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June 13, 2022

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. S7-13-22 – Special Purpose Acquisition Companies, Shell Companies, and Projections

Dear Ms. Countryman:

We are responding to Release No. 33-11048 in which the Securities and Exchange Commission (the "Commission" or the "SEC") solicited comments on its proposal to amend its rules relating to special purpose acquisition companies ("SPACs").

I. Background

On March 30, 2022, the Commissioners of the SEC proposed new rules and amendments to certain existing rules under the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act"), related to SPACs.[1] The Proposal would cover enhancing disclosure requirements, expanding potential underwriter liability, expanding the scope of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), revising registration requirements for business combinations involving shell companies, and other topics related to specialized disclosure requirements.

According to the Commission's press release, dated March 30, 2022, the proposals aim to "ensure that [the SEC's regulatory] tools are applied to SPACs." The Commission believes it to be "important to consider the economic drivers of SPACs" as an alternative means to conducting an IPO and thus the proposals are intended to afford investors additional protections akin to those presently available to them in traditional IPOs.[2] However, as more fully described below, we believe that certain of the SEC's proposals fail to consider the fundamental differences between a de-SPAC transaction and an initial public offering.

[1] *See Special Purpose Acquisition Companies, Shell Companies, and Projections*, SEC Release Nos. 33-11048, 34-94546 (March 30, 2022), 87 Fed. Reg. 29458 (May 13, 2022) (the "Proposal").

[2] SEC Press Release 2022-56 (March 30, 2022).

SPAC business combination transactions have never fit neatly into a particular box under the SEC's rules and historically have not been viewed by the SEC as initial public offerings. The SEC has historically viewed SPAC business combination transactions, or "de-SPACs," as mergers and treated the post-business combination entity as the successor registrant to the SPAC. As a result, the SEC has in many cases taken a form over substance approach in applying its rules and regulations. Examples include:

- Until recently, allowing the post-business combination entity to utilize Form S-3 immediately following the business combination provided that the SPAC had been public for at least 12 months, notwithstanding that the resulting operating company had no reporting history; and

- Basing the number of years of financial statements required in a registration statement for a business combination in part on whether the SPAC had filed its first Form 10-K before the registration statement went effective, even though this had no bearing on the level of disclosure necessary for investor protection in the de-SPAC transaction.

Under the proposed rules and amendments, the SEC has recharacterized SPAC business combinations and moved them to the IPO "box" to ensure that the protections of Section 11 of the Securities Act (and attendant underwriter oversight) are available to persons investing in companies that become publicly traded through a SPAC business combination. However, while SPAC business combinations do share some characteristics with traditional IPOs, the proposals fail to take into account the unique nature of SPAC business combination transactions. To effectively regulate SPAC business combinations, it is important to recognize that SPAC IPOs are distinct transactions from de-SPAC transactions and that SPAC business combinations combine attributes of an IPO of the target company, an issuer tender offer by the SPAC and a merger transaction involving an existing public company with securities that are publicly traded. Therefore, a more nuanced approach to disclosure requirements, communications rules and liability is required than what is contemplated under the current proposed rules.

II. Discussion of Certain Proposed Rules

Section 11 Liability

Proposed Rule 145a

Section 11 of the Securities Act provides for strict liability for material misstatements or omissions in registration statements made by the issuer in a public offering. In this context, strict liability is an appropriate standard because an issuer is in a position to verify the accuracy of information concerning itself. Non-issuer defendants can avoid liability under Section 11 by demonstrating that they conducted a "reasonable investigation" with regard to the portions of the registration statement for which they were responsible. Similarly, Section 12(a)(2) of the Securities Act provides a defense for defendants who, in the exercise of "reasonable care," could not have known of the alleged misstatement or omission.

The SEC has proposed new Rule 145a providing that, in business combination transactions in which the SPAC is the surviving public company, both the SPAC and the target are making an offer (as co-registrants) of new securities to all of the SPAC's and the target's stockholders. As a result, both the SPAC and the target would have Section 11 strict liability for any material misstatement or omission in the Form S-4 or Form F-4. However, in most cases, a SPAC is not in the same position as the target to ensure the accuracy of information concerning the target contained in disclosure documents. The SPAC conducts due diligence on the target but it does so as a counterparty in a heavily negotiated transaction. Providing strict liability for SPACs is inconsistent with the notion of strict liability only for the party that is in a position to have all material information. The SEC should revisit whether SPACs should be deemed to be issuing what are essentially target company securities to the SPAC's stockholders.

A SPAC is more accurately viewed as making an offer to repurchase its own stock in a de-SPAC rather than making an offer of the target's or the SPAC's securities to the SPAC's or the target's stockholders. In connection with the stockholder vote to approve the business combination and the repurchase of shares from redeeming SPAC stockholders, a SPAC already has liability under Section 14(a) of the Exchange Act and the antifraud provisions of Rule 10b-5. The addition of Section 11 liability for the deemed issuance of securities to SPAC stockholders that retain their securities in the de-SPAC or the registration of securities to be issued to the target's stockholders is inconsistent with the reality that it is the target, and not the SPAC, that is engaged in a distribution of its securities.

The Staff specifically requested comment on whether the Staff should be seeking to align the required disclosures and liabilities associated with de-SPAC transactions among the various alternative structures. As drafted, proposed Rule 145a provides that a de-SPAC transaction is deemed to involve an offer and sale but does not specify by whom. With respect to the SPAC, the choice of transaction structure will continue to determine whether the SPAC is a registrant and therefore deemed to be making an offer and sale to its own stockholders. The proposed amendments to Form S-4 provide that if the SPAC is issuing securities, the term "registrant" shall mean the SPAC and the target. If the SPAC is not actually issuing securities, it should not be deemed a registrant. Proposed Rule 145a, to the extent adopted, should specify that a de-SPAC transaction will be deemed an offer and sale of securities by the target company only.

It is unclear whether there is any reason to distinguish between a de-SPAC transaction, as commonly structured, and any other reverse merger. If the SEC adopts Rule 145a, it should consider whether SPACs warrant this differential treatment. The accounting predecessor in a reverse merger is not currently deemed to be engaged in a distribution of its securities to stockholders of the non-predecessor entity (i.e., the SPAC or the smaller public company in a non-SPAC reverse merger).

The Staff specifically requested comment on whether the sponsor of a SPAC should 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. We respectfully note that the target company's directors and executive officers are the parties most similarly situated to the directors and officers of a private company conducting a traditional initial public offering, in terms of their knowledge of the company that will become publicly traded through a de-SPAC transaction. Requiring a sponsor to sign a registration statement would also be inconsistent with the treatment of controlling persons of other entities that engage in public offerings.

Underwriter Liability

Another proposed rule, Rule 140a, would provide that any underwriter in a SPAC IPO that facilitates a de-SPAC transaction or any related financing transaction in any way will be deemed to be engaged in a distribution of the securities of the surviving company resulting from the de-SPAC transaction. As a result, such investment banks would be subject to the underwriter liability provisions of Section 11 for any material misstatements or omissions in the disclosure related to the de-SPAC transaction, subject to a due diligence defense. This proposed rule ignores the historical interpretation of what constitutes a "distribution" and the requirement that securities in a "distribution" be traced to a particular registered offering. The Proposal also states that the "receipt of compensation in connection with a de-SPAC transaction could constitute direct or indirect participation in the de-SPAC transaction." While it did not specifically address the other participants in a de-SPAC transaction in the proposed rules, the Commission stated that such others may also be deemed statutory underwriters in certain circumstances.

Section 2(a)(11) of the Securities Act defines an "underwriter" as "any person who has purchased from an issuer with a view to, or offers or sells for an issue in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." The Proposal asserts that proposed Rule 140a is merely an interpretation of the above definition and that a de-SPAC transaction is a distribution of the target's securities. We respectfully disagree – proposed Rule 140a substantively expands the set of market participants that could be considered an "underwriter" under the Securities Act and should be implemented, if at all, through legislation.

While the U.S. Supreme Court has indicated that indirect participation in a distribution may be sufficient for a party to be considered an "underwriter," [3] participation in activities that facilitate the distribution of securities by others is not sufficient.[4] As proposed, Rule 140a would potentially cause even remote "participation" by an investment bank in a de-SPAC transaction to subject such party to being treated as a statutory underwriter. This goes beyond mere interpretation – it is an impermissible expansion of the definition of "underwriter" in the Securities Act and is contrary to the case law interpreting the Securities Act.

Moreover, the IPO of a SPAC is a distinct transaction made pursuant to a registration statement that involves an analysis by IPO investors of an investment in the SPAC, with its unique

[3] *Pinter v. Dahl*, 486 U.S. 622 (1988).

[4] *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F. 3d 167 (2011).

risks, protections and incentives. We agree with the argument set forth in the comment letter by the Securities Industry and Financial Markets Association that proposed Rule 140a erases the distinctions between two entirely separate distributions of securities, that of the SPAC IPO and the subsequent de-SPAC transaction, with the first concluding months or even years before the second.[5] The investors in the SPAC's IPO are generally not the same as the ultimate investors in the de-SPAC transaction.[6] The distribution of securities in a SPAC IPO is clearly concluded when those securities come to rest in the hands of purchasers in the IPO to whom the underwriter has marketed the securities. Whether or not an investment bank served as an underwriter in the SPAC's IPO should not be relevant to the analysis of who is serving as an underwriter in a de-SPAC transaction.

In order for there to be an underwriter, there must be an offering of securities. As discussed above, proposed Rule 145a erroneously will deem the SPAC to be an issuer of the target's securities in transactions where the de-SPAC transaction is structured with the SPAC as the surviving company. In cases where the SPAC is not the surviving company, the SPAC will not be deemed to be a registrant. This would result in an anomalous situation in which the SPAC itself is not a "registrant," but the SPAC's IPO underwriters will be deemed to be underwriters.

Additionally, a de-SPAC transaction involves a completely separate investment decision that is distinct from the decision to invest in the SPAC IPO—namely, the decision of investors in the public markets to purchase the SPAC's securities in the open market after the de-SPAC transaction is announced based on a desire to own the target company or, absent such market demand, a decision by SPAC investors to hold their securities and exercise redemption rights, and, in some cases, a private investment in public equity ("PIPE") transaction involving a new issuance of securities to new investors who will only own target company securities upon closing of the de-SPAC transaction. As the SEC recognizes in the Proposal, the securities offered in connection with a de-SPAC transaction are effectively those of the operating company, or "target," in the business combination rather than those of the SPAC.

Under the Proposal, an investment bank that served as an underwriter in a SPAC's IPO and then acts as a placement agent in a separate private placement of securities to institutional investors in connection with the de-SPAC transaction would have Section 11 liability with respect to the de-SPAC transaction, in addition to potential liability to the purchasers in the private placement. This would result in enhanced liability for such investment bank even though it played no role in marketing the de-SPAC transaction to the SPAC's IPO investors, to the target's stockholders or to investors purchasing securities in the public market.

[5] *See* Letter to the Securities and Exchange Commission from the Securities Industry and Financial Markets Association dated June 10, 2022.

[6] *See SPAC Research* Newsletter, "Day One Float Turnover" (December 7, 2020) ("… sponsors … have to recycle most of the SPAC's float to have a successful deal closing, … it may be hard to find a stronger relationship with success than how much of a SPAC's float turned over on the day its deal was announced").

Section 11 liability for an investment bank, if adopted, should in all cases be tied exclusively to the role that the investment bank actually plays in the de-SPAC transaction. In *In re Worldcom, Inc. Securities Litigation,*[7] a case cited by the SEC in the Proposal,[8] the court stated:

> According to the statutory definition of an underwriter, which includes those who participate directly and indirectly in an underwriting, liability under Section 11 extends to any person who has purchased securities from an issuer for distribution, or who offers or sells securities for an issuer for that purpose, or who participates directly or indirectly in those tasks. As a consequence, the definition of a statutory underwriter turns on the relationship of the party and the offering. Professor Loss, a leading commentator on federal securities law, has observed that "[t]he term 'underwriter' is defined not with reference to the particular person's general business but on the basis of his *relationship to the particular offering* ....Any person who performs one of the specified functions in relation to the offering is a statutory underwriter". *In re Laser Arms Corp. Sec. Litig*., 794 F. Supp. 475, 484 (S.D.N.Y. 1989) (citing L. Loss, The Fundamentals of Securities Regulation at 1017 n. 2 (1983)) (emphasis in original).
>
> Given this statutory emphasis on an entity's "participation" in the underwriting, courts have determined whether a defendant was an underwriter by analyzing its role in the underwriting process. *See*, *e.g*., *Securities and Exchange Commission v. Culpepper*, 270 F.2d 241, 246 (2d Cir. 1959). Having a relationship with an issuer or an underwriter, however, does not transform one into an underwriter.

A rule that deems certain investment banks to be underwriters without regard to the role played by the investment banks in the de-SPAC transaction could result in meaningfully disparate legal treatment of investment banks playing the same substantive role in the de-SPAC transaction.

The SEC appears to believe that the typical deferral of a portion of the underwriting fees for a SPAC IPO to the closing of a de-SPAC transaction should be a determinative factor in assessing whether banks are (or should be deemed to be) participating in a distribution of the target's securities in the de-SPAC transaction. Most SPAC IPO underwriting engagements, however, do not require the investment bank to provide additional services in order to receive the deferred fee. The fee is deferred because SPACs lack sufficient cash to pay the full fee at the closing of the SPAC IPO, not because the underwriter has services that remain to be performed, whether in connection with the de-SPAC transaction or otherwise. The Proposal, which would impose materially different standards of liability on investment banks providing identical services in a de-SPAC transaction, may have the effect of causing the SPAC's IPO underwriters to not participate in any aspect of de-SPAC transactions.[9]

[7] *In re: WorldCom Sec. Litig.,* 308 F. Supp. 2d 338, 344 (S.D.N.Y. 2004).

[8] *See* Proposal, fn. 185.

[9] Steve Gelsi, *Goldman Sachs and Other Big Banks Hit SPAC Pause Button as Market Shifts and New Regulations*

The rules of the Financial Industry Regulatory Authority, Inc. ("FINRA")[10] provide further clarification of the definition of "participation" that describes the roles commonly associated with underwriting. These include involvement in the preparation of the offering document or other documents, involvement in the distribution of the offering, furnishing of customer or broker lists for solicitation, or providing advisory or consulting services to the issuer related to the offering, but do not include advisory or consulting services provided to the issuer by an independent financial adviser. Banks that do not provide services that are commonly associated with underwriting, such as those acting solely as PIPE placement agents or providing fairness opinions in connection with a business combination, should not be deemed to be participating in a distribution in connection with the de-SPAC.

The Proposal does not indicate whether the rule would be applied to de-SPAC transactions for which investment banks have already provided services. Doing so would fail to achieve the stated purpose of the rule, which is to increase the oversight by investment banks participating in the de-SPAC that are in a position to undertake due diligence of the target. If a business combination agreement has already been entered into, investment banks, particularly those retained by the SPAC, are not in a position to require the target to provide the investment banks with access to diligence materials, to require the target's or the SPAC's counsel to provide legal opinions or to require the target to seek comfort letters from the target's independent accountants. These rights are contractually sought by investment banks when they are retained in transactions for which they believe they are acting as underwriters. To the extent the SEC adopts rules that will subject investment banks to underwriter liability, such rules should be applied only prospectively so that investment banks can negotiate for the rights, protections and indemnifications that they typically receive in an underwritten offering.

Further, the Proposal states that others, including PIPE investors and financial advisors, may also be deemed to be statutory underwriters in a de-SPAC if they participate in the distribution of securities. It is unclear whether the Staff is suggesting that a PIPE investor would have liability beyond that which could be incurred by a purchaser in a private placement upon resale of securities. We respectfully request that the Staff clarify whether statutory underwriter liability would extend to persons such as PIPE investors other than as historically interpreted by the Staff as it relates to the resale of private securities. These statements otherwise have the potential to chill capital-raising by SPACs, which is inconsistent with the SEC's mandate to facilitate capital formation.

Financial Statement Requirements

While we generally agree with the changes to Regulation S-X as proposed, we are not in favor of the proposed rules related to acquisitions of businesses by a shell company registrant or its predecessor that are not or will not be a predecessor. We agree that the rules applicable to Form S-

Loom; Marketwatch, May 10, 2022, https://www marketwatch.com/story/goldman-sachs-and-other-big-banks-hit-spac-pause-button-as-market-shifts-and-new-regulations-loom-11652189888; Katherine Doherty, *Global Banks Flee the Monster SPAC Market They Helped Create*, May 10, 2022, https://www.insurancejournal.com/news/national/2022/05/10/667036.htm.

[10] FINRA R. 5110(j)(15).

4 should be aligned with those applicable in an IPO. Rule 3-05(b)(iv)(2) of Regulation S-X allows registrants to omit financial statements of a probable acquisition or a recently acquired business unless the acquisition is significant at the 50% or greater level. Instead, such financial statements can be provided on Form 8-K within 75 days after consummation of the acquisition. The Proposal states that "it is unclear how those financial statements are to be filed when the private operating company is not yet subject to Exchange Act reporting requirements and thus may not be able to file a Form 8-K." The Proposal states that rather than requiring a post-effective amendment to the Form S-4, new Rule 15-01(d)(2) would require inclusion of such financial statements in the Form 8-K pursuant to Item 2.01(f) to be filed immediately following the closing (the "Super 8-K"). We respectfully suggest that operating companies be allowed a minimum of 75 days before such financial statements are required to be filed.

The Staff specifically requested comments on whether the Super 8-K should provide that 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. Consistent with the SEC's approach with initial public offerings, we believe that any updated financial statements should be provided in the first periodic report following effectiveness of the de-SPAC transaction, subject to reasonable grace periods. We recommend that the SEC revisit whether a Super 8-K is even needed given that Rule 145a, as proposed, would require that every de-SPAC transaction be registered on Form S-4. The Form S-4 will provide all required information to investors that would otherwise be provided in a Form S-1 for a traditional IPO. Alternatively, the SEC should consider limiting the Form 8-K requirements to reporting the number of shares redeemed, together with the results of the vote, and other matters not determinable until the time of the closing of the business combination but which, due to materiality, warrant reporting on a current basis rather than in the surviving company's next periodic report.

Safe Harbor Under the Investment Company Act

SPACs have been used for approximately 20 years as a vehicle for private companies to access the public markets. The SEC has made no argument in the Proposal to suggest that investors have been harmed due to the lack of protections of the Investment Company Act of 1940 (the "ICA") during this period. SPACs maintain their funds in a trust account and invest the trust account assets only in government securities and in funds that invest only in government securities. Assets are typically sold, if at all, only when interest earned on the trust account assets is withdrawn to pay the SPAC's taxes. The Proposal states, citing Section 1(b) of the ICA:

> The [ICA] regulates the organization of investment companies that engage primarily in investing, reinvesting, and trading in securities, and whose own securities are offered to the investing public. The Act is designed to minimize conflicts of interest that arise in these complex operations protecting investors by preventing insiders from managing the companies to their benefit and to the detriment of public investors; preventing the issuance of securities having inequitable or discriminatory provisions; preventing the management of investment companies by irresponsible persons; preventing the use of unsound or

> misleading methods of computing earnings and asset value; preventing changes in the character of investment companies without the consent of investors; preventing investment companies from engaging in excessive leveraging; and ensuring the disclosure of full and accurate information about the companies and their sponsors."[11]

The SEC has not suggested that the investment of trust account assets involves complex operations presenting conflicts of interest, or that management of trust account assets has ever involved misleading calculations of returns or leverage of any sort, much less excessive leverage, that there is a lack of disclosure on how trust account assets are invested or that any of the concerns noted above are implicated by the investment of a SPAC's trust account.

Given that SPACs do not implicate the concerns that the ICA is meant to address, any safe harbor should be constructed such that SPACs as currently structured fall within the safe harbor. The SEC's analysis suggests that expanding the safe harbor to 36 months (consistent with the deadline under national stock exchange listing rules) would have allowed 96% of the SPACs reviewed in the Staff's sample to meet the duration conditions of the proposed safe harbor.

The SEC recognizes in the Proposal that some SPACs will need to expedite the deadline set in their charters in order to meet the 18-month and 24-month requirements for announcing and completing a business combination. In fact, only 57% of the SPACs in the SEC's sample would have both announced and completed transactions within the proposed time periods. This percentage is likely even lower under current market conditions and given the increasing length of time the SEC has been taking to review proxy statements and registration statements in de-SPAC transactions. For example, the SEC states that its analysis shows an average time of five months from signing a definitive business combination agreement to closing the transaction.[12] Currently, this time period is 6.7 months.[13]

The deadlines in the proposed safe harbor arbitrarily deny SPACs the benefits of the time periods that have been agreed on with their IPO investors. The duration of a SPAC is one of many terms that IPO investors weigh in deciding whether to invest in a particular SPAC, together with other terms such as warrant coverage. In addition, existing SPACs have relied upon the deadlines in their charters in structuring their searches for business combination targets and will now be forced to rush to complete transactions that they believed they had more time to complete or risk being treated as investment companies.

The SEC acknowledges these risks. The Staff's own Cost Benefit Analysis states:

> [W]e expect that the combined effect of the two proposed duration conditions would be to force a significant proportion of SPACs that would seek to take advantage of the safe harbor to conclude their search for a target sooner than they would have under the baseline or forgo

[11] *See* Proposal, fn. 295.
[12] Proposal, fn. 340.
[13] SPACInsider (May 23, 2022).

a de-SPAC transaction, either of which could potentially impose costs on SPACs and their investors and sponsors.

With respect to the 18-month requirement, the SEC cites no reason for this duration other than the Rule 419 deadline applicable to blank check companies to complete business combinations. SPACs are not subject to Rule 419 because they are not blank check companies and not required to meet the requirements of Rule 419. The SEC states that requiring existing SPACs to accelerate their timelines is warranted because:

> [T]he longer the SPAC operates with its assets invested in securities and its income derived from securities, the more likely investors will come to view the SPAC as a fund-like investment and the more likely the SPAC appears to be deviating from its stated business purpose. In turn, this may raise investor protection concerns and increase the possibility of regulatory arbitrage compared to the proposed duration conditions.

The SEC provides no support for the notion that investors view SPACs with a 24-month duration versus a 36-month duration as "fund-like" investments or for the need for an interim condition related to deal announcement. The portions of the proposed safe harbor that require evidence of primary engagement in a business other than investing, reinvesting or trading in securities are sufficient to address investor perceptions of whether a SPAC is a fund-like investment. After incorporating that evidence (the three "Tonopah factors") into the safe harbor, there is no reason for an investor to believe that a SPAC in existence for more than 24 months is suddenly a fund-like investment. Attempting to eliminate the remote possibility of any such misconception is far outweighed by the disruption to the industry outlined above.

PSLRA

We respectfully disagree with the proposal to amend the definition of "blank check company" for purposes of the PSLRA in a manner that would make SPACs ineligible for the safe harbor for forward-looking statements provided by the PSLRA. This proposal could limit the use of projections and increase associated transaction costs with little or no corresponding benefit to the investing public. Furthermore, we believe such a proposed limitation on the applicability of the PSLRA is beyond the scope of the Commission's rulemaking authority and should more properly be addressed, if at all, through legislation.

The PSLRA provides a safe harbor from liability for forward-looking statements when such statements are accompanied by meaningful cautionary statements. However, the safe harbor does not protect against liability for false or misleading statements, even if forward-looking. The safe harbor does not apply to IPOs, limited partnerships or certain other issuers, including blank check companies. SPACs that raise more than $5 million in their IPOs are currently excluded from the definition of blank check companies, so the safe harbor is generally considered to be available for de-SPAC transactions. The SEC's proposed change would expand the definition of blank check companies to include SPACs, even though they would not qualify as such under the PSLRA.

The Commission stated that the proposed change to the PSLRA definition is necessary to align traditional IPOs more closely with de-SPAC transactions. However, the Commission's position is inconsistent with the provisions of Regulation MA, which actually require disclosure of target company projections if the SPAC's board relied on such projections when approving the de-SPAC transaction. There is no similar requirement in the IPO context. We can see no justification for treating a de-SPAC transaction differently from any other stock-for-stock merger for this purpose. For this reason and others, SPACs will be forced to continue to disclose projections in de-SPAC transactions.

The use of projections is critical to the evaluation of proposed de-SPAC transactions by SPAC boards of directors, existing SPAC investors, PIPE investors and other investors considering an investment in the combined company. Market participants benefit from accessing the same analysis that SPAC boards review in making an investment decision with respect to a proposed business combination. The removal of PSLRA protections for issuers and underwriters could limit the use and scope of projections to the detriment of market participants and would increase the associated cost of preparing and delivering such projections.

However, even if the proposed amendment is adopted, under the so-called "bespeaks caution" doctrine, SPACs should still be able to make forward-looking statements in the absence of the PSLRA safe harbor. In fact, while it may not be common in certain industries, many types of IPO issuers (e.g., REITs, yieldcos, and master limited partnerships) do regularly disclose projections in their IPO registration statements and those projections are expected, and relied upon, by underwriters and institutional and retail investors.

Moreover, the PSLRA only applies to private litigation and does not limit the Commission from pursuing claims related to false or misleading disclosure. For these reasons, we believe that the existing framework provides sufficient investor protection from the use of misleading forward-looking information and that the change proposed by the SEC would only increase transaction costs and administrative burdens on de-SPAC transactions.

Finally, de-SPAC transactions were not within the scope of issuers and transactions excluded from the PSLRA by Congress. The PSLRA excludes from the safe harbor, among other things, forward-looking statements made in connection with an initial public offering, and an offering of securities by a blank check company or by an issuer that issues penny stock. As discussed above, SPACs are not blank check companies subject to Rule 419 nor do SPACs issue penny stock. In transactions where the de-SPAC transaction is structured with the SPAC as the surviving company, the transaction is not an initial public offering of the SPAC. As a result, we believe the proposed expansion of the exclusions from the PSLRA that were legislated by Congress are not merely clarifying or interpretive in nature; rather, they go beyond the Commission's rulemaking authority and should be addressed by statute.

III. Topics Not Addressed by the Proposal

The SEC should eliminate Rule 144(i).[14] In connection with a de-SPAC, an operating company will have provided information to investors comparable to that available in an IPO. As such, Rule 144 should be available on the same terms to companies that choose to become publicly traded through a de-SPAC. The ongoing current information requirement of Rule 144(i) unnecessarily hinders resales and the removal of restrictive legends by persons holding securities issued in private placements by de-SPAC companies.

The SEC should remove SPACs from the list of issuers treated as "ineligible issuers" for the same reason. Operating companies that become publicly traded through a de-SPAC do not present additional risks to investors in comparison to companies that go public through a traditional IPO. Accordingly, additional restrictions on capital formation by these entities following a de-SPAC transaction are not warranted.

Lastly, consistent with the SEC's position that the time period for S-3 eligibility begins with the closing of the de-SPAC, the SEC should treat companies that become publicly traded via a de-SPAC as new operating companies for all purposes, including any grace periods with respect to compliance with Sarbanes-Oxley that are available to new public companies.

IV. Conclusion

We appreciate the opportunity to comment on the Proposal and would be happy to discuss any questions the Staff may have with respect to this letter. Any questions about this letter may be directed to Carol Anne Huff [redacted]) or David Sakowit[redacted]

Very truly yours,

WINSTON & STRAWN LLP

[14] *See* "SEC Should Revisit Its Special Purpose Acquisition Co. Regs," *Law360,* Carol Anne Huff (February 19, 2019) for further analysis of the applicability of certain rules and regulations to SPACs. https://www.law360.com/articles/1129102/sec-should-revisit-its-special-purpose-acquisition-co-regs