Item 10(b) of Regulation S-K, we support the goal of ensuring financial projections and measures not based on actual financial results or operational history be clearly distinguished from projections that are based on actual historical measures and operating history. We agree those actual financial results be presented with equal or greater prominence than the pro forma information. CFA Institute supports the use of projections based on non-GAAP measures but agrees such non-GAAP information should be clearly identified, explained and referenced (but not reconciled) to the most closely related GAAP measures.

Leveling the Regulations for de-SPACs with Regular IPOs. The Proposed Rules related to the goal of leveling the regulation of the de-SPAC process with the traditional IPO process is more challenging. We encourage the SEC to carefully calibrate the SPAC-related proposals so as to address key investor protection concerns as opposed to simply satisfying the urge to make the processes equal. These two structures are economically similar, but they are also structurally and legally quite distinct. Better alignment of procedural protections in de-SPAC transactions with those in traditional IPOs makes good sense, but suggesting they need to be identical or making them more restrictive on de-SPACs, does not.

Private Company Mergers v. Traditional Mergers. As to the need to amend the merger registration statement forms and schedules filed in connection de-SPAC mergers involving a private operating company target, but not other mergers, creates regulatory uncertainty and confusion. That is, while it may level the de-SPAC and IPO disclosure regimes, it would potentially leave different disclosure regimes for private company mergers with a public company that is not a SPAC. The SEC should take care to ensure these proposed de-SPAC actions do not result in other confusions, trip wires and new uncertainty with established merger practice.

Twenty-Day Advance Dissemination of de-SPAC Merger/Proxy Vote Documents. CFA Institute supports as much lead time as possible for dissemination of disclosure documents regarding the de-SPAC transaction and agrees with the proposed minimum of twenty (20)calendar days in advance merger approval vote. We would support the idea of seeking a ruling on federal preemption where this rule would override the laws of the jurisdiction of incorporation or organization if such period is less than 20 calendar days for any public de-SPAC listing occurring on regulated exchanges in the U.S.

Target as a Co-Registrant. The Commission has proposed that a private operating company target, in a de-SPAC transaction, be treated as a co-registrant of a registration statement on Form S-4 or other relevant forms when a SPAC files such a registration statement for a de-SPAC transaction. This would result in the target company, its principle executive officer, financial officer, accounting officer and the target board members being subject to the

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enhanced liabilities that accrue under Section 11 of the Securities Act, principally liability for any material misstatements or omissions in the registration statement. We support this idea and suggest additional clarity as to whether this liability correctly or mistakenly extends to anyone other than unaffiliated, non-redeeming SPAC shareholder. For example, could such liability extend to various SPAC "insiders" who may claim they are unaffiliated and do not redeem, even though they have conducted detailed due diligence and have negotiated special deal terms with the SPAC such as anchor and PIPE investors. Moreover, would this provision extend the target company liability to its own, private company shareowners.

Liability for Forward Looking Statements (FLS). To address their concerns over the veracity and integrity of projections used in connection with de-SPACs, the Commission has proposed a number of actions including a move to redefine the term "blank check company" which would change how forward-looking statements about the prospects for de-SPAC merger are covered under the Private Securities Litigation Reform Act of 1995 (PSLRA). Simply stated, the PSLRA safe harbor protections for FLS about the de-SPAC would be eliminated by the SEC proposal.

A forward-looking statement is a statement of how top management views a company's future prospects in qualitative and/or quantitative terms. Such statements often contain projections of annual financial metrics, including revenue, earnings, or EBITDA, or other key financial performance indicators stretching several years into the future.

FLS are regularly used in connection with de-SPAC merger transactions and are considered key information for assessing prospects for the newly merged entity. Specifically, such information is highly relevant for use by SPAC shareholders in deciding how to vote on the merger and whether such shareholders should redeem their SPAC shares.

Forward-looking statements that appear in the various SPAC merger documents have thus far been considered by industry practitioners as eligible for a safe harbor from private litigation, subject to either of two conditions: (1) that the statements are accompanied by meaningful cautionary statements,[5] and (2) that the company does not make statements with actual knowledge at the time the statement is made that such statement is false or misleading. In other words, the company cannot be sued simply because its good-faith, reasonably based projections turn out to be incorrect.

These considerations prompted a multiplicity of views among our Report working group members. Some members suggested it would be tantamount to a ban on forward-looking statements, effectively eliminating decision-critical information about the de-SPAC, ultimately curtailing demand for SPAC investments generally. Other working group members had the view that too many of these de-SPAC forward-looking statements are an exercise in creative writing, baseless hype and embellishment. One observer commented that "These things are routinely misleading on their face and deserve no quarter."

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[5] The cautionary statements must specify important factors that could cause actual results to differ materially from those in the forward-looking statements.

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While professional analysts and primary users of financial disclosures support the flow of forward-looking statements in general, in the context of leveling the PSLRA safe harbor treatment between IPOs and de-SPACs, we support removal of the safe harbor for forward looking information in both regular IPOs and de-SPAC mergers. In our view, both the regular IPO and de-SPAC approaches for taking a new, emerging company public should be treated similarly in this critical area for market integrity -- the legitimacy of forward-looking projections.

At the same time, the SEC should monitor the effects of removing the safe harbor for de-SPACs on the quality and quantity of forward-looking information expected/intended by new Item 1609 of Regulation SK, in the merger registration / proxy documentation. The combination of removing the safe harbor while adding amendments to Item 10(b) of Regulation S-K and Item 1609 of Regulation SK essentially mandating some level of FLS projections, goes beyond leveling de-SPACs with IPOs. This actually puts the de-SPAC transaction into a higher liability regime for projections. In this regard, the Commission should be careful not to mix messages on regulatory "leveling" or to chill key information for SPAC investor decisions on merger approval votes and exercising redemption rights.

De-SPAC Transaction "Fairness" Statements. New Item 1606(a) of Regulation S-K calls for the SPAC sponsor to provide a statement in connection with a de-SPAC transaction as to whether the SPAC (board and sponsor) reasonably believes the de-SPAC transaction and any related financing transactions are fair to the SPAC's unaffiliated security holders. This new Item also requires a SPAC to provide reasonable detail about what factors are considered and how they are weighted in deciding whether the de-SPAC transaction is "fair." This Item 1606 raises many questions and implications for sponsor liability and uncertainties about the definition of a "reasonable belief" statement. The exercise would most certainly force some level of preparation and consideration of FLS projections, an assessment of all aspects of the de-SPAC ancillary financing arrangements, a prediction on redemption levels and a declaration that the standard dilutive effects of sponsor promote are "fair." The SPAC would also be required to disclose how each factor was weighted in its determination of fairness. The potential exposure of the sponsor, combined with the inherent subjectivity of this fairness exercise, makes for daunting legal uncertainty. It is particularly confusing in the context of understanding what intended sponsor liability is ascribed to this fairness process and statement. Item 1606 seems ill-conceived, and the Commission should assess whether this further undermines the notion of "level regulation". Regular IPOs and S-4 mergers do not *require* forward looking statements or a fairness statement.

Underwriter Liability in de-SPAC Transactions. We support the SEC in its efforts to address the expected gold-rush of de-SPAC mergers in the pipeline. Such transactions would be treated as a sale of stock for cash to non-redeeming SPAC shareholders and that relevant advisory parties to the de-SPAC transaction be subject to Section 11 and Section 12 of the Securities Act of 1933. However, we encourage the SEC to properly calibrate application of underwriter status in this context. That calibration, in our view, should be narrow in scope and clearly defined as to which, among the many SPAC advisors/facilitators that typically participate

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in the three phases of the SPAC lifecycle, would be subject to this new interpretation. We are concerned this potentially broad expansion of underwriter status would seriously diminish or even destroy the SPAC capital formation process if not calibrated properly. Here are a few matters to consider:

An Offering of Securities. In examining this issue, we considered how the merger transaction has elements of both a direct listing IPO and a reverse merger transaction. It is important to clarify the bounds of investment bank / deal advisor responsibilities under Section 11 in these instances generally and in the de-SPAC context specifically. Traditionally, the application of Section 11 of the Securities Act provides investors with the ability to hold issuers, officers, underwriters, and others liable for damages caused by untrue statements of material fact or omissions of material fact made *in connection to the offering of securities*.

Direct Listing. Technically speaking, the de-SPAC has no firm commitment underwritten offering of securities. As such, the transaction is similar to a direct listing of shares where the liability of the issuer's financial advisers as potential underwriters is not clear or established. In practice, investment banks acting as advisers in direct listings have, out of caution, decided to perform substantially the same due diligence procedures as in an IPO, even if not required.

Reverse Merger. There are also similarities of the de-SPAC merger to a reverse merger. Here too, the application of Section 11 liabilities in these reverse takeover (RTO) transactions is unclear. Similar to the direct listing process, there is no firm commitment underwritten offering. In addition, there is a history of RTO-like transactions marked by numerous, failed public listings. In 2012, the SEC found substantial evidence of abuse of dormant shells and took action to suspend trading on hundreds of shells to prevent fraudsters from manipulating the stock price.

Rule 140a - Assigning Underwriter Liability in de-SPACs. For the reasons noted above, it is hard to draw an exact regulatory overlay or to say that SPAC mergers are the same as a traditional IPO, a direct listing IPO, or an RTO structure. It is also challenging to offer a blanket regulatory approach when trying to level or eliminate regulatory arbitrage. These structures are distinct, complex and very nuanced in the way they each bring a new company into the public market. The SEC's Rule 140a proposal to deem anyone who has acted as an underwriter of the securities in the SPAC IPO phase and/or takes steps to facilitate a de-SPAC transaction is too imprecise. This appears to implicate merger advisors for both the SPAC and target, PIPE finders, PIPE investors and potentially a range of other practitioners and advisors who participate (directly or indirectly) in facilitating a de-SPAC transaction. In our view, this proposal needs to be more tightly modeled.

Investment Company Act Safe Harbor. The SEC's proposed changes here include a new Rule 3a-10 to the Investment Company Act (ICA) that would provide a non-exclusive safe harbor from the definition of "investment company" for a SPAC that satisfies several conditions. The changes are in response to the SEC concerns that SPACs could be acting as a regulated

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investment company without being subject to the important investor protection requirements of the ICA. In pertinent part, the proposed safe harbor is conditioned on these elements:

- The SPAC's assets consist solely of government securities, securities issued by government money market funds and cash items prior to completion of the de-SPAC transaction.
- Such assets are not acquired or disposed of for the primary purpose of trading and recognizing gains or decreasing losses resulting from market value changes.
- The SPAC seeks to complete a single de-SPAC transaction as a result of which the surviving entity, directly or through a primarily controlled company, will be primarily engaged in the business of the target company.
- The SPAC files a Form 8-K announcing a proposed de-SPAC merger, no later than 18 months after the effective date of its initial SPAC IPO registration and completes the de-SPAC transaction no later than 24 months after such effective date.

CFA institute supports the idea of ensuring SPACs do not venture into activities that should be regulated by the ICA. On balance, the conditions proposed are appropriate; however, given the complexity of these transactions and the increased competition for targets, we do support more flexible time limits for identifying and completing de-SPAC merger. A more straightforward approach would be to condition the safe harbor on the completion of a de-SAPC within 30 months. This allows flexibility to find, announce, and complete a suitable merger deal rather than rushing to meet separate announcement and completion limits.

Transition Period for New SPAC Proposals - Addressing Looming Market Risk. In the context of the number of approaching de-SPAC mergers and considering the unique incentives and conflicts of a Sponsor to avoid a "no deal," there are current and immediate market integrity risks looming. While it is generally the case that there be a transition period for implementation of new rules, the impending *rush to de-SPAC* is concerning. If we view this through the lens of market disruptions caused by the dot.com bubble and RTO abuses, there is reason to consider more expeditious and preemptive application in the public interest.

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Conclusion. We believe that the options presented in the Commission's proposal on Special Purpose Acquisition Companies, Shell Companies, and Projections provide thoughtful choices and mechanisms for addressing many of the gaps in SPAC regulation, improving transparency and protecting market integrity. For questions about this comment letter, please contact Kurt Schacht, [redacted], or Stephen Deane, [redacted]

Sincerely,

Paul P. Andrews

Paul Andrews
Managing Director
Research, Advocacy and Standards
CFA Institute

cc: Commissioner Hester Peirce
Commissioner Allison Herren Lee
Commissioner Caroline Crenshaw
Rick Fleming, Investor Advocate