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

Re: **File No. S7-13-22 (Special Purpose Acquisition Companies, Shell Companies, and Projections) (the "Proposing Release")**

Dear Ms. Countryman:

We appreciate the opportunity to comment on the U.S. Securities and Exchange Commission ("**Commission**" or "**SEC**") proposed rules relating to Special Purpose Acquisition Companies ("**SPACs**"), Shell Companies, and Projections (the "**Proposed Rules**").

In recent years, SPACs have become an important part of the U.S. capital markets, presenting opportunities for capital formation from the public for many companies that otherwise would have stayed private. This, in turn, has opened new investment opportunities for public investors and helped to reverse the decline in the number of publicly traded companies in the U.S.

We applaud the SEC's attempt to improve disclosure and the recognition that revisions are appropriate to reflect the fact that the substance of a de-SPAC transaction is often in essence an IPO by the target company. In addition, we welcome the elimination of uncertainty resulting from the SEC codifying certain of its positions that were inconsistent with the previous rule and form requirements or where codifying industry practice would result in more consistency in disclosure, improve readability for investors and advise SPACs and their advisors of unstated requirements that are either unwritten or inconsistently required. However, we believe certain of the Proposed Rules and their underlying motivation suffer from, among other things, overstating regulatory arbitrage, failing to consider the structural and legal differences between de-SPAC transactions and IPOs, insufficiently aligning the treatment of companies that have gone public through de-SPAC transactions with those that went public via IPO, and legislative encroachment. We believe the proposed "clarification" of underwriter status goes beyond the definition of "underwriter" provided under the Securities Act of 1933 (the "**Securities Act**"). Many of the proposed rules are entirely redundant with existing requirements, serving no purpose. Moreover, many of the Proposed Rules deviate from the principles-based approach that the SEC has utilized for decades that results in efficient disclosure focused on material items. Instead, the Proposed Rules introduce unduly prescriptive requirements and will result in repetitive and immaterial disclosure in documents that are already too lengthy for many investors to digest.

We welcome regulation (or legislation, where the Commission does not have authority to regulate) that improves investor protection, but such regulation or legislation should be balanced by the benefits SPACs present in the area of capital formation. Whether intentional or unintentional, a likely consequence of the Proposed Rules, if adopted as proposed, would be to defer access by some companies to the capital markets for an extended period of time, reduce capital formation and innovation in the U.S. and deny ordinary investors access to investment opportunities not otherwise available to them. As the SEC notes, "a significant increase in the cost of shell company mergers and de-SPAC transactions could deter some private companies from going public, and thus potentially reduce overall initial public offering activity and capital formation"[1], and that is the very likely outcome of some of the Proposed Rules.

For ease of reference, we have included endnotes from our comments to the applicable Request for Comment from the Proposing Release.

PROPOSED NEW SUBPART 1600 OF REGULATION S-K

As part of the new rules, the SEC is proposing to add a new Subpart 1600 of Regulation S-K ("**S-K**") specifically applicable to SPACs. Regulation S-K provides non-financial disclosure requirements that are cross referenced from applicable SEC forms, such as Form S-1, Form S-4, Form F-4 and Schedule 14A. Subpart 1600 would set forth specialized disclosure requirements regarding the SPAC sponsor, conflicts of interest and dilution.

Definitions

"Special Purpose Acquisition Company"

Fundamentally, we see no reason why the Proposed Rules should not apply to all shell companies, other than business combination related shell companies, inclusive of blank check companies as defined in Rule 419(a)(2) of the Securities Act. As such, we see no need for a new defined term of "special purpose acquisition company."[i]

If the SEC adopts a new definition, condition (3) of proposed S-K Item 1601(b) (that the SPAC have a business plan to "[r]eturn all remaining proceeds from the registered offering and any concurrent offerings to its shareholders if the company does not complete a de-SPAC transaction within the specified time frame") is unnecessary and should be eliminated or revised to only refer to the plan to return proceeds from the registered offering. SPACs often hold a modest amount of working capital outside of their trust accounts that they use to fund operating expenses. If a shell company had such cash remaining at the point when the public shareholders exercise their redemption rights, it would be inappropriate to exclude such shell company from the Proposed Rules based solely on retaining such cash.

If the SEC chooses to apply the Proposed Rules to a subset of shell companies, we note that the proposed definition of "special purpose acquisition company" is not limited to companies listed on a national securities exchange. It would include shell companies traded in over-the-counter markets, which are not

[1] Proposing Release, p. 277.

what would generally be considered to be "SPACs." Stock exchange listing rules applicable to listed SPACs require, among other things, a SPAC shareholder vote (and thus a proxy statement) in most de-SPAC transactions (and where a shareholder vote is not required, the exchange listing rules require substantially the same financial and other information), while OTC-traded SPACs may be able to announce and consummate a de-SPAC transaction without a shareholder vote and without such information. We think a logical distinction could be drawn based on exchange listing, rather than on whether the offering is by a blank check company and therefore subject to Rule 419.

More importantly, the proposed definition is unclear as to whether a SPAC ceases to be a SPAC for purposes of the rules after consummation of a de-SPAC transaction.[2] This could result in uncertainty as to the application of some of the Proposed Rules following the completion of a de-SPAC transaction, and, if the Proposed Rules do continue to apply, disparity between companies that go public via de-SPAC transactions as opposed to traditional IPOs. If the SEC adopts a new definition, the new definition should clarify that a SPAC ceases to be a SPAC upon consummation of a de-SPAC transaction (similar to the way the definition of "shell company" operates).

We believe it is clear what entities are SPACs, without the need for additional boxes to check on the covers of registration statements, tender offer schedules or proxy schedules, or additional affirmative statements in registration statements.[ii] Eliminating unnecessary additional disclosures and form requirements that have not historically been made will simplify transition for the more than 700 SPACs active today.

"*de-SPAC transaction*"

The proposed definition of "de-SPAC transaction"[iii] should be revised to eliminate the reference to "a special purpose acquisition company" in order to eliminate circularity (as proposed, a special purpose acquisition company has a business plan to complete a de-SPAC transaction, and a de-SPAC transaction involves a special purpose acquisition company). There is no need to tie the definition to exchange listing standards, particularly if the SEC defines special purpose acquisition company to include non-listed shell companies.

"*SPAC sponsor*"

The Proposed Rules should be revised to eliminate the need for a defined term "SPAC sponsor".[iv] Instead, the rules should require disclosure regarding the SPAC's directors, officers and affiliates.

The proposed definition is largely redundant with the terms "officers" and "directors" as used in the Securities Exchange Act of 1934 (the "**Exchange Act**") and the Securities Act – i.e., the persons performing the function of officers and directors are primarily responsible for directing or managing the business and affairs of a registrant – yet the definition's exclusion of directors and officers in their capacities as such would result in there being no "sponsor" for many SPACs. The Proposing Release blurs the lines between the roles and responsibilities of the SPAC sponsor and that of the SPAC board and

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[2] The use of the term SPAC in Proposed Rule 3a-10 under the Investment Company Act of 1940 suggests that a company continues to be a "SPAC" even after completion of a de-SPAC transaction. See "<u>Investment Company Act Safe Harbor</u>".

officers.[3] If the SPAC sponsor is actually managing and directing the SPAC, like the SEC suggests, then the SPAC sponsor's directors and officers would constitute the directors and officers of the SPAC for purposes of both the Securities Act and the Exchange Act. As a result, many of the proposed disclosure items would already be covered under existing disclosure requirements that require such disclosure vis-à-vis the directors and officers of the SPAC and their affiliates.

Accordingly, replacing the concept of "SPAC sponsor" with "directors, officers and affiliates of the SPAC" would better suit the intent of the concept.

"*Target Company*"

The proposed definition of "target company" is sufficiently clear for purposes of defining a "de-SPAC transaction."[v] However, the concept of "assets" being a "target company" yields anomalous results under certain of the Proposed Rules (such as requiring assets to sign a registration statement), and the concept of a "business" may be vague (as a business may be a product line, rather than an entity that could sign a registration statement). The Proposed Rules should be revised to carve out "target companies" that are not entities from the requirement to sign the registration statement, as well as from proposed S-K Item 1609(c).

Disclosure Regarding SPAC Sponsors

Proposed S-K Item 1603(a) would require enhanced disclosure about the SPAC sponsor, its affiliates and any other promoters of the SPAC in connection with SPAC IPOs and de-SPAC transactions, including:

- The experience, material roles and responsibilities of each of the parties listed above;
- Any agreement or arrangement with respect to (1) the determination of whether to proceed with a de-SPAC transaction or (2) the redemption of securities;
- The controlling persons of the SPAC sponsor and any person with a direct or indirect material interest in the SPAC sponsor;
- An organizational chart reflecting the relationship between the SPAC sponsor, the SPAC and the SPAC sponsor's affiliates;
- Tabular disclosure of the material terms of any lock-up agreements; and
- The compensation of the SPAC sponsor, its affiliates or other promoters.

As stated above, we recommend that the concept of a "SPAC sponsor" should be eliminated, and any new disclosure requirements should focus on the SPAC's directors, officers and affiliates.[vi] Requiring

[3] For example: "A SPAC is … managed by its sponsor" (p. 9); "a potential conflict of interests that could lead sponsors to enter into de-SPAC transactions" (p. 13); "the sponsor … negotiates the transaction … and promotes the transaction to the SPAC's shareholders." (p. 29).

disclosure about such parties, with a focus on affiliates that are expected to provide material assistance to the SPAC in connection with a de-SPAC transaction (e.g., identifying possible target companies, negotiating the de-SPAC transaction, marketing the transaction, etc.) would provide more meaningful information to investors. For example, disclosure regarding a promoter of the SPAC's IPO that will have no involvement with the de-SPAC transaction would be immaterial to investors.

We believe the sponsor's compensation and reimbursement are already sufficiently disclosed in response to existing disclosure requirements, and that incremental disclosure requirements are thus not merited.[vii] If the SEC imposes new requirements, the reference to "compensation" should be revised to refer instead to all equity and rights to cash held by the SPAC directors and officers and their affiliates, as certain equity interests may be purchased for value (i.e., not be "compensation") and reimbursement of advances or repayment of loans would not be compensation.

The identity of natural persons controlling the sponsor is already disclosed in response to existing regulations (S-K Item 403), and the material terms of lockup agreements are already disclosed as a matter of industry practice. [viii] Requiring additional disclosure with respect to lockup agreements – tabular or otherwise – would not provide meaningful additional information to investors and would go beyond the disclosure requirements applicable to lockup agreements that are entered into in connection with a traditional IPO.[ix]

Conflicts of Interest Disclosure

The SEC is proposing to require disclosure of any actual or potential material conflict of interest between (1) the SPAC sponsor or its affiliates or the SPAC's officers, directors or promoters, and (2) unaffiliated security holders. The SEC notes that this would include any conflict of interest in determining whether to proceed with a de-SPAC transaction and any conflict of interest arising from the manner in which a SPAC compensates the SPAC sponsor or the SPAC's officers and directors, or the manner in which the SPAC sponsor compensates its own officers and directors. The SEC is also proposing to require disclosure regarding the fiduciary duties that each officer and director of a SPAC owes to other companies.

The proposed required conflicts of interest disclosure would largely codify existing disclosure practice.[x] In SPAC IPOs, SPACs routinely disclose conflicts of interest in the Summary, Risk Factors and Management sections of Form S-1 related to, among other things, the following: (1) potential competition (both with respect to investment opportunities and allocation of management time) with SPACs and other investment vehicles affiliated with the SPAC sponsor or the SPAC's directors and officers, (2) potential post-closing roles that the SPAC's directors and officers may be offered by the target company, (3) potential affiliations between the SPAC and the target company and (4) the SPAC sponsor's and the SPAC's directors' and officers' investment in the SPAC's securities. SPACs also routinely include disclosure regarding the specific fiduciary duties owed by the SPAC's directors and officers to other companies. In de-SPAC transactions, SPACs also disclose conflicts of interests in response to the existing requirements of Item 5 of Schedule 14A, which are also incorporated into the requirements of Form S-4 and Form F-4.

We believe the existing disclosure practices provide sufficient information for investors. If new rules are adopted, they should not go beyond codifying these existing practices.[xi] Tabular disclosure should not be required, but should be encouraged, along with bulleted lists, where it would assist readability (for example, in a list of entities to which the officers and directors owe fiduciary duties that could present a material conflict for the officers or directors). A requirement for disclosure of policies and procedures or assessment and management of conflicts of interest would result in incremental boilerplate disclosures, particularly as many of the conflicts are inherent in the typical SPAC structure, are readily apparent to investors, and cannot be minimized.[xii] Moreover, the directors and officers of SPACs have fiduciary duties that provide protections for unaffiliated investors stronger than mere disclosure obligations. If disclosure analogous to an IPO is the desired outcome, the self-interests of underwriters and the issuer and its directors and officers to maximize the IPO price and close the IPO have no corresponding disclosure requirement.

Regarding disclosure in Exchange Act reports following the SPAC IPO and the Form 8-K announcing the signing of the de-SPAC transaction, additional disclosure should be required only where the conflict of interest is material and has not been previously disclosed.[xiii] For example, the conflicts arising from ownership of sponsor promote by SPAC directors, officers and affiliates would have been disclosed in the IPO registration statement, and including that boilerplate disclosure in subsequent Form 10-Q or 10-K filings or in the Form 8-K announcing the signing of the de-SPAC transaction would not provide useful information and would distract from new and material information. However, if a specific conflict arose by virtue of the de-SPAC transaction, such as an ownership interest by a SPAC director or officer in the target company, that should be required to be disclosed.

Dilution Disclosure

Proposed S-K items[4] would require disclosure regarding potential dilution in registration statements and proxy statements for SPAC IPOs and de-SPAC transactions. The SEC's stated goal with these proposed items is to "[e]nhance the clarity and readability of prospectuses in SPAC [IPOs and de-SPAC transactions] and disclosures relating to dilution in these prospectuses."[5] Material potential sources of future dilution would be required to be disclosed, including tabular disclosure about potential dilution that may be borne by non-redeeming shareholders, along with a sensitivity analysis showing potential dilution under a range of redemption levels. The SEC notes the following as potential sources of dilution: SPAC sponsor economics, underwriting fees, warrants and convertible securities, and financing transactions.

Disclosure of material potential sources of future dilution should be required in SPAC IPO registration statements, the Form 8-K announcing signing of the de-SPAC transaction and the registration statement or proxy statement for the de-SPAC transaction.[xiv] Disclosure in other filings should only be required where there is a material change from the previously disclosed information.[xv]

The quantitative disclosure currently required under S-K Item 506 at IPO is not helpful for investors, as the output is largely driven by the maximum redemption scenario which can differ based on (i) different

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[4] Proposed S-K Item 1602(a)(4), 1602(c) and 1604(c).
[5] Proposing Release, p. 23.

provisions of the SPAC's constituent documents (e.g., whether there is a prohibition on redemptions if it would cause the SPAC to have less than $5 million of net tangible assets or not) and (ii) the interpretation of those constituent documents. While S-K Item 506 disclosure is often required because "there is substantial disparity between the public offering price and the effective cash cost to"[6] the SPAC sponsor, directors and officers, the presentation is not meaningful to investors – in some instances the presentation may actually show that there is a decrease in net tangible book value from the offering after giving effect to the redeemable shares. In lieu of such disclosure, SPACs should present the per share amount of cash (or securities) in trust, under a range of hypothetical redemption scenarios and after giving effect to sponsor equity, underwriter compensation and IPO expenses.[xvi] We would suggest the hypothetical redemption scenarios include a maximum of 100% of the public shares (regardless of any provisions of the SPAC's constituent documents that might theoretically limit redemptions) less any shares subject to a binding commitment to not be redeemed. This would permit ready comparison across SPACs, regardless of the terms of constituent documents or the interpretation thereof. Sensitivity analyses should only be required for sources of dilution, such as warrants, where the dilutive impact varies based on changing equity values or other variables.[xvii]

At the time of the IPO, much of the dilution that may accompany the de-SPAC transaction is unknown, as the specifics of the transaction are unknown.[xviii] Will there be a PIPE financing; at what per share valuation; will the PIPE issuance include warrants; will there be convertible equity or debt issued; what will transaction expenses be; are there convertible or derivative securities of the target that will be assumed; etc.? Most importantly, the value of the target company is not known at the time of the IPO. Tabular disclosure and sensitivity analyses in SPAC IPO registration statements should be limited to the sources of dilution in existence or contracted at the time of the IPO.

For de-SPAC transactions, the most meaningful information would be the expected value per share, using the agreed equity value of the target company plus net cash proceeds from the de-SPAC transaction under a range of hypothetical redemption scenarios. Given that SPAC warrants are almost uniformly out of the money at the agreed per share equity value used in the de-SPAC transaction (typically the $10 IPO per unit price), conveying the potential dilutive effect of the warrants can be handled in many different ways. We would suggest disclosing the percentage ownership of the surviving company at various hypothetical share increments above $10 per share, utilizing the treasury share method.

The current information contained on the cover page of prospectuses for SPAC IPOs already often exceeds one page.[xix] We would suggest that dilution disclosure be contained in the prospectus summary instead.

Prospectus Cover Page and Prospectus Summary Disclosure

Cover pages for SPAC IPOs and de-SPAC transactions (often a letter to investors relating to the proxy, rather than a traditional cover) are already lengthy. Requiring this disclosure to be included at least three times in the document (e.g., on the cover page, in the summary, and in the body of the document where the same information often appears multiple times) seems excessive and potentially distracting to

[6] S-k 506.

investors.[xx] If the SEC determines to adopt the proposed requirements, information in the summary should be sufficiently prominent for investors, rather than lengthening an already lengthy cover page.

We are agnostic to the benefit of codifying existing industry practice for disclosure in prospectus summaries.[xxi] However, the SEC should not require disclosure of "any plans to seek additional financing and how such additional financing might impact shareholders" in IPO registration statements. At the time of the IPO, this would be purely hypothetical, and will result in meaningless boilerplate and distract investors from material information in a document that is already often nearly 200 pages. If the SPAC already has commitments for additional financing at the time of the IPO (e.g., a forward purchase agreement or a backstop commitment), the material terms of such financings and potential impact on shareholders or on the de-SPAC transaction should be disclosed.

Regarding the proposed disclosure pursuant to S-K Item 1604(b), the background of the de-SPAC transaction is not meaningful information that merits inclusion in the prospectus summary. In comparison to an IPO, there is no discussion of the background of negotiations between an IPO registrant and the underwriters.

Disclosure and Procedural Requirements in De-SPAC Transactions

The SEC is proposing specialized disclosure and procedural requirements in de-SPAC transactions. More specifically, the Proposed Rules would require: (1) additional disclosures on the background of and reasons for the transaction; (2) a statement from the SPAC as to whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders; and (3) disclosure on any outside report, opinion, or appraisal relating to the fairness of the transaction.

Background of and Reasons for the de-SPAC Transaction; Terms and Effects

For the most part, the proposed additional disclosure requirements for the background of and reasons for the de-SPAC transaction and its terms and effects are either already required by the rules governing registration statements and proxy statements or are standard industry practice (partly in response to comments received during the SEC review process). As such, the proposed requirements would largely be redundant with disclosures required by rules governing proxy statements or registration statements, and thus would provide no new information to investors.[xxii]

The SEC should not adopt a new disclosure requirement with respect to material interests in a prospective de-SPAC transaction or any related financing transaction held by the sponsor and the SPAC's officers and directors, as proposed. The new regulation would be redundant with the existing requirements of Schedule 14A Item 5.[xxiii]

Similarly, a new requirement regarding disclosure of appraisal or redemption rights would be redundant with Schedule 14A Item 3 and Item 202 of Regulation S-K.[xxiv]

Fairness Disclosure

Modeled after Item 1014(a) of Regulation M-A, which sets forth disclosure requirements for going private transactions, proposed S-K Item 1606(a) would require disclosure as to whether the SPAC reasonably believes that "the de-SPAC transaction and any related financing are fair or unfair to unaffiliated security holders of the [SPAC]".[7]

While inclusion of a statement that "the de-SPAC transaction and any related financing are fair or unfair to unaffiliated security holders of the [SPAC]" would be a new requirement, in light of the fiduciary duties applicable to SPACs and their directors and officers, the statement and disclosure regarding the bases of such determination would likely be redundant with the standard disclosure of the SPAC board's reasons for approval of the de-SPAC transaction. If the SEC determines such disclosure is material for investors, notwithstanding that it is inconsistent with IPO disclosure, the SEC should instead mandate the application of Item 1014(a) of Regulation M-A to all de-SPAC transactions, rather than add a new separate rule.[xxv]

With respect to the proposed requirement to disclose whether the approval of a majority of unaffiliated security holders is required, such disclosure is already required for proxy statements by Item 21 of Schedule 14A and would not provide investors with material information in the case of a de-SPAC transaction that does not require a shareholder vote. Retention of a representative to represent the investors in the negotiation of the de-SPAC transaction is an exceedingly rare, if not unprecedented, action in de-SPAC transactions, such that the requirement will not result in meaningful additional disclosure.[xxvi]

Reports, Opinions, and Appraisals

Proposed S-K Item 1607(b)(6) would require a summary of the negotiation, report, opinion or appraisal, including the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the SPAC or SPAC sponsor; and any limitation imposed by the SPAC or SPAC sponsor on the scope of the investigation.

The proposed requirements are consistent with 1015(b) of Regulation M-A. We would not suggest a new requirement that would be surplusage with existing requirements, but would support a new requirement that was more narrowly tailored to de-SPAC transactions, along with an amendment to Item 4(b) of Forms S-4 and F-4 to refer to Item 1607(b)(6) "in the case of a de-SPAC transaction", rather than Item 1015(b) of Regulation M-A.[xxvii]

Forms S-4 and F-4 currently expressly require that reports, opinions or appraisals described in the prospectus be filed as an exhibit to the registration statement. Including such reports, opinions or appraisals in a proxy statement would go beyond the current requirements for proxy statements, but proposed Rule 145a would effectively eliminate proxy statement-only de-SPAC transactions. Similar to the required statement regarding fairness of the transaction, this requirement goes beyond required disclosure in IPO registration statements.[xxviii]

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[7] Item 1014(a) of Regulation M-A; Proposed S-K Item 1606(a).

Requirements for Tender Offers Conducted in De-SPAC Transactions

Proposed Item 1608 of Regulation S-K would require that a Schedule TO filed in connection with a de-SPAC transaction contain the same information about the target company as would be required under the proxy rules.

The SEC should adopt proposed Item 1608 with modifications.[xxix] While the Proposing Release indicates that the SEC believes it is merely codifying a staff position, as currently drafted, Item 1608 would apply to all tender offers filed by SPACs, not only those in connection with a de-SPAC transaction. Tenders not made in connection with a de-SPAC transaction, such as a tender for warrants in connection with an extension vote, should not be subject to proposed Item 1608. Moreover, proposed Rule 145a would effectively require the use of Form S-4 or F-4, and thus eliminate the ability of SPACs to use merely a Schedule TO in connection with a de-SPAC transaction, rendering proposed Item 1608 surplusage if Rule 145a is adopted.

Exchange Act Rule 14e-5 should be amended to codify and expand on the guidance in Tender Offers and Schedules C&DI 166.01. Specifically, the policy set forth in C&DI 166.01 should be expanded to apply to all covered persons within the scope of Rule 14e-5, not just the SPAC's sponsor.[xxx]

The SEC's existing position that a SPAC filing a Schedule 14A or 14C in connection with a de-SPAC transaction or an extension of the time frame to complete a de-SPAC transaction does not need to file a Schedule TO or otherwise comply with the tender offer rules is well taken and should be retained and codified.[xxxi] While the form of a de-SPAC transaction has elements of a tender (offer to purchase existing securities), in substance the SEC acknowledges the transaction is often in essence an IPO by the target company. As such, requiring compliance with the proxy rules (Schedule 14A or 14C) or registration requirements (Form S-4 or F-4), or both, provide sufficient investor protection.

Structured Data Requirement

The SEC is proposing to require that all information disclosed in response to new Subpart 1600 of Regulation S-K be tagged in Inline XBRL.

We do not think requiring early compliance with the structured data requirements by SPACs is merited or would provide useful information to investors.[xxxii] SPAC IPOs are considerably simpler and easier to understand for investors than traditional IPOs, and the redemption rights make an investment in a SPAC IPO considerably less risky. As such, we do not see a need for structured data tagging for SPAC IPOs.

ALIGNING DE-SPAC TRANSACTIONS WITH INITIAL PUBLIC OFFERINGS

Aligning Non-Financial Disclosures in De-SPAC Disclosure Documents

The SEC is proposing to require disclosure with respect to a target company in a de-SPAC transaction that is not subject to the reporting requirements of the Exchange Act pursuant to the following existing items of Regulation S-K:

- Item 101 (description of business);
- Item 102 (description of property);
- Item 103 (legal proceedings);
- Item 304 (changes in and disagreements with accountants and financial disclosure)
- Item 403 (security ownership of certain beneficial owners and management, assuming the completion of the de-SPAC transaction and any related financing transaction); and
- Item 701 (recent sales of unregistered securities).

The Regulation S-K items proposed to be added for de-SPAC transactions, except for Item 701, require disclosure of information already disclosed with respect to target companies. Therefore, this required disclosure would largely codify existing disclosure practice in de-SPAC transactions and would not provide investors with a better understanding of the target company's operations and related risks and would not provide meaningful benefits to investors when making their voting, investment and redemption decisions.[xxxiii] We do not believe Item 701 disclosure with respect to the target company, as opposed to the registrant, would be consistent with IPO disclosure or provide meaningful information to investors.

Consistent with the idea of aligning disclosures with what would be required in an IPO by the target company, the information required should track the reporting status that the target company would have had in an IPO by the target company. Where the target company would have qualified as a foreign private issuer, the information should be that which would have been required in a Form F-1 (which references the requirements of Form 20-F).[xxxiv] Where the target company would have qualified as a smaller reporting company or an emerging growth company, the information should be what would have been required in a Form S-1 or Form F-1 by the target company.[xxxv]

<u>Minimum Dissemination Period</u>

The SEC is proposing to amend Exchange Act Rules 14a-6 and 14c-2, as well as to add instructions to Forms S-4 and F-4, to require that prospectuses and proxy and information statements filed in connection with de-SPAC transactions be distributed to shareholders at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the applicable laws of the SPAC's jurisdiction of incorporation or organization if such period is less than 20 calendar days.

The SEC should not require a minimum dissemination period for prospectuses or proxy/information statements in de-SPAC transactions.[xxxvi] Under the existing regulatory framework, which is dictated by the laws of the SPAC's jurisdiction of formation and the proxy rules,[8] SPACs are typically required to

[8] Beyond Rule 14a-16 of the Exchange Act that permits using the notice and access method of proxy delivery, SEC rules do not require a specific amount of time for allowing shareholders to consider and vote upon new proposals. Section 401.03 of the NYSE's Listed Company Manual "recommends" but does not require at least 30 days between the record and meeting dates for a meeting to give ample time for the solicitation of proxies.

deliver notice of the special meeting not less than 10 days before the meeting[9] and, if the SPAC is a Delaware entity and will be directly merging with another entity, such notice is typically required at least 20 days before the meeting.[10] This notice is included at the beginning of the SPAC's proxy statement and effectively requires that final versions of all proxy materials be delivered to the SPAC's shareholders at least 10 days (or 20 days, as applicable) before the SPAC's special meeting. Moreover, a final proxy statement is available for at least 10 days (if using the full set mailing approach for dissemination of the proxy statement) before the shareholder vote on the de-SPAC transaction.

The SEC's proposed solution does not align with the treatment of IPOs. An IPO prospectus is substantially final at launch of the IPO roadshow; however, since there is no required length for a roadshow, investors in an IPO may only have access to a substantially final version of the prospectus for a few days prior to making their investment decision. Under the current framework, the final registration statement or proxy statement in a de-SPAC transaction is available for at least 10 days and a preliminary version is typically publicly available for up to several months longer than in an IPO.

The SEC justifies this differential treatment by citing the complexity of the SPAC structure, the conflicts of interest that are often present in this structure and the effects of dilution on non-redeeming shareholders, but it fails to appreciate that many of these same considerations can be present in IPO transactions and that this proposed rule is decidedly contrary to the SEC's stated intention of aligning de-SPAC transactions with IPOs.

Target Company as Co-Signatory to Form S-4 and Form F-4

The SEC is proposing to amend the signature instructions to Forms S-4 and F-4 to state that, if a SPAC is offering its securities in a de-SPAC transaction that is registered on the form, the term "registrant" for purposes of the signature requirements of the form would mean the SPAC and the target company.

The SEC should not amend Forms S-4 and F-4 to require that the target company be treated as a co-registrant.[xxxvii] However, as a preliminary matter, the proposed revisions to the forms do not appear to result in the target company being a co-registrant for the entirety of the form. The proposed change to Instruction 1 to the Signatures section of the forms purports to make the target company a registrant "for purposes of this instruction." Thus, it appears that the change would solely require that the target company, along with its specified officers and directors, sign the registration statement. Compare existing Instruction 3 to the Signatures section of the forms, which is not limited solely to the Signatures section. If the regulatory goal is exposing the target company and its officers and directors, as signatories, to Section 11 liability for material misstatements or omissions in the registration statement, the proposed amendment to Instruction 1 of the forms accomplishes that. There is no need for an additional entity to be treated as a "registrant" for other sections of Forms S-4 and F-4 (as opposed to a mere signatory), which would result in disclosure requirements that are inconsistent with the proposed revisions to Regulation S-

[9] Delaware General Corporation Law ("DGCL") Section 222(b). Article 61 of The Cayman Companies Act requires at least five days-notice of meetings, but most Cayman SPAC governing documents align with the Delaware requirements and require 10 days-notice of meetings.
[10] DGCL Section 251(c).

X ("**S-X**") (e.g. if there were multiple target companies, would each require PCAOB compliant financials, rather than solely the predecessor as in proposed Rule 15-01 of Regulation S-X?).

Putting aside the signatory/registrant distinction, we believe that the SEC should not make the target company sign the registration statement or be a full co-registrant. The required signatories should be the surviving company, which might be a new registrant and the directors and officers of that entity.[11] This would be more aligned with an IPO, where a new registrant is often formed, for example in connection with a carve-out IPO of a division, or where multiple existing businesses or assets are combined into a new registrant. Moreover, the proposed definition of "target company" includes assets, and we do not understand how assets could be expected to sign a registration statement. Additionally, we believe that the proposed rule results in inconsistencies with IPOs where there are multiple target companies – should all be required to sign the registration statement, just the accounting predecessor or acquiror, the one whose shareholders own the largest amount of the surviving company, etc.? In situations where the de-SPAC transaction is not in essence an IPO (e.g., where the target company shareholders only receive cash consideration), the target company should not be required to sign the registration statement.

We do not believe expanding the signatories to Forms S-4 and F-4 would improve the disclosure provided in connection with de-SPAC transactions.[xxxviii] We believe the target companies and their officers and directors already have strong incentives to ensure that the disclosure in connection with a de-SPAC transaction is correct. As noted in the Proposing Release, "[e]ven when not liable under Section 11, the [target] company and its affiliates … may be subject to enforcement actions by the Commission."[12] Moreover, where the shareholders of the target company will own a substantial amount of equity in the surviving company, the directors and officers of the target company should already have sufficient incentives to ensure that the surviving company does not face post-transaction liability. While the proposed amendment to Instruction 1 would extend Section 11 liability to new individuals, we do not agree that this would create "strong incentives … to review more closely the disclosure"[13], given the existing strong incentives for such review.

We similarly do not believe the SPAC sponsor should be required to sign a Form S-4 or F-4. As discussed above, the concept of a "sponsor" is vague, and the concept would be better suited by assigning liability to the SPAC's directors and officers, as well as the surviving company and its directors, officers and director nominees. Requiring the SPAC sponsor to sign would not be consistent with the SEC's approach with respect to requiring execution by the board of directors of a corporate general partner – absent such requirement there would be confusion as to whether the "directors" of the limited partnership were the general partner(s) as entities, or the natural persons serving as directors of the general partner(s) (as opposed to both).[xxxix] Moreover, if the SEC believes a sponsor should have liability for the registration

[11] Consistent with an IPO, those individuals that, with their consent, are named as director nominees would also have liability.
[12] Proposing Release, fn. 140, citing *In the Matter of Momentus, Inc., et al,* . Release No. 34-92391 (July 13, 2021). See also *In the Matter of Nikola Corp.*, Release No. 33-11018, 34-93838 (Dec. 21, 2021) and *SEC v. Akazoo S.A.*, Case No. 1:20-cv-08101 (S.D.N.Y. filed Sept. 30, 2020).
[13] Proposing Release, p. 77.

statement due to its control of the SPAC, Section 15(a) of the Securities Act already provides liability for controlling persons.

Re-Determination of Smaller Reporting Company Status

The SEC is proposing to require a redetermination of smaller reporting company ("**SRC**") status following the consummation of a de-SPAC transaction.

The SEC should not require redetermination of SRC status as of a date within four business days after consummation of the de-SPAC transaction.[xl]

This change could be potentially problematic for transactions where (1) the SPAC is an SRC and the legal acquirer, (2) the target company was an SRC prior to the closing of the de-SPAC transaction and filed two years of audited financial statements and (3) the post-closing public float exceeds $700 million. The post-closing re-determination of the public float would be dependent on redemption levels and the post-closing trading price and could lead to significant uncertainty regarding required disclosure if the post-closing company's first annual report is due shortly after closing or the company is required to file a registration statement after the company's first periodic report. If the post-closing public float exceeds $700 million, the post-closing company would be required to include three years of audited financial statements in its annual report and any registration statement, which may be more than what was included in the Form S-4 or proxy statement filed in connection with the de-SPAC transaction. Notably, this uncertainty does not exist after IPOs where required financial statements are based on the status determined prior to the initial filing of the registration statement and not re-tested promptly after the IPO.

While longer periods or accommodations could ameliorate the issues with the proposed amendments to S-K Item 10(f), a simpler solution, consistent with aligning the treatment of de-SPAC transactions with IPOs, is to have the determination be consistent with that which applies in an IPO. The SRC status of the target company should be determined in accordance with S-K Item 10(f)(2)(ii), based on the revenues and public float of the target company that will be the predecessor for financial reporting purposes. The public float of S-K Item 10(f)(2)(ii)(A) should be calculated as the agreed value of the equity consideration payable to the owners of the target company, plus the total outstanding shares of the SPAC (valued at $10 per share, or whatever the agreed per-share valuation of the equity consideration is), plus any common equity to be issued to finance the de-SPAC transaction. That status should be reflected on the cover page of the registration statement (or in the proxy statement, where a registration statement is not required) and redetermined as of the end of the second fiscal quarter subsequent to the closing of the de-SPAC transaction (each consistent with the S-K Item 10(f)(2)(ii)(C) treatment for IPO issuers). The surviving company should have the option to redetermine its status based on the number of shares outstanding after the closing of the de-SPAC transaction (i.e., reflecting redemptions and any equity not issued in the financing transaction or as equity consideration), consistent with the last sentence of S-K Item 10(f)(2)(ii)(C).[xli]

Moreover, the SEC should revisit and revise its guidance in 5230.1 of the Division of Corporation Finance's Financial Reporting Manual, which could result in more information being required in a Super 8-K (defined below) than would be required in a Form S-1 for the target company.

Re-determinations of other issuer status (e.g., emerging growth company, accelerated or large accelerated filer, foreign private issuer, etc.) should take place consistent with the treatment of post-IPO companies, as of the end of the second fiscal quarter of the company.[xlii] However, similar to the option of a company to redetermine its status as an SRC under S-K Item 10(f)(2)(ii)(C), we believe a registrant should be allowed to redetermine its status as a foreign private issuer after closing of the de-SPAC transaction. Where the surviving company would otherwise qualify as a foreign private issuer and the SPAC is not a foreign private issuer, a new registrant must be formed to achieve eligibility, which can have adverse consequences on other aspects of the transaction (including making it more costly). Allowing redetermination of foreign private issuer status would result in disclosure requirements and filer status determinations that are consistent with what would apply if the target company went public via an IPO, without regard to the de-SPAC transaction structure.[xliii] A de-SPAC transaction may be structured so that an entity other than the SPAC is the acquiror for tax reasons, due to the domicile of the surviving company, or due to required consents and approvals applicable to the target company. Aligning the disclosure requirements so that, for example, a target company that would have qualified as a foreign private issuer could be acquired by a domestic SPAC and then the surviving company could be immediately eligible for foreign private issuer status would allow de-SPAC transactions to be structured in the best interests of shareholders.[xliv]

Elimination of PSLRA Safe Harbor

The SEC is proposing to amend the definition of "blank check company" for purposes of the Private Securities Litigation Reform Act of 1995 (the "**PSLRA**") to mean "a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person."[14] This would make SPACs ineligible for the safe harbor provided by the PSLRA.

With respect to forward looking statements, the SEC's "de-SPAC transactions are merely IPOs of the target company" theory has flaws. Specifically, the SPAC is a publicly traded company, typically either formed in Delaware or the Cayman Islands, and the directors and officers of the SPAC have fiduciary duties. They are required to conduct substantial diligence (arguably more than underwriters in an IPO), and are required to disclose the material reasons for approving and proposing the de-SPAC transactions to the SPAC's shareholders, which frequently include projections provided to the directors in connection with their evaluation of the de-SPAC transaction.[xlv] While in an IPO the issuer may choose to not disclose projections (and in practice IPO underwriters often object to the inclusion of projections in an IPO registration statement or prospectus[15]), in a de-SPAC transaction the disclosure is mandatory where the board of the SPAC relied on projections in determining to enter into the de-SPAC transaction. For this reason, we believe the SEC should not amend the definition of blank check company as proposed.[xlvi]

Projections are used in IPOs--they are just customarily not included in the registration statement and prospectus. Instead, they are disclosed to analysts at the investment banks, who use them to assist in

[14] Proposed amendment to Rule 405.
[15] In practice, underwriters often object to projections in transactions even when the PSLRA is available (e.g. follow-on offerings by existing registrants).

pricing the securities and in building the analysts' models for disclosure to institutional investors. Following the SEC's "de-SPAC transaction is an IPO" theme, the SPAC is an underwriter, and is using projections to value the business. The difference is that the SPAC, as a public company, has a duty to disclose all material information that the SPAC's board utilized in approving the de-SPAC transaction.

We do not believe an amendment (and the proposed change is not a "clarification") would improve the quality of projections in connection with de-SPAC transactions.[xlvii] SPACs and target companies already have strong incentives to make sure that the projections are as reasonable as possible. They may face suits over inaccurate projections,[16] and the target company has a strong incentive to set projections that it will be able to meet or beat once it is a public company. However, the expansion of underwriter liability to cover de-SPAC transactions may cause an increased focus on projections, and more thorough discussion regarding the assumptions and considerations underlying the projections, as well as material risks that could cause such projections to not be satisfied. Where projections are not a material consideration for a SPAC board, under the Proposed Rules that SPAC will be less likely to disclose projections.

While some de-SPAC transactions are in form "initial public offering[s]" (e.g., where the target or a new company is formed to acquire the SPAC), it is inappropriate to deem a de-SPAC transaction where an existing public company stays public (e.g., where the SPAC survives the de-SPAC transaction as the publicly traded company) as an "initial public offering".[xlviii] However, the PSLRA already excludes forward looking statements made in connection with a tender offer, such that the SEC could effectively limit the PSLRA safe harbor through an interpretation of that exclusion.[17]

If Rule 405 is amended to define SPACs as "blank check companies", other rules (Securities Act Rules 137, 138, 139, 163A, 164, 174, 430B and 437a) should be revised to continue to only apply to blank check companies subject to Rule 419.[xlix]

Underwriter Status and Liability in Securities Transactions

In the Proposing Release, the SEC alleges that every de-SPAC transaction constitutes a distribution of the combined company's securities, because the "result of a de-SPAC transaction, however structured, is consistent with that of a traditional initial public offering."[18]

Proposed Rule 140a would provide that underwriters of a SPAC's IPO who take steps to facilitate the de-SPAC transaction or any related financing transaction, or otherwise participate (directly or indirectly) in the de-SPAC transaction, will be deemed to be engaged in the distribution of the securities of the combined

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[16] The PSLRA safe harbor only protects against civil suits, and in a civil case it is not a shield against a fraud claim.
[17] See Section 27A(b)(2)(c) of the Securities Act and Section 21E(b)(2)(c) of the Exchange Act ("(b) Exclusions. Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement… (2) that is… (C) made in connection with a tender offer…").
[18] Proposing Release, p. 95.

company resulting from the de-SPAC transaction. This would make those investment banks liable for any material misstatements or omissions appearing in the disclosure[19], subject to a due diligence defense.

The Proposing Release states "receipt of compensation in connection with the de-SPAC transaction could constitute direct or indirect participation in the de-SPAC transaction."[20] The SEC argues that, because the SPAC IPO underwriters have deferred underwriting compensation that will only be received if a de-SPAC transaction is completed, the underwriter "has a strong financial interest in taking steps to ensure the consummation of the de-SPAC transaction."[21]

In terms of impact on SPACs, SPAC IPOs and de-SPAC transactions, while the Proposed Rules are pending and assuming they are adopted as proposed, institutions involved in SPAC IPOs and de-SPAC transactions will likely (frankly many already are) attempt to establish a due diligence defense against potential liability, or seek ways to distance themselves from the de-SPAC transaction sufficiently as to not constitute statutory underwriters (although this may be difficult, given the breadth and vagueness of the SEC's new interpretation). This has the likelihood to delay de-SPAC transactions and increase costs for de-SPAC transactions, and will likely result in incremental negotiated contractual rights for the SPAC IPO underwriters and investment banks participating in a de-SPAC transaction. Some institutions may refrain from participating in de-SPAC transactions altogether, even where they did not serve as IPO underwriters, due to the breadth of the SEC's "interpretation" of Section 2(a)(11) of the Securities Act. Taken together, this will increase uncertainty for SPAC market participants across the spectrum. For future SPAC IPOs and de-SPAC engagements, investment banks will likely seek strong contractual rights to participate in diligence, comment on the disclosure documents, and potentially withdraw at their option.

The SEC should not adopt Rule 140a as proposed.[1] While the SEC purports to be merely interpreting the phrase "or participates or has a direct or indirect participation in [the distribution of any security]"[22], in addition to determining that all de-SPAC transactions are, in economic substance, a distribution of the target companies' securities to the SPACs' shareholders, in our view, the SEC's position goes beyond a mere interpretation of the Securities Act and is substantively expanding the concept of an "underwriter" beyond that contemplated by Congress in adopting the Securities Act.

While the Supreme Court has endorsed (in dicta) the concept of indirect participation in a distribution being sufficient to constitute an "underwriter",[23] incidental participation is not sufficient. "[P]articipat[ion] only in non-distributional activities that may facilitate securities' offering by others…"[24]

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[19] "Disclosure" in connection with a de-SPAC transaction may include a proxy statement, a registration statement on Form S-4 or F-4, a prospectus included in a registration statement, or a tender offer statement on Schedule TO. By virtue of proposed Rule 145a, almost all de-SPAC transactions would require a registration statement, which will contain a joint proxy statement and prospectus.
[20] Proposing Release, p. 97
[21] Id.
[22] Section 2(a)(11) of the Securities Act (defining "underwriter").
[23] *Pinter v. Dahl*, 486 U.S. 622 (1988).
[24] *In re Lehman Brothers Mortgage-Backed Securities Litigation*, U.S. Court of Appeals, Second Circuit, Fed. Sec. L. Rep. ¶96,310, 650 F.3d 167, (May 11, 2011).

is not sufficient. Underwriter status is limited to those "people (or entities) responsible for distributing securities to the public, that is, on those engaged in the public offering."[25]

The securities laws do not mandate that every distribution have an underwriter, but impose liability on those that act in the capacity of an underwriter. The SEC seems inclined to attempt to mandate that there be an underwriter for de-SPAC transactions in order to "screen the multitude of issuers seeking access to the capital markets",[26] but many of the cases cited by the SEC in explaining the importance of the underwriter role and liability support the conclusion that the investment banks participating in de-SPAC transactions are not in fact underwriters. The SEC quotes *SEC v. Richmond* for the proposition that "[i]nvestors … rely on [an implicit representation from an underwriter that it has done diligence] which has a direct bearing on their appraisal of the reliability of the representations in the prospectus."[27] In a footnote in the Proposing Release, the SEC quotes *Sanders v. John Nuveen & Co., Inc.,* 524 F.2d 164, 1069-70 (7th Cir. 1975), for the proposition that, among other things, "the relationship between the underwriter and its customers implicitly involves a favorable recommendation of the issued security."[28] However, in de-SPAC transactions, assuming *arguendo* they involve a distribution, the investment banks do not have such customers. Their names do not appear on the cover of the prospectus, and the investing public is not relying on the role of the investment banks to make an investment decision. Financial motivations notwithstanding, the SPAC IPO underwriters may have no actual participation in the de-SPAC transaction, and even when they do they are not responsible for the public disclosure. To the extent they are named in the disclosure, it is merely to describe their roles, which do not relate to the de-SPAC transaction's alleged distribution of securities under proposed Rule 145a. As proposed by the SEC, remote "participation" in the de-SPAC transaction by an investment bank or other advisors—for example, acting as lead arranger for a credit facility for the surviving company—would transform such investment bank or other advisors from incidental participants into underwriters for purposes of the Securities Act. To take the SEC's "interpretation" of participation to its logical outcome, every person or entity remotely participating in a de-SPAC transaction is a statutory underwriter, including the SPAC and target company's attorneys, accountants, proxy solicitors, etc., as well as the financial printer that files the registration statement or proxy. Frankly, it would seem that the SEC itself is one of the major "participants" under this line of logic. This goes well beyond the definition of "underwriter", beyond the congressional intent from 1933, and is inconsistent with case law interpreting both. We agree with the comments of the Securities Industry and Financial Markets Association ("**SIFMA**") submitted on June 10, 2022[29] that proposed Rule 140a exceeds the Commission's statutory authority and is therefore unlawful, as well as SIFMA's suggestions to limit the proposal if the Commission does not abandon it altogether.

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[25] Id.
[26] Proposing Release p. 91, citing Harold S. Bloomenthal & Samuel Wolff, Due diligence defenses – Underwriter's responsibilities and liabilities, 3B Sec. & Fed. Corp. Law (2d. Ed.) and *New High Risk Ventures*, Release No. 33-5272 (July 27, 1992).
[27] Proposing Release, pp. 91 and 92, citing *In the matter of the Richmond Corp.,* Release No. 33-4584 (Feb. 27, 1963).
[28] Proposing Release, note 185, at p. 92.
[29] Available: https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-on-SECs-SPAC-Proposal.pdf

As drafted, the Proposed Rule is unduly vague, and we believe specificity as to which investment banks and advisors may be exposed to potential underwriter liability is imperative. The proposed expansion of underwriter liability would also introduce substantial uncertainty as to when and how liability attaches. When does the deemed distribution occur? At effectiveness of registration, on the redemption deadline, at the vote…?

If the SEC or Congress determines that an underwriter should be mandated for every de-SPAC transaction, that would be more appropriately handled via legislation. Alternatively, the SEC could mandate a new role for an investment bank in de-SPAC transactions for all exchange-listed SPACs. For example, NYSE and NASDAQ exchange listing rules require a third-party valuation be conducted by a financial advisor for direct listings.[li] Whether the financial advisor was a statutory underwriter due to its participation is a point of debate.[30] However, the SEC could mandate a similar role in connection with a de-SPAC transaction, and clarify that such role in both de-SPAC transactions and direct listings constitute statutory underwriters.

In our experience, SPACs and their advisors conduct robust diligence on target companies, equaling or exceeding that conducted by underwriters in an IPO.[lii] The Proposed Rule would likely result in more parties conducting diligence, but not necessarily improved diligence or disclosure.

While SPAC IPO underwriters may be able to perform diligence where they have a role in connection with the de-SPAC transaction, most do not have a contractual right to conduct diligence. It would be possible to negotiate such a right in connection with a future IPO, but for the hundreds of existing SPACs, the IPO underwriters have no contractual right to perform diligence at the de-SPAC stage.[liii] If the SEC adopts proposed Rule 140a, it should provide guidance on appropriate disclosure regarding which institutions may be statutory underwriters, as well as disclosure regarding any institutions that have withdrawn from such role. Moreover, the SEC should adopt guidance permitting an institution to withdraw from being an underwriter after the effective date of the Form S-4 or F-4, but prior to the deadline for shareholder redemption – that date would be more aligned with effectiveness of a Form S-1 or F-1 in an IPO (which occurs very close to pricing and the investment decision by investors, rather than weeks or months before in connection with a Form S-4 or F-4 with a proxy statement).[31]

BUSINESS COMBINATIONS INVOLVING SHELL COMPANIES

De-SPAC Transactions Deemed a Sale to SPAC Shareholders

New Rule 145a would deem that a de-SPAC transaction constitutes a sale of securities to the SPAC's shareholders for purposes of the Securities Act. This would require the filing of a Form S-4 or Form F-4 for most de-SPAC transactions. Under current rules, depending on the structure of the de-SPAC

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[30] See statement of Allison Herren Lee and Caroline A. Crenshaw on Primary Direct Listings: https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23.

[31] We recognize that this is inconsistent with Section 11(b) of the Securities Act. However, should the SEC impose underwriter liability on participants in proxy solicitations, it would seem appropriate to allow withdrawal up until a point closer to the investment decision rather than shortly before mailing of the proxy statement.

transaction and other considerations, a de-SPAC transaction can be accomplished using only a proxy statement.

We are supportive of aligning disclosures and liabilities across de-SPAC transactions, but do not believe the Commission has statutory authority to "deem" a distribution to occur when one in fact does not.[liv] The SEC has attempted to interpret there to be a distribution where there may or may not be a distribution in fact. Structuring considerations other than securities laws often require that the target company or one of its newly formed subsidiaries serve as the surviving company, which requires a registration statement for the offering of securities to the SPAC's existing public shareholders. While the SEC suggests that the change is to prevent private companies from using a shell company "to avoid the disclosure, liability, and other provisions applicable in traditional registered offerings"[32], in practice, exchange listed SPACs provide substantially the same disclosure regardless of whether the transaction involves a registration statement or only a proxy statement. Moreover, the SPAC has similar obligations for any misstatements or omissions made in a proxy statement as in a registration statement. As such, we do not believe proposed Rule 145a is necessary for the protection of investors.

In practice, the rule would effectively require a registration statement for all publicly traded shell companies, including SPACs.[lv] Since exchange listed SPACs already go through at least a proxy statement filing and review process, the impact of the proposed rule on exchange listed SPACs would be modest, if not non-existent.

The SEC does not need to provide guidance with respect to the timing of effectiveness of a registration statement.[lvi] The requirements and guidance with respect to effectiveness of registration statements for other mergers is sufficient.

If the SEC does adopt Rule 145a, we believe the deemed sale should be limited to securities with respect to which there is a redemption right.[lvii]

Reliance on an exemption such as Securities Act Section 3(a)(9) would effectively gut the SEC's intent of aligning disclosure and liability regimes across de-SPAC transactions.[lviii] However, we believe it requires a strained interpretation to conclude that Securities Act Section 3(a)(9) is not available. First, if the SPAC shareholders retain their securities in the SPAC, it is a stretch to conclude that there is exchange. Moreover, if there is an exchange, it is embodied in the redemption decision, not the vote, and thus payment of compensation for a proxy solicitor should not prevent reliance on Securities Act Section 3(a)(9). In addition, while the SEC notes that none of the non-exclusive safe harbors in Rule 152(b) are likely to apply,[33] we believe concurrent exemptions may still be possible under Rule 152(a).

Business combination related shell companies should be excluded from the scope of proposed Rule 145a, as they do not present the same concerns as other shell companies.[lix] In practice, most transactions involving business combination related shell companies should be able to rely on other exemptions from

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[32] Proposing Release, pp. 103-104.
[33] Proposing Release, fn. 233.

registration (e.g., the business combination related shell company will almost always be wholly owned by a limited number of accredited investors), but exclusion would still be advisable.

In the spirit of aligning treatment of IPOs and de-SPAC transactions, Rule 145 should be revised to not apply to any transactions that Rule 145a applies to.[lx] [34]

Financial Statement Requirements in Business Combination Transactions Involving Shell Companies

The SEC is proposing a number of technical changes to financial statement requirements in de-SPAC transactions. These changes include:

- Permitting target companies that qualify as emerging growth companies to include two years (rather than three years) of PCAOB audited financial statements in the Form S-4 or F-4 registration statement required for a de-SPAC transaction.

- Codifying existing staff guidance obligating a target company in a de-SPAC transaction to include financial statements in the Form S-4 or F-4 that are audited to the same extent as a registrant in an IPO.

- Codifying "existing practice" by providing that the age of financial statements for a target company that would be the predecessor to a shell company in a registration statement or proxy statement would be based on whether the target company would qualify as an SRC if filing its own initial registration statement.

- Applying Rule 3-05 of Regulation S-X in cases where a target company party to a de-SPAC transaction has recently acquired or will acquire another business.

- Permitting combined companies to omit stand-alone financial statements of a SPAC for periods prior to the de-SPAC transaction if (i) the financial statements of the SPAC have been filed for all required periods through the acquisition date, and (ii) the financial statements of the registrant include the fiscal period in which the acquisition was consummated.

The SEC should adopt the amendments and new rules related to aligning financial statement disclosures, including Rule 15-01 of Regulation S-X, as proposed, with the exception of Rules 15-01(d)(2), 15-01(e) and 11-01(d).[lxi] With the exception of the aforementioned Rule subsections and S-X Item, the amendments and new rules either codify existing practice or reconcile inconsistencies between SEC practice (such as requiring PCAOB compliant target financials in a manner not required by the proxy rules[lxii]) and the form requirements.

Proposed Rule 15-01(d)(2) should be revised to require filing of omitted financial statements at the later of (a) the Form 8-K filed with Form 10 information and (b) 75 days after consummation of the acquisition.

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[34] See "Other Potential Revisions" below.

If other businesses are acquired by the target company shortly before the Super 8-K is filed, the Proposed Rules would effectively accelerate the financial statement requirements and mandate their presentation on a faster timeline than if the business was instead acquired by an operating company.

Proposed S-X Rule 15-01(e) should be revised to not require financial statements of the SPAC unless the company determines that they provide material information to investors.[lxiii] We cannot think of any scenario in which the pre-acquisition financial statements of the SPAC are material to post-closing investors in the combined company. If they were, Exchange Act Rule 12b-20 or Securities Act Rule 408(a) would require their inclusion, as the SEC notes in the Proposing Release.[35] Requiring continued inclusion of pre-closing SPAC financial statements does not promote investor protection and merely results in immaterial information and additional cost and expense for the combined company. We also note that the discussion of proposed Rule 15-01(e) in the body of the Proposing Release describes one of the conditions for application of that rule as the financial statements of the "shell company" have been filed, while the text of proposed Rule 15-01(e) itself uses the term "predecessor". This discrepancy should be clarified.

Proposed S-X Rule 11-01(d) should not be adopted.[lxiv] SPACs do not constitute businesses as defined in S-X Rule 11-01(d). In a de-SPAC transaction there is no continuity of operations between the SPAC and the surviving company, and the SPAC's revenue producing activities (interest on short term U.S. government securities or money market funds investing in the same) do not continue post-closing and are not material to investors in the surviving company. While there is a presumption that a separate entity, such as a SPAC, is a business, none of the attributes identified in S-X Rule 11-01(d)(2) for evaluation of whether a lesser component of a business constitutes a business (i.e. physical facilities, employee base, market distribution system, sales force, customer base, operating rights, production techniques or trade names) remain after the de-SPAC transaction. The fact that the SPAC undertakes "significant equity transactions"[36] does not make the SPAC a business. To correct a statement of the SEC in the Proposing Release "… consideration of the continuity of the SPAC's operations prior to and after the de-SPAC transaction ~~may~~ <u>should</u> lead ~~some parties~~ <u>everyone</u> to conclude that a SPAC is not a business under the rule."[37] We disagree that financial statements of the SPAC could ever be material to an investor in the combined company, as surmised by the SEC in the Proposing Release, but if they were material then Exchange Act Rule 12b-20 or Securities Act Rule 408(a) would require their disclosure.

The significance tests that determine whether the financial statements of businesses that are not or will not be the predecessor are required to be filed should employ as denominator the financial position and financial results of the target company in lieu of that of the shell company registrant.[lxv] This would align financial reporting for non-predecessor acquirees in connection with a de-SPAC transaction to the requirements in connection with a traditional IPO. The use of pro forma financials should only be allowed to the extent they would be permitted for an acquisition in connection with a pending or completed IPO.

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[35] Proposing Release, pp. 123-124 and fn. 276.
[36] Proposing Release, p. 124.
[37] Proposing Release, p. 124, struck through text in original, underlined text added.

Form 8-K should be amended to provide an exception from a third fiscal year of financial statements where that fiscal year would be prior to the earliest audited period contained in the registration statement or proxy statement for the de-SPAC transaction.[lxvi] We note that if our suggestion to allow the surviving company the option to redetermine its status as an SRC under S-K Item 10(f)(2)(ii)(C) as discussed above under "Re-Determination of Smaller Reporting Company Status" were to be adopted, we believe any such Form 8-K amendment would be unnecessary.

Enhanced Projections Disclosure

The SEC is proposing to amend Item 10(b) of Regulation S-K and create new Item 1609 of Regulation S-K. The amendments to Item 10(b) are intended to expand and update the SEC's views and guidance for registrants on the use and presentation of projections in SEC filings, and new Item 1609 will mandate specific disclosures relating to financial projections presented in de-SPAC transactions.[lxvii]

Consistent with the theme that de-SPAC transactions should be treated consistently with IPOs, we believe the additional disclosures in Item 1609 should apply to all projections included in Commission filings.[lxviii]

The SEC should not prohibit the disclosure of any specific financial measures or metrics. The purpose of the projections is to explain the material information that the SPAC board relied upon in approving the de-SPAC transaction, and thus prohibiting disclosure would potentially be inconsistent with fiduciary obligations of the SPAC board.[lxix]

Investment Company Act Safe Harbor

The SEC is proposing a new Rule 3a-10 under the Investment Company Act of 1940 (the "**'40 Act**") that would establish a safe harbor from investment company act status for SPACs so long as certain conditions are met.

> The conditions of the proposed safe harbor would be:
>
> "(a)… (1) The SPAC's assets consist solely of Government securities, securities issued by government money market funds as defined in [Investment Company Act Rule] 2a-7(a)(14)[[38]], and cash items prior to completion of the de-SPAC transaction;
>
> (2) The assets set forth in paragraph (a)(1) of this section are not at any time acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes;
>
> (3) The SPAC:
>
> (i) Seeks to complete a single de-SPAC transaction as a result of which:

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[38] Rule 2a-7(a)(14) defines "Government Money Market Fund" as "a money market fund that invests 99.5 percent or more of its total assets in cash, government securities, and/or repurchase agreements that are collateralized fully."

(A) The surviving company, either directly or through a primarily controlled company, will be primarily engaged in the business of the target company or companies, which business is not that of an investment company, and

(B) The surviving company will have at least one class of securities listed for trading on a national securities exchange;

(ii) Files a Form 8-K with the Commission, no later than 18 months after the effective date of its initial registration statement, disclosing an agreement to engage in the de-SPAC transaction with at least one target company; and

(iii) Completes the de-SPAC transaction no later than 24 months after the effective date of its initial registration statement.

(4) Any assets of the SPAC:

(i) That are not used in connection with the de-SPAC transaction; or

(ii) In the event of a failure of the SPAC to file a Form 8-K within the time frame set forth in paragraph (a)(3)(ii) of this section or complete a de-SPAC transaction within the time frame set forth in paragraph (a)(3)(iii) of this section

will be distributed in cash to investors as soon as reasonably practicable thereafter;

(5) The SPAC is primarily engaged in the business of seeking to complete a single de-SPAC transaction, as set forth in paragraphs (a)(3) of this section and evidenced by:

(i) The activities of its officers, directors and employees;

(ii) Its public representations of policies;

(iii) Its historical development; and

(iv) An appropriate resolution of its board of directors, which resolution or action has been recorded contemporaneously in its minute books or comparable documents; and

(6) The SPAC does not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities."[39]

We are supportive of a safe harbor, but believe proposed Rule 3a-10 should be revised substantially.[lxx] *For the avoidance of doubt, the rule should also provide a safe harbor for the trust account, to the extent it may also be an issuer.*[lxxi]

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[39] Proposed Rule 3a-10.

Condition (1), that the "SPAC's assets consist solely of Government securities…", substantively codifies the existing behavior by SPACs. Current SPAC practice is to limit investment of the assets in the trust account to U.S. government securities within the meaning of Section 2(a)(16) of the Investment Company Act having a maturity of 185 days or less, or in money market funds meeting the conditions of paragraphs (d)(1), (d)(2), (d)(3) and (d)(4) of Rule 2a-7 promulgated under the Investment Company Act, which invest only in direct U.S. government treasury obligations. In lieu of an investment of the assets in the trust account, they can be held in cash. However, the proposed condition is slightly more lenient than current SPAC practice, in that the safe harbor would not include a maturity limit for government securities, and the proposed condition would not include the "Risk-limiting conditions" set forth in Rule 2a-7(d).[40]

The SEC should consider whether to grant SPACs more leniency in their investments than Proposed Rule 3a-10(a)(1), such as to allow for investments in capital preservation investments (similar to Rule 3a-8), or to include money market funds relying on Rule 2a-7.[lxxii] Money market funds should be permitted as cash equivalents. If the SEC determines to permit investment in securities other than U.S. government securities, the proposed safe harbor should be expanded to include an exemption from Section 3(a)(1)(C).[lxxiii]

We do not believe it is necessary for the safe harbor to include a requirement that the SPAC assets are held in trust or escrow accounts. However, if the SEC does adopt such a requirement, it should accommodate the fact that SPACs do not hold "all" of their cash in trust. They typically have a working capital account to pay expenses between IPO and the de-SPAC transaction.[lxxiv]

*Condition (2), that the assets of the SPAC are not "*at any time acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes" has been described by the SEC as a condition that the SPAC not "actively manage its portfolio". This is consistent with how SPAC management teams already operate.[lxxv]

Condition (3) would require that the SPAC seek to undertake "a single de-SPAC transaction" as a result of which the surviving company, roughly speaking, is listed on a national securities exchange and not an investment company. Most importantly, this condition would require the de-SPAC transaction to be announced within 18 months of the SPAC's IPO[41] and closed within 24 months after the SPAC's IPO. These time limits are arbitrary and unduly restrictive, and by the SEC's own estimation would not have been met by approximately 43% of SPACs that completed de-SPAC transactions between 2016 and 2019.[42] Moreover, the surveys cited by the SEC are dated, and more recent transactions have been taking longer (in part because the SEC review and comment periods have been more protracted).

In our view, the proposed deadlines for signing and closing do not match the purported risk that investors might view long-in-the-tooth SPACs more like investment companies.[lxxvi] If investors were investing in

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[40] Rule 2a-7(d) imposes conditions relating to portfolio maturity, portfolio quality, portfolio diversification and portfolio liquidity.
[41] Technically, the 18-month period begins with the effectiveness of the IPO registration statement, which may pre-date the IPO pricing date and will pre-date the IPO closing date.
[42] Proposing Release, p. 271.

SPACs to gain exposure to short-term U.S. government securities, investing in a recently minted SPAC (with more time to maturity) would be a better strategy, as there would be a longer period to benefit from the investments. In practice, investors seeking such exposure would invest in actual mutual funds invested in such securities, as there is no guarantee that SPACs will invest the funds in the trust account and their returns from the investment in U.S. government securities would be higher in a mutual fund. Importantly, SPAC management has little ability to profit from investments in securities made with the funds held in the SPAC trust account. The concept that a SPAC management team would engage in "regulatory arbitrage… to operate like an investment company without investment company registration"[43] is nonsensical, as the redemption requirement means that management has zero incentive to manage the trust account assets other than to preserve capital. So long as the directors and officers of the SPAC are focusing on acquiring operating companies or assets, we believe arbitrary deadlines should be avoided, which would allow SPACs to be treated similar to other companies with substantial cash to be invested for capital preservation purposes.[44] If the SEC believes that a maximum period of reliance on the safe harbor is necessary, we would suggest a minimum of 36 months, consistent with the exchange listing rules applicable to SPACs, would be appropriate, or existing SPACs should be grandfathered based on the existing deadlines set forth in their constituent documents. If any time period requirements are included, they should be styled in the manner of Rule 3a-2 under the Investment Company Act – i.e. a maximum period of reliance on the safe harbor, rather than a period by which the issuer has to complete a transaction.[lxxvii] Moreover, we do not believe it is necessary to have separate periods for signing of a transaction and closing of the transaction – one period of maximum reliance on the safe harbor (consistent with Rule 3a-2's formulation) would provide sufficient investor protection.

The requirement that the SPAC undertake "a single de-SPAC transaction" would not prevent a multi-target de-SPAC transaction, and the stated reason for this requirement seems to miss the point that once a de-SPAC transaction is completed, the surviving company is no longer a SPAC.[lxxviii] However, this condition could be read to prevent the target company from signing further business acquisitions during the pendency of the de-SPAC transaction, which would adversely affect companies going public in this manner as compared to an IPO. Accordingly, the word "single" in the condition should be eliminated. We do not believe the condition is necessary for investor protection – if the surviving company pursues multiple transactions (beyond the flexibility in the definition of "target company") and that brought it within the definition of an "investment company", the existing protections of the '40 Act should be sufficient.

We believe the requirement that the surviving company "either directly or through a primarily controlled company, will be primarily engaged in the business of the target company or companies, which business

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[43] Proposing Release, p. 265.

[44] For example, Rule 3a-8 permits R&D companies, subject to a number of conditions, to invest their cash in securities indefinitely. Similarly, the SEC has granted exemptive orders for companies with substantial cash investments in securities and low income from operations that are substantially longer than the proposed deadlines, or are indefinite (see e.g., *In re Snowflake, Inc.*, https://www.sec.gov/rules/ic/2020/ic-34085.pdf; *In re Lyft, Inc.*, https://www.sec.gov/rules/ic/2019/ic-33442.pdf; and *In re Upstart Holdings, Inc.*, https://www.sec.gov/rules/ic/2020/ic-34124.pdf). In one instance, a court concluded that a company that held a majority of its assets in securities for a decade was not primarily engaged in the business of investing in securities (*SEC v. National Presto Industries, Inc.*, 486 F.3d 305, 315 (7th Cir. 2007)).

is not that of an investment company" should be eliminated or substantially revised.[lxxix] The definition of "target company" includes assets, such that the target company may not be in a business prior to consummation of the de-SPAC transaction. Elimination of the condition would be consistent with other "transitory" exemptions, i.e. Rules 3a-2 and 3a-8, which do not specify how companies relying on those exemptions otherwise come into compliance with the requirements of the '40 Act (that is to say, companies failing to meet the requirements of those exemptions can find other exemptions or exclusions, liquidate, register under the '40 Act, etc.). Consistent with the other transitory exemptions, the safe harbor need not contain other restrictions on the manner in which the surviving company is outside of, or exempt from, the definition of an investment company – there should be no requirement that the surviving company have a majority interest in the target company, control the target company, consolidate the target company, etc., and there is no need to prohibit SPACs from undertaking de-SPAC transactions with companies relying on Section 3(c)(1) or 3(c)(7) (as the surviving company will need to find its own exemptions from the '40 Act, which will naturally limit the SPAC's ability to merge with companies truly relying on these sections).[lxxx] Similarly, there should be no limit on a SPAC seeking to engage with a private company relying on other exemptions or exclusions under Section 3 of the '40 Act – under the SEC's theory that a de-SPAC transaction is merely a different form of IPO, it does not make sense to prohibit a de-SPAC with, for example, a mortgage financing business relying on Section 3(c)(5)(C) or a minerals business relying on Section 3(c)(9). If the SEC desires to prohibit a SPAC from relying on Proposed Rule 3a-10 and then registering as an investment company, the condition could more succinctly be drafted as "The surviving company is not an investment company."

The requirement that the SPAC seeks a transaction in which the surviving company will be listed on a national securities exchange bears no relationship to whether the SPAC is an investment company, and should be eliminated. While exchange listing is the goal for almost every de-SPAC transaction, it is possible that the company may not be eligible due to, among other things, excessive redemptions, and we view there to be no correlation between whether the surviving company is listed on an exchange and investors viewing the SPAC as an investment company. We note that the other transitory exceptions do not have a concept that the registrant "seeks" an outcome, while the concept of being "primarily engaged" is a well understood concept. We believe condition (3) should be eliminated entirely, as the reasons investors invest in SPACs rather than in mutual funds is already covered by proposed condition (5).

Condition (4) would require the SPAC to distribute all assets not used in the de-SPAC transaction to investors promptly thereafter. This condition is described by the SEC as "…the SPAC would be unable to seek another de-SPAC transaction with its remaining assets, or otherwise continue to operate as a SPAC…", and as a supplement to the condition that the SPAC undertake only a single de-SPAC transaction.[45] This condition ignores the practical reality that most de-SPAC transactions are financing transactions for the target company—just like in an IPO, the surviving company typically retains substantial cash on its balance sheet in order to fund its future operations. We believe this condition should be eliminated. After completion of the de-SPAC transaction, the surviving public company is no longer a SPAC, and any acquisitions it subsequently makes are no longer de-SPAC transactions. The

[45] Proposing Release, pp. 156-157

surviving company should not be prohibited from seeking future business acquisitions, just like a company would not be so prohibited after completing a traditional IPO.

Condition (4) would also require all assets (not just the trust account assets) to be distributed if the SPAC failed to announce a de-SPAC transaction within 18 months or consummate a de-SPAC transaction within 24 months. Whether a SPAC could rely on the safe harbor for its first 18 or 24 months of operation, and then rely on a different exemption or exclusion thereafter (i.e., without distribution of all assets and liquidation) is unclear. The SEC states in the Proposing Release that the SPAC could not rely on the "transitory" exemption under Rule 3a-2 after relying on the Proposed Rule 3a-10 safe harbor (or vice versa), but does not expressly preclude an alternative exclusion (such as liquidating the investments in the trust account and exclusively holding cash). Consistent with other transitory exemptions (Rule 3a-2 and Rule 3a-8), we believe this condition should be eliminated. Under those other transitory exemptions, if the company is not eligible for an exemption or otherwise excluded from the definition of an investment company in Section 3(a)(1) of the '40 Act (e.g., if it converted all of its assets to cash), the company would be required to register or liquidate, but the rules do not mandate a specific outcome when the exemption is no longer available.

Conditions (5) and (6) would require the SPAC to be primarily engaged in hunting for a de-SPAC transaction, and not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities. This effectively states what SPACs are already doing (as, for example, the directors and officers of the SPAC spend little to no time dealing with the investment of the trust assets in securities, but instead focus on identifying, negotiating and consummating a de-SPAC transaction). The proposed requirement for a board resolution should be eliminated, and existing SPACs that meet the requirements for the safe harbor should be allowed to rely on it upon adoption.[lxxxi] The stated intentions of the SPAC in its IPO registration statement sufficiently advise investors as to the business purpose of the SPAC. A resolution of the board of directors is unnecessary, and does not serve the purpose that the SEC states – board resolutions are not publicly available, and thus do not "publicly document the intent of management."[46] Public statements in the SPAC IPO registration statement should be sufficient and avoid the possibility of a technical foot fault for the hundreds of existing SPACs that did not adopt such a board resolution before Proposed Rule 3a-10 was even proposed.

The SEC should not include a condition that the SPAC must disclose its intention to rely on the safe harbor.[lxxxii] Such a requirement would be unnecessary for the protection of investors (who are already investing in SPACs based on their stated purposes to enter into a de-SPAC transaction) and would be inconsistent with other safe harbors under the '40 Act.

In our view the vast majority of SPACs do not constitute investment companies under applicable law,[47] do not undertake the practices that the SEC cites as raising questions as to whether they are investment companies (other than perhaps taking a long time to identify a target company and consummate a transaction), and do not present the risks of investor harm that the Investment Company Act was adopted

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[46] Proposing Release, p. 149.

[47] For a more thorough discussion, see https://corpgov.law harvard.edu/2021/09/03/special-purpose-acquisition-companies-and-the-investment-company-act-of-1940/

to protect against. SPACs' assets are invested in low risk, high quality U.S. government debt securities as a capital preservation mechanism, and not for speculative purposes. Moreover, because of the trust account structure and redemption rights, SPAC officers and directors have no motivation to manage the investments for their own interests. While a safe harbor would be welcome, one that leaves almost half of the companies that might seek to rely on it sailing the open seas, without real justification based on the investor harms the Investment Company Act was adopted to protect against, is inappropriate.

While the certainty of a safe harbor would be welcome, the impact on existing SPACs could be meaningful. For SPACs that are approaching, or have already exceeded, the proposed deadlines, the SEC's statements in the Proposing Release introduce substantial uncertainty, as the SEC is effectively suggesting that there is a strong risk that the SEC will view them as unregistered investment companies. This may make target companies, investment banks and others less willing to transact, or require such SPACs to hold cash in lieu of investing in U.S. government securities (potentially decreasing the return on the cash and potentially substantially increasing risk to the public investors). [48]

Accordingly, we would propose that the conditions to Proposed Rule 3a-10 be revised as follows:

> "(a)… (1) The SPAC's assets consist solely of Government securities, securities issued by government money market funds as defined in [Investment Company Act Rule] 2a-7(a)(14), and cash items prior to completion of the de-SPAC transaction;
>
> (2) The assets set forth in paragraph (a)(1) of this section are not at any time acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes;
>
> (3) The SPAC is primarily engaged in the business of seeking to complete a single de-SPAC transaction, as set forth in paragraphs (a)(3) of this section and evidenced by:
>
> > (i) The activities of its officers, directors and employees;
> >
> > (ii) Its public representations of policies; and
> >
> > (iii) Its historical development; and
>
> (4) The SPAC does not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities."

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[48] In response to Question 179 ("*Is it feasible for SPACs to hold most of their assets in cash accounts rather than Government securities or Government money market funds? What would be the costs to SPACs of holding their assets in cash? How costly would it be for SPACs that are currently invested in Government securities or Government funds to switch to cash? Please provide supportive data or estimates to the extent available.*"), it is feasible for SPACs to hold their assets in cash. We believe the returns on deposit accounts would be lower than the return on Government securities, and the move would likely increase the SPAC's counterparty risks.

OTHER POTENTIAL REVISIONS

We applaud the SEC for attempting to align the treatment of companies that go public via a de-SPAC transaction with companies that pursue a traditional IPO, but respectfully suggest that the SEC has not gone nearly far enough and should revisit the rules applicable to shell companies and former shell companies (the "**Shell Company Regs**") as discussed below. The SEC notes that former shell companies, including SPACs, are subject to different (and worse) treatment under a variety of existing rules.[49] Most of these rules were adopted in the early 2000s, before any SPACs were exchange listed, out of concern over pump-and-dump schemes relating to transactions with limited public disclosure. Many of the concerns do not apply to exchange listed SPACs due to the need for a proxy solicitation in almost every de-SPAC transaction, and the proposed rules would even further mitigate the concerns that motivated the Shell Company Regs. Accordingly, the SEC should eliminate the different treatment for companies going public via de-SPAC transactions.[lxxxiii] The SEC should also eliminate the requirement for a Form 8-K with Form 10 information (the "**Super 8-K**") within four business days after the completion of the de-SPAC transaction.[lxxxiv] The requirement originated in concern that investors in shell companies did not have robust information about the target company for months after a transaction had closed, allowing for pump-and-dump activities. The concern does not apply to exchange listed SPACs today due to robust disclosures in proxy statements and registration statements, and the Proposed Rules would make these concerns inapplicable to all shell companies registering a de-SPAC transaction in response to Proposed Rule 145a. This would be consistent with reporting for an IPO. If the Super 8-K requirement is retained, it should not be accelerated, as preparation of pro forma financial statements is not likely feasible in shorter than four business days.

The SEC should also revise Form 8-K to require more information when the de-SPAC transaction is initially announced. Such information should include any new conflicts of interest, a description of the material terms of the contracts entered into (such as the business combination agreement, PIPE subscription agreements, etc.) and a summary of material risks relating to the transaction and the business of the target company. However, the requirements should be limited, so as to balance the legitimate desire for speed by the board of directors of the SPAC with the need for additional prompt information for investors.[lxxxv]

The SEC should not adopt new requirements comparable to those under Rule 419.[lxxxvi] Rule 419 provides fewer material investor protections than market practice for SPACs. As such, applying any portions of Rule 419 would not serve investor interests.

The Commission should not adopt rule changes to address the "empty voting" phenomenon, where SPAC shareholders can vote against a de-SPAC transaction and still exercise redemption rights. Most SPACs permit such decoupling of the vote from continued ownership in the company. We think concerns over empty voting are overstated, as the individual redemption right of each shareholder renders the vote a

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[49] For example, Rule 144 is not available for resale of securities of former shell companies to the same extent as for securities issued by companies that go public via traditional IPO, former shell companies are limited in their ability to use Form S-8 for equity compensation and former shell companies are "ineligible issuers" for purposes of using free-writing prospectuses or qualifying as well-known seasoned issuers for three years post de-SPAC transaction.

formality. More importantly, the current system of proxy solicitation in the U.S. (requiring a record date, mailing, and a minimum dissemination period) (a) already introduces a risk of empty voting in all public company mergers and (b) means that purchasers of SPAC shares after the record date for the vote do not have the right to vote for or against the de-SPAC transaction. If SPAC shareholders were required to vote "no" on the transaction in order to have redemption rights (which is permissible under the exchange listing rules), any purchaser of shares after the record date would have irredeemable shares.[50] This would unduly penalize such purchasers, and we expect many retail investors would not understand the issue and be the most likely to end up with irredeemable equity. If aligning the de-SPAC process with the traditional IPO process is desired, there is no requirement in an IPO for there to be a vote among the offerees, and no minimum percentage acceptance by offerees in order to proceed with the IPO.

Conclusion

We appreciate this opportunity to submit, and the Commission's consideration of, our comments on the Proposed Rules. We would be pleased to respond to any inquiries you may have regarding our letter or our views on the Proposed Rules more generally. Please feel free to direct any inquiries to Ramey Layne [redacted] Brenda Lenahan [redacted] or Zach Swartz [redacted]

Respectfully submitted,

Vinson & Elkins L.L.P.

[50] In this regard, we note that Fn 381 in the Proposing Release is inaccurate. SPACs have not extended redemption right to shareholders "voting in favor", they have extended redemption rights to all shareholders regardless of whether they vote, for, against, or do not vote at all. This is a key distinction, because the lag between the record date and the vote would mean that requiring an affirmative vote one way or the other would result in shares trading ex redemption rights for a substantial period of time, seriously disadvantaging shareholders.

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[i] 1. *Should we define the term "special purpose acquisition company" as proposed? Does the proposed definition provide a workable approach to determining which issuers would be subject to the requirements of proposed Subpart 1600? Should we define this term differently? If so, how? For example, are there certain other common characteristics of SPACs that should be included in the definition, such as redemption rights, exchange listing, the placing of initial public offering proceeds in a trust or escrow account, and/or that the de-SPAC transaction must meet a minimum fair market value (e.g., at least 80%) of the value of the proceeds in the trust or escrow account? Should we include a reference to "shell company" in the definition?*

[ii] *6. With respect to the proposed definition of "special purpose acquisition company," is it clear what "has indicated that its business plan" is intended to convey? Should we require registrants to affirmatively state in filings whether they are a special purpose acquisition company? For example, should we amend Form S-1, Form F-1, Form S-4, and/or Form F-4 to add to the registration statement cover page of these forms a check box for issuers to indicate whether they are special purpose acquisition companies? Should we also amend Schedule 14A, Schedule 14C and Schedule TO to include this check box on the cover pages of these schedules?*

[iii] *2. Should we define "de-SPAC transaction" as proposed? Should the scope of the proposed definition instead be tied to de-SPAC transactions that are permitted under exchange listing standards?*

[iv] *3. Should we define the term "SPAC sponsor" as proposed? Does the proposed definition reflect those activities commonly associated with a SPAC's sponsor? Would the proposed definition encompass persons or entities that are not commonly considered to be sponsors of a SPAC? If so, how should we revise the definition to avoid scoping in such persons or entities? In regard to natural persons, should we exclude from the scope of the definition the activities performed by natural persons in their capacities as directors and/or officers of the SPAC, as proposed?*

[v] *4. Should we define the term "target company" as proposed? Is this definition sufficiently clear? Would this definition, in combination with the other proposed definitions, be overly broad and encompass transactions that should not be treated as de-SPAC transactions?*

[vi] *7. Should we require additional information regarding sponsors of SPACs pursuant to Item 1603(a), as proposed? If so, should we also require disclosure regarding the sponsor's affiliates and any promoters of the SPAC, as proposed?*

[vii] *9. Should we require more or less information about the sponsor's compensation and reimbursements? Should we require this disclosure only when the amounts exceed a de minimis threshold? If so, what should the de minimis threshold be?*

[viii] *11. Should we require disclosure about the controlling persons of the sponsor and any persons who have direct and indirect material interests in the sponsor, as proposed? Should we take a different approach than requiring disclosure on persons with "material interests" in the sponsor? Should we consider requiring additional disclosure on the controlling persons of entities that own or control the sponsor? Should we require an organizational chart that shows the relationship among the SPAC, the sponsor, and the sponsor's affiliates, as proposed? Would both narrative disclosure and an organizational chart be helpful to investors?*

[ix] *12. Should we require disclosure of the material terms of any lock-up agreements with the sponsor and its affiliates as proposed? Would the proposed requirement to provide this disclosure in a tabular format be helpful to investors? Should we instead require this disclosure in a non-tabular format?*
[x] *15. Should we require disclosure with respect to material conflicts of interest that may arise in connection with de-SPAC transactions, as proposed? Should we include a materiality threshold, as proposed? Is it clear what would constitute an actual or potential material conflict of interest, or is further guidance or specification needed? For example, are there other specific conflicts of interest that we should identify in the rule?*
[xi] *16. Would the proposed disclosure requirements adequately inform investors as to potential material conflicts of interest? Are there approaches that could minimize potential boilerplate or duplicative disclosure? Should we require that this disclosure be presented in a tabular format?*
[xii] *17. Is there any additional information that we should require regarding conflicts of interest? For example, should we also require a description of any policies and procedures used or to be used to minimize potential or actual conflicts of interest? Should we require disclosure of how the board of directors assesses and manages such conflicts, in particular where directors themselves have conflicts of interest?*
[xiii] *18. Should SPACs be required to provide additional disclosure regarding material conflicts of interest in Exchange Act reports following their initial public offerings? For example, should periodic reports require that any changes in previously disclosed conflicts of interest be reported? Should we require disclosure about material conflicts of interest relating to both the SPAC and the identified target company in the Form 8-K that is required to be filed in connection with the announcement of a de-SPAC transaction?*
[xiv] *20. Should we require disclosure of material potential sources of future dilution in registration statements filed by SPACs for initial public offerings and in disclosure documents for de-SPAC transactions, as proposed? How would investors benefit from this additional disclosure? Should we require other information either in addition to, or in lieu of, the proposed dilution disclosure, such as disclosure of the cumulative amount of dilution that non-redeeming shareholders may experience or the amount of net cash underlying each share at the time of a de-SPAC transaction? If so, should we require that this disclosure be presented in a tabular format? Should we provide additional explanation on how to calculate the amount of dilution for purposes of these disclosure requirements? Should we provide further guidance about disclosures that SPACs should consider making to help non-affiliated shareholders understand the potential for dilution and the consequences of dilution for non-affiliated shareholders?*
[xv] *21. Should we also consider requiring enhanced dilution disclosure in other Commission filings? If so, what additional information should we require in this context? How would investors use this additional dilution disclosure?*
[xvi] *25. Should we consider additional amendments that would highlight or simplify dilution disclosure so that it is more clear and accessible for investors?*
[xvii] *23. Should we require, in disclosure documents for de-SPAC transactions, a sensitivity analysis in a tabular format, as proposed? Should we consider additional or alternative approaches to this disclosure requirement?*
[xviii] *24. Are there any significant challenges in providing the proposed enhanced dilution disclosure at the initial public offering stage or at the de-SPAC transaction stage?*
[xix] *22. Should we require simplified tabular disclosure regarding dilution on the prospectus cover page of a Form S-1 or Form F-1, as proposed? Should we require additional or less information, or alternative information, in the tabular disclosure? For example, would a tabular presentation of cash remaining per non-redeemed share in lieu of a tabular presentation of remaining pro forma net tangible book value per share be useful to investors? Should we consider adding a similar requirement to provide simplified tabular disclosure (1) in the prospectus summary of a Form S-1 or F-1 or (2) on the prospectus cover page and/or in the prospectus summary of a Form S-4 or Form F-4 for a de-SPAC transaction? If so, what information should be included in such tabular disclosure? Are there other ways to present the potential for dilution to investors in a more accessible format?*
[xx] *26. Would requiring certain information in regard to SPAC offerings on the prospectus cover page and in the prospectus summary make it easier for investors to review and understand the disclosures in these registration statements? Are there other ways we could make these registration statements easier for investors to understand?*
27. Should we require the proposed cover page disclosures for SPAC initial public offerings and de-SPAC transactions? Is there other information that we should require to be included on the cover page, either in addition to, or in lieu of, the information proposed to be required? Conversely, are there any proposed additional cover page disclosures that we should not adopt?

[xxi] *28. Should we require the inclusion of the proposed specified information in the prospectus summary? Is there other information that we should require to be included in the prospectus summary?*

29. Is the subset of the disclosure under proposed Item 1605 that we are proposing to require to be more prominently presented on the prospectus cover page and in the prospectus summary via proposed Items 1604(a) and (b) the most informative or otherwise important information for purposes of the prospectus cover page and the prospectus summary? Should any additional disclosure provided pursuant to proposed Item 1605 be added to or replace an existing element of the information proposed to be required on the prospectus cover page or in the prospectus summary?

[xxii] *31. Would the proposed disclosure requirements provide investors with important information regarding the background of and reasons for a de-SPAC transaction? Is there any additional information about the background of and reasons for the de-SPAC transaction that we should require to be disclosed? Are there any additional or alternative requirements that we should consider to further improve the disclosures about de-SPAC transactions?*

[xxiii] *33. Should we require disclosure with respect to material interests in a prospective de-SPAC transaction or any related financing transaction held by the sponsor and the SPAC's officers and directors, as proposed? Should we require additional or alternative disclosure regarding the interests of these parties in the de-SPAC transaction?*

[xxiv] *34. Should we require disclosure regarding whether or not security holders are entitled to any redemption or appraisal rights and a summary of any such rights, as proposed? Is there additional or alternative disclosure about redemption or appraisal rights that we should require?*

35. Would the disclosure requirements in proposed Item 1605 result in duplicative disclosures? If so, are there alternative approaches that we should consider to avoid this result?

[xxv] *37. Should we require a statement from the SPAC as to whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders, as proposed? Should the scope of the fairness determination include both the de-SPAC transaction and any related financing transaction, as proposed? Should the fairness determination be as to the SPAC's security holders as a whole, rather than to the SPAC's unaffiliated security holders? The factors enumerated in proposed Item 1606(b) in determining fairness include, but are not limited to, the valuation of the target company, the consideration of any financial projections, any report, opinion, or appraisal described in Item 1607 of Regulation S-K, and the dilutive effects described in Item 1604(c) of Regulation S-K. Is there any additional or alternative information that should be disclosed in connection with the SPAC's fairness determination?*

36. Should we adopt Item 1606 as proposed?

[xxvi] *42. How would investors use disclosure about whether the approval of at least a majority of unaffiliated security holders is required and whether the de-SPAC transaction or any related financing transaction was approved by a majority of non-employee directors of the SPAC? How would investors use disclosure about whether a representative has been retained to represent the investors in the negotiations of the de-SPAC transaction?*

[xxvii] *43. Should we require disclosure regarding reports, opinions, or appraisals from an outside party, as proposed? Is there any additional or alternative information that we should require with respect to these reports, opinions, or appraisals? Is there any proposed information that should not be required?*

[xxviii] *44. Should we require that the reports, opinions or appraisals be filed as exhibits to the Form S-4, Form F-4, or Schedule TO for the de-SPAC transaction or included in the Schedule 14A or Schedule 14C for the transaction, as proposed? Should we require instead that such reports, opinions, or appraisals be made available for inspection and copying upon written request? Should we require the filing of board books and other written materials presented to the board in connection with the reports, opinions, or appraisals, as is the case with going-private transactions? Are there other means by which investors should be able to access such report, opinion, or appraisal, such as posting on a website?*

[xxix] *46. Should we adopt Item 1608 as proposed?*

[xxx] *49. Are there any other provisions of Rule 13e-4 or Regulation 14E that should be amended to ensure that SPAC security holders are provided with the information material to their decision on whether to redeem their SPAC securities or to address other issues arising from the SPAC redemption process? For example, should we amend Exchange Act Rule 14e-5, which generally prohibits a bidder or its affiliates from making purchases outside of a tender offer, to permit a sponsor's purchases of SPAC securities outside of the redemption offer as long as certain conditions are satisfied (such as requiring disclosures of the sponsor's purchases and limiting the purchase price to no more than the price offered through the redemption offer), e.g., in a manner consistent with the Division of Corporation Finance's Tender Offers and Schedules Compliance and Disclosure Interpretation 166.01 (Mar. 22, 2022)?*

[xxxi] *50. As noted above, the staff has taken the position that a SPAC filing a Schedule 14A or 14C in connection with a de-SPAC transaction or an extension of the time frame to complete a de-SPAC transaction would not need to file a Schedule TO*

or otherwise comply with the tender offer rules, including the procedural requirements of the tender offer rules, such as the all-holders requirement. Should we codify this position? Should we reconsider this position?

[xxxii] *51. Should we require SPACs to tag the disclosures required by Subpart 1600 of Regulation S-K, as proposed? Are there any changes we should make to ensure accurate and consistent tagging? If so, what changes should we make?*

[xxxiii] *56. Should we require additional information regarding the private operating company in disclosure documents filed in connection with a de-SPAC transaction, as proposed? Would these additional disclosures provide investors with a better understanding of the private operating company's operations and related risks? Should we require more or less disclosure regarding the private operating company in the registration statements or schedules filed in connection with de-SPAC transactions?*

57. What are the benefits of providing this information earlier to investors when they are making voting, investment, and redemption decisions in connection with a de-SPAC transaction or at or before the commencement of trading in the post-business combination company's securities on a securities exchange? Would it be unduly burdensome to provide this additional information regarding the private operating company at this earlier point in time?

[xxxiv] *58. Should a private operating company that would qualify as a foreign private issuer have the option of providing disclosure in accordance with certain items of Form 20-F, as proposed?*

[xxxv] *60. Should the proposed disclosure requirements with respect to the private operating company be scaled to take into account the size, nature, or certain characteristics of the company?*

[xxxvi] *61. Should we require a minimum dissemination period for prospectuses and proxy or information statements in de-SPAC transactions as proposed? Is a 20–day period necessary or appropriate to enable shareholders to review and consider these disclosure documents relating to a de-SPAC transaction? Should this 20 calendar day period be longer or shorter? Should the minimum dissemination period be based on business days (e.g., 20 business days) instead of calendar days as proposed?*

[xxxvii] *65. Should we amend Form S-4 and Form F-4, as proposed, to require that the SPAC and the private operating company be treated as co-registrants when the registration statement is filed by the SPAC in connection with a de-SPAC transaction?*

[xxxviii] *66. Would amending Form S-4 and Form F-4 in this manner improve the disclosure provided in connection with de-SPAC transactions that are registered on these forms?*

[xxxix] *68. Should the sponsor of a SPAC also be required to sign a Form S-4 or Form F-4 filed in connection with a de-SPAC transaction, as well as a Form S-1 or Form F-1 filed for a SPAC's initial public offering, in view of, among other things, the sponsor's control over the SPAC and the sponsor's role in preparing these registration statements? Would such a requirement be consistent with the Commission's approach in requiring ga majority of the board of directors of any corporate general partner to sign a registration statement when the registrant is a limited partnership?*

[xl] *70. As proposed, the re-determination of smaller reporting company status must be based on public float measured as of a date within four business days after the consummation of the de-SPAC transaction and the annual revenues of the private operating company as of the most recently completed fiscal year for which audited financial statements are available. Should we require the re-determination of smaller reporting company status upon the completion of a de-SPAC transaction, as proposed? Should public float be determined within a different time frame (e.g., 30 days) or through a different method (e.g., as the average over a certain period)? Should the annual revenues of the private operating company be used in determining whether the revenue threshold has been met, as proposed?*

[xli] *71. Should we require a post-business combination company following a de-SPAC transaction to reflect the re-determination of smaller reporting company status in its next periodic report, as proposed? Alternatively, should we require a post-business combination company to reflect the re-determination of smaller reporting company status at an earlier or later point in time after the completion of a de-SPAC transaction, such as in the first periodic report that covers the period in which the de-SPAC transaction occurred (e.g., when a de-SPAC transaction is completed after the end of a fiscal year but prior to the due date of the Form 10-K for that fiscal year)? Should we provide an accommodation if a de-SPAC transaction is completed close in time to the due date for the registrant's first periodic report?*

72. To the extent that a post-business combination company no longer qualifies for smaller reporting company status as a result of the proposed re-determination of this status following a de-SPAC transaction, would the proposed re-determination make it more difficult for such a company to file a registration statement after the filing of its first periodic report that complies with the disclosure requirements applicable to non-smaller reporting companies? If so, should we provide any accommodations for this scenario?

[xlii] *74. Should we similarly require a re-determination of emerging growth company status, accelerated filer status, large accelerated filer status and/or foreign private issuer status upon the completion of a de-SPAC transaction?*

[xliii] *146. Should the disclosure requirements and filer status determinations in a de-SPAC transaction be the same no matter the de-SPAC structure? Do our proposals accomplish this, or are there other disclosure requirements and filer status determinations impacted by transaction structure that we should address?*

[xliv] *147. What are the reasons, other than possible reporting outcomes, why a de-SPAC transaction is structured so that an entity other than the SPAC is the acquirer and filing the registration statement or proxy or information statement for the de-SPAC transaction? Are there tax or other reasons that we should consider in relation to the proposed amendments in this release and whether the disclosure requirements should be further aligned across all de-SPAC transaction structures?*

[xlv] *169. Have we correctly characterized the benefits and costs from the proposed amendments related to the PSLRA safe harbor? Are there any other benefits and costs that should be considered? Please provide supportive data to the extent available.*

[xlvi] *75. Should we define "blank check company" in Rule 405, as proposed? Should we include a reference in the definition to "development stage company" or the issuance of "penny stock"? Should we consider other changes to the proposed definition?*

[xlvii] *76. Would the proposed amendments improve the quality of projections in connection with de-SPAC transactions by clarifying that the safe harbor under the PSLRA is unavailable? Would the proposed amendment discourage some SPACs from disclosing projections in connection with these transactions or affect the ability of SPACs or target companies to comply with their obligations under the laws of their jurisdiction of incorporation or organization to disclose projections used by the board of directors or the companies' fairness opinion advisers?*

[xlviii] *77. As an alternative approach, should we issue an interpretation addressing whether a de-SPAC transaction is an "initial public offering" for purposes of the PSLRA?*

[xlix] *79. Should we amend the references to "blank check company" in Securities Act Rules 137, 138, 139, 163A, 164, 174, 430B and 437a to refer to "blank check company issuing penny stock," as proposed?*

[l] *82. Should we adopt a definition of distribution in Rule 140a, as proposed?*

[li] *90. Are there alternative approaches we should consider that would enhance the incentives of participants in a de-SPAC transaction to assure the accuracy of the disclosures provided to public investors in connection with the de-SPAC transaction and/or align liability protections for investors across the various avenues for private operating companies to go public?*

[lii] *83. Does the current regulatory regime provide sufficient incentives for participants in a de-SPAC transaction to conduct appropriate due diligence on the target private operating company and the disclosures provided to public investors in connection with the de-SPAC transaction? Would proposed Rule 140a likely result in improved diligence of private company targets in de-SPAC transactions and related disclosure? Would the other measures we are proposing in this release mitigate the need for proposed Rule 140a?*

[liii] *84. Does the SPAC IPO underwriter have the means and access necessary (via contract or otherwise) to perform due diligence at the de-SPAC transaction stage, particularly where the SPAC IPO underwriter is not retained as an advisor in the de-SPAC transaction or the target is the registrant for the de-SPAC transaction? Could such access be reasonably obtained in the course of the negotiation of the underwriting agreement for the SPAC initial public offering or otherwise?*

[liv] *92. Should we be seeking to align the required disclosures and liabilities associated with shell company business combinations among the various available transaction structures in order to provide reporting shell company investors consistent disclosures and protections across transaction structures? Are there alternative approaches that would accomplish this goal?*

[lv] *93. How would the proposed rule affect business combinations involving both SPACs and non-SPAC reporting shell companies? Would these entities be more likely to register such transactions?*

[lvi] *94. If the deemed sale to reporting shell company shareholders is required to be registered under the Securities Act pursuant to the proposed amendments, should we provide guidance with respect to the timing of the effectiveness of such registration statement in relation to the business combination?*

[lvii] *96. Should proposed Rule 145a be limited to deeming shell company business combinations "sales" with respect to only reporting shell company shareholders? Are there other parties whose interest in a shell company would be such that a shell company business combination should be deemed a sale? For example, holders of securities other than common shares?*

[lviii] *97. Should reporting shell companies be prohibited from relying on the exemption in Securities Act Section 3(a)(9) in a transaction deemed a sale under proposed Rule 145a? Should we provide additional guidance on the potential availability or lack of availability of other exemptions from registration for the proposed Rule 145a sale? If so, what exemptions should we address?*

[lix] *98. Should we exclude business combination related shell companies from the scope of proposed Rule 145a, as proposed?*

[lx] *100. Securities Act Rule 145(a) deems sales within the meaning of Section 2(a)(3) of the Securities Act for certain transactions submitted for the vote or consent of security holders. Securities Act Rules 145(c) and (d) include provisions that have the effect of limiting resales with respect to parties to transactions described in Rule 145(a) and their affiliates that involve shell companies. Although proposed Rule 145a would apply to all reporting shell company business combinations, not all of these business combinations would also fall within Rule 145(a). Should we consider resale limitations for Rule 145a? Should any such resale limitations be similar to those in existing Rule 145?*

[lxi] *103. Should we adopt the amendments and new rules related to aligning financial statement disclosures, including Rule 15-01 of Regulation S-X, as proposed?*

[lxii] *104. Should Rule 15-01 provide that the term audit (or examination), when used in regard to financial statements of a business that is or will be a predecessor to a shell company, means an examination of the financial statements by an independent accountant in accordance with the standards of the PCAOB for the purpose of expressing an opinion thereon, as proposed?*

[lxiii] *107. Should the financial statements of a shell company not be required in filings once the financial statements of the registrant include the period in which the acquisition was consummated, as proposed? Are there situations in which investors would continue to rely upon the information in the shell company financial statements after the acquisition was consummated and reflected in the financial statements of the registrant, or other factors we should consider in determining when the shell company financial statements should not be required in filings after the acquisition is complete? Should the accounting for the transaction as a forward acquisition or reverse recapitalization determine whether the financial statements are required in filings made after the acquisition was consummated?*

[lxiv] *108. Should Rule 11-01(d) of Regulation S-X be amended to state that a SPAC is a business for purposes of the rule, as proposed? Would it change the existing application of Rule 11-01(b)(3)(i)(B) of Regulation S-X as it relates to de-SPAC transactions? Should eliciting the financial statements of the SPAC in a resale registration statement of an issuer that is not a SPAC be accomplished through a rule that specifically requires the SPAC financial statements to be filed (subject to the provisions of proposed Rule 15-01(e)?*

[lxv] *106. Should the significance tests that determine whether the financial statements of businesses that are not or will not be the predecessor are required to be filed employ the denominator of the private operating company in lieu of that of the shell company registrant, as proposed? Should the pro forma financial information that gives effect to the shell company transaction be allowed to be used as the denominator in measuring the significance of other acquisitions not involving a predecessor? Should there be restrictions on when such pro forma financial information is used to measure significance, such as only for acquisitions that occur subsequent to consummation of the transaction and not for acquisitions that are done in tandem with the shell company transaction?*

[lxvi] *109. The Form 8-K filed pursuant to Item 2.01(f) may require a third fiscal year of certain financial statements for an acquired business that is the predecessor to a shell company and an emerging growth company, while Rule 15-01(b), as proposed, would only require two. Should we amend the Form 8-K requirement to provide an exception to the required Form 10-type information so the financial statements of the acquired business need not be presented for any period prior to the earliest audited period previously presented in connection with a registration, proxy, or information statement of the registrant?*

[lxvii] *110. Should we amend Item 10(b) of Regulation S-K, as proposed? Is there additional or different guidance we should provide?*

[lxviii] *115. As proposed, Item 1609 of Regulation S-K would apply only to de-SPAC transactions. Should we expand the scope of the item to apply to all companies that publicly disclose financial projections in Commission filings?*

[lxix] *116. Should we prohibit the disclosure of any specific financial measures or metrics? If so, which measures or metrics?*

[lxx] *119. Instead of a safe harbor, should we provide an interpretation concerning when SPACs would meet the definition of "investment company"? Alternatively, should we exempt SPACs that meet the definition of "investment company" from any provisions of the Investment Company Act, and if so, which provisions? Are there any changes we should make to the proposed approach that would better achieve the objectives of the proposed rule? Are there conditions we should include in addition to those set forth below?*

[lxxi] *122. We understand that SPACs typically place most of their assets in a trust or escrow account as required by the listing standards. In the event that these accounts may also be "issuers" under the Investment Company Act, does the safe harbor need to address these accounts under that Act? Alternatively, should the rule text specify that assets and activities of the SPAC (as discussed below) include those of the trust?*

[lxxii] *124. Should we allow SPACs seeking to rely on the safe harbor to invest in Government securities? Alternatively, should we limit these SPACs to only certain types of Government securities, such as U.S. Treasury securities?*

125. Should we allow SPACs to invest in government money market funds, as defined in Rule 2a-7? Should we instead limit the type of money market funds that a SPAC may invest in to money market funds that only hold U.S. Treasury securities? Conversely, should the provision be expanded to permit SPACs to invest in all types of money market funds provided that they rely on Rule 2a-7?
126. In addition to the questions raised above, as a general matter, is paragraph (a)(1) too narrow? For example, should the safe harbor be expanded to include SPACs that acquire investment securities or other assets (e.g., assets that are not for investment purposes relevant to the operation of the SPAC)? If yes, please explain which investment securities and/or assets and why such an expansion of the safe harbor would be appropriate.

[lxxiii] *120. We request comment on whether the safe harbor should include an exemption from Section 3(a)(1)(C), in addition to Section 3(a)(1)(A). If such an expansion is needed, please explain the circumstances in which a SPAC could meet the definition of "investment company" in Section 3(a)(1)(C) while still complying with the conditions in the proposed safe harbor.*

[lxxiv] *128. As noted, we understand that SPACs typically place most of their assets in trust or escrow accounts. Should the rule text address the manner in which a SPAC holds its assets? For example, should the rule require SPAC assets to be held in trust or escrow accounts? If yes, should the safe harbor be conditioned on complying with the terms of the custody rules under the Investment Company Act as if they applied to these accounts?*

[lxxv] *127. Does paragraph (a)(2) provide enough flexibility with respect to a SPAC's holdings but yet prevent SPACs from engaging in activities similar to management investment companies?*

[lxxvi] *140. Should we include an option for SPACs that have not identified a target within 18 months, or completed the de-SPAC transaction within 24 months to extend these deadlines? If so, what would that be and what conditions should be included? For example, should we provide that a SPAC can obtain an extra 2, 4 or 6 months and stay within the safe harbor if it obtains approval from its shareholders? Please explain how any extensions of these deadlines would be consistent with the framework of the Investment Company Act, the rules thereunder, and prior Commission positions.*
141. Should we require, as proposed, that the SPAC complete the de-SPAC transaction within a 24-month period? Should the time period be 18 months, as in Rule 419 or 12 months, as in Rule 3a-2? Should the period be longer (e.g., 30 months)? If so, how would that longer period be consistent with the framework of the Investment Company Act, the rules thereunder, and past Commission positions?

[lxxvii] *138. Should we require, as proposed, that the SPAC reach an agreement with at least one target company within 18 months? Should we require that the SPAC reach an agreement with at least one target company within 12 months, which would be more consistent with the time period in Rule 3a-2? Should the time period be even shorter than 12 months (e.g., 6 months)? Should the time period be longer (e.g., 20 months, 24 months, 36 months)? If the time period should be longer, please explain why such a longer period is necessary and how any such longer period would be consistent with the framework of the Investment Company Act, the rules thereunder, and prior Commission positions.*

[lxxviii] *133. As proposed, should the SPAC be limited to only one de-SPAC transaction while relying on the safe harbor? Why or why not? Similarly, should a SPAC, as proposed, be limited to engaging in a combination with multiple target companies only if the combination occurs as part of a single de-SPAC transaction with a single closing? Why or why not? Should there be a limit on how many target companies may be part of a single de-SPAC transaction? If so, what should that limit be and why? For example, would limiting the safe harbor to two target companies strike an appropriate balance of the relevant regulatory considerations?*

[lxxix] *130. As proposed, should the SPAC be required to seek a de-SPAC transaction in which the surviving company is required either to directly or through a primarily controlled company be primarily engaged in the business of the target company? Are the proposed definitions of "surviving company" and "primarily controlled company" appropriate? Should the proposed definitions be revised, and if so, how?*
135. As drafted, the proposed rule would permit a SPAC relying on the safe harbor to seek to engage in a de-SPAC transaction with any company other than an investment company. Should the safe harbor further limit the types of companies in which a SPAC may seek a de-SPAC transaction? For example, should a SPAC be precluded from seeking to engage in a de-SPAC transaction with issuers relying on Section 3(c)(1) or Section 3(c)(7)? Should a SPAC be precluded from seeking to engage in a de-SPAC transaction with issuers relying on other exclusions under Section 3(c)? Should a SPAC be precluded from seeking to engage in a de-SPAC transaction with issuers otherwise relying on an exclusion or exemption by order from the definition of "investment company" by Section 3(b) or the rules or regulations under Section 3(a)? If so please identify which issuers and why?

[lxxx] *131. Should the safe harbor be limited to SPACs that seek de-SPAC transactions that result in the surviving company having at least a majority interest in the target company? Conversely, should the safe harbor permit the SPAC to seek a de-*

SPAC transaction in which the surviving company is only required to control the target company? Are there other approaches, such as requiring the de-SPAC transaction to result in a consolidation of the SPAC and the target company?

[lxxxi] *123. As proposed, an existing SPAC that has not completed a de-SPAC transaction prior to the effective date of the rule would not be prohibited from relying on the safe harbor if it satisfies the conditions. Should we permit an existing SPAC to rely on the safe harbor if it does not have a board resolution but has other contemporary evidence of its intent and otherwise meets the conditions of the safe harbor? Alternatively, should we limit reliance on the safe harbor to SPACs formed after the effective date of the rule? If proposed Rule 3a-10 is adopted, should the rule's effective date reflect the possibility that some SPAC's may need to alter their operations or more quickly complete a de-SPAC transaction in order to meet the conditions of the rule? If so, should we provide an extended or delayed effective date? Should we provide a compliance or transition period, and if so, why?*

136. Should the rule include as evidence of the SPAC's business purpose the SPAC's historical development given the SPAC's short duration? Should the rule include, as evidence of the SPAC's business purpose, the SPAC's public representation of policies and the activities of its officers, directors and employees? Similarly, is it appropriate to require the board of directors to adopt a resolution stating that the SPAC is primarily engaged in the business of seeking to complete a de-SPAC transaction as described by the rule? Should we require that the SPAC's activities also, or instead, be evidenced by its articles of incorporation, other formation documents or by-laws? If so, which documents should be required? If a SPAC's business purpose is evidenced in its formation documents or by-laws, should we condition the proposed rule on those provisions being subject to change only with the approval of shareholders? Should the rule include a separate condition that addresses the SPAC's sources of income? For example, should a SPAC's income be limited to that derived from assets in proposed Rule 3a-10(a)(1)? Are any other conditions necessary to ensure that SPACs do not convey to investors that they have attributes similar to investment companies? Given the nature of a SPAC's activities and the proposed conditions of the safe harbor, should the proposed rule also include a condition providing that a SPAC must not be a special situation investment company?

[lxxxii] *137. Should we include a condition to the safe harbor that SPACs must disclose their intention to rely on the safe harbor? Would such a condition be redundant to the disclosure requirements under the Securities Act or under the Exchange Act? Should the safe harbor include a condition that the SPAC's board of directors must adopt a resolution indicating that the SPAC intends to rely on the safe harbor?*

[lxxxiii] *153. A post-business combination company following a de-SPAC transaction is subject to different treatment under various rules based on its status as a former shell company. For example, a post-business combination company following a de-SPAC transaction is an "ineligible issuer," based on its status as a former shell company, which prevents the company from using free writing prospectuses pursuant to Securities Act Rules 164 and 433 for a three-year period. As a former shell company, the post-business combination company is also ineligible to file a registration statement on Form S-8 for a 60-day period following the de-SPAC transaction, and the safe harbor in Rule 139 for broker-dealer research reports is not available for research reports on the post-business combination company for a three-year period. In this regard, we note that the treatment of former shell companies under these rules is based on heightened concerns regarding fraud and other abuses surrounding many shell company transactions. To better align de-SPAC transactions with initial public offerings, should we consider amending these and other rules relating to former shell companies to treat companies that have become public companies through a de-SPAC transaction in the same or similar manner as those that have completed traditional initial public offerings? Should we differentiate SPACs from other shell companies in applying these rules? If so, on what basis?*

[lxxxiv] *151. Currently, the post-business combination company is required to file a Form 8-K with Form 10 information within four business days after the completion of a de-SPAC transaction. Should we require the filing of this Form 8-K within a shorter time frame in order to reduce the gap in timing between the completion of the transaction and the public availability of this information in the Form 8-K?*

[lxxxv] *150. We note that the announcement of a prospective de-SPAC transaction often results in an immediate and substantial increase in the trading volume of the securities of the SPAC, based on the terms of the transaction that have been disclosed and the limited information publicly available on the private operating company at the time of the announcement, which is far less extensive than that of a newly public company after a traditional initial public offering. Should we consider requiring additional disclosures, such as more disclosure on the private operating company or risk factor disclosure, in a Form 8-K filed pursuant to Item 1.01 of the form disclosing that the parties have entered into a business combination agreement? If so, what additional disclosure should we require? Should we amend Item 1.01 of Form 8-K to require the filing of the business combination agreement as an exhibit to the Form 8-K filing (as opposed to allowing the agreement to be filed as an exhibit to a subsequent periodic report)? What other amendments should we consider in this regard?*

[lxxxvi] *152. Are there other rule changes the Commission should consider to enhance investor protections in initial public offerings by SPACs and in de-SPAC transactions?*
• We have not proposed requirements for SPAC offerings comparable to those applicable to blank check companies under Rule 419. Should we consider requiring SPACs to comply with conditions similar to those in Rule 419? If so, which conditions?
• The shareholders of a SPAC are permitted to vote in favor of a proposed de-SPAC transaction while redeeming their shares prior to the closing of the transaction and retaining their warrants, such that the vote is decoupled from any continuing share ownership in the post-business combination company (unless and until the warrants are exercised). Should the Commission adopt rule changes or other approaches to address this situation? For example, should the Commission condition the continued availability of an exclusion from the requirements of Rule 419 on whether shareholders voting to approve a de-SPAC transaction retain an economic interest in the combined company? Should we address this issue through the Commission's authority under Section 19(c) of the Exchange Act to adopt rules applicable to national securities exchanges?