June 13, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090
File No: S7-13-22

Dear Ms. Countryman:

We write to comment on the Commission's proposal to adopt Investment Company Act ("ICA") Rule 3a-10 (the "Rule"), which would address the status of special purpose acquisition companies ("SPACs") under the ICA. We urge the Commission promptly to adopt the proposed Rule.

Our research and teaching emphasize economic analysis of corporate and securities law. Robert Jackson is the Pierrepont Family Professor of Law at NYU School of Law. He was nominated by the President, and unanimously confirmed by the Senate, to be an SEC Commissioner in 2017, a position in which he served until 2020. John Morley is a Professor of Law at Yale Law School and one of the nation's leading experts on the regulation of investment managers. Together, we serve as co-counsel in a series of lawsuits seeking to protect investors by rescinding the excessive compensation SPAC sponsors have arranged to pay themselves at investor expense in violation of the ICA.[1]

We strongly support the SEC's efforts to draw attention to the gravity of the questions raised by SPACs under the ICA. We offer three comments as the Commission prepares to finalize the Rule:

- The SEC should ***promptly finalize the Rule***. Although some SPACs are clearly investment companies under current law, many SPAC practitioners have failed to take the challenges raised by the ICA sufficiently seriously. The Rule is necessary to eliminate any doubt that the ICA applies to SPACs.[2]

- The SEC should ***shorten the permitted acquisition periods under the final Rule***. As proposed, the Rule would require a SPAC to announce a de-SPAC transaction within 18 months and close it within 24 months to avoid serious questions about its status as an investment company. We suggest that the SEC shorten the limits to 12 months for announcement and 18 months for completion. Since August of 2021, new SPACs have significantly shortened their intended timelines in a manner consistent with our proposed approach. The SEC can therefore shorten the time limits in the Rule without meaningfully disrupting SPAC practices. Shortened limits would be closer to current law and would reduce the risk that SPACs will complete bad acquisitions as they age.

[1] These lawsuits, in which Susman Godfrey LLP and Bernstein Litowitz Berger & Grossmann LLP serve as co-counsel, allege that certain SPACs have illegally failed to register with the SEC as investment companies under the ICA and that affiliates of the sponsors of some of these SPACs have illegally failed to register with the SEC as investment advisers under the Investment Advisers Act of 1940. *See, e.g.*, Complaint in *Assad* v. *Pershing Square Tontine Holdings, Ltd. et al.*, No. 1:21-cv-06907-AT-BCM (S.D.N.Y. Aug. 2021). We disclose the conflict of interest present for any counsel to pending litigation affected by rulemaking under Commission consideration.

[2] John C. Coates, *SPAC Law and Myths*, at 37-38 (working paper 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022809 ("[M]ajor law firms and their clients in the SPAC industry" are "invested" in the "myth" "that the ICA clearly . . . does not apply to SPACs").

- The SEC should further clarify that ***noncompliant SPACs are investment companies***. Although the proposing release makes clear that noncompliant SPACs face "serious questions" about their investment-company status, we encourage the SEC to state these SPACs' status unambiguously. As of the date of this letter, 49 SPACs holding $18 billion in investment funds have exceeded the time limits in the proposed Rule and to our knowledge none has done what the Rule would require: distribute its assets "in cash to investors as soon as reasonably practicable." To ensure that these SPACs promptly return capital to investors as the law requires, the SEC should declare definitively that any SPAC that fails to comply with the rule is an investment company.

I. SPACs Can Be Investment Companies under the ICA

We share the Commission's concern, expressed in the Rule, that "SPACs may fail to recognize when their activities raise the investor protection concerns addressed by the Investment Company Act." Like the SEC, "[w]e believe that certain SPAC structures and practices may raise serious questions as to their status as investment companies."[3] SPAC sponsors and some counsel, however, have taken these concerns insufficiently seriously, even in the months since the SEC proposed the Rule. Adoption of the Rule is necessary to eliminate any doubt that many SPACs are now in violation of the ICA.

SPACs raise precisely the kinds of concerns that Congress designed the ICA to address. SPACs are organized like investment companies, capitalized like investment companies, invested in the same kinds of assets as investment companies, and operated by the same people as investment companies.[4]

Like other investment companies, SPACs use what one of us has called a "divided structure."[5] Like private equity, hedge, venture capital, closed-end, and mutual funds, SPACs have no employees or operating resources of their own, relying instead entirely on the efforts of outside professional investment managers. SPACs' reliance on these external managers creates for SPACs the same serious agency conflicts that appear in other investment companies. For example, like the mutual fund investors who do not own their fund's adviser, a SPAC's investors do not own the SPAC's sponsor and have no direct mechanism for holding the sponsor accountable. And like the mutual fund adviser that advises other mutual funds, SPAC sponsors also tend to manage other SPACs and to do so alongside private equity, hedge, and even mutual funds. As a result, like investment fund advisers, SPAC sponsors have conflicting loyalties to the many different vehicles they manage. Like mutual funds, SPACs make up for their investors' lack of control by giving investors the right to redeem and take the value of their vehicles' portfolios of securities in cash. But as one of us has elsewhere explained, these redemption rights introduce problems of their own, such as the risk that the exercise of these rights will be postponed, manipulated, or abused.[6]

---

[3] *See* SEC, Special Purpose Acquisition Companies, Shell Companies, and Projections, Release No. 33-11048, File No. S7-13-22 (March 30, 2022), at 22, 136 [hereinafter, the "Rule Release"]; *see also id.* at 138, 155-56 ("[W]e stress that the inability of a SPAC to identify a target and complete a de-SPAC transaction within the proposed timeframe would raise serious questions concerning the applicability of the [ICA] to that SPAC.").

[4] This analysis is drawn from our forthcoming academic paper on this subject. *See* Robert J. Jackson, Jr. & John Morley, *SPACs As Investment Funds* (working paper, January 2022); *see also* Note, *The Investment Company Act of 1940*, 50 YALE L.J. 440 (1941) (contemporaneously noting that the ICA sought to address "abuses [that] stemmed from the control of investment companies by banking, brokerage, or dealer interests," "control founded in complicated capital structures" "exercised to benefit the sponsor").

[5] John Morley, *Houses Divided: The Inner Workings of Investment Funds* (working paper 2021); John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation,* 123 YALE L.J. 1228 (2014).

[6] John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 85 (2010) ("Though exit gives investors a powerful tool to protect their interests, the net effect of exit on many investors is ambiguous, because investors who do not use their rights to leave underperforming funds cannot expect activism by other investors to improve the funds.).

Congress adopted the Investment Company Act to address precisely these problems. The ICA regulates the relationship between an investment company and its adviser in a host of ways. It governs how the adviser is compensated, the level of the adviser's fees, and the content and format of an advisory agreement.[7] Those protections would significantly benefit SPAC investors because SPAC sponsors pay themselves in forms and amounts that are obviously prohibited by the ICA.[8] Rather than comply with these protections, however, many SPAC lawyers claim that the ICA simply does not apply.[9]

As the Rule explains, that is not correct. The ICA applies to "any issuer" "which is" "engaged primarily, or proposes to engage primarily, in the business of investing" "in securities."[10] In the five-factor test governing whether an issuer is "primarily" in the investing business, the most important factors are the nature of an issuer's present assets and the sources of its present income. Under these factors, SPACs are clearly investment companies because they derive 100% of their income and assets from securities.[11]

SPAC investors clearly understand SPACs to be substitutes for mutual funds and other types of investment companies. In the median SPAC, *nearly three quarters* of investors choose to redeem rather than hold their shares through the completion of the SPAC's acquisition.[12] When they redeem, they avoid any exposure to the SPAC's future operations, taking only the return on the SPAC's securities portfolio. It is thus no surprise that sophisticated investors tend to treat SPACs as substitutes for investments in money market mutual funds and other vehicles that hold portfolios of Treasuries.[13] For the vast majority of SPAC investors, a SPAC's portfolio of securities is the only source of return they will ever receive.

As the Rule notes, the Commission and the courts have for decades applied the ICA's language to acquisition companies like SPACs, concluding each time that an acquisition company that goes on investing in securities for too long becomes an investment company under the ICA—regardless of its hopes for an

[7] *See* 15 U.S.C. §§ 80a-15(a), 80a-22(g), 80a-23(a), 80a-35(b).

[8] *See, e.g.*, Complaint in No. 1:21-cv-06907-AT-BCM, *supra* note 1, at ¶ 93 (noting that the sponsor's warrants in one SPAC were once valued by the SPAC "at a staggering $843,289,449").

[9] In August of 2021, sixty law firms wrote a public letter categorically claiming that no SPACs were investment companies. *E.g.*, Ropes & Gray, *Over Sixty of the Nation's Leading Law Firms Respond to Investment Company Act Lawsuits Targeting the SPAC Industry* (Aug. 27, 2021). John Coates has pointed out that the letter "contains no reasoning beyond the bald assertion that the 'plain text' of the ICA resolves the question" and "cites no authorities at all." Coates, *supra* note 2, at 35-36.

[10] 15 U.S.C. § 80a-3(a)(1)(A) (2018).

[11] *Tonopah Mining Co. of Nev.*, 26 S.E.C. 426, 427 (1947) (interpreting ICA Section 3(b)(2), 15 U.S.C. § 80a-3(b)(2)) (describing the factors as "1) the company's historical development; 2) its public representations of policy; 3) the activities of its officers and directors; and, *most important*, 4) the nature of its *present* assets; and 5) the sources of its *present* income" (emphases added)). In practice, the last two factors—those the SEC described as "most important"—have carried far greater weight than the others. ROBERT H. ROSENBLUM, INVESTMENT COMPANY DETERMINATION UNDER THE 1940 ACT § 6.3.1 n.17 and accompanying text (2003). Under *Tonopah* and the law that has followed it, an issuer is generally deemed to be primarily in the business of investing in securities so long as a *mere majority* of both its assets and its income are derived from securities, *ICOS Corp.*, 1940 Act Rel. No. 19334, 58 Fed. Reg. 15 (March 22, 1993), and the Staff of the Division of Investment Management has declined to grant no-action relief to any issuer that derives more than 45% of its assets and income from securities, *Financial Funding Group*, SEC No-Action Ltr., 1982 WL 28965, at *1 (March 3, 1982).

[12] Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. REG. 228, 240 tbl.1 (2022) (showing that, in the median SPAC, 73% of investors redeem; in a quarter of SPACs, *nearly all shares* redeem); Amrith Ramkumar, *The SPAC Ship is Sinking, Investors Want their Money Back*, WALL ST. J. (Jan. 2022).

[13] Sam Goldfarb, *Some Investors Find Stability in SPACs*, WALL ST. J. (Oct. 2021); Lauren LaCapra, *Hedge Funds Find Arb Opportunity in SPACs*, THESTREET (April 2009).

acquisition in the future.[14] Though an issuer may sometimes avoid becoming an investment company by showing that its investments in securities are temporary, some SPACs stretch the limits of temporariness too far. Under long-established doctrine, the outer limit for "temporary" investments is generally no more than one year.[15] That is why in ICA Rule 3a-2, the Commission limited the safe harbor for temporary investment companies to one year.[16]

In light of the longstanding law governing this area, one might wonder why the Rule is necessary. The reason is that some in the SPAC marketplace have failed to take the ICA sufficiently seriously. We share the dismay of Harvard Law School Professor and former SEC General Counsel and Acting Director of the Division of Corporation Finance John Coates, who has pointed out that many practitioners' responses to these concerns "contain[] no reasoning beyond the bald assertion" that the ICA does not apply to SPACs. Professor Coates describes the "main significance" of the SPAC industry's response as showing "how broadly the SPAC product spread during the bubble of 2021, and how invested major law firms and their clients in the SPAC industry became in struggling to maintain the status quo underlying the bubble and the related fee streams it was producing."[17]

Indeed, even in the months since the Commission proposed the Rule, some SPAC lawyers have continued to tell the market that the ICA does not apply to SPACs. One law firm responded to the Commission's proposal of the Rule by declaring to its clients two weeks later that "SPACs simply are not investment companies."[18] Ordinarily it would not be necessary for the Commission to explain the application of longstanding legal principles to sophisticated market participants. The circumstances in the SPAC market, however, require the Commission to promptly finalize the Rule.

---

[14] *SEC* v. *Nat'l Presto Indus., Inc.*, 486 F.3d 305, 315 (7th Cir. 2007) (Easterbrook, J.) (describing as the very "model" of an "inadvertent investment company" an issuer that invests the bulk of its assets in securities while it "purports to be looking for acquisitions").

[15] In the most important case on the temporary investment company doctrine, the Southern District of New York and Second Circuit limited an acquisition company's search period to nine months. *SEC* v. *Fifth Ave. Coach Lines*, 289 F. Supp. 3, 29 (S.D.N.Y. 1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970). Since *Fifth Avenue Coach Lines*, the grace period has often been extended to one year. Especially notable is the Staff's no-action letter in *Arizona Property Investors, Ltd.*, 1979 WL 14220, a company that was virtually identical to a SPAC. The issuer proposed to go public as a shell company, invest all of its assets in U.S. government securities, and then use the assets over time to effectively acquire an operating business by purchasing interests in real estate. The issuer and the Staff recognized the same problem of temporary securities investing that SPACs now pose under the ICA, and the Staff agreed not to recommend enforcement action only on condition that the company move into operations in no more than one year.

[16] 17 C.F.R. § 270.3a-2 (2020); SEC, Transient Investment Companies, 46 Fed. Reg. 6882, 6882 (January 1981). In adopting Rule 3a-2, the Commission made clear that although in principle some companies might be allowed to go beyond one year under special circumstances, these circumstances were rare. The release adopting the rule declared: "The Commission stresses that a company's inability to become engaged primarily in a non-investment company business within the rule's one-year period would raise serious questions concerning the applicability of the [ICA] to that company." *Id.* at 6883.

[17] Coates, *supra* note 2, at 35. Professor Coates addressed the argument that the SEC's prior approval of SPAC registration statements entitles SPACs to repose under the ICA. That argument, he explained, "reduce[s] to a claim that a regulatory agency with a limited budget should be held to legally have given up authority if it does not bring an enforcement action when it could," contrary to longstanding law. *Id.*; 15 U.S.C. § 78z (2018) (no "failure to act by the [SEC] shall be construed to mean that the [SEC] has in any way passed upon the merits of, or given approval to, any security").

[18] WHITE & CASE CLIENT ALERT, *SEC Proposes Rules to Regulate SPACs* (April 2022). Other practitioners have responded to the Rule with more care. SULLIVAN & CROMWELL LLP, *SEC Proposes Sweeping Changes Regulating SPAC Formation and De-SPAC Transactions* (March 2022), at 10 ("The Staff's statements in proposing [the Rule] raise the question of whether existing SPACs that do not meet the safe harbor would be considered unregistered investment companies by the [SEC S]taff.").

II. The Final Rule Should Reduce the Time Allowed for De-SPAC Transactions

As proposed, the Rule would grant a safe harbor under the ICA to SPACs that announce a de-SPAC transaction within 18 months and close it within 24 months of the initial public offering.[19] For three reasons, we suggest that in the final rule the Commission reduce the allowed time to 12 months for announcing a transaction and 18 months for completing it.

First, as noted above, the law has for decades placed the outer boundary of temporary investment company status at 12 months or less. That is the approach of Rule 3a-2 and the cases and no-action letters that inspired it.[20] To our knowledge, neither the Commission, nor its Staff, nor any court has ever formally allowed an issuer to invest 100% of its assets and derive 100% of its income from securities for more than one year based solely on the argument that the issuer's investment company status was temporary. We see little reason to give SPACs more time than the law has previously offered.

To date, the outer boundary of the temporary investment-company doctrine has been Rule 419. Rule 419 did not formally address the status of any issuer under the ICA and it has never applied to SPACs, but it informally suggested that an issuer somewhat similar to a SPAC that complies with that rule will not be considered an investment company if it completes the acquisition of an operating company within 18 months.[21] Rule 419's 18-month deadline is six months shorter than the 24-month period proposed in the Rule, and it is exactly the amount of time the SEC should provide when finalizing Rule 3a-10.

Second, the Rule's proposed timeframe is based in part on the Rule Release's analysis of data on SPAC practices. Those data show that, in 2021, the average SPAC proposed an acquisition period of just over 20 months.[22] We applaud the SEC's use of empirical evidence in developing the proposed Rule. The figures presented in the Rule Release, however, do not reveal the changes the SPAC industry made *during* 2021. Figure 1 below shows the permitted acquisition period for the median new SPAC that completed an IPO in each month from January 2021 through May 2022:

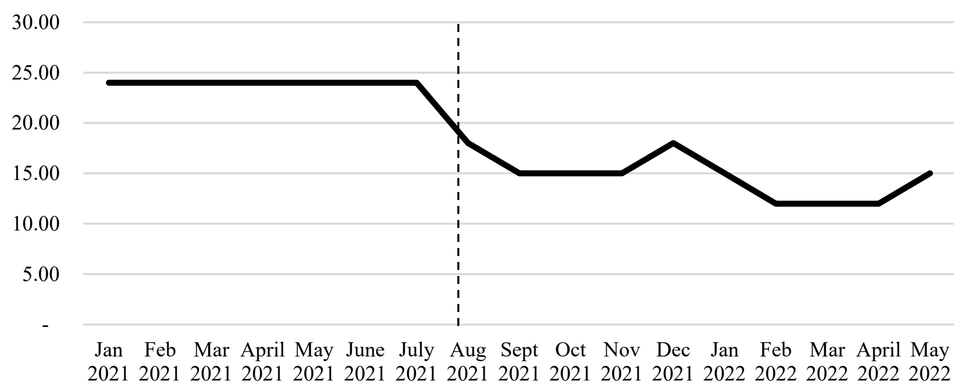

Figure 1. Median New SPAC Proposed Acquisition Periods by Month, 2021-Present

[19] Rule Release, *supra* note 3, at 152 (a SPAC seeking the safe harbor must "file a report on Form 8-K with the Commission announcing that it has entered into a [de-SPAC agreement] no later than 18 months after the effective date of the SPAC's registration statement for its initial public offering").

[20] *See, e.g.*, Florida First Equities Corp., SEC No-Action Ltr., 1980 WL 14869 (September 1980).

[21] 17 C.F.R. § 230.419(e)(iv) ("If a consummated acquisition(s) meeting the requirements of this section has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account shall be returned . . . within five business days following that date.").

[22] Rule Release, *supra* note 3, at 186 & tbl.2.

As Figure 1[23] shows, SPAC market practices shifted significantly after we filed our lawsuits in August 2021, and the SPAC industry finally took notice of its longstanding obligations under the ICA. Before August 2021, the median new SPAC gave itself 24 months to complete an acquisition. But after August 2021, that figure dropped to 15 months, and by the Spring of 2022 the median new SPAC gave itself 12 months—the period contemplated by Rule 3a-2.

The evidence in Figure 1 offers the SEC several insights as it finalizes the Rule. First, the costs of compliance with the Rule's timeframes will be lower for SPACs of more recent vintage, since newer SPACs have already moved toward compliance with the time limits we propose. Second, any claim that a SPAC cannot complete a transaction in the shorter search period we have proposed is mistaken. In fact, the median new SPAC gave itself exactly the amount of time we propose.[24] Finally, we note that Figure 1 shows an uptick in average acquisition periods in May 2022, a month after the SEC issued the Rule Release.[25] We document this change to note that the market may view the proposed Rule as being more, not less, permissive than longstanding interpretations of the ICA. Whether the SEC wishes to give SPACs more permissive treatment than other investment vehicles is, of course, a policy judgment committed to the SEC's sound discretion. We note, however, that market participants are observing and responding to those judgments in real time.

Third, limiting the duration of SPACs would benefit investors by reducing the number of low-quality de-SPAC transactions to which investors are exposed. Empirical research shows that, even in comparison to the poor performance of post-SPAC companies generally, the very-worst performing post-SPAC companies tend to be those acquired late in a SPAC's search.[26] As the Rule Release noted, this evidence is consistent with a SPAC sponsor's strong incentives to prefer a low-quality transaction over no transaction, as a failure to complete a transaction results in the sponsor receiving no compensation.[27] We suggest that the SEC, when finalizing the Rule, allow SPACs 12 months to announce and 18 months to complete a de-SPAC transaction—or otherwise comply with the investor protections of the ICA.[28]

---

[23] Figure 1 uses data on the acquisition completion period for each new SPAC at the time of its IPO as provided by its certificate of incorporation and other organizational documents. *See* SPAC IPO INSIDER, SPACINSIDER.COM (providing data). We note that many of the termination dates reflect the timelines to announce an acquisition rather than to complete it. Many SPAC termination dates extend automatically if a SPAC announces a transaction within the original time limit. Even if we take Figure 1 to indicate only the time limits for announcements, however, it is consistent with our suggestion to establish the time limit for an announcement at 12 months. Twelve 12 months is the median reflected in Figure 1 for new SPACs during Spring 2022.

[24] We also note that the SPAC industry made these changes in response to its ICA obligations even as many claimed the ICA did not apply. Professor Coates has taken similar note of the tension between many SPAC practitioners' words and SPACs' conduct. Coates, *supra* note 2, at 36 (noting that many SPACs, while claiming that the ICA does not apply to them, "explicitly note[] ICA-related risk in their offering documents," and that no SPAC has "ever disclosed having obtained a legal opinion that the ICA does not in fact apply to SPACs").

[25] Of course, the medians we observe are based on relatively small sample sizes and do not definitively establish a causal relationship between market practices and any particular development in the law. But the evidence is suggestive and we provide it in response to the SEC's requests for data. Rule Release, *supra* note 3, at 201.

[26] *See, e.g.*, Lora Dimitrova, *Perverse Incentives of Special Purpose Acquisition Companies, the "Poor Man's Private Equity Funds,"* 63 J. ACCT. & ECON. 99 (2017).

[27] Rule Release, *supra* note 3, at 204 & n.454 (citing Dimitrova, *supra* note 26)).

[28] As the Rule Release did, we acknowledge that a shorter search period "may cause some SPACs to pursue comparatively less attractive targets as they get closer to their de-SPAC transaction deadlines," and that the limited period "may increase the bargaining power of target companies in negotiations with SPACs compared to other potential buyers that do not face such regulatory . . . time constraints." Rule Release, *supra* note 3, at 204-05. We note, however, that these risks must be weighed against the likelihood that SPACs will hold investor funds unproductively for extensive periods of time in violation of law. And, as the Rule Release points out, the average realized acquisition period for SPACs in 2021 was less than nine months. Rule Release, *supra* note 3, at 186 tbl.2.

III. THE FINAL RULE SHOULD DEFINITIVELY ADDRESS THE STATUS OF NONCOMPLIANT SPACS

The Rule would require a SPAC "to distribute its assets in cash to investors as soon as reasonably practicable if [the SPAC] does not meet either the 18 month deadline or the 24 month deadline."[29] As noted above, this timeframe is more, not less, lenient than the current law governing SPACs. Currently, however, dozens of SPACs that cannot comply with that timeframe are holding billions of dollars, putting investors at risk of the low-quality transactions that commonly occur late in a SPAC's search period. Accordingly, when finalizing the Rule the Commission should state clearly that a SPAC that fails to comply with the Rule is an investment company.

We acknowledge that the Rule Release already proposes to make clear the legal concerns facing noncompliant SPACs. As proposed, the Rule would provide that any noncompliant SPAC faces "serious questions" about whether it is an investment company.[30] In so doing, the Rule Release follows the SEC's longstanding practice of adopting a safe harbor and then raising serious questions about actors that venture outside of it.[31] For three reasons, however, the SPAC market presents a unique case in which investors will remain at significant risk unless the SEC takes steps to clarify its position even further.

First, there is an astonishing amount of capital that is now, or soon will be, held by SPACs in violation of the conditions of the proposed Rule. As of this writing, 49 SPACs, holding more than $18 billion, have been searching for more than 18 months without announcing deals. And yet none of these SPACs has announced that it will return capital to investors as soon as reasonably practicable.[32] By Thanksgiving, there will be 279 SPACs that will have been public for more than 18 months holding more than $97 billion. It is undesirable for the SEC to permit such a vast amount of capital to be held in clear violation of one of the Commission's organic statutes.

Second, SPAC sponsors are not likely to return that capital to investors unless they face a clearer legal obligation to do so. A SPAC sponsor generally prefers to hold on to capital as long as possible to maximize the value of the sponsor's option to pursue a de-SPAC transaction.[33] As a result, some SPAC practitioners have declined, even in the wake of the Commission's proposal of the Rule, to address seriously the ICA questions that the proposal raises.[34] In light of the incentives Professor Coates has identified, we see no reason to expect the SPAC industry, or much of the SPAC bar, to change in the coming months.

---

[29] *Id.* at 271-72.

[30] Rule Release, *supra* note 3, at 136, 138, 155-56, and 155 & n.349.

[31] Indeed, as noted above the Commission's adopting release for Rule 3a-2 similarly said that "serious questions" about ICA status can arise for issuers that do not comply with that Rule's requirements. Transient Investment Companies, 46 Fed. Reg. at 6882.

[32] We calculated these figures by drawing data on SPAC search status and initial public offering dates from SPAC IPO INSIDER, *supra* note 23.

[33] *See* Brief of Accounting and Financial Economics Scholars in *Assad* v. *E.Merge Technology Acquisition Corp.*, No. 1:21-cv-07072-JPO (November 2021), at 6-7 (explaining, on behalf of more than thirty scholars of accounting and finance, that SPAC sponsor compensation is "economically equivalent to contingent compensation," the value of which depends in part upon the time the holder has for the contingency to be realized).

[34] Some practitioners' approach is especially notable in light of Staff remarks related to noncompliance with the proposed Rule's timeframe. Commissioner Hester M. Peirce, *Statement Regarding SPAC Matter* (April 15, 2022) ("[C]ertainly for those SPACs that . . . fall outside the safe harbor . . . the [S]taff w[ill] also be taking a look at them." (quoting William Birdthistle, Director, Division of Investment Management)). While some practitioners have carefully acknowledged these remarks, see SULLIVAN & CROMWELL LLP, *supra* note 18; SIDLEY, *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook* (April 2022), some failed to mention them, see WHITE & CASE, *supra* note 18, while others openly advised SPACs that cannot comply with the Rule that the ICA does not apply to them, DAVIS POLK, *SPACs Remain in the SEC's Crosshairs*, HARV. L. SCH. F. ON CORP. GOV. (April 2022) ("For

Third, resolving the status of noncompliant SPACs makes sense because there is little benefit to reserving case-by-case judgment about it. In all of the ways that matter under the ICA, SPACs are virtually identical to one another. Their assets, their offers of redemption rights, and their investment-company-like organization are all virtually the same across SPACs. The only dimension of variance among SPACs that is meaningful under the ICA is duration, but duration is already addressed by the Rule—it is the very feature the Rule aims to regulate. Under circumstances like these, economic analysis of law tells us that we should prefer a bright-line rule over a malleable standard.[35]

Addressing SPACs' status on a case-by-case basis will be costly for the SEC and for investors. There are nearly 600 SPACs holding more than $140 billion currently searching for targets. As Professor Coates has said, the SPAC industry's prevailing view is that a "regulatory agency with a limited budget should be held to legally have given up authority if it does not bring an enforcement action when it could."[36] Given the Commission's limited resources, enforcement on the scale necessary to remedy SPACs' current and future ICA violations will be challenging. Unless the Commission unambiguously states that SPACs that do not comply with the final Rule are investment companies, SPACs may test the Commission's will by continuing to search for targets beyond the timeframes permitted by the Rule. The Commission should therefore make unambiguously clear that noncompliant SPACs are violating the law. This would raise the odds that these SPACs will promptly return their capital to investors, who can put that money to better use.

* * * *

The explosion of the SPAC market in 2020 and 2021 exposed millions of investors to the risks of conflicts of interest and excessive compensation. But Congress, having identified similar problems in related vehicles decades ago, created a regulatory regime to address these problems in the ICA. Although longstanding legal principles under the ICA limit a SPAC's duration, the market for too long failed to adhere to or even acknowledge those limits. We applaud the SEC for proposing a Rule that firmly states that SPACs do not enjoy a special exemption from the Investment Company Act, and we encourage the Commission to further strengthen the Rule by making its requirements more consistent with existing law and by clarifying its significance even further.

For these reasons, we urge the Commission promptly to finalize the Rule. If the Commission or the Staff have any questions, or if we can be of assistance in any way, please contact us at your convenience: Robert Jackson can be reached at [redacted] or via electronic mail at [redacted]. John Morley can be reached at [redacted] or via electronic mail at [redacted]

Very truly yours,

Robert J. Jackson, Jr.

John Morley

---

those SPACs that are unable to complete a business combination within the . . . period required by the safe harbor, the proposed safe harbor does not otherwise amend or modify the existing SEC rules regarding investment companies, which as noted above, we and the law firm community continue to believe do not apply to SPACs.").

[35] When every case is the same, there is no benefit to case-by-case decision-making. A single rule can address every case accurately. Frederick Schauer, *The Convergence of Rules and Standards*, 2003 NEW ZEALAND L. REV. 303, 305-309 (2003).

[36] Coates, *supra* note 2, at 36.