Freshfields Bruckhaus Deringer US LLP

June 13, 2022

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

Via email to rule-comments@sec.gov

Re: Special Purpose Acquisition Companies, Shell Companies, and Projections; Release Nos. 33–11048, 34-94546 and IC-34549; File No. S7–13–22

Dear Ms. Countryman:

Freshfields Bruckhaus Deringer US LLP appreciates the opportunity to offer our views on the above-referenced proposal regarding special purpose acquisition companies (SPACs) and business combinations involving SPACs.

Our comments are generally presented in the order in which items are raised in the SEC's proposing release.

If you have any questions regarding our comment letter or would like additional information, please contact Michael Levitt of Freshfields Bruckhaus Deringer US LLP at [redacted]

Sincerely,

Freshfields Bruckhaus Deringer US LLP

Freshfields Bruckhaus Deringer US LLP

Table of Contents

7. Making De-SPAC Transactions More Equivalent to a Traditional IPO
    a. Free Writing Prospectuses
    b. WKSI Status
    c. Rule 144
    d. Research Safe Harbors
    e. Form S-8
    f. Form S-1 / F-1 Incorporation by Reference
8. Evergreen "Current Public Information" Requirement in Rule 144(i)
9. Foreign Private Issuer Status
10. Timing of Effectiveness of Proposals

Discussion

1. Disclosure Requirements in SPAC IPOs and De-SPAC Transactions (New Subpart 1600 of Regulation S-K)

The SEC proposes to add new Subpart 1600 of Regulation S-K that would set forth specialized disclosure requirements in connection with initial public offerings by SPACs and in connection with de-SPAC transactions. We have the following comments with respect to certain of the proposed disclosure requirements proposed in Subpart 1600 of Regulation S-K.

a. Dilution Disclosure on Prospectus Cover of SPAC IPOs (Item 1602(a)(4)). In Item 1602(a)(4), the SEC proposes to require disclosure in a specified tabular format on the cover of the prospectus for SPAC IPOs, showing the estimated remaining pro forma net tangible book value per share at quartile intervals up to a maximum redemption threshold, with a cross reference to the locations of related disclosures in the prospectus. The table would show the remaining pro forma net tangible book value per share, at a specified offering price ($10 per share), at 25%, 50%, 75% and 100% of maximum redemptions. The SEC proposals would also require additional disclosure regarding dilution in the SPAC IPO prospectus (proposed Item 1602(c)) and in the prospectus or proxy statement for de-SPAC transactions (proposed Item 1604(c)).

We urge the SEC to not require this dilution disclosure on the cover page of the SPAC IPO prospectus. While we do not disagree with the SEC assessment of the importance of dilution to a SPAC's public investors, and agree that there are many potential sources of dilution such as the Sponsor's compensation, underwriting fees, the public warrants, and equity issued to PIPE investors, we are skeptical that adding the table on the cover of the SPAC's IPO prospectus will provide the anticipated benefits. In particular, we do not think the disclosure at the SPAC IPO stage will be meaningful because the SPAC does not yet know the amount of equity to be issued in a PIPE (if any) or to the target company's stockholders (If any) or the extent to which the SPAC sponsor's promote will be renegotiated in connection with the actual de-SPAC transaction.

b. Promoters (Item 1603). Proposed Item 1603 of Regulation S-K would require disclosure in SPAC IPO prospectuses and de-SPAC prospectuses and proxy statements of specified information regarding the SPAC sponsor, its affiliates and any "promoters," including their experience in organizing SPACs, the extent to which they are involved in other SPACs, their material roles in directing and managing the SPAC's activities, any compensation to be provided to them for all services rendered to the SPAC and its affiliates, any reimbursements to be paid to them upon completion of a de-SPAC transaction, and any conflicts of interest between the SPAC sponsor or promoters and unaffiliated security holders.

We do not believe the disclosure requirements of Item 1603 should extend to "promoters." We believe that it should be sufficient to cover the SPAC sponsor and its affiliates and believe that the SPAC sponsor and its affiliates would include all significant participants in the SPAC. The term promoter is defined in Rule 405 under the Securities Act of 1933, as amended (the "Securities Act"), and Rule 12b-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and includes (i) any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business

or enterprise of an issuer or (ii) any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10% or more of any class of securities of the issuer or 10% or more of the proceeds from the sale of any class of such securities."

We believe that extending the disclosure requirements in Item 1603 to "promoters" would not significantly benefit investors because the requirement already applies to the SPAC sponsor and its affiliates. The term "sponsor" includes the entity and/or persons primarily responsible for organizing, directing or managing the business and affairs of the SPAC, as well as the affiliates of the SPAC sponsor. These are the parties that investors are relying upon in making their investment decision with respect to the SPAC. The proposed rules also already require disclosure of all persons who have direct and indirect material interests in the SPAC sponsor and the amount and nature of their interests. This should encompass the most relevant entities and persons.

c. Lockups (Item 1603(a)(9)). In prospectuses for a SPAC IPO, and proxy statements and prospectuses for a de-SPAC transaction, registrants would be required to disclose the material terms of lockup agreements, arrangements or understandings applicable to the SPAC sponsor and its affiliates. The disclosure as proposed must include "any exceptions under such an agreement, arrangement or understanding."

We suggest clarifying that this will require disclosure of only "material" exceptions and will exclude customary exceptions. There are many exceptions to lockups that are customary and not significant or material, such as transfers to affiliates, transfers to family members, gifts and other charitable donations, transfers by will or inheritance, transfers upon dissolution of a marriage, in-kind distributions to an entity's members and partners, and the like, generally requiring that any such recipients agree to the lockup for the remaining duration of the lockup agreement. We do not believe these should be or need to be disclosed because they do not affect the substance of the lockup.

d. Fairness (Item 1604(a)(1) and (b)(2) and 1606(a) and (b)). The rule proposals include three disclosure requirements for de-SPAC disclosure documents which relate to the fairness of the de-SPAC transaction.

- First, on the outside cover page of prospectuses for a de-SPAC transaction, registrants would be required to state whether the SPAC reasonably believes that the de-SPAC transaction is fair or unfair to unaffiliated security holders.

- Second, in the prospectus summary for a de-SPAC transaction, registrants would be required to state whether the SPAC reasonably believes that the de-SPAC transaction is fair or unfair to unaffiliated security holders and the bases for the fairness statement.

- Third, in the prospectus for a de-SPAC transaction, registrants would be required to state whether the SPAC reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders and to discuss in reasonable detail the material factors upon which the belief is based and, to the extent practicable, the weight assigned to each factor. Such factors would include,

but not be limited to, the valuation of the target company, the consideration of any financial projections, any report, opinion or appraisal provided, and dilution.

We oppose these disclosure requirements for the following reasons.

- First, there is no similar requirement in traditional IPOs, nor is there a similar requirement in proxy statements and registration statements for traditional public mergers and business combinations not involving a SPAC. Imposing this requirement on de-SPAC transactions makes it more difficult to enter into a de-SPAC transaction as opposed to a traditional IPO and goes beyond the stated goal of leveling the playing field between the two mechanisms of going public.

- Second, we believe the effect of the requirement will be that SPACs will need to obtain fairness opinions in order to support the statement of fairness, even though the rules do not purport to require fairness opinions in every deal, which will increase the cost of completing and the time needed to complete a de-SPAC transaction without adding any additional meaningful disclosure.

- Third, the disclosure requirement goes beyond what is typically stated in a fairness opinion. This disclosure requirement elicits a statement about the fairness of a transaction to unaffiliated shareholders, but traditional fairness opinions only speak to the fairness of the consideration to be offered to target shareholders and do not speak to the overall fairness of a transaction. Also, traditional fairness opinions do not speak to the fairness of consideration to a specific subset of shareholders of one of the parties to the merger (eg, the unaffiliated shareholders). Given the foregoing, it is not clear that SPACs would be able to obtain fairness opinions that are broad enough to cover a statement of fairness as proposed.

- Fourth we believe the fairness requirement is likely to invite litigation following any de-SPAC transaction whose stock after closing trades below the per share price of the SPAC before closing, regardless of whether or not there was materially deficient disclosure or fraudulent intent. The proposed requirement therefore creates a new standard of disclosure which only SPACs would be required to address.

  If a traditional IPO performs poorly after the closing of the IPO, shareholders may bring lawsuits alleging that the disclosure was inadequate, but they cannot sue on the basis that the disclosure stated that the transaction was fair. But in a de-SPAC transaction, if the stock price falls after the closing of the de-SPAC transactions, shareholders will be able to bring lawsuits against the surviving company questioning the accuracy of the statement of fairness. Yet a stock price after closing of a de-SPAC transaction is influenced by a myriad of factors and does not correlate necessarily only to the value of the business or to the fairness of the de-SPAC transaction. A de-SPAC transaction can be fair to non-affiliated shareholders even if the stock price falls after the closing, but the SEC's proposal provides a new cause of action to aggrieved shareholders which they would not have following the closing of an IPO. Imposing the fairness disclosure requirement will therefore unfairly prejudice against de-SPAC transactions and in favor

of traditional IPOs, as opposed to leveling the playing field between the de-SPAC and the IPO.

- Fifth, the proposals regarding fairness are substantially similar to the requirements in going private transactions, which we believe are not comparable to de-SPAC transactions. Items 1014(a) and 1014(b) of Regulation M-A require disclosure in a going private transaction of (1) whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders, (2) the factors considered in determining fairness and (3) in reasonable detail, the material factors upon which the belief regarding fairness is based and, to the extent practicable, the weight assigned to each factor.

  However, a going-private transaction is a completely different transaction as compared to a de-SPAC transaction. A going private transaction is an inherently conflicted transaction in which shareholders are being asked to give up their interest in a company, often by an insider or a group of insiders. Whereas in a going private transaction a shareholder is being forced to give up its interest in a public company, in a de-SPAC transaction the target shareholders are receiving an interest in a public company and the SPAC shareholders are not being forced to give up their interest but have an option to either keep their interest or receive their pro rata portion of the SPAC's trust fund assets. Also, notwithstanding some of the conflicts between sponsors and unaffiliated shareholders that have been identified, de-SPAC transactions generally involve an independent third party target company that negotiates the terms of the transaction on an arm's length basis, as compared to a going private transaction that is inherently conflicted by virtue of a controlling party negotiating the transaction with the company it controls. Given these differences, we do not believe that the fairness requirements of a going private transaction should apply to a de-SPAC transaction.

- Sixth, although we oppose the disclosure requirement, if the SEC decides to adopt a disclosure requirement, we do not believe it should cover both the de-SPAC transaction "and any related financing." Even if a SPAC could opine regarding the fairness of a SPAC transaction, it would be extremely difficult for a SPAC or target company to opine on the fairness of the financing to the unaffiliated shareholders, and there is no statement made as to the fairness of a financing transaction in M&A transactions or IPO's currently. As stated above, fairness opinions opine as to the fairness of consideration to shareholders of a company but not as to the fairness of a particular financing transaction.

e. Director Votes Against or Abstaining From the De-SPAC Transaction (Item 1606(a)). In connection with de-SPAC transactions, registrants would be required to disclose if any director voted against, or abstained from voting on, approval of the de-SPAC transaction or any related financing transaction, identifying the director and indicating, if known, after making reasonable inquiry, the reasons for the vote against the transaction or abstention.

We oppose this disclosure requirement. First, this disclosure is not required in traditional IPOs or in traditional mergers and business combinations. We believe this requirement is another example of going beyond leveling the playing field between de-SPAC transactions and traditional

IPOs and, instead, prejudices companies against de-SPAC transactions. Second, the existence of this disclosure requirement will make it more difficult, and less likely, for individual directors to oppose transactions, if they know that their objection will be made public. The requirement could also have the effect of inhibiting discussion among directors at board meetings. Accordingly, we believe that this disclosure requirement will result in more unanimous votes, and that only very rarely will any disclosure be made on this topic, which is the opposite of the intended effect of such a requirement.

This proposal is based on Item 1014(a) of Regulation M-A, which provides that in going private transactions "[i]f any director dissented to or abstained from voting on the Rule 13e-3 transaction, identify the director, and indicate, if known, after making reasonable inquiry, the reasons for the dissent or abstention." However, as discussed above, we do not believe that every de-SPAC transaction is as inherently conflicted as any going private transaction. Accordingly, we do not believe that a requirement borrowed from the going private context should necessarily be equally applicable in a going public context.

If the SEC chooses to retain and adopt this requirement, we recommend that the provision clarify that it is referring to a director of the SPAC who voted against or abstained from voting on the transaction. As drafted, the provision could be interpreted to refer to a director of the target company who voted against or abstained from voting on the transaction.

f. Unaffiliated Representative (Item 1606(d)). In connection with de-SPAC transactions, registrants would be required to disclose whether or not a majority of directors who are not employees of the SPAC have retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the de-SPAC transaction or any related financing transaction and/or preparing a report concerning the fairness of the de-SPAC transaction or any related financing transaction.

We oppose this requirement. In our experience, this is not a practice utilized in de-SPAC transactions. We believe that virtually every deal would disclose that a majority of non-employee directors have not retained an unaffiliated representative to act solely on behalf of unaffiliated security holders. Accordingly, we do not believe that this requirement would elicit disclosure useful to investors, nor do we believe that this requirement will result in a change in practice.

We acknowledge that it is much more common in going private transactions to form an independent committee that retains an independent investment bank and counsel. Not surprisingly, Item 1014(d) of Regulation M-A requires disclosure in a going private transaction substantially similar to what is being proposed in Item 1606(d) - "whether or not a majority of directors who are not employees of the subject company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the Rule 13e-3 transaction and/or preparing a report concerning the fairness of the transaction." However, given the difference in practice between going private transactions and de-SPAC transactions, we believe that this requirement – while customary for a going private transaction - is not applicable for de-SPAC transactions and would not elicit disclosure useful to investors.

g. Affirming Projections as of the Date of the Filing (Item 1609(c)). In connection with de-SPAC transactions, if the projections relate to a target company, the registrant would be required to disclose whether the target company has affirmed to the SPAC that its projections reflect the view of the target company's management or board about its future performance "as of the date of the filing." Similar disclosure would be required if the projections relate to the performance of the SPAC. If the disclosed projections no longer reflect the view of the board or management of the SPAC or target company as of the date of the filing, the registrant would be required to discuss the purpose of disclosing the projections and the reasons for any continued reliance by the management or board on the projections.

We oppose requiring this disclosure "as of the date of the filing." The projections are included in the de-SPAC offering document in order to describe the basis upon which the board of directors of the SPAC approved the de-SPAC transaction – not to serve as a basis for investors to make an investment decision. Given this purpose, the relevant projections are the projections which existed at the time the board of directors of the SPAC reviewed them, not a later updated version of the projections. The requirement to update the projections to "the date of the filing" is therefore at odds with the purpose of including the projections, which is to describe the information evaluated by the SPAC directors when they decided to approve the de-SPAC transaction. In addition, projections are routinely disclosed in proxy statements and registration statements of public company mergers as the basis for fairness opinions issued at the time of execution of the merger agreement for the public merger, but the SEC has not historically required the parties to the merger to confirm the projections in connection with each filing.

The SEC proposal in this instance means that the target company or the SPAC will need to evaluate the projections and the underlying assumptions upon each filing of a registration statement or amendment thereto or a proxy statement or supplement thereto in order to determine if the projections still reflect the view of the target management or board or SPAC management or board. This would apply no matter how many amendments or supplements are filed and no matter how much time has elapsed since the projections were prepared. We believe it should be sufficient for the projections to speak as of their date and for the disclosure to make this clear.

h. Definition of "Target Company" (Item 1601(d)). In Item 1601(d), the term "target company" is defined as "an operating company, business or assets" and in Item 1601(a) the term "de-SPAC transaction" is defined as "a business combination such as a merger, consolidation, exchange of securities, acquisition of assets, or similar transaction involving a special purpose acquisition company and one or more target companies."

We believe the definition of the term "target company" is too broad insofar as it covers any acquisition of "assets." We believe there are circumstances where a SPAC may acquire some assets (such as cash) but would not yet have completed its acquisition of a target company. We suggest deleting the term "assets" from the definition or clarifying that a target company includes assets where the acquisition of such assets is intended to constitute the SPAC's initial business combination.

2. Target Company as Co-Registrant on Form S-4 and Form F-4

a. SEC Proposal

The SEC proposes to amend an instruction to Form S-4 and Form F-4 to provide that, if the securities to be registered on the Form S-4 or Form F-4 will be issued by a SPAC in a de-SPAC transaction, the term "registrant" will mean the SPAC and the target company. This provision means that the SPAC and the target company, and each of their directors and principal executive officer, principal financial officer and principal accounting officer, must sign the Form S-4 or Form F-4 and become subject to potential liability under Section 11 of the Securities Act for the disclosure contained in the Form S-4 or Form F-4.

b. Target Companies Should not be Co-Registrants on a SPAC's Registration Statement

We oppose requiring a target company to become a co-registrant on a SPAC's registration statement in a de-SPAC transaction and do not believe that this makes the liability of the target company in a de-SPAC transaction more equivalent to the liability of the target company in a traditional IPO. In most de-SPAC transactions the shares being registered on the SPAC's registration statement are being issued only to the target's shareholders and are not being issued or sold by the target company. Adding the target company as a co-registrant means that, in most cases, the target company will have potential Section 11 liability with respect to its own shareholders, but this is not logical or intuitive and is not consistent with the structure of a traditional IPO. In a traditional IPO, a company's existing shareholders at the time of the IPO do not receive registered shares and would not have potential Section 11 claims against the company due to the disclosures in the IPO registration statement.

c. Inconsistent with Definitions of "Issuer" and "Registrant"

Adding the target as a co-registrant and effective issuer also is not consistent with the definitions of "issuer" and "registrant" in the federal securities laws. The term "issuer" is defined in Section 2(a)(4) of the Securities Act of 1933 as "every person who issues or proposes to issue any security" and the term registrant is defined in Rule 100(4) of the Securities Act as "the issuer of securities for which a registration statement is filed." Yet in a de-SPAC transaction the target company is not actually issuing or proposing to issue any securities to either the shareholders of the SPAC or the shareholders of the target (or anyone else).

d. Target Company Would be a Public Company even if the De-SPAC Does Not Close

In addition, the requirement to make the target company a co-registrant on the SPAC's registration statement would have other negative consequences for the target company if the de-SPAC transaction does not close. In a typical de-SPAC transaction, the Form S-4 or Form F-4 for the transaction becomes effective approximately one month before the de-SPAC transaction closes. This means that, if the Form S-4 or Form F-4 is declared effective by the SEC, but the de-SPAC transaction does not close, the target, previously a private company, would be burdened with disclosure obligations as if it was a public company for at least the remainder of the year but would have no securities trading in the public markets.

e. Should Not Apply to Non-Continuing Directors or Officers of the Target

If this provision is retained, we believe it should not apply to directors or executive officers of the target company who will not be continuing directors or executive officers of the combined company after the consummation of the de-SPAC transaction. This would be consistent with the obligations in a traditional IPO, where the registrant identifies in the prospectus who will be its directors following the IPO. We suggest that the SEC clarify that directors and executive officers of the target company, who will not be directors or executive officers of the target company following the consummation of the de-SPAC transaction, are not required to sign the Form S-4 or Form F-4 and are not deemed to be directors or executive officers of the target company for purposes of the liability provisions of the securities laws.

f. SPAC Sponsor Should Not Sign the SPAC's Registration Statement

In response to the SEC's request for comment #68, we also do not believe that the SPAC's sponsor should be required to sign a Form S-1 or F-1 for a SPAC's initial public offering or a Form S-4 or F-4 for a de-SPAC transaction. While the SEC does require a majority of the board of a corporate general partner to sign a registration statement when the registrant is a limited partnership, more generally, the SEC does not require controlling entities to sign a company's registration statement in any other instance. The corporate general partner's board signs the registration statement of a limited partnership because the limited partnership does not have its own board and acts through its general partner; a limited partnership differs from a SPAC that has its own board of directors and officers. The SEC has not required parent companies to sign registration statements in connection with spin-offs and has not required private equity firms to sign registration statements in connection with IPOs of their portfolio companies. Section 11 liability on its face applies to the issuer of the securities, its directors, its officers who sign the registration statement, as well as accountants and underwriters, but the SEC has not previously extended the strict liability of Section 11 to a controlling entity like a SPAC sponsor. Instead, the liability of controlling persons has been addressed by other statutory provisions in the Securities Act and Exchange Act which impose liability on controlling parties in specified circumstances.

3. Rule 140a (Underwriter Liability)

The SEC has proposed new Rule 140a, which provides that "[a] person who has acted as an underwriter of the securities of a special purpose acquisition company and takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction will be deemed to be engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction within the meaning of section 2(a)(11) of the Securities Act." The result of Rule 140a is that SPAC IPO underwriters who participate in a de-SPAC transaction would be subject to potential Section 11 liability in connection with the de-SPAC transaction.

A. Rule 140a Should Not be Adopted

While we understand the SEC's motivation in creating a gatekeeper for the disclosure provided in a de-SPAC transaction, we do not believe it is appropriate that an underwriter of a SPAC IPO also should be viewed as an "underwriter" of that SPAC's de-SPAC transaction.

a. An Underwriter of One Distribution is Not an Underwriter of a Second Distribution

The term "underwriter" is defined in Section 2(a)(11) of the Securities Act to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer 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."

We do not believe that this definition should be interpreted to mean that an underwriter in one distribution necessarily would become an underwriter of a second future distribution which may not occur until two years later, and we are not aware of the SEC ever taking a position in the past that an underwriter of one registered distribution is responsible for disclosure in a second registered distribution. In addition, we do not believe that Congress in enacting the definition of underwriter in the Securities Act was contemplating a two step transaction with the two steps separated by a substantial amount of time.

Moreover, it is not clear to us that every de-SPAC transaction is necessarily a "distribution" of securities. The de-SPAC transaction in most cases does not involve any distribution of securities to the SPAC's shareholders, and de-SPAC transactions do not always involve a registered sale of securities to the target's shareholders. While there are de-SPAC transactions which involve the registration of securities as merger consideration to the target's shareholders, as in any other public merger in the United States, we are not aware that the SEC has taken the position in public mergers that one or more parties to such transaction is a statutory underwriter.

In addition, we do not believe that the definition of "underwriter" in Section 2(a)(11) means, or has been historically interpreted by the SEC or courts to mean, that anyone who "participates" in any way in a distribution will be viewed as a statutory underwriter. For example, one Second Circuit case in 2011 concluded that a rating agency could not be viewed as a statutory underwriter participating in a distribution of mortgage-backed securities even though the rating agency was involved in structuring the mortgage-backed securities. The court concluded that the rating agency's activities were not related to the actual distribution of securities, the rating agency did not "participate" in any distribution, and therefore the rating agency was not a statutory underwriter.[1] Therefore, an investment bank who performs various capital markets or financial advisory roles in a de-SPAC transaction – similar to the services provided in any other public merger in the United States – should not be viewed as "participating" in a distribution and therefore a statutory underwriter.

b. Section 11 Liability in a De-SPAC Transaction is more Onerous than in a Traditional IPO

Although the imposition of Section 11 liability is being proposed in order to equalize the liability in a de-SPAC transaction and an IPO, and impose a similar gatekeeper into both transactions, in fact the Section 11 liability being proposed in the de-SPAC context is significantly different and more expansive than the liability imposed in a traditional IPO. The Section 11 liability an underwriter of a de-SPAC transaction faces is significantly more onerous for the underwriter as compared to the Section 11 liability in a traditional IPO, and prejudices investment banks against de-SPAC transactions and in favor of traditional

[1] In re Lehman Brother Mortgage-Backed Securities Litigation, 650 F.3rd 167 (2nd Circuit 2011).

IPOs, thereby potentially eliminating the de-SPAC route to the public markets for private companies, due to at least three reasons:

- Projections. The disclosure documents in traditional IPOs almost never include projections, whereas the registration statement or proxy statement for a de-SPAC transaction have historically usually included projections given the consideration of the projections by the SPAC's board of directors in evaluating whether or not to approve the business combination with the target. This means that an underwriter's potential Section 11 liability in a traditional IPO does not include liability for forward-looking projections, whereas an underwriter's potential Section 11 liability in a de-SPAC transaction would potentially include liability for the target company's projections. This would significantly increase the underwriter's risk, and could make investment banks unwilling to participate in de-SPAC transactions.

- Fairness. The disclosure documents in a traditional IPO do not include any discussion of the fairness of the IPO price for the purchasers of securities in the IPO. On the other hand, the SEC's proposal would require the disclosure document in a de-SPAC transaction to include a statement by the SPAC that the transaction is fair to unaffiliated shareholders of the SPAC. The underwriters would need to due diligence the accuracy of this statement and would have potential Section 11 liability with respect to this statement, which they would not have in an IPO. This could make investment banks unwilling to participate in de-SPAC transactions.

- Shares Registered. In a traditional IPO, the underwriter would only have liability for the shares registered on the registration statement and actually issued to the public in the IPO, which is usually only 10-20% of the company's total share capitalization. On the other hand, in a de-SPAC transaction, the registration statement typically registers the issuance of shares to the target company's shareholders, which can be up to 70 – 80% of the company's total share capitalization or more. This means that, unless the rules are clarified by the SEC, the underwriter's Section 11 liability in a de-SPAC transaction would be potentially significantly greater than its liability in a traditional IPO. This could make investment banks unwilling to participate in de-SPAC transactions (or cause investment banks to charge significantly more for a de-SPAC than they would for a traditional IPO).

c. Goal of Making the Investment Bank into a De-SPAC "Gatekeeper" Would not be Met

While the goal behind Rule 140a is to motivate SPAC underwriters to conduct due diligence with respect to de-SPAC transactions in order to avoid potential Section 11 liability, given the factors listed above we believe that the adoption of Rule 140a will not result in this goal being achieved. We believe the more likely result of the rule change is that either (1) investment banks who are underwriters of SPAC IPOs will avoid any role in connection with de-SPAC transactions in order to avoid the potential Section 11 liability or (2) investment banks will refrain from underwriting SPAC IPOs, if they want a role in a de-SPAC transaction, in order to avoid the potential Section 11 liability. Therefore, we believe the adoption of Rule 140a will not lead to greater gatekeeper responsibility by investment banks and, in many cases, will result in decreased gatekeeper responsibility with fewer investment banks willing to be involved in de-SPAC transactions.

d. De-SPAC Gatekeepers Already Exist

Finally, we believe that there are many other parties to a de-SPAC transaction who serve as gatekeepers focused on the accuracy of the disclosure being made in the transaction and that, therefore, it is not necessary to create a legal liability structure in order to cause investment banks to serve as an additional set of gatekeepers.

- The SPAC and its directors and officers are required to sign any registration statement utilized in de-SPAC transactions and incur Section 11 liability for the disclosure provided to investors in the registration statement. They also incur liability for the disclosure contained in any proxy statement provided to investors in the de-SPAC transaction.

- The target and its directors and officers are subject to potential SEC enforcement action in connection with a de-SPAC transaction, in accordance with Section 10(b) of the Exchange Act of 1934 and Rule 10b-5.

- The target company's auditors sign an audit opinion and incur liability for the target's audited financial statements included in the registration statement or proxy statement utilized in every de-SPAC transaction. In our experience the target company's auditors review the entire registration statement and prospectus and provide comments throughout the document (not just on the financial statements). The SPAC's auditor also signs an audit opinion and reviews the entire registration statement.

- Multiple sets of law firms for the SPAC, the target company, and any placement agents also prepare and/or review the disclosure contained in the registration statement or proxy statement for the de-SPAC transaction (although they do not currently render disclosure opinions regarding such disclosure).

- In many cases the super 8-K filed by the target company incorporates by reference large segments of the registration statement or proxy statement utilized in the de-SPAC transaction, and in most deals the target company files a resale Form S-1 or Form F-1 shortly after closing which contains largely the same disclosure that was included in the registration statement or proxy statement for the de-SPAC transaction. The target company and its directors and officers incur liability for the contents of the super 8-K and the resale Form S-1 or Form F-1.

- There have been a number of highly publicized SEC enforcement actions, and lawsuits brought by shareholders, in connection with an following the closing of de-SPAC transactions. These enforcement actions and lawsuits have a deterrent effect and remind the parties to the de-SPAC transactions that they will be liable for misleading or inaccurate disclosure.

Given the foregoing, we believe that adequate gatekeeper liability already exists for the disclosures being made in de-SPAC transactions and that Section 11 liability for investment banks who provide services to a SPAC or target company in connection with a de-SPAC transaction is not necessary.

B. If Rule 140a is Adopted, it Should be Modified/Clarified

If Rule 140a is adopted, which we recommend against, we believe that the SEC should clarify how it would work in practice. In particular:

a. Deferred Underwriter Compensation. The SEC should clarify either in the rule or in the adopting release that an underwriter of a SPAC IPO, who obtains a portion of its compensation for the SPAC IPO on a deferred basis at the time of and contingent on the closing of the de-SPAC transaction, but has no other role in the de-SPAC transaction, should not be deemed to be an "underwriter" of the de-SPAC transaction. The deferred underwriter fee relates only to services performed in the SPAC IPO and does not relate to any services provided in the de-SPAC transaction or during the period between the closing of the SPAC IPO and the closing of the de-SPAC transaction. The fact that the SPAC IPO underwriter agreed to defer a portion of its IPO fee to a later date does not mean that the SPAC IPO underwriter who has no role whatsoever in the de-SPAC transaction is an underwriter of the de-SPAC transaction.

In addition, an underwriter who has no relationship to the de-SPAC transaction other than receipt of its deferred underwriting fee would have no ability to affect the disclosure in the Form S-4 or F-4 or proxy statement for the de-SPAC transaction; imposing underwriter liability in such a circumstance would not make sense (and would be inconsistent with legislative history) given that the investment bank would not be able to establish a due diligence defense and would thus effectively eliminate a defense enacted by Congress in 1933.

b. Direct or Indirect Participation in the de-SPAC Transaction. Given the numerous roles that investment banks play in the de-SPAC process, if the SEC concludes that an underwriter who "participates" in a de-SPAC transaction is an underwriter of such de-SPAC transaction, the SEC should clarify either in the final rule or in the adopting release what it means to "participate" directly or indirectly in the de-SPAC transaction such that the participation makes the investment bank a statutory underwriter. For example, as discussed below, (1) an investment bank who serves as a PIPE placement agent, (2) an investment bank who serves as a financial advisor or capital markets advisor to the SPAC or the target company, (3) an investment bank who assists the SPAC in scheduling informational meetings with investors or potential investors following the closing of the SPAC IPO, or (4) an investment bank who assists in preparing a potential list of target companies to the SPAC or its principals, in each case should not be deemed an "underwriter" of the de-SPAC transaction.

c. Liability Only for Shares Registered for Issuance to SPAC's Public Shareholders. The SEC should clarify either in the final rule or in the adopting release which securities registered on the registration statement the "underwriter" of the de-SPAC transaction is liable for. The underwriter of the de-SPAC transaction should only incur liability for shares registered for issuance to the SPAC shareholders (if any). Registration statements in connection with a de-SPAC transaction often register the issuance of shares to the existing shareholders of the target company and an underwriter should not be liable to these shareholders. This would provide a windfall to the target's shareholders and potentially impose a huge liability on the underwriter which is disproportionate to the liability an underwriter incurs in a traditional IPO.

The liability of a de-SPAC underwriter should be analogous to the underwriter's liability in a traditional IPO. In a traditional IPO, a company's shareholders might own 100 shares, and the company might issue 20 new shares to the public in the IPO. In this hypothetical, the underwriters would only be liable for the issuance of the 20 new shares, but not for the 100 shares already owned by the company's shareholders at the time of the IPO. Similarly, in a de-SPAC transaction, if the post-closing combined company will have 140 shares – 100 registered on the registration statement as merger consideration for the target shareholders, 20 not registered but already owned by the SPAC's shareholders, and 20 not registered but to be issued to PIPE investors – then the underwriter should not have any liability for any of these shares. If the registration statement only registers shares to be issued to the target company's shareholders, then the underwriter of the SPAC IPO should have no liability at all.

d. Liability Only for Consummated De-SPAC Transaction. In some cases a SPAC will sign a business combination agreement with one target, seek to consummate the business combination with this target, terminate the agreement with this target, and then sign a new business combination agreement with a new target and consummate a business combination with this new target. An underwriter of the SPAC's IPO that seeks to facilitate the business combination with the first target, which is not consummated, and that plays no role in connection with the business combination with the second target, which is consummated, should not have liability for the business combination consummated with the second target. We suggest that the SEC make this clear either in the final rule or in the adopting release.

C. Potential Liability of Other Parties Related to a De-SPAC Transaction.

The proposing release states that "[f]ederal courts and the Commission may find that other parties involved in securities distributions, including other parties that perform activities necessary to the successful completion of de-SPAC transactions, are 'statutory underwriters' within the definition of underwriter in Section 2(a)(11). For example, financial advisors, PIPE investors, or other advisors, depending on the circumstances, may be deemed statutory underwriters in connection with a de-SPAC transaction if they are purchasing from an issuer 'with a view to' distribution, are selling 'for an issuer,' and/or are 'participating' in a distribution."

We believe this language creates undue uncertainty and that the SEC should clarify in the final rule or in the adopting release that there are numerous participants in the de-SPAC process who should not be considered statutory underwriters. We believe such open-ended language could lead some market participants to avoid participating in or financing de-SPAC transactions in light of the uncertainty. We outline below our views with respect to certain potential participants in a de-SPAC transaction.

a. PIPE Investors. We do not believe that PIPE investors should be viewed as statutory underwriters of the de-SPAC transaction and we believe the SEC should clarify this in the adopting release. Viewing PIPE investors as statutory underwriters would be similar to viewing purchasers in an IPO as underwriters of the IPO – the SEC has long moved away from a concept of presumptive underwriter status for purchasers, even large purchasers, in underwritten offerings. Further, we believe PIPE investors would not be willing to invest in de-SPAC transactions if their investment subjected them to Section 11 liability.

b. PIPE Placement Agents. Similarly we do not believe that placement agents for the SPAC or the target company in connection with a PIPE transaction that finances a de-SPAC transaction should be deemed statutory underwriters in connection with the de-SPAC transaction and we believe the SEC should clarify this in the adopting release.

The PIPE financing in a de-SPAC transaction is structured as a private placement between the SPAC and/or the target company, on the one hand, and sophisticated institutional investors on the other hand. The investors represent that they are sophisticated investors – either accredited investors or qualified institutional buyers – and that they have had the opportunity to ask questions and obtain necessary information to make their investment decision. The PIPE investors conduct their own due diligence, including document review and discussions with management. The PIPE transaction does not include a disclosure document beyond an investor presentation, and the PIPE investors make their investment decision before a registration statement for the de-SPAC transaction is prepared.

Imposing underwriter liability on a PIPE placement agent on the disclosure contained in a registration statement on Form S-4 or Form F-4 related to a de-SPAC transaction would not make sense given the timing of the PIPE placement. In a typical PIPE placement related to a de-SPAC transaction, PIPE investors are approached at the same time as the business combination agreement is being negotiated between the SPAC and the private operating company. The PIPE investors execute subscription agreements at the time of signing the business combination agreement in which they commit to purchase securities at the time of the closing of the de-SPAC transaction. When the PIPE investors make their investment decision, at the time of signing the business combination agreement, a registration statement has not yet been submitted to or filed with the SEC. There is no correlation between the investment decision made by PIPE investors and the disclosure contained in the registration statement or proxy statement for the de-SPAC transaction.

Given the foregoing, it would not make sense for the placement agents in a PIPE to have potential Section 11 or Section 12(a)(2) liability for the contents of a registration statement where that registration statement is not relevant to the investment decision made by the PIPE investors solicited by the placement agents for the SPAC and/or the target company. It would also not make sense to deem the placement agents in a PIPE as underwriters of a public distribution when the transaction with the PIPE investors is a private placement and the PIPE investors themselves could not assert Section 11 or Section 12(a)(2) liability claims.

c. Providers of Fairness Opinions. We do not believe that an investment bank that served as an underwriter of a SPAC IPO, and later provides a fairness opinion in connection with the de-SPAC transaction, should be deemed a statutory underwriter in the de-SPAC transaction, and we believe the SEC should clarify this in the adopting release.

Investment banks routinely render fairness opinions in public mergers and business combinations, including going-private transactions. The investment banks rendering fairness opinions have historically been considered "experts" when the opinions were included in a registration statement and incurred potential Section 11 liability for the disclosure regarding their fairness opinion. However, they have never before been considered underwriters with responsibility for any disclosure beyond the disclosure regarding their fairness opinion – even if

they were previously "underwriters" of securities of one of the parties to the business combination.

We believe the effect of imposing potential Section 11 liability on investment banks who provide fairness opinions will lead many investment banks to refuse to provide fairness opinions in de-SPAC transactions. Historically, fairness opinions have been provided in only a small minority of de-SPAC transactions – approximately 15% of closed de-SPAC transactions in 2021 were supported by fairness opinions, based on our research. However, by requiring SPACs to assert in de-SPAC disclosure documents that the de-SPAC transaction is fair, SPACs may increasingly require fairness opinions as back-up to their fairness assertions. If the investment banks could be deemed to be underwriters solely by virtue of rendering a fairness opinion, the combination of proposed rules would therefore create a situation where more SPACs may need fairness opinions but fewer investment banks will be willing to provide such opinions. This would make it significantly more difficult to enter into a de-SPAC transaction as opposed to a traditional IPO.

d. Debt Financing Arrangers. We do not believe that an investment bank which served as an underwriter of a SPAC IPO, and later arranges debt or bank financing in connection with the de-SPAC transaction, should be deemed a statutory underwriter in the de-SPAC transaction, and we believe the SEC should clarify this in the adopting release.

Bank financing does not involve the issuance of securities. Bank arrangers and lenders in banking syndicates do not perform the same degree of due diligence that underwriters perform in capital markets transactions. Comfort letters and 10b-5 opinions are not provided to lenders in bank loan transactions, and the informational documents provided to the syndicate of banks does not contain the depth and detailed information contained in registration statements and prospectuses. The lenders in bank financings also do not necessarily require the same degree of audited and pro forma financial statements that would be typical in an SEC-registered offering. Given the foregoing, an investment bank that arranges debt financing is not currently subject to potential Section 11 or 12(a)(2) liability and would not seek to establish a due diligence defense.

Therefore, we believe the SEC should clarify or confirm that bank arrangers of financing in connection with a de-SPAC transaction should not be considered statutory underwriters and should not be subject to potential Section 11 or 12(a)(2) liability.

4. Registration Requirement for de-SPAC Transactions (Proposed Rule 145a)

The SEC has proposed new Rule 145a which provides that, with respect to a reporting shell company's shareholders, any direct or indirect business combination of a reporting shell company that is not a business combination related shell company, involving another entity that is not a shell company, is deemed to involve an offer, offer to sell, offer for sale, or sale within the meaning of section 2(a)(3) of the Securities Act. This means that in any de-SPAC transaction, even if no new securities are being offered to the SPAC's existing shareholders and no securities are being registered as merger consideration to the target's shareholders, the de-SPAC transaction would need to be registered with the SEC and the SPAC's public shareholders would be entitled to bring Section 11 and 12(a)(2) claims against the SPAC and the target company, their respective directors and certain senior officers, statutory underwriters and experts who have expertized portions of the applicable registration statement.

We do not support the adoption of this proposed rule insofar as it would require the registration of de-SPAC transactions where no new securities are being sold to the SPAC's existing shareholders. The vast majority of de-SPAC transactions do not involve any "sale" of securities to the SPAC's existing shareholders. In addition, a fundamental premise underlying a SPAC is that prior to the consummation of a business combination, the SPAC's shareholders can resell their shares in the market at the SPAC's market price (typically tied to the value of the cash in the SPAC's trust account) and, in connection with a business combination, the SPAC's shareholders can always elect to redeem their shares and receive their pro rata portion of the funds in the trust account (and still keep their warrants for free, if the SPAC has issued warrants). This unique feature differentiates the SPAC from other public offering contexts where investors must make an investment decision and potentially lose 100% of the value of their shares. Given the foregoing, we do not believe that the SPAC's public shareholders need or expect that they would have Section 11 or 12(a)(2) claims in transactions that are not registered with the SEC on a registration statement and in which no new shares are issued to the SPAC's public shareholders. At a minimum, SPAC shareholders who elect to redeem their shares in connection with a de-SPAC transaction should not have Section 11 or 12(a)(2) claims in connection with such transaction because, once receiving back their initial investment, the Section 11 or 12(a)(2) claim would provide a windfall to such investors.

5. Financial Statement Requirements (New Rule 15-01 of Regulation S-X).

a. New Rule 15-01(b) of Regulation S-X (Number of Years of Financial Statements).

The SEC has proposed in Rule 15-01(b) of Regulation S-X that where the registrant is a shell company (other than a business combination related shell company), and the financial statements of a private operating company are required in a registration statement or proxy statement, the registrant must file the financial statements of the target company as if the filing were a Securities Act registration statement for the IPO of the target company's equity securities. This means that three years of audited financial statements will typically be required for the target company, unless it would have been an emerging growth company (EGC) or a smaller reporting company or in some cases for foreign private issuers, in which case only two years of audited financial statements would be required to be included in the registration statement or proxy statement.

We support this proposal. The SEC Division of Corporation Finance's current Financial Reporting Manual provides that two years of audited financial statements are permitted where the target company would be an emerging growth company if it were conducting an initial public offering of common equity securities and the registrant shell company is an EGC that has not yet filed or been required to file its first annual report, even if the target would not be a smaller reporting company. We support the proposed Rule 15-01(b), which would eliminate the proviso related to the registrant shell company's filing of its annual report and would permit the SPAC to only include two years of audited financial statements of the target company in the applicable registration statement or proxy statement for a de-SPAC transaction in all circumstances where the target company meets the definition of emerging growth company.

In response to comment request #109, if Rule 15-01(b) only requires two years of financial statements for an acquired business that is the predecessor to a shell company, then we believe the Form 8-K filed pursuant to Item 2.01(f) also should only require two years of financial statements. The financial statements of the acquired business should 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. We do not believe investors would benefit from the third year of financial statements because they will have already made their investment decision whether or not to redeem their SPAC shares or vote in favor of the SPAC's business combination. In particular, if the timing of filing could potentially require a third year of financial statements, investors likely already benefit from filing of one, two or three quarters of information from the most recent fiscal year and the financial information from the third historical year will be increasingly stale. We are concerned that requiring the third year of financial statements in the Form 8-K filed within four business days after closing could jeopardize the timing of closing of the de-SPAC transaction in a scenario where the target company has not already prepared the third year of audited financial statements because it was not required in the SPAC's registration statement or proxy statement.

b. Rule 15-01(d)(1) and 1-02(w)(1) of Regulation S-X (Significance of Acquirees of a Target Company).

The SEC has proposed in new Rule 15-01(d)(1) and amended Rule 1-02(w)(1) of Regulation S-X that when a target company proposes to make a probable acquisition or closes an acquisition that, in either case, may be "significant," the significance of the business must be determined using the predecessor's (target company's) financial statements instead of the registrant and its consolidated subsidiaries (SPAC's) in applying the relevant significance tests. This means that, in the context of a de-SPAC transaction, the denominator in the calculations will be the assets, revenue or pre-tax income of the target company rather than the SPAC.

We support this clarification in the rules. If the financial statements of the SPAC were used to calculate significance, given that most SPACs have minimal revenue and pre-tax income and no significant assets beyond the cash in their trust account, virtually every acquiree of a target company might be found to be significant using the Regulation S-X significance tests. Comparing the acquiree's financial statements to the financial statements of the target company itself would be analogous to what would be done in a traditional IPO of the target company.

In response to comment request #106, we agree that the pro forma financial information that gives effect to the shell company transaction should be allowed to be used as the denominator in measuring the significance of other acquisitions not involving a predecessor. We do not believe there should be any 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. In most de-SPAC transactions there are numerous other contemporaneous transactions occurring that affect the target's capital structure and, as a result, using pro forma financial statements for measuring significance can produce a more accurate analysis of an acquiree's significance.

c. New Rule 15-01(d)(2) of Regulation S-X (Omitted Financial Statements of Recent Acquirees of a Target Company)

The SEC has proposed new Rule 15-01(d)(2) of Regulation S-X which would provide that "[a] shell company (other than a business combination related shell company) that omits from a registration statement or proxy statement the financial statements of a recently acquired business that is not or will

not be its predecessor pursuant to Rule 3-05(b)(4)(i) of Regulation S-X must file those financial statements in its Form 8-K filed pursuant to Item 2.01(f)."

This means that a registration statement or proxy statement filed by a SPAC in connection with a de-SPAC transaction need not include separate financial statements of an acquired business if the acquired business is not significant at the 50% level and the date of the final prospectus or prospectus supplement relating to an offering, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business acquisition, and the financial statements have not previously been filed by the registrant. However, the financial statements of the acquiree of the target company would need to be included in the Form 8-K filed by the former SPAC within four business days after the closing of the de-SPAC transaction.

We believe that this proposal may not provide sufficient time to former SPACs, after completion of the de-SPAC transaction, to provide the financial statements of the target company's acquirees in the case where these acquired entities are not significant at the 50% level. In our view, given that the de-SPAC transaction has already closed, we believe that the rule should be similar to what would apply going forward. If the target company's acquisition has been consummated prior to the closing of the de-SPAC transaction, then the company should have the standard 74-day grace period in order to file the financial statements.

These acquired entity financial statements should not in the ordinary course be required four business days after the closing of the de-SPAC transaction. A management team is quite busy in the period leading up to the closing of the de-SPAC transaction and there should be no need or reason to accelerate the requirement to obtain and file financial statements of its acquired entities so soon after closing the de-SPAC transaction. We are concerned that this financial statement requirement could delay closings of de-SPAC transactions and provide additional leverage to the sellers of businesses to the target company because they will know that the entire de-SPAC transaction would become dependent on obtaining audited financial statements of the target company's acquiree so quickly after closing.

d. New Rule 15-01(e) of Regulation S-X (Financial Statements of a Shell Company after the de-SPAC transaction)

The SEC has proposed new Rule 15-01(e) of Regulation S-X which provides that "[a]fter a shell company (other than a business combination related shell company) acquires a business that is its predecessor, the financial statements of the shell company for periods prior to consummation of the acquisition are not required to be included in a filing once the financial statements of the predecessor have been filed for all required periods through the acquisition date and the financial statements of the registrant include the period in which the acquisition was consummated."

We appreciate that the SEC has proposed this rule in order to address an area that is currently, in our view, uncertain. There are various circumstances where Regulation S-X is not currently clear as to whether financial statements of the SPAC are required to be included in filings after the de-SPAC transaction. Accordingly, we welcome the certainty which the rule offers. We also appreciate that the SEC has proposed this rule in order to reduce disclosure that may no longer be relevant or meaningful for investors.

However, once a de-SPAC transaction has been consummated, we question any requirement to file the separate financial statements of the SPAC or shell company at all. Following the consummation of a de-SPAC transaction, investors are focused only on the financial performance of the acquired operating company, and the SPAC's historical financial performance is not relevant. Accordingly, we would support a provision providing that once a de-SPAC transaction has been consummated, the registrant or new surviving company should have no obligation or requirement to include financial statements of the former SPAC or shell company and, therefore, no obligation or requirement to obtain the consent of such entity's auditor to the inclusion of its audit report in a registration statement (whether an S-1, S-3 or S-8). We believe it would be sufficient to rely on Exchange Act Rule 12b-20 and Securities Act Rule 408(a), which require a registrant to provide all material information as may be necessary to make required statements, in light of the circumstances under which they were made, not misleading.

If the SEC proceeds to adopt Rule 15-01(e) as proposed, we request that the SEC clarify the intention behind the first condition to the rule. Rule 15-01(e) as proposed would permit the financial statements of the shell company for periods prior to the consummation of the acquisition to be omitted "once the **financial statements of the predecessor** have been filed for all required periods through the acquisition date." However, on pages 123 and 260 of the proposing release, this condition is described as "the **financial statements of the shell company** have been filed for all required periods through the acquisition date."

6. Proposed Rule 3a-10 (Investment Company Act Exemption).

a. SEC Proposal

The SEC has proposed a new safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act whereby a special purpose acquisition company will be deemed to not be an investment company if it meets specified criteria. These criteria include requirements that the SPAC (1) file a Form 8-K with the SEC, no later than 18 months after the effective date of the SPAC's IPO registration statement, disclosing an agreement to engage in the de-SPAC transaction with at least one target company, and (2) complete the de-SPAC transaction no later than 24 months after the effective date of the SPAC's IPO registration statement. The safe harbor would also provide that any assets of the SPAC that are not used in connection with the de-SPAC transaction, or in the event of failure of the SPAC to file the required Form 8-K within 18 months or to complete a de-SPAC transaction within 24 months, will be distributed in cash to investors as soon as reasonably practicable thereafter.

b. SPACs are Not Investment Companies

Section 3(a)(1)(A) of the Investment Company Act provides that an investment company is a company that is or holds itself out as being engaged primarily, or proposed to engage primarily, in the business of investing, reinvesting or trading in securities.

In our view, even without the proposed safe harbor, a SPAC is not an investment company. A SPAC is a company that is formed and holds itself out as formed to acquire and operate a target company. It is not engaged primarily, and does not propose to engage primarily, in the business of investing, reinvesting or trading in securities. There have been hundreds of SPACs formed in recent years and we

are not aware that any of them have been determined to be an investment company by the SEC or courts. Accordingly, we do not believe that the proposed safe harbor is necessary.

c. 18 Months / 24 Months Requirement

To the extent the SEC determines to adopt the proposed safe harbor, we request that the SEC eliminate or lengthen the proposed 18-month and 24-month time periods, which necessarily exclude a fair number of SPACs currently in the market that went public before adoption of this new safe harbor provision.

While most SPACs in recent years have been able to sign a definitive business combination agreement with a target within 18 months, in the current market environment we believe that 18 months is not necessarily enough time for a SPAC to reach a definitive agreement with a target. This is particularly the case in the current market where more than 500 SPACs are searching for a target company. If the 18-month deadline to enter into a business combination agreement or merger agreement is retained, there will be pressure on SPACs in the future to adopt such shorter time periods in their organizational documents, which would exacerbate the pressure on SPAC sponsors to enter into business combinations more quickly in order to avoid the necessary liquidation at the end of the designated deadlines. Fears that a SPAC sponsor might be willing to sign up to "any deal" could become a reality if the SPAC approaches the 18-month deadline contained in the proposed safe harbor.

We do not believe that the 12-month timeframe in Rule 3a-2 is a useful comparative benchmark. Rule 3a-2 provides a one-year safe harbor to transient investment companies – issuers that, as a result of an unusual business occurrence, may be considered an investment company under the statutory definitions but intend to be engaged in a non-investment company business. However, we do not believe that a transient investment company is comparable to a SPAC because Rule 3a-2 addresses companies that may actually be investment companies – they may fail the 40% test of Section 3(a)(1)(C) of the Investment Company Act or may not be actively engaged in a business other than that of investing in securities.

Similarly, we do not believe that the 18-month timeframe in Rule 419 was adopted in order to prevent blank check companies from being considered investment companies. While Rule 419 requires a blank check company to complete its acquisition within 18 months before being required to return funds in its escrow account to investors, the SEC release from 1991 that proposed Rule 419 does not indicate that the 18-month timeframe was proposed due to Investment Company Act considerations. Rather, commercial concerns appeared to be more on point. The proposing release solicited comments regarding "in particular, whether [the 18-month deadline] provides an adequate opportunity for the blank check company to accomplish the objectives of its offering while not unduly prolonging the retention of purchaser funds in the Rule 419 Account. Comment also is solicited on whether upon the passage of a specified time period, such as one year, investors should have the option to have their funds returned or retained by the company for a specified additional period, such as six months." SEC Release 33-6891 (April 17, 1991) (Blank Check Offerings).

We also do not believe that the "Tonopah Factors" support an 18-month or 24-month deadline. In determining whether or not an issuer is an investment company for purposes of Section 3(a)(1)(A), the courts and the SEC have considered the five factors developed by the SEC in *In the Matter of Tonopah Mining Co. of Nevada* (Investment Company Act Release No. 1084, 26 SEC 426 at 427, July 22, 1947)

("Tonopah"). Under Tonopah, the five factors used to determine the business in which an issuer is primarily engaged are: (1) the issuer's historic development; (2) the issuer's public representation of policy; (3) the activities of the issuer's officers and directors; (4) the source of the issuer's present income; and (5) the nature of the issuer's present assets. As highlighted by case law, no one factor is dispositive in an analysis of an issuer's primary business engagement, and courts look to each individual factor in determining whether a company is an investment company that is primarily engaged in the business of investing, reinvesting or trading in securities. The Tonopah factors do not address the amount of time a company may invest in securities before the company will be considered an investment company.

If the SEC believes that the list of criteria requires a time period, we suggest utilizing the 36-month period permitted by the NYSE and Nasdaq for the life of a SPAC before it must be liquidated (or longer if permitted by the NYSE or Nasdaq).

In addition, we do not believe that the safe harbor needs an intermediate time period for when an agreement with the target company is signed. If a time period must be included, it would be sufficient to have only one time period, the deadline by which the business combination must be completed. We note, for example, that Rule 419 only has one time period (18 months) and the stock exchanges only have one time period (36 months).

d. Allow Extensions

If the SEC concludes that it must retain the 18-month and 24-month time periods, we believe that the safe harbor should permit companies to obtain a shareholder vote to extend these time periods to up to 36 months. A SPAC that obtains this shareholder approval should be deemed to be within the safe harbor. Shareholder approval is used in a number of other contexts to permit investment companies to take actions that would not otherwise be permitted – for example, business development companies can obtain shareholder approval in order to issue shares at less than their net asset value for a specified period of time or to decrease their asset coverage (total assets / total debt) to 150% from 200%.

e. Confirmation Regarding Existing SPACs

If the safe harbor contained in Rule 3a-10 is adopted substantially as proposed, we request that the SEC confirm in the adopting release that all existing SPACs formed prior to the date of effectiveness of the rule would not be deemed to be investment companies under Section 3(a)(1)(A) of the Investment Company Act notwithstanding that they may not satisfy all of the requirements contained in the safe harbor. Otherwise adoption of the rule will raise questions for many existing SPACs notwithstanding that such SPACs were established and went public prior to adoption of the new safe harbor.

There are a number of statements in the proposing release that raise questions about SPACs that do not comply with the proposed safe harbor. For example, the proposing release states that "we 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 Investment Company Act to that SPAC" (page 155). The proposing release also states that "[w]e believe that certain SPAC structures and practices may raise serious questions as to their status as investment companies" (page 136) and "we have designed the proposed conditions of the safe harbor to align with the structures and practices that we

preliminarily believe would distinguish a SPAC that is likely to raise serious questions as to its status as an investment company under the Investment Company Act from one that would not" (page 138).

In light of these statements, if the proposed safe harbor is adopted as proposed, we believe the SEC should confirm in the adopting release that SPACs that were formed prior to the effectiveness of the proposed safe harbor would not be deemed to be investment companies, notwithstanding that they may not conform to all of the requirements itemized in the safe harbor. This would be particularly relevant, for example, for a SPAC with a 24-month maturity that has not yet signed an agreement with a target company after 18 months.

7. Making De-SPAC Transactions More Equivalent to a Traditional IPO

Throughout the SEC's proposing release, and in public statements about the SPAC proposal, the SEC has stated that one of its core aims is to make the de-SPAC process more equivalent to a traditional IPO. For example, the SEC states on page 66 of the proposing release that "the proposed new rules and amendments are intended to provide investors with disclosures and liability protections comparable to those that would be present if the private operating company were to conduct a traditional firm commitment initial public offering." This is one of the SEC's underlying reasons for, among other things, imposing underwriter liability on the de-SPAC process, eliminating the safe harbor for forward-looking statements from the de-SPAC process, requiring the target company to become a co-registrant on the SPAC's registration statement, requiring substantially all de-SPAC transactions to be registered with the SEC and requiring specified narrative disclosures about the target company in the registration statement or proxy statement of the de-SPAC transaction.

Given the SEC's motivation to make the de-SPAC process and the traditional IPO more equivalent to each other, we believe there are a number of other rule changes that should be made in order to make the de-SPAC and traditional IPO more equivalent to each other. All of the following rules could be amended to provide exceptions for former SPACs that have become public companies through a de-SPAC transaction while still retaining prohibitions for other shell companies and black check companies.

a. Free Writing Prospectuses. Companies going public in a traditional IPO are permitted to use free writing prospectuses pursuant to Rules 164 and 433. On the other hand, pursuant to Rule 164(e)(2), SPACs cannot use free writing prospectuses until three years after they lose their shell company and blank check company status. We believe the SEC should amend Rule 164(e)(2) by allowing former SPACs that have become public companies through a de-SPAC transaction to utilize free writing prospectuses immediately following the loss of their shell company and blank check company status.

b. WKSI Status. Companies going public in a traditional IPO are eligible to be "well-known seasoned issuers" beginning one year following the consummation of their IPO. A WKSI can file short-form registration statements that are immediately effective with no SEC review, making it significantly easier for a WKSI to raise primary capital and facilitate secondary offerings. In contrast, a SPAC is considered an ineligible issuer for three years following the consummation of a de-SPAC transaction and therefore cannot be deemed to be a WKSI or file an automatically effective registration statement for three years following the consummation of its de-SPAC transaction. We believe the SEC should amend the definition of "WKSI" in Rule 405 to allow a

former SPAC that has gone public through a de-SPAC transaction to be a WKSI one year after the conclusion of the de-SPAC transaction.

c. Rule 144. Non-affiliate shareholders of a company going public in a traditional IPO are permitted to resell their shares pursuant to Rule 144 as soon as they have held the shares for six months (including tacking of periods before the IPO), subject to a current public information requirement, and after 12 months subject to no additional requirements. In addition, affiliate shareholders of a company going public in a traditional IPO are permitted to resell their shares pursuant to Rule 144 as soon as they have held the shares for six months (including tacking of periods before the IPO), subject to all of the requirements of Rule 144 (including the notice, volume, manner of sale and current public information requirements).

On the other hand, in accordance with Rule 144(i), the shareholders of SPACs cannot utilize Rule 144 until 12 months after the SPAC's Form 10 information has been filed with the SEC on a Form 8-K. As a result of this requirement, following the consummation of a de-SPAC transaction, many companies are required to register shares on a resale registration statement on Form S-1 or F-1 in order to provide the liquidity for shareholders that in a traditional IPO might have otherwise been provided by Rule 144. We believe the SEC should amend Rule 144(i) to provide that Rule 144 is available to the shareholders of the company following consummation of a de-SPAC transaction on the same basis as it would be if the issuer was going public in a traditional IPO or direct listing. There should be no difference between a post-IPO company and a company which became public in a de-SPAC transaction.

d. Research Safe Harbors. Research analysts who want to publish research reports or other information about public companies typically utilize the research safe harbors contained in Rule 138 and Rule 139 as the basis for their securities law compliance. On the other hand, Rules 138(a)(4) and 139(a)(1)(ii) of the research report safe harbors expressly carve out entities that are or have been within the past three years shell companies or blank check companies and therefore research analysts for post de-SPAC companies do not have these safe harbors available when they want to publish about a post de-SPAC company during the three years following completion of the de-SPAC transaction. We believe the SEC should amend Rules 138 and 139 by including a carveout from the reference to shell companies and blank check companies for former SPACs following the completion of a de-SPAC transaction. We do not believe there is any reason that a private company which has merged with a SPAC in a de-SPAC transaction should be treated differently with respect to research than a company that has completed a traditional IPO. In fact, in many cases, companies that emerge from a de-SPAC transaction may have an even greater need for research coverage than companies who go public through a traditional IPO because they may have less liquidity and lack the market-making services that underwriters in traditional IPOs provide.

e. Form S-8. Companies going public through a traditional IPO are permitted to file, and very often file, automatically-effective registration statements on Form S-8 for purposes of registering shares issued or issuable under employee benefit plans immediately following the effectiveness of the company's Securities Act and Exchange Act registration statements. In contrast, former SPAC's are not permitted to utilize Form S-8 until 60 days after the former SPAC has filed "Form 10" information on a Form 8-K. We believe the SEC should amend Form S-8 to allow a former SPAC that has consummated a business combination with a private operating company to file a

registration statement on Form S-8 immediately following the consummation of the business combination. We do not believe that the availability of Form S-8 should differentiate between a traditional IPO and a former SPAC going public through a de-SPAC transaction.

f. Form S-1 / F-1 Incorporation by Reference. After a company goes public through a traditional IPO, the company is permitted to incorporate by reference Exchange Act filings into Form S-1 or Form F-1 subject to specified conditions, including having filed at least one annual report and having made all required SEC filings for 12 months or such shorter period of time that the company was required to file such reports. In contrast, former SPAC's are not permitted to so incorporate by reference into Form S-1 or Form F-1 until three years after the company is no longer a shell company or a blank check company. We believe that the SEC should amend Instruction VII of Form S-1 (clause D1), and Instruction VI of Form F-1 (clause D1), to permit a former SPAC that has consummated a business combination with a private operating company to incorporate by reference into Form S-1 or Form F-1.

8. Evergreen "Current Public Information" Requirement in Rule 144(i)

Rule 144(i) provides that Rule 144 is generally not available to shareholders of SPACs. However, it also provides that Rule 144 will become available to shareholders of a former SPAC beginning 12 months after the SPAC has filed Form 10 information, so long as the post-de-SPAC company has filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months, other than Form 8-K reports.

This provision, known as the evergreen current public information requirement, means that Rule 144 is not available to a former SPAC at any time in the future if, at the time of a proposed sale, the company has not been current in its periodic reporting during the 12 months prior to the time of such proposed sale. For example, if a SPAC consummates a de-SPAC transaction, but 5 or 10 years later is late on a Form 10-Q or 10-K, then Rule 144 will not be available for affiliates or non-affiliates. This contrasts with the situation for non-affiliates of non-SPACs, who do not need to comply with the current public information requirement after holding the securities for one year.

This evergreen provision also makes it difficult for non-affiliates of former SPACs with shares registered on a resale registration statement to move their shares to their own brokerage accounts following the consummation of the de-SPAC transaction. Because a company that is a former SPAC can never be sure that it will not miss a 10-Q or 10-K (or a Form 20-F for foreign private issuers), the company will be less likely to be willing to remove restrictive legends from securities of non-affiliates that are registered on a resale shelf registration statement.

We request that the SEC amend Rule 144(i) to provide that – similar to shareholders of non-SPACs – once shares have been held for at least 12 months (including through tacking), the current public information requirement should be deemed to be satisfied.

9. Foreign Private Issuer Status

When a foreign private operating company that qualifies as a foreign private issuer enters into a business combination with a SPAC, in most if not all cases, the foreign private operating company would prefer to report as a foreign private issuer following consummation of the business combination.

However, as the SEC discusses in footnote 117 to the proposing release, the structure of the acquisition can affect whether or not the public company going forward qualifies as a foreign private issuer. If the SPAC is a domestic registrant and the target is a foreign private issuer, then either (1) if the target files a Form F-4 and acquires the SPAC, then going forward, the reporting company will be a foreign private issuer, (2) if the SPAC files a Form S-4 and acquires the foreign target, then going forward, the reporting company will be a domestic company (the SPAC), (3) if a new foreign holding company is established that files a Form F-4 and acquires both the SPAC and the foreign target, then going forward the reporting company will be a foreign private issuer (the foreign holding company) and (4) if the SPAC creates a new domestic company which files a Form S-4 and acquires both the SPAC and the foreign target, then going forward the reporting company will be a domestic company (the SPAC's subsidiary). These are just the four most obvious structures, but other structures can be utilized as well, also with inconsistent conclusions regarding foreign private issuer status.

We do not believe that the technical structure of the transaction should affect whether or not going forward a target company that constitutes a foreign private issuer can report as a foreign private issuer after the consummation of the de-SPAC transaction. We believe that the SEC should provide interpretative guidance that in transactions where a foreign private issuer target engages in a business combination with a domestic U.S. SPAC, notwithstanding the structure of the transaction, if the SEC reporting company upon consummation of the business combination (or within four business days following the consummation of the business combination) would be deemed to be a foreign private issuer then such company should be permitted to report as a foreign private issuer. It should not have to wait to test its foreign private issuer status until the last day of its second fiscal quarter (June 30 for calendar year companies) and only be permitted to report as a foreign private issuer on the first day of its next fiscal year (January 1 for calendar year companies). Of course, the post-closing reporting company could always elect to report or to continue reporting as a domestic registrant in its discretion, even if it was a foreign private issuer.

We believe that allowing a foreign private issuer operating company target to continue to report as a foreign private issuer following consummation of the business combination is consistent with a number of the other SEC proposals where the SEC looks at the actual securities law status of the target company in evaluating its compliance with SEC rules. For example, the SEC proposal provides that, if the target company is an emerging growth company, then it would only need to provide two years of financial statements in the disclosure document for the de-SPAC transaction. In addition, the SEC states in the proposing release that "[i]n the staff's view, the private operating company's revenue, as predecessor, should be used to determine whether the registrant qualifies as an EGC after the transaction." Similarly, the SEC proposal looks at whether the surviving reporting company is a smaller reporting company within four business days following the closing of the business combination and, if not, such company loses its smaller reporting company status when it files its first periodic report following the SPAC's "Super 8-K."

10. Timing of Effectiveness of Proposals.

The SEC's proposing release does not indicate when the rules would become effective or how the proposed rules would affect existing transactions. In particular, the new rules would impose new liabilities on underwriters, target companies, and directors and senior officers of target companies, and

would require most de-SPAC transactions to be registered with the SEC, but does not specify how these liability and registration requirements apply to existing transactions.

In our view, parties that have already signed business combination agreements or merger agreements for a de-SPAC transaction, or that have already filed a proxy statement or registration statement for a de-SPAC transaction or a SPAC IPO, should not be required to comply with any of the new requirements, and the new liability and registration requirements should not apply in any such scenarios. Parties that have already made business decisions based on existing disclosure and liability requirements should not be required to comply with new requirements that were not contemplated when they made their initial investment decision.

Accordingly, we recommend as follows:

a. Any requirement that SPAC IPO underwriters have underwriter liability in connection with a de-SPAC transaction should not apply to any transaction effected pursuant to a signed business combination agreement or merger agreement in effect at the time the rules become effective.

b. Any requirement that SPAC IPO underwriters have underwriter liability in connection with a de-SPAC transaction should not apply to the underwriters of a SPAC IPO whose registration statement has been publicly filed or confidentially submitted to the SEC at the time the rules become effective.

c. Any requirement that the target company and its directors and senior officers be deemed a co-registrant of a registration statement for a de-SPAC transaction should not apply to any transaction effected pursuant to a signed business combination agreement or merger agreement in effect at the time the rules become effective.

d. Any requirement that the de-SPAC transaction must be effected as a registered transaction should not apply to any transaction effected pursuant to a signed business combination agreement or merger agreement in effect at the time the rules become effective.

e. Any new disclosure requirements for a SPAC IPO should not apply to any registration statement for a SPAC IPO that has been publicly filed or confidentially submitted to the SEC at the time the rules become effective.

f. Any new disclosure requirements for a de-SPAC transaction should not apply to any registration statement or proxy statement that has been publicly filed or confidentially submitted to the SEC at the time the rules become effective.

g. In addition to the foregoing, in order to give relevant parties sufficient time to understand the new rules and determine their willingness to participate or continue to participate in SPAC IPOs or de-SPAC transactions in light of the new rules, none of the proposed rules should become effective until a date to be specified in the adopting release that is a substantial period of time following the date of issuance of the adopting release.