June 13, 2022

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

VIA ELECTRONIC MAIL: rule-comments@sec.gov

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

Dear Ms. Countryman:

The Committee on Capital Markets Regulation (the "**Committee**") is grateful to the Securities and Exchange Commission (the "**SEC**") for the opportunity to comment on the proposed amendments to rules under the Securities Act of 1933, as amended (the "**Securities Act**"),[1] the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"),[2] and the Investment Company Act of 1940, as amended (the "**Investment Company Act**")[3] that would impose specialized disclosure, reporting, and other procedural requirements for special purpose acquisition companies ("**SPACs**"), SPAC sponsors, and underwriters in initial public offerings and in subsequent business combination transactions between SPACs and private operating companies ("**de-SPACs**").[4]

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes thirty-seven leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Emeritus Dean, Columbia Business School) and John L. Thornton (Former Chairman, The Brookings Institution) and is led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

As set forth throughout this letter, the Committee's review of empirical data on SPACs and de-SPACs finds that SPACs play an important role in helping companies raise capital and enter the U.S. public markets, which have been otherwise shrinking for years. In regulating SPACs, the SEC should therefore seek to preserve SPACs' viability as a path to the public markets. The Committee supports the provisions of the Proposed Rule that would enhance transparency for investors regarding the SPAC and de-SPAC process but has concerns with other aspects of the proposal that could discourage the use of SPACs rather than enhancing the way they work for companies and investors.

Part I of this letter sets forth data on the SPAC and de-SPAC markets, demonstrating their important role in U.S. capital markets in recent years. **Part II** briefly summarizes the principal provisions of the Proposed Rule. **Part III** is an analysis of the policy and legal basis for the Proposed Rule, setting forth

[1] 15 U.S.C. § 77a *et seq*.

[2] 15 U.S.C. § 78a *et seq*.

[3] 15 U.S.C. §§ 80a-1 *et seq*.

[4] Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29458, 574 (May 13, 2022).

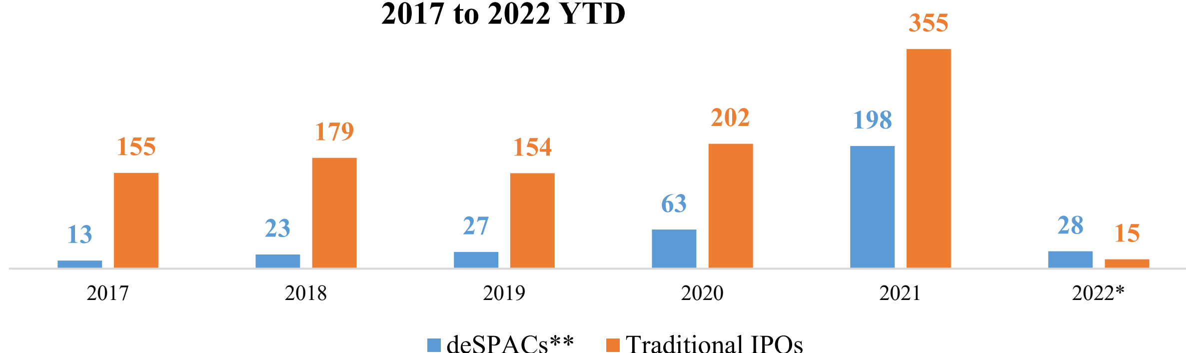
recommendations that, in the Committee's view, would enhance transparency for SPAC investors while preserving SPACs' viability as a path to the public markets.

I. EMPIRICAL DATA ON THE SPAC AND DE-SPAC MARKETS

The Committee has conducted an independent review of the SPAC and de-SPAC markets finding that SPACs have played an important role in U.S. capital markets in recent years.

The role of SPACs is particularly critical given recent trends in the number of companies going public. Research from Ritter et al. (2017) shows that 2000 to 2016 experienced a general trend of fewer companies entering the public markets, and that this was especially pronounced for smaller companies.[5] This trend began to reverse in 2017, and the emergence of SPACs played a significant role in this reversal. These SPACs have since started to complete their merger mandates, and the number of operating companies entering public markets through de-SPAC mergers has increased over the past few years. **Figure 1** shows that 2020 and 2021 alone witnessed a total of 261 de-SPACs, and 28 have already occurred in 2022 as of the end of April 2022—compared to only 15 traditional IPOs this year.

Figure 1: Number of de-SPACs and Traditional IPOs 2017 to 2022 YTD



*2022 data is as of April 28, 2022
**de-SPAC data for 2017 to 2019 is from Jay Ritter. de-SPAC data for 2020 to 2022 YTD is from SPAC Research.
Sources: Gahng, Minmo, Jay Ritter, Donghang Zhang, "SPACS," (December 14, 2021): https://site.warrington.ufl.edu/ritter/files/SPACs.pdf; "SPAC and US IPO Activity," *SPAC Analytics* (accessed April 28, 2022): https://www.spacanalytics.com; "Deal Closed," SPAC Research (accessed April 28, 2022):

A. The SPAC structure can serve unique functions for companies seeking to enter the U.S. public markets.

The Committee's findings further indicate that SPACs have raised more capital than IPOs on a per company basis and that SPACs have tended to take smaller companies public than IPOs over the period 2017 to 2021. SPACs also tend to be concentrated in industry sectors that differ from traditional IPOs.[6] Overall, the data

[5] See, Jay Ritter, *Where Have All the IPOs Gone?*, Executive Summary (Mar. 17, 2017), https://site.warrington.ufl.edu/ritter/files/2017/03/Where-Have-All-the-IPOs-Gone_exec-sum.pdf ("From 1980-2000, an average of 310 operating company initial public offerings (IPOs) occurred in the U.S. each year. During 2001-2016, the average has been only 108 IPOs per year, in spite of real GDP more than doubling from the 1980s until now. The prolonged drought has been especially severe among small firms.").

[6] The sampled transactions included both U.S. and non-U.S. transactions. Data on de-SPACs were drawn from SPAC Research (https://www.spacresearch.com/symbol?s=closed§or=&geography=) and Bloomberg. Data on

suggest that SPACs are an important mechanism for expanding issuer access to public markets, especially for smaller companies and industry segments undergoing rapid growth.

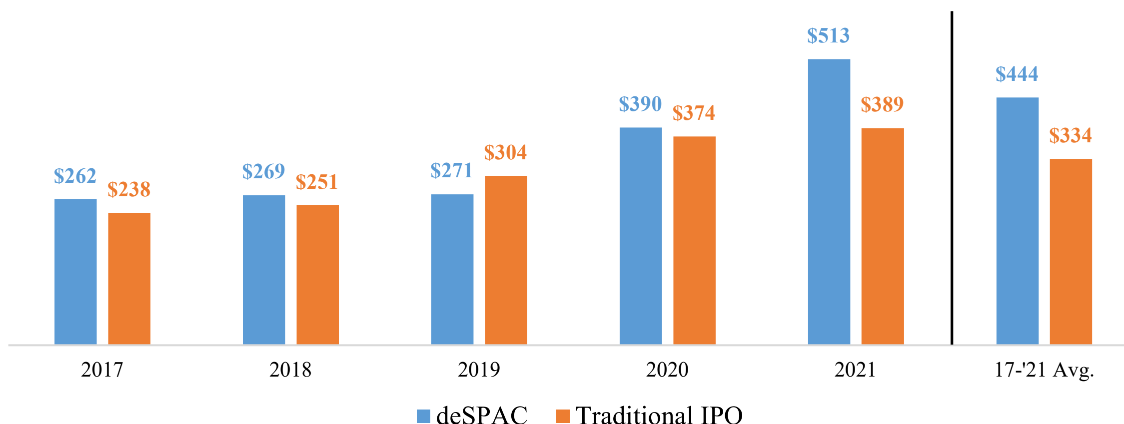
1. Recent SPACs have raised more capital than IPOs on a per company basis.

SPAC proceeds consist of money raised in the initial offering of SPAC shares plus any additional proceeds received in connection with the de-SPAC, including private investments (often referred to as private investments in public companies, or "**PIPEs**") and other backstop or strategic investments, less shareholder redemptions. For traditional IPOs, total proceeds are equal to the cash raised by the operating company in the public listing, net of offering costs and fees.

From 2017 through 2021, on a per company basis, SPACs raised on average more proceeds in the public markets than traditional IPOs. As **Figure 2** shows, the average SPAC generated $445 million in capital for an operating company, compared to $335 million for the average traditional IPO.

SPAC proceeds also constituted on average a greater percentage of an operating company's market capitalization than traditional IPO proceeds. For the 2017-2021 period, average SPAC proceeds were equal to 47% of the market capitalization of an operating company, whereas average IPO proceeds were equivalent to 22% of the market capitalization of an operating company. These data suggest that the SPAC structure may be particularly important for companies seeking to maximize the amount of capital raised relative to their market capitalization.

Figure 2: Average Proceeds Generated ($M), 2017-2021



Source: SEC filings, and Bloomberg data

2. SPACs tend to take smaller companies public than traditional IPOs.

The data also suggest that SPACs are an important path to the public markets for smaller operating companies. For the 2017-2021 period, the average market capitalization of a company going public by a de-SPAC was $950 million, compared to $1.5 billion for an IPO. As **Figure 3** shows, the average revenue for an operating company for the year immediately preceding a de-SPAC was $270 million, compared to $495 million for an operating company in the year immediately preceding a traditional IPO. The

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traditional IPOs were drawn from Bloomberg and Compustat. Additional data on operating company characteristics were drawn from SEC filings as supplemented with Bloomberg data.

percentages of operating companies that were profitable, as determined by the last full year of net income before going public, were by contrast highly similar, constituting 26% of operating companies going public through a de-SPAC and 25% of companies going public through IPOs.

Figure 3: Average Market Cap and Revenue of Company, 2017-2021

Metric	de-SPAC	Traditional IPO
Avg. Market Cap ($M)	$950	$1,500
Avg. Revenue ($M)	$270	$495

Source: SEC filings, Bloomberg data, and Compustat

3. SPACs have served different industry sectors than IPOs.

The data show that de-SPAC and traditional IPO issuers differed significantly by industry for the years 2017-2021 (**Figure 4.1** and **Figure 4.2**). Operating companies taken public by de-SPAC were weighted more heavily toward consumer cyclicals (18% vs. 7.5% for IPOs) and less heavily towards financials (7% vs. 13% for IPOs). These distinctions suggest that de-SPACs may complement traditional IPOs by serving different industries. It is also notable that in 2021, all companies in the U.S. automotive sector that went public did so by way of a de-SPAC and that these companies were concentrated in the electric and autonomous vehicle industry.

Figure 4.1: Industry of de-SPAC Operating Company, 2017-2021

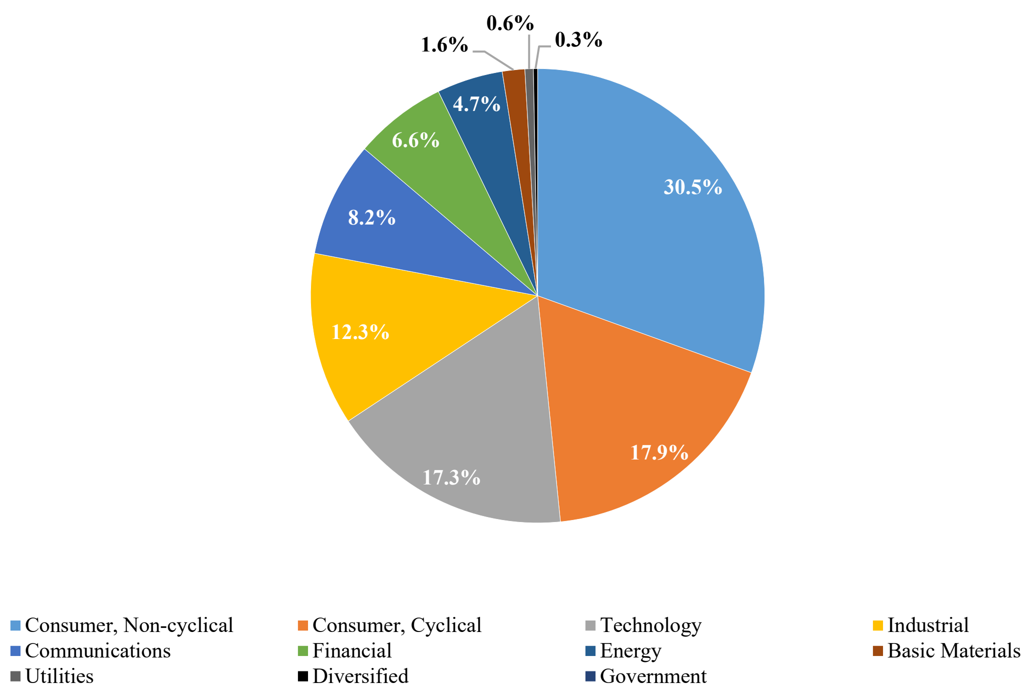
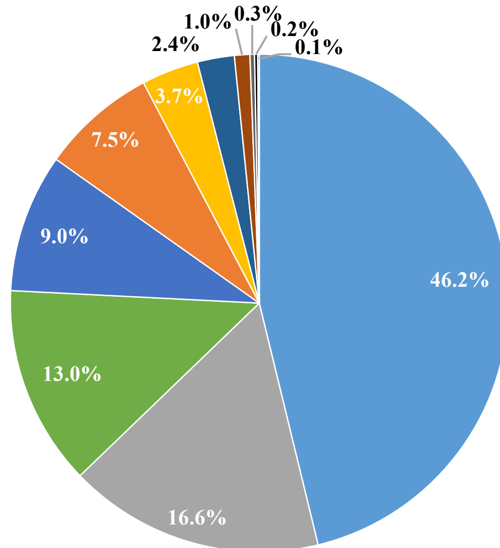


Figure 4.2: Industry of Traditional IPO, 2017-2021



Soure: Bloomberg data.

B. Investment in SPACs by retail investors is limited.

As described in the Committee's October 2021 report,[7] retail investors can gain exposure to SPACs either by purchasing IPO shares from the underwriter or by purchasing shares in the secondary market after the SPAC's IPO and before the de-SPAC merger. However, data on SPAC ownership show that retail investors do not participate significantly in SPACs through either of these channels.[8]

For example, aggregating data included in 13F filings, research finds that median ownership by 13F filers (*i.e.*, large institutional investors) was 85% immediately after the SPAC's IPO,[9] highlighting the dominance of large institutional investors in the initial IPO allocation of SPAC shares. This figure changes little between the IPO and merger, as 13F ownership was 87% immediately before the de-SPAC merger.[10] Importantly, these findings likely *understate* the extent of non-retail ownership, since they do not include SPAC ownership by institutional investors that do not file form 13F, nor do they include SPAC ownership by wealthy individuals. In all, these findings show minimal participation of retail investors in the SPAC IPO and effectively no change in the relative distribution of SPAC equity ownership between its IPO and de-SPAC merger.

[7] "Nothing but the Facts: Retail Investors and Special Purpose Acquisition Companies," *The Committee on Capital Markets Regulation* (October, 2021): https://www.capmktsreg.org/wp-content/uploads/2021/10/CCMR-NBTF-SPACs-Retail-Investors.pdf.

[8] *See* Klausner et al. (2021).

[9] As evidenced by the first 13F filing after the SPAC IPO.

[10] As evidenced by the last 13F filing before the SPAC merger.

C. De-SPAC Performance as compared to IPO Performance

A common criticism of de-SPACs is that their returns have been negative and trailed the broader stock market.[11] However, such critiques generally do not compare the performance of de-SPACs with comparable IPOs. The staff of the Committee has therefore compared the performance of de-SPACs against traditional IPOs from 2017-2021, finding that de-SPACs only slightly underperformed traditional IPOs (by less than 5%).

Figure 5

Weighted Average Annual Price Return for de-SPACs and Traditional IPOs		
Year	De-SPACs	Traditional IPOs
2017	-7.5%	-6.8%
2018	-1.5%	-4.2%
2019	-5.2%	-10.0%
2020	-20.8%	-17.4%
2021	-37.8%	-25.6%
2017 - 2021	*-32.2%*	*-27.9%*
Source: Bloomberg data, security prices as of close May 31, 2022		

Although **Figure 5** controls for differences in the size of operating companies going public through a de-SPAC as compared to an IPO, it does not control for the fact that de-SPAC and traditional IPO issuers differed significantly by industry for the years 2017-2021. It is possible that companies that went public through de-SPACs tended to be from industries that have underperformed industries that went public through traditional IPOs. For example, as noted in the prior section, electronic and autonomous vehicle companies exclusively went public through de-SPACs, and this sector has had particularly weak performance in the markets in late 2021 and early 2022.[12] Such performance for electronic and autonomous vehicle companies is more likely attributable to business challenges for that industry rather than issues with the de-SPAC process for bringing these operating companies public.

Another criticism of de-SPACs is that the incidence of going-concern warnings for de-SPACs has been increasing in recent months. A going-concern warning is a public disclosure that a public company's auditor has determined that the company may fail within a year. In June, the Wall Street Journal reported that at least 25 companies that went public through a de-SPAC between 2020 and 2021 have issued so-

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[11] *See, e.g.*, Bailey Lipschultz, *Awful SPAC Returns Mean More Frustration for Blank-Check Firms*, BLOOMBERG (April 1, 2022), https://www.bloomberg.com/news/articles/2022-04-01/awful-spac-returns-mean-more-frustration-for-blank-check-firms?sref=2lCQoM0A; BLOOMBERG LAW, *YTD Post-Merger SPAC Performance Is Mostly Negative* (June 11, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ytd-post-merger-spac-performance-is-mostly-negative.

[12] *See, e.g.*, YAHOO FINANCE, *Global X Autonomous & Electric Vehicles ETF (DRIV)* (last accessed June 13, 2022), https://finance.yahoo.com/quote/DRIV/.

called going-concern warnings in recent months.[13] However, the report did not compare the frequency of new going concern warnings for companies that went public via a de-SPAC with similar companies that went public through a traditional IPO. Furthermore, the report did not consider that new going concern reports are extremely common during market stress. For example, in 2007 and in 2008 there were more than 1000 new going concern reports each year by public companies.[14] It is therefore unclear that 25 new going concern reports by de-SPACs during the present market stress represents a noteworthy or disproportionate rise in going concerns by companies that went public through a de-SPAC.

II. SUMMARY OF PROPOSED RULE

If adopted, the Proposed Rule would introduce significant new regulation with a view toward aligning the SPAC and de-SPAC markets with the traditional IPO market.

Specifically, the Proposed Rule would amend Regulation S-K to (i) require additional disclosures about SPAC sponsors, conflicts of interest, and dilution; (ii) require additional disclosures about de-SPAC transactions, including disclosures regarding the fairness of a proposed transaction and whether the sponsor has received any relevant outside reports, opinions, or appraisals regarding to such fairness; and (iii) impose certain prospectus cover page disclosures and other formal requirements.[15] Moreover, a new Article 15 of Regulation S-X[16] would align financial statement reporting requirements in business combinations involving shell companies and private operating companies with the requirements applicable to traditional IPOs.[17] The Proposed Rule would also introduce amendments to Regulation S-K "intended to enhance the reliability of projections disclosure in Commission filings, as well as additional requirements when projections are disclosed in connection with de-SPAC transactions.[18]

The Proposed Rule would also implement new "procedural protections" designed to align the SPAC and de-SPAC process more closely with traditional IPOs. Such protections would include (i) deeming private operating companies to be "co-registrants" on the registration statement of the SPAC, such that the private operating company and its signatories would be subject to Section 11 liability under the Securities Act; and (ii) defining "blank check company" to encompass SPACs and certain other entities for purposes of the Private Securities Litigation Reform Act of 1995 (the "**PSLRA**"),[19] rendering the safe harbor thereunder unavailable for SPACs, including with respect to financial and operational projections of private operating company targets of de-SPAC transactions.[20]

Under the Proposed Rule, new Securities Act Rule 140a would deem "anyone who has acted as an underwriter of the securities of a SPAC and takes steps to facilitate a de-SPAC transaction, or any related financing transaction or otherwise participates (directly or indirectly) in the de-SPAC transaction to be

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[13] Eliot Brown, *SPACs Are Warning They May Go Bust*, WALL STREET JOURNAL (May 27, 2022), https://www.wsj.com/articles/spacs-are-warning-they-may-go-bust-11653601111.

[14] AUDIT ANALYTICS, *Going Concerns – a Twenty-Year Review* (March 18, 2021).

[15] 87 Fed. Reg. at 29,463.

[16] 17 C.F.R. § 210.1-01 *et seq*.

[17] 87 Fed. Reg. at 29,464.

[18] *Id*.

[19] Public Law 104–67, 109 Stat. 737 (1995).

[20] 87 Fed. Reg. at 29,463.

engaged in a distribution and to be an underwriter in the de-SPAC transaction."[21] Such parties would consequently be subject to Section 11 liability for disclosures related to the de-SPAC transaction, thus in the SEC's view "better motivat[ing] SPAC underwriters to exercise the care necessary to ensure the accuracy of the disclosure in these transactions."[22]

III. ANALYSIS & RECOMMENDATIONS

The Committee generally supports enhanced disclosure regarding SPACs and de-SPAC transactions. In particular, the Committee supports the proposed enhanced disclosures regarding (i) SPAC sponsors, conflicts of interest, and dilution; and (ii) de-SPAC transactions, including disclosures regarding the fairness of a proposed transaction and whether the sponsor has received any relevant outside reports, opinions, or appraisals related to such fairness. Taken together, the Committee believes that these important reforms to Regulation S-K will place investors in a better position to evaluate the merits of SPAC and de-SPAC transactions.

That said, we would like to highlight the below concerns with the Proposed Rule and set forth certain recommendations that, in the Committee's view, would better align the proposal with its policy aims.

A. The Proposed Rule would subject an underwriter in a SPAC IPO to liability for disclosures in the de-SPAC transaction. This change would potentially disrupt settled understandings of underwriter status and is negatively impacting SPAC and de-SPAC markets today without the opportunity for public comment.

Section 2(a)(11) of the Securities Act defines "underwriter" 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 underwriting…."[23] However, the Proposed Rule would go further and deem "anyone who…takes steps to facilitate a de-SPAC transaction, or any related financing transaction or otherwise participates (directly or indirectly) in the de-SPAC transaction to be engaged in a distribution and to be an underwriter in the de-SPAC transaction."[24]

The resulting Section 11 liability would therefore apply to investment banks involved in SPACs and de-SPAC transactions despite the SEC's acknowledgment that "SPAC IPO underwriters typically are not retained to act as firm commitment underwriters in the de-SPAC transaction."[25] Whether and to what extent a SPAC underwriter has "facilitated" the de-SPAC transaction—and whether such activities rise to the level of taking on Section 11 liability for the later transaction—is not adequately considered by the Proposed Rule[26] and is a significant ambiguity that is likely to have a chilling effect on present and future SPACs, such as slowing down planned transaction timelines, increasing ancillary costs, *etc*.

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[21] *Id*.

[22] *Id*.

[23] 15 U.S.C. § 77b(a)(11).

[24] *Id*. at 29,463.

[25] *Id*. at 29,486.

[26] For example, the proposing release fails to consider *In re Lehman Bros. Mortgage Backed Sec. Litig.*, 650 F.3d 167, 177 (2d Cir. 2011), which distinguished the cases cited in the proposing release in concluding that a person is not an underwriter simply because it "tak[es] steps that facilitate the eventual sale of a registered security." It held, rather, that "persons playing roles essential in the actual distribution of securities qualify as underwriters." 650 F.3d 167, 178.

Furthermore, the proposing release repeatedly characterizes this reform to the definition of an underwriter as merely a "clarification" of a SPAC underwriter's status under existing law, meaning that it would apply *now* and potentially retrospectively to banks involved in SPACs and de-SPAC transactions. Indeed, certain banks have frozen their SPAC underwriting activities and are exiting the business now due to the high potential liability risk involved in SPAC underwriting activities covered by the Proposed Rule.[27] In the Committee's view, at the very least, the SEC should provide the public with the opportunity to comment on such a significant reform.

Recommendation: The Proposed Rule should be revised to conform its definition of an underwriter to existing law regarding statutory underwriter status.

B. The Proposed Rule would appear to impose retroactive obligations on SPAC market participants.

By its terms, the Proposed Rule's various provisions appear to apply immediately upon adoption to all existing SPACs, effectively introducing retroactive requirements on current market participants who have had neither notice nor an opportunity to comment. This feature of the proposal is already having a chilling effect on the market, as discussed directly above in Part III.A.

Recommendation: The Proposed Rule should be revised to clarify that it does not apply retroactively to already formed SPACs but has only prospective effect to SPACs formed after the Final Rule's effective date.

C. The Proposed Rule fails to adequately assess the costs and benefits of the proposed exclusion of SPACs from the PSLRA safe harbor for forward-looking statements.

The proposal would eliminate the liability safe harbor under the PSLRA for financial and operational projections of private operating company targets of de-SPAC transactions.[28] According to the proposal, the SEC "sees no reason to treat forward-looking statements made in connection with de-SPAC transactions differently than forward-looking statements made in traditional initial public offerings, in that both instances involve private issuers entering the public U.S. securities markets for the first time and similar informational asymmetries exist between these issuers (and their insiders and early investors) and public investors."[29]

However, the cost-benefit analysis conducted by the SEC in the proposing release does not adequately consider the costs of the approach to forward-looking statements in the traditional IPO context or assess how these costs might apply in the SPAC context. Instead, the cost-benefit analysis presumes that forward-looking statements by SPACs are "potentially unreasonable and potentially misleading."[30] While the release concedes that the exclusion of IPOs from the PSLRA safe harbor "may have created a chilling effect"[31] on forward-looking statements—a conclusion that is warranted by historical experience—the SEC

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[27] *See e.g*. Ortenca Aliaj, Nikou Asgrai, & Joshua Franklin, *Goldman Sachs pauses work on new Spacs after SEC takes tougher stance*, FINANCIAL TIMES, May 9, 2022, available at https://www.ft.com/content/34d28d11-118f-41a1-9bc0-3ab9412d9b9f.

[28] 87 Fed. Reg. at 29,463.

[29] *Id*.

[30] *Id*. at 29,535.

[31] *Id*.

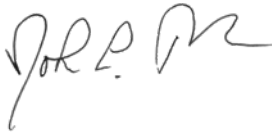
neither cites nor conducts any empirical studies to suggest that forward-looking statements with regard to SPACs (or even traditional IPOs) are a net detriment to investors.

Recommendation: The SEC should conduct a cost-benefit analysis of the impact of eliminating the PSLRA safe harbor for financial and operational projections of private operating company targets of de-SPAC transactions.

* * *

Thank you very much for your consideration of the Committee's position. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Professor Hal S. Scott (hscott@law.harvard.edu), or its Executive Director, John Gulliver (jgulliver@capmktsreg.org), at your convenience.

Respectfully submitted,



John L. Thornton	Hal S. Scott	R. Glenn Hubbard
CO-CHAIR	PRESIDENT	CO-CHAIR