



June 13, 2022

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

Dear Secretary Countryman:

The SPAC Association (SPACA) is submitting this public comment letter in response to the U.S. Securities and Exchange Commission and its proposed rules and amendments regarding File No. S7-13-22 – Special Purpose Acquisition Companies, Shell Companies, and Projections.

SPACA is the industry trade association that represents key stakeholders involved in the special purpose acquisition company (SPAC) ecosystem, including SPAC sponsors, law firms, insurance service providers, proxy solicitors, accounting firms, academics, nonprofits, and other companies. We are the only organized voice for the SPAC industry in the United States.

The proposed new rules and amendments to regulate the SPAC industry would, broadly, seek to:

- Enhance disclosures and provide additional investor protections in SPAC initial public offerings and in business combination transactions between SPACs and private operating companies (de-SPACs);
- Address the treatment under the Securities Act of 1933 of business combination transactions involving a reporting shell company and amend the financial statement requirements applicable to transactions involving shell companies;
- Provide additional guidance on the use of projections in SEC filings to address concerns about their reliability; and
- Assist SPACs in assessing when they may be subject to regulation under the Investment Company Act of 1940.

We believe these regulatory actions go above and beyond the SEC's purported goal to enhance disclosures and protect investors while also encroaching into legislative territory outside the bounds of the SEC's established purview. Accordingly, many of the provisions are more suitable for the U.S. Congress to address through the legislative process. When retail investors have participated in unsuccessful de-SPAC transactions, such contributable shortcomings are neither from the inherent construct of the SPAC structure nor the disclosure that is provided to the public markets, which are prepared by the same established capital market law firms and accounting firms

as those who service initial public offerings (IPOs). Rather, such failings have predominantly been attributed through access points in the public markets (such as broker-dealers) that are not adequately carrying out their Know Your Customer (KYC) responsibilities. The proposed new rules and amendments are an inadvisable reaction to misguided pressure that overlooks the overall benefits that SPACs provide to capital markets, job creation, or self-imposed corrective actions exemplified throughout the industry's promising history.

While the growth of the SPAC industry has attracted media attention, academic interest and calls for more regulatory oversight, the effects of these proposed rules and amendments will have a deleterious impact on bringing new companies into U.S. markets. SPACs provide access to capital for growing companies in critical sectors that are vital to American innovation. SPACs also serve to address our country's global competitiveness across industries and sectors. The limits and restrictions proposed by the SEC would inhibit that growth and prosperity. Further, these proposals will significantly hinder companies currently in the middle of SPAC transactions, which will impose upon them significant costs and reduce economic growth, not to mention the hundreds of SPACs that will be deterred from entering the public markets as a result of these regulations.

The SPAC Association is committed to working with the SEC Commissioners and staff to ensure that the impacts to industry and American leadership on the global stage are considered as the SEC promulgates its final rulemaking. We hope to work toward a level playing field where the rights of retail investors, as well as the industry itself, are protected and safeguarded from bad actors. We look forward to working with the SEC to promote a more cooperative structure for protecting investors and providing access to capital for growing American companies. Below, we have highlighted several areas of most pressing concern, and we urge the SEC to take a closer look at these concerns, value the data with regard to the economic impact and job creation, and consult with industry participants to gain a fuller understanding of how the proposed rules will negatively impact business growth.

#### PSLRA safe harbor, forward-looking statements, forecasting, projections, and disclosures.

The Private Securities Litigation Reform Act (PSLRA) and its safe harbor for forward-looking statements protects SPAC companies from speaking about the future and the growth potential of the transaction in relation to attracting investors. The proposal would amend the definition of "blank check company" to include SPACs, which would have the effect of making the safe harbor unavailable for disclosure in de-SPAC registration statements, including projections. If SPACs are not permitted to avail themselves of this protection under the PSLRA as they have been since the inception of SPACs, should any public company be permitted to do a material acquisition and have this protection? The discrimination here is as much about historic animosity towards SPACs as it to protect the IPO industry, as if a bit of healthy competition isn't a good thing.

The SEC has proposed these rules to provide retail investors with a cause of action against SPACs for the projections that they provide to the public after an announcement of the proposed business combination, should those projections prove to be erroneous. However, we believe that an opposite result may take place if these proposed rules were to be promulgated: the public may be deprived of potentially helpful information and that same information will only be made available to institutional investors in private settings, like what happens in the IPO market, with the difference

being that the investment banks prepare that information instead of the company doing the acquisition, as is the case with SPACs. As a result, information will be provided to institutional investors privately and no projections will be provided to the public, leading to information asymmetry.

Moreover, because of SEC action through its Investor Alert in March 2021, the use and practice of using projections has changed, forcing bankers, lawyers, and clients to be much more careful. In this respect, the SEC has already achieved its goal, providing a framework through which industry players act with more dutiful diligence and assembly of projections for the benefit of the retail investor.

By removing the safe harbor provisions from SPAC mergers, the proposed rules would replicate the biggest flaw of IPOs, hindering investor visibility toward management expectations and related future prospects. To avoid liability in the absence of IPO safe harbor provisions, newly formed public companies rely on research analysts to provide their own findings to investors. These views are: (1) not dissimilar from an educated guess since analysts do not have access to any non-public data, and are shown by numerous academic studies to be overwhelmingly bullish forecasts; and (2) not available until one quarter after the IPO. By removing access to information available in all public mergers, this proposal will disadvantage retail investors. We would recommend an alternative approach:

In their earnings statements, de-SPAC companies should file their initial forecast in addition to actual earnings. This will allow market forces to reward management teams for making good forecasts and punish those who do not. Such an approach would ultimately promote greater transparency among industry competitors.

#### Rule 140a, the Underwriter Provision.

In the proposed language of this provision, the SEC has overstepped its authority into legislative territory. The Securities Act of 1933 defines an underwriter as:

“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.”

Rule 140a would broaden the legislative definition to make investment banks liable for facilitating SPAC transactions. If the banks are treated as underwriters in SPAC transactions, these rules will have a major impact on the rate at which banks participate, if at all, in SPAC transactions going forward.

IPO underwriters have traditionally taken a conservative approach to the use of projections in IPO disclosures because of their liability as “underwriters.” Consequently, the proposed rule will have a chilling effect on whether investment banks will decide to participate in these transactions in the future. Further, by circumventing the role of the U.S. Congress, the SEC has proposed to make major changes to securities law that forsake the legislative predictability entrepreneurs depend on

when considering whether to create a new business. Such uncertainty in the SPAC market will prove detrimental to its growth, and due to an overly broad interpretation of public law, we urge the SEC to remove this provision.

#### Private investment in public equity (PIPE).

Further exacerbating the externalities inflicted by the proposed rules related to the underwriting provision would be the impact on private investment in the marketplace. This is because PIPE investors are also subject to the underwriter provision. PIPE investors could be said to be in a worse position than regular retail SPAC shareholders. PIPE investors rarely receive more than a 1-hour video call with management and an investor deck prior to making a contractually binding commitment; in contrast, once the deal is announced, management will typically hold group and one-on-one calls with any investor who expresses an interest in not redeeming shares (whether or not they actually hold shares) and release a proxy containing audited financials. Additionally, unlike retail investors, PIPE investors generally sign up to a transaction before it is announced (and so do not benefit from seeing the market reaction) and cannot back out if the transaction is received poorly. Should these rules go into effect, the ultimate result would lead to a significant decline in PIPE investment, essentially stalling any future growth in the industry space.

#### SPAC promote and compensation.

In the proposed rules, the SEC stated that “almost all of the SPAC sponsors’ compensation is contingent on the completion of a de-SPAC transaction, the sponsors may therefore have an incentive to select target companies that would maximize their own, as well as investors’, returns at exit...and there is also a potential conflict of interest for sponsors precisely because their compensation (e.g., 20% promote) is dependent on the completion of a de-SPAC transaction.” The SEC concluded that “this could create an incentive to enter into unfavorable, or less favorable, de-SPAC transactions than would otherwise be optimal for the SPAC’s unaffiliated shareholders because the sponsor’s alternative to a de-SPAC transaction is to liquidate the SPAC, and return the initial public offering proceeds, forfeiting their potential promote.”

The SEC has noted concerns around sponsor incentives not being fully aligned with other shareholders and the difficulty in understanding the compensation structures. Here, we would like to correct the record. The SEC is a disclosure agency, and the SPAC 20% promote is fully and fairly disclosed and has been for decades. If investors want to support a sponsor and pay them 50%, it’s their right. The SEC is supposed to operate on the basis that investors may make any bad investment that they choose if there is full and fair disclosure; otherwise it’s governmental paternalism and that is not our system.

It has been stated that the 20% is a conflict of interest because the sponsors can make money on their investment even below \$10.00. This is true and disclosed and well known. Conflicts under federal securities laws are not a prohibition but need to be disclosed. Under Delaware law, disclosure isn’t the standard and may be more cause for concern. In the Multiplan litigation, the plaintiffs are claiming that the 20% creates an inherent conflict of interest that is irreconcilable even with full disclosure and the Delaware courts will rule on that eventually. Similarly, the way directors are compensated, while again properly disclosed for SEC purposes, may also create a

conflict. But what irks some is that a few sponsors have also taken investment banking-like advisory fees for their own de-SPAC transactions and disclosed the amounts. This has happened in only a few transactions and is an outlier. There are also transactions that the sponsor owns privately and then sells to the SPAC, and that requires a fairness opinion. To be clear, other than the 20% promote and the director compensation, the conflicts constitute a small fraction of SPAC deals. The 20% promote at IPO is typically diluted down to low single digits on transaction closing – the exact percentage is determined based on mutual agreement between the target company and the SPAC. SPACs cannot unilaterally set promote levels if investors and target companies are not in agreement. The promote shares are disclosed in the Investor Presentation and the proxy filings.

#### Redemption, warrants, and investor protection.

The SEC’s Office of Investor Advocate recently issued a letter to the NYSE and NASDAQ exchanges urging both parties to institute listing rules requiring no more than 50% of the SPAC common shares to be allowed to redeem as part of a de-SPAC transaction. In its justification, the Office of Investor Advocate believes the separation of redemption rights and shareholder voting has harmed “the investing public, because the current rules allow new companies to enter the public markets despite the fact that large majorities of the SPAC’s initial investors redeem their shares, indicating their lack of confidence in the prospects of the merged company.”

The alleged harm claimed by the Office of Investor Advocate is that when too many investors elect to redeem their shares for cash, “this can require the SPAC sponsors to seek additional capital through deals that offer discounts or side payments” and that “this is a source of dilution that represents a handicap that the resulting operating company must overcome before it can return profits to ordinary shareholders.”

While we agree with the potential risk that these side payments are dilutive to non-redeeming shareholders, we disagree with the approach the SEC has taken to correct the risk due to the unintended consequences such rules would create. These include ultimately making a SPAC merger an unviable alternative to a traditional public listing. By requiring a minimum number of redemptions, the Office of Investor Advocate’s proposal will create significant uncertainty for any private company contemplating a public listing via SPAC.

Such uncertainty will be borne out by the reduction in the value of public warrants tied to SPACs and will ultimately require any SPAC IPO to include more warrants in the IPO Unit in order to compensate initial shareholders for their initial investment. These additional warrants have a direct impact on the cost of any private company given the potential future dilution, a cost that will be disproportionately borne by the smaller private companies, and their future shareholders, that are more likely to entertain a public listing via SPAC.

Add the additional expenses and potential exposure to liabilities that the recent SEC proposals will create, less the advantages of using forward projections as a result of the Safe Harbor exclusion, and one has to wonder if the SEC is truly looking to improve the SPAC listing process or kill it.

Indeed, SEC Chair Gary Gensler has often stated that the desire to “treat like cases alike” and that investors in SPACs should receive similar protections to those investing in traditional IPOs. Yet

unclear is in what part of a traditional IPO process is there a requirement that an IPO offering must place at least 50% of the initial shares offered. There have been many instances of IPOs being downsized due to tepid market demand. The key in those scenarios is that potential investors in a traditional IPO were provided with updated disclosures ahead of the IPO pricing.

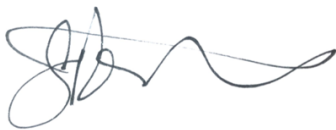
As the NASDAQ and the SEC itself previously concluded, there is no better protection for investors than to allow them to “vote with their feet.” As such, the real risk for public investors is if they do not redeem and a subsequent “side deal” is entered into that creates additional dilution not previously disclosed. Instead of creating execution uncertainty for a company pursuing a public listing via a SPAC, the SEC should stick to its mandate of ensuring investors receive the proper disclosures before they are asked to “vote with their feet.” Such a structure could entail requiring any adjustments to deal terms to be accompanied by a reset of the redemption deadline to allow all investors to make an informed decision.

Finally, critics have commented on the high number of redemptions as of late. If SPAC sponsors, investment bankers, legal services firms, insurance companies and institutional investors don’t structure an optimal, accretive transaction, we see significant redemptions. The high redemptions we are seeing in the market today are an example that capital markets are working efficiently. The IPO market has seen boom and bust around these exact scenarios, across industry sectors and geographies. The free market is working.

#### Conclusion.

The U.S. Securities and Exchange Commission has proposed rules that the SPAC Association believes will significantly harm the ability for American companies to seek access to capital and create jobs in industries that are critical to our country’s future growth and economic development. We urge the SEC to continue to engage with industry participants before the publication of the final proposed rules. We acknowledge the Commission’s desire to safeguard retail investors, but caution that the proposed rules, particularly with respect to Rule 140a, go above and beyond the statutory authority of the SEC and are better suited to be considered by the U.S. Congress. We look forward to further dialogue and discussion with the Commission, as well as the U.S. Congress, as the SEC considers public comments and works toward promulgating the final rulemaking.

Sincerely,



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