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Invested in America

June 10, 2022

VIA EMAIL

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("**SIFMA**"),[1] which represents the shared interests of hundreds of broker-dealers, investment banks, and asset managers throughout the United States, appreciates the opportunity to comment on the above-referenced package of proposed new rules and rule amendments (the "**Release**")[2] regarding special purpose acquisition companies ("**SPACs**").

SIFMA agrees with the Securities and Exchange Commission (the "**Commission**") that investors require useful and clear information in deciding whether to purchase securities in the initial public offering ("**IPO**") conducted by a SPAC (a "**SPAC IPO**") or to trade in the secondary market for post-IPO SPAC securities. They likewise need such information when making voting, investment and redemption decisions in a SPAC's subsequent business combination transaction with one or more private operating companies (a "**de-SPAC transaction**"). In this letter, we do not focus on the disclosure aspects of the Release.

Instead, we are writing to address the Commission's concerns relating to gatekeepers in de-SPAC transactions, and in particular, proposed Rule 140a. SIFMA shares the Commission's

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

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

view of the important role played by gatekeepers under the Securities Act. But we have significant concerns regarding proposed Rule 140a.

Proposed Rule 140a Exceeds the Commission's Statutory Authority and Is Therefore Unlawful

Proposed Rule 140a exceeds the Commission's statutory authority and is therefore unlawful and should be abandoned by the Commission. In the Release, the Commission references concerns about "de-SPAC transactions as a mechanism for private operating companies to access the U.S. public securities markets."[3] The Release points to "the lack of a named *underwriter* in these transactions that would typically perform traditional *gatekeeping* functions, such as due diligence, and would be subject to liability under Section 11" of the Securities Act of 1933, as amended (the "**Securities Act**"), for material misstatements or omissions.[4]

To address this perceived problem, the Commission has proposed Rule 140a under the Securities Act. This entirely new rule would provide:

> 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.[5]

In effect, proposed Rule 140a treats an underwriter's involvement in a fully completed distribution (the SPAC IPO) as central to assigning underwriter status months or even years later. That subsequent underwriter status, and consequent liability, arises in a separate and distinct distribution (the de-SPAC transaction) of the securities of the combined company in a business combination involving the SPAC and one or more operating companies. The proposed rule does this by erasing the distinction between the two entirely separate distributions of securities registered under the Securities Act: proposed Rule 140a treats the SPAC IPO and the later de-SPAC transaction as one continuous distribution of securities, even though the first distribution is complete months or even years before the second distribution, and even though the two distributions involve fundamentally different securities, different investment decisions, and different purchasers. And it makes the underwriter of the SPAC IPO liable for both distributions, even if that underwriter never participated in any purchase, offer, or sale of the securities for distribution in the later de-SPAC transaction.

Proposed Rule 140a thus attempts to impose underwriter status on a new group of persons: banks that the proposed rule would deem to be underwriters of the de-SPAC

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[3] *Id.* at 29461.

[4] *Id.* at 29462 (emphasis added).

[5] *Id.* at 29567 (proposing 17 C.F.R. § 230.140a).

transaction under Section 2(a)(11) of the Securities Act because they underwrote the earlier SPAC IPO. The Commission is transparent about its aim in doing so. It seeks to subject those banks to gatekeeper obligations and potential liability under Section 11 of the Securities Act.[6]

Proposed Rule 140a founders on its defects as a matter of law because it:

- ***stretches the statutory definition of "underwriter" in Section 2(a)(11) of the Securities Act beyond its limits***, ignoring the statutory text, legislative history and judicial interpretations of its meaning;

- ***runs afoul of multiple other provisions of the Securities Act***, by incorrectly deeming the SPAC IPO and the later de-SPAC transaction to be one single distribution of securities;

- ***conflicts with the Commission's proposed Rule 145a***, which recognizes that the SPAC IPO and the subsequent de-SPAC transaction are two distinct distributions, subject to distinct registration requirements under the Securities Act;

- ***conflicts with longstanding policies and practices of the Commission and its Staff***, which permit the initial listing of securities on U.S. stock exchanges and allow investors to make purchase, sale and voting decisions without attempting to impose Section 11 underwriter liability on any persons; and

- ***violates the Administrative Procedure Act*** (the "**APA**"), because proposed Rule 140a is an unreasonable interpretation of the unambiguous text of Section 2(a)(11).

The Commission repeatedly asserts that proposed Rule 140a will "clarify" the existing meaning of Section 2(a)(11).[7] This suggestive word choice has generated confusion among market participants, many of which have perceived—incorrectly in our view—a possible implication that the proposed rule comports with current law or could even have current effect,

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[6] *Id*. at 29463.

[7] *Id.* at 29486 (noting that "proposed Rule 140a would *clarify* that the SPAC IPO underwriter is an underwriter with respect to the distribution that occurs in the de-SPAC transaction" (emphasis added)); *see also id.* (explaining that "*[c]larifying* the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions" will affirm that they are subject to Section 11 liability and thereby motivate them to "help ensure the accuracy of the disclosures in these transactions" (emphasis added)); *id*. at 29487 (asking whether to "limit underwriter status as *clarified* by Rule 140a to the entities acting as traditional underwriter in a SPAC IPO" (emphasis added)); *id*. at 29508 (noting that "proposed Rule 140a *clarifies* the underwriter status of SPAC IPO underwriters at the de-SPAC transaction stage" (emphasis added)); *id*. at 29534 (noting that proposed Rule 140a "would *clarify* the underwriter status of SPAC IPO underwriters in registered de-SPAC transactions" (emphasis added)); *id*. (noting that proposed Rule 140a "would *clarify* that a person who has acted as an underwriter in a SPAC IPO and . . . participates (directly or indirectly) in the de-SPAC transaction will be deemed" to be a statutory underwriter in the de-SPAC transaction (emphasis added)); *id*. at 29536 (discussing expected effects of proposed Rule 140a in "*clarifying* the application of underwriter liability" (emphasis added)); *id*. at 29558 (explaining that the proposed rule would "*clarify* the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions" (emphasis added)).

despite its status as a proposed rule.[8] Far from "clarifying" Section 2(a)(11), the proposed rule distorts the meaning and exceeds the scope of the statute.

We accordingly urge the Commission to abandon proposed Rule 140a. We address our concerns in detail below.

I. Proposed Rule 140a Stretches the Definition of Underwriter Beyond the Limits of Section 2(a)(11)'s Text, Legislative History and Judicial Interpretations

A. Section 2(a)(11) Does Not Have "Unlimited Applicability" to All Persons Associated with a Securities Offering

Section 2(a)(11) of the Securities Act defines an "underwriter" as:

> any person who has purchased from an issuer with a view to, or offers or sells for an 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.[9]

Thus, an underwriter under Section 2(a)(11) is any person who (1) purchased securities from the issuer with a view to their distribution, (2) offers or sells for an issuer in connection with the distribution of any security, or (3) directly or indirectly participates in the purchases, offers or sales relating to the distribution or in the underwriting of those purchases, offers or sales.[10] In other words, Section 2(a)(11) includes as underwriters "any intermediary between the issuer and the investor that is an *essential cog* in the distribution process."[11]

It is crucial to understand that the term "underwriter" as used in Section 2(a)(11) is not "a term of unlimited applicability" that captures "anyone associated" with an issuance of securities:

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[8] The Commission, for its part, acknowledges that the proposed rule may be altogether unnecessary. *Id.* at 29486 (Question 83) (questioning "the need for proposed Rule 140a" based on "the other measures we are proposing in this Release").

[9] 15 U.S.C. § 77b(a)(11).

[10] The third prong of this definition encompasses what are known as the participation clauses, covering any person who "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." *Id.* Our analysis combines the two participation clauses, consistent with the discussion in the Release. *See, e.g.*, Release at 29486 (proposing that advisors "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").

[11] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 178 (2d Cir. 2011) (emphasis added) (alterations and internal quotation marks omitted) (quoting *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1082 (9th Cir. 2010)); *see also FDIC v. First Horizon Asset Sec. Inc.*, 443 F. Supp. 3d 505, 510 n.4 (describing "underwriter" as including "all persons who might operate as *conduits* for securities being placed in the hands of the investing public" (emphasis in original) (internal quotation marks omitted) (quoting *SEC v. Lybrand*, 200 F. Supp. 2d 384, 393 (S.D.N.Y. 2002), *aff'd*, *SEC v. Kern*, 425 F.3d 143 (2d Cir. 2005))); *see generally* 2 Louis Loss, Joel Seligman & Troy Paredes, SECURITIES REGULATION 3.A.3 (6th ed. 2019).

> [C]ourts have emphasized that the breadth of the definition of "underwriter" is intended to sweep up all—but only—those who play a role in the distribution of the securities. . . . [W]hile the definition is indeed broad, "'[u]nderwriter' is not . . . a term of unlimited applicability that includes anyone associated with a given transaction."[12]

The Commission emphasizes only the breadth of Section 2(a)(11) while ignoring its limitations. The underwriter definition applies to "those who play a role in the *distribution*" of securities but not to "anyone *associated* with a given transaction."[13] And yet proposed Rule 140a attempts to expand underwriter status in a manner that federal courts have rejected time and again. This is apparent from the multiple authoritative and controlling cases on the meaning of Section 2(a)(11)—cases impossible to reconcile with proposed Rule 140a—which the Commission fails to acknowledge, mention or cite anywhere in the 372 pages of the Release.[14] As for the cases on which the Commission does rely, those cases lend no support to proposed Rule 140a's attempted expansion of Section 2(a)(11). Indeed, none of the cases cited in the Release provides the legal basis that the Commission asserts for proposed Rule 140a.[15] This includes an 81-year-old decision that more recent controlling authority has limited and distinguished.

Contrary to proposed Rule 140a, a de-SPAC transaction does not involve underwriting activity within the meaning of Section 2(a)(11) because a de-SPAC transaction does not involve "persons playing roles essential in the actual distribution of securities" through any of the distributional activities described in Section 2(a)(11).[16] Although underwriters distribute the securities in a SPAC IPO, the distribution of securities in the later de-SPAC transaction occurs directly from the issuer to the counterparties to the business combination, without the involvement of underwriters. We now turn to this in detail.

B. Unlike a SPAC IPO, a De-SPAC Transaction Does Not Involve Underwriters

Unlike the distribution of securities in a SPAC IPO—in which an investment bank purchases securities from the SPAC and distributes the securities to IPO investors—there is no underwriter in a de-SPAC transaction because a business combination involves the direct issuance of securities by the issuer to the shareholders of the counterparty to the business combination. As a result, de-SPAC transactions *do not* involve underwriters because no person engages in the distributional activities described in *any* of the clauses of Section 2(a)(11).

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[12] *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *4 (S.D.N.Y. 2008) (citing *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989)).

[13] *Id*. (emphasis added) (citation omitted).

[14] *See* Appendix A attached hereto.

[15] *See* Appendix B attached hereto.

[16] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 178 (2d Cir 2011).

1. No Person in a De-SPAC Transaction Purchases with a View to Distribution

The interpretation of Section 2(a)(11)'s underwriter definition has "traditionally focused" on the first clause of the definition: those who have "purchased from an issuer with a view to distribution."[17] In particular, decisions construing the first clause have focused on "the words 'with a view to' in the phrase 'purchased from an issuer with a view to . . . distribution.'"[18] As the Commission has explained, this clause encompasses persons who "act as links in a chain of transactions through which securities move from an issuer to the public."[19] This will typically include "an investment banking firm which arranges with an issuer for the public sale of its securities."[20] But it can also include other persons who act as conduits for securities being placed in the hands of the investing public. In other words, underwriter status can attach to any third party who purchased securities from the issuer and moves those securities from the issuer to public investors.

In a de-SPAC transaction, however, there is no person other than the issuer who moves the securities of the combined company to public investors. The SPAC will offer its securities *directly* to the shareholders of the operating company, or the SPAC and the operating company will use a business combination transaction that similarly results in a direct offering to the operating company's shareholders. This occurs via registered offer of newly issued securities of the combined company in exchange for all outstanding securities of the constituent corporation in the business combination. For that reason, the de-SPAC transaction is fundamentally different than the SPAC IPO, and unlike the SPAC IPO there is no entity that fits the definition of underwriter as set out in the first clause of Section 2(a)(11).

2. No Person in a De-SPAC Transaction Engages in an Offer or Sale for an Issuer in Connection with the Distribution

The second clause of Section 2(a)(11) encompasses any person who "offers or sells for an issuer in connection with the distribution." As noted in a leading securities law treatise, this clause "has been used sparingly in determining whether particular persons qualify as underwriters."[21] Nearly all of those infrequent instances, moreover, involve unregistered distributions in violation of Section 5 of the Securities Act.[22] Indeed, the cases cited in the Release are "of questionable relevance because they involved SEC enforcement actions against

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[17] Release No. 33-5223, 37 Fed. Reg. 591, 592 (Jan. 14, 1972); *see also* Rule 144 Preliminary Note, 17 C.F.R. § 230.144.

[18] 37 Fed. Reg. at 592.

[19] *Id.*

[20] *Id.*

[21] 7A J. William Hicks, EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933, § 9:39 (May 2022 update).

[22] *See id*. at § 9:39 n.19.

defendants for selling *unregistered* securities in violation of Section 5 rather than Section 11 liability for misstatements or omissions in registration statements."[23]

In practice, courts have applied this clause to persons in unregistered public offerings—*i.e.*, distributions that are illegal under Section 5—who systematically and continuously solicit orders to buy the issuer's securities, and then collect funds from buyers and remit payment to the issuer for the purchase and ultimate distribution of the securities without registration or an available exemption.[24] Cases concerning this clause "do not hold that anyone taking steps that facilitate the eventual sale of a registered security fits the statutory definition of underwriter,"[25] and the precedents cited by the Release "involved defendants who themselves participated in distributing securities" by soliciting orders, obtaining cash from purchasers and delivering securities.[26]

Again, however, no participant in a de-SPAC transaction engages in conduct that would fit this definition because there is no person other than the issuer itself, pursuant to the registration statement, who engages in soliciting orders to buy the combined company's securities or who remits payment to the combined company for the purchase and distribution of its securities. Instead, the combined company's securities come to rest in the hands of its shareholders through a direct offering or other business combination that does not involve any distribution-related activity conducted by any broker-dealer or any other intermediary that is separate from the issuer itself.

3. No Person in a De-SPAC Transaction Participates in Any Purchase, Offer, or Sale of Securities for Distribution

The participation clauses of Section 2(a)(11) encompass any person who "participates or has a direct or indirect participation in any such undertaking," with the phrase "any such undertaking" referring back to the activities described by the preceding two clauses of Section 2(a)(11)—*i.e.*, the purchases, offers or sales relating to the distribution of securities.

As a result, the terms "participate" and "participation" in this context have a specific meaning that refers to distribution-related activities but *not* "services that facilitate a securities

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[23] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 178 n.8 (2d Cir. 2011) (emphasis added) (citing *SEC v. Kern*, 425 F.3d 143, 147-48 (2d Cir. 2005); *SEC v. N. Am. Research Dev. Corp.*, 424 F.2d 63, 70-72, 80-82 (2d Cir. 1970); *SEC v. Culpepper*, 270 F.2d 241, 245-48 (2d Cir. 1959); *SEC v. Chinese Consol. Benevolent Ass'n*, 120 F.2d 738, 739-41 (2d Cir. 1941)). "'[I]n the context of an enforcement action,' courts have held 'any person who is a "necessary participant" or a "substantial factor" in' a sale of unregistered securities liable pursuant to § 5." *Id*. (quoting 1 Thomas Lee Hazen, LAW OF SECURITIES REGULATION § 2.2[1][A] (6th ed. 2011)).

[24] *See, e.g.*, *Chinese Consol. Benevolent Ass'n*, 120 F.2d at 740-41.

[25] *Lehman Bros.*, 650 F.3d at 178.

[26] *Id.* (citing *Kern*, 425 F.3d at 152 (defendants "acquired securities from affiliates with a view to distribution"); *Chinese Consol. Benevolent Ass'n*, 120 F.2d at 740-41 (defendant "solicited" orders, "obtained . . . cash from" purchasers, and "forwarded" bonds)).

offering" generally. That is the central teaching of *In re Lehman Bros. Mortgage-Backed Securities Litigation*,[27] in which the United States Court of Appeals for the Second Circuit held:

> The plain language of the statute limits liability to persons who participate in the purchase, offer, or sale of securities for distribution. While such participation may be indirect as well as direct, the statute *does not* reach further to identify as underwriters persons who provide services that *facilitate* a securities offering, but who do not themselves *participate* in the *statutorily specified* distribution-related activities.[28]

In other words, the participation clauses of Section 2(a)(11) confer underwriter status only on a person who participates, directly or indirectly, in purchasing securities from an issuer with a view to distribution, in offering or selling securities for an issuer in connection with a distribution or in the underwriting of such an offering.[29] In a de-SPAC transaction, however, no person engages in activities that constitute "participation" in statutorily specified distribution-related activities because the combined business offers its securities directly to the shareholders of the counterparty, and there is no third party who acts as a conduit for the securities being distributed to the counterparty shareholders.

The Release sidesteps this crucial point. Instead, the Commission uses "participate" in a loose, almost colloquial sense comparable to "involvement in the offering," equating the phrase "participates in the distribution" with "taking steps to facilitate the de-SPAC transaction."[30] This ignores the text of the statute, under which the relevant "participation" occurs only in connection with the statutorily specified distribution-related activities described above. In so doing, the Commission also ignores the fact that "'participates' and 'participation' . . . have a technical meaning under Section 2(a)(11) and should be used with care and precision."[31] The Second Circuit and other courts have explained that persons can "participate" in a distribution only by "playing roles *essential* in the *actual distribution* of securities."[32] By contrast, merely "taking

[27] 650 F.3d 167 (2d Cir. 2011).

[28] *Id*. at 175-76 (emphasis added).

[29] *See id*.

[30] Release at 29486 (referring to "a person who . . . participates in the distribution by taking steps to facilitate the de-SPAC transaction").

[31] Hicks, *supra* note 21, at § 9:54 ("The terms 'participates' and 'participation' . . . have a technical meaning under Section 2(a)(11) and should be used with care and precision. . . . An indiscriminate use of the terms 'participants,' 'participation,' and 'participates' . . . ignores not only the technical meaning that those terms have under Section 2(a)(11) but also the special meaning that they enjoy under other provisions of the federal securities laws.").

[32] *Lehman Bros.*, 650 F.3d at 178 (emphasis added); *see also id.* at 182 ("[T]he text, case law, legislative history, and purpose of the statute demonstrate that Congress intended the participation clause of the underwriter definition to reach those who participate in purchasing securities with a view towards distribution, or in offering or selling securities for an issuer in connection with a distribution, *but not further*." (emphasis added)); *see also Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 507-09 (S.D.N.Y. 2018); *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *4 (S.D.N.Y. Aug. 14, 2008); *In re WorldCom Sec. Litig.*, 308 F. Supp. 2d 338, 343 (S.D.N.Y. 2004); *see also* Hazen, *supra* note 23, § 4:98 & n.13 (summarizing the case law to stand for the proposition that

steps that facilitate the eventual sale of a registered security" is not enough to constitute "participation" within the meaning of Section 2(a)(11).[33]

The Commission ignores all of these principles in proposing Rule 140a. The proposed rule attempts to impose underwriter status "in a de-SPAC transaction" on any SPAC IPO underwriter who—after the SPAC IPO distribution is complete—later "*takes steps to facilitate* the de-SPAC transaction, or any related financing transaction, or *otherwise participates* (directly or indirectly) in the de-SPAC transaction."[34] Indeed, the precise phrase at the heart of proposed Rule 140a—"takes steps to facilitate"—is a test that the Second Circuit in 2011 specifically rejected as a basis for underwriter status.[35] Moreover, in reaching that conclusion, the Second Circuit distinguished and limited the opposite holding of the same 81-year-old Second Circuit case on which the Commission principally relies in proposing Rule 140a. "Contrary to plaintiffs' contention, our prior cases *do not* hold that anyone taking *steps that facilitate the eventual sale* of a registered security fits the statutory definition of underwriter."[36] And yet the Release nowhere cites or acknowledges this more recent case that provides the relevant analysis of the statutory limits on the scope of the underwriter definition under the Securities Act.

Lehman Bros. involved Section 11 claims brought by plaintiffs against the major credit rating agencies.[37] The plaintiffs sought to hold the rating agencies liable as underwriters on the theory that the rating agencies' comprehensive involvement in certain offerings made them distribution "participants" under Section 2(a)(11).[38] The plaintiffs alleged that the rating agencies took extensive steps to facilitate the offerings by "actively aiding in the structuring and securitization process," engaging in "an 'iterative process'" with the banks, providing "'feedback' on which combinations of loans and credit enhancements would generate particular

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"[u]nderwriter status attaches when an individual or an entity p[l]ays an[] *essential role* in the distribution of securities" (emphasis in original)).

[33] *Lehman Bros.*, 650 F.3d at 177; *see also* Hicks, *supra* note 21, at § 9:54 ("The terms 'participates' and 'participation' . . . have a technical meaning under Section 2(a)(11) and should be used with care and precision. . . . An indiscriminate use of the terms 'participants,' 'participation,' and 'participates' . . . ignores not only the technical meaning that those terms have under Section 2(a)(11) but also the special meaning that they enjoy under other provisions of the federal securities laws."). *But cf*. Release at 96-98 (using "participates" to mean "taking steps to facilitate" without reference to the statutorily enumerated distributional activities in Section 2(a)(11)).

[34] Release at 29567 (proposing 17 C.F.R. § 230.140a).

[35] *See Lehman Bros.*, 650 F.3d at 176.

[36] *Id*. at 177-78 (distinguishing, among other cases, *SEC v. Chinese Consol. Benevolent Ass'n*,120 F.2d 738, 740-41 (2d Cir. 1941)). *But cf.* Release at 29486 & n.202 ("Although SPAC IPO underwriters typically are not retained to act as firm commitment underwriters in the de-SPAC transaction, they nevertheless typically participate in activities that are necessary to that distribution." (citing *Chinese Consolidated Benevolent Ass'n*)); *id*. at 29484-85 n.186, 29485 nn.189 & 191.

[37] *Lehman Bros.*, 650 F.3d at 170-71.

[38] *Id.* at 171, 175-76.

ratings," and providing "their modeling tools to the banks' traders to help them pre-determine the combinations of credit enhancements and loans needed to achieve specific ratings."[39]

Despite these allegations, the Second Circuit rejected the attempt to characterize the rating agencies as distribution participants. The court explained that invoking

> participant liability does not answer the question: participation in what? A plain reading of the text points us to one answer: participation in the distribution of securities, either through the *purchase of securities* from an issuer with a view towards distribution, the *sale or offer of such securities* by an issuer, or the *underwriting* of such undertakings.[40]

Proposed Rule 140a seeks to do for de-SPAC transactions what the plaintiffs attempted unsuccessfully to do for the rating agencies in *Lehman Bros.* The Commission wants to deem any entity that served as an underwriter of the SPAC IPO to be an underwriter of the later de-SPAC transaction, despite the absence of any "purchase of securities from an issuer with a view towards distribution," any "sale or offer of such securities" or the "underwriting of such undertakings."[41] The Second Circuit's decision in *Lehman Bros.* forecloses such an unprecedented expansion of the definition of underwriter.

The Second Circuit emphasized—and the Release completely ignores—the requirement in Section 2(a)(11) that "participation" in underwriting depends on "statutorily enumerated distributional activities" (*i.e.*, participating in the purchase, offer, or sale of securities for distribution) rather than "non-distributional activities" that may facilitate the distribution by others:

> To be sure, "direct or indirect participation" in underwriting subjects a person to strict liability. But the participation must be in the *statutorily enumerated distributional activities*, not in non-distributional activities that may facilitate the eventual distribution by others. This approach avoids the implausible result of transforming every . . . professional whose work is theoretically "necessary" to bringing a security to market into an "underwriter" subject to strict liability under Section 11, a dramatic outcome that Congress provided no sign of intending.[42]

In reaching this conclusion, the Second Circuit looked back to the legislative history of the Securities Act.[43] It pointed to a 1933 House Report explaining that the participation clauses

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[39] *Id.* at 172-73.

[40] *Id.* at 180 (emphasis added).

[41] *Id.*

[42] *Id*. at 181 (emphasis added) (citing Section 2(a)(11)).

[43] *Id.* at 180 (citing H.R. Rep. No. 73-85 (1933); H.R. Rep. No. 73-152 (1933)).

"include not only the ordinary underwriter, who for a commission promises to see that an issue is disposed of at a certain price, but also . . . the person who purchases an issue outright with the idea of then selling that issue to the public" as well as "two other groups of persons who perform functions, similar in character, in the distribution," namely (1) underwriters of the underwriter, and (2) "participants in the underwriting or outright purchase . . . who are given a certain share or interest."[44] Ultimately, the Second Circuit emphasized that congressional intent focused on persons who "*operate as conduits* for securities being placed into the hands of the investing public,"[45] and "Congress did *not* intend for strict underwriter liability to extend to persons merely interested in a distribution by virtue of their provision of non-distribution services to an offeror."[46]

Participation in this sense involves activities that are distinguishable from other statutorily enumerated distributional activities. For example, persons may be liable for participation, even though they do not themselves directly sell or offer securities or purchase securities for resale, "by referring investors to sellers or offerors for a fee" or by "acting as an intermediary in a purchase of securities for resale" to an investor.[47] By contrast, other activities that may facilitate or be an integral part of the distribution—even extensive steps to facilitate the offering, such as involvement in transaction structuring for purposes of providing credit ratings around which the issuer allegedly designed the securities—do not amount to "participation."

C. Proposed Rule 140a Exceeds the Scope of Section 2(a)(11)

Applying Section 2(a)(11) to a de-SPAC transaction shows how proposed Rule 140a exceeds the scope of the statutory provision. In a de-SPAC transaction, there is no person whose activities constitute "participation" in "statutorily enumerated distributional activities." The combined business in a de-SPAC transaction offers its securities directly to the shareholders of the counterparty to the business combination, and no third party acts as a conduit for securities being placed in the hands of the investing public.[48] Instead, the distribution of securities in the business combination occurs directly from the issuer of the securities in the business combination transaction to the shareholders of the counterparty, without any distributional activities of any person acting as an underwriter within the meaning of Section 2(a)(11). In short, the distribution of securities in a de-SPAC transaction is no different than the distribution

[44] H.R. Rep. No. 73-85, at 13 (1933). A later House Report explained that the final definition excluded those who merely furnish money to an underwriter, and adopted a test "of participation in the underwriting undertaking rather than that of a mere interest in it." H.R. Rep. No. 73-152, at 24 (1933).

[45] *Lehman Bros.*, 650 F.3d at 180-81 (emphasis added) (quoting Hazen, *supra* note 23, § 4.27[1]).

[46] *Id*. at 181 (emphasis added); *see also In re WorldCom Sec. Litig.*, 308 F. Supp. 2d 338, 344 (S.D.N.Y. 2004) ("Having a relationship with an issuer or underwriter . . . does not transform one into an underwriter.").

[47] *Lehman Bros.*, 650 F.3d at 181 n.10 (emphasizing that "limiting liability to those who participate in the listed distributional activities does not render the direct or indirect participation prong of the underwriter definition superfluous").

[48] That is true even in the circumstance where a financial institution acts as a placement agent in a PIPE financing, which falls under the Section 4(a)(2) private-placement exemption and is distinct from either of the distributions.

of securities in any other type of business combination transaction that is registered under the Securities Act—*i.e.*, no underwriters are involved.

The absence of underwriters in a de-SPAC transaction shows how proposed Rule 140a impermissibly ranges beyond the limits of Section 2(a)(11). Consider a hypothetical investment bank that serves as an underwriter for a SPAC IPO. Eighteen months after the SPAC IPO has been completed and the SPAC securities have begun trading on a stock exchange, the investment bank then serves as a financial advisor for one of the parties in connection with a de-SPAC transaction in which the SPAC combines with an operating company. The investment bank's role in the later de-SPAC transaction is limited to advisory services in connection with the business combination. The investment bank does not participate in any purchasing, offering, or selling of securities offered in the de-SPAC transaction, and all of the distributive activity occurs directly by the issuer pursuant to the registration statement under which its securities are issued to the security holders of the constituent corporation in the business combination.

Even so, proposed Rule 140a states that the hypothetical investment bank "will be deemed" an underwriter of that de-SPAC transaction. The proposed rule would reach this result even though, as we have demonstrated above, the investment bank's role in the subsequent de-SPAC transaction does not satisfy *any* of the three clauses of the statutory underwriter definition: (1) the investment bank does not purchase securities from the issuer with a view to their distribution; (2) the bank does not offer or sell for the issuer in connection with the distribution of any security; and (3) the bank has no direct or indirect participation in the purchase, offer or sales relating to the distribution or in the underwriting of those purchases, offers or sales. As a result, proposed Rule 140a would subject the investment bank to liability under the Securities Act, thereby overriding Congress's choice to limit Section 11 underwriter liability only to those satisfying the definition of underwriter in Section 2(a)(11).

D. The Commission Attempts to Shoehorn De-SPAC Transaction Advisors into Section 2(a)(11) by Wrongly Treating the SPAC IPO and the Later De-SPAC Transaction as a Single Distribution

The Commission seems to recognize that Section 2(a)(11)'s logical limitations are fatal to the Commission's desire to impose gatekeeper obligations where they do not exist under the Securities Act. The Commission brushes these limits aside by treating the SPAC IPO and the later de-SPAC transaction as one continuous distribution of securities. Using this maneuver, the Commission purports to satisfy the elements of Section 2(a)(11) based on the fact that underwriters distribute the securities in a SPAC IPO while ignoring the fact that the distribution in a de-SPAC transaction occurs directly from the issuer to the counterparties to the business combination, without the involvement of underwriters. Even so, the Commission cannot end-run Section 2(a)(11) by declaring the de-SPAC transaction to be a slow-motion continuation of the SPAC IPO. Despite proposed Rule 140a, and as the Commission well knows, a SPAC IPO and a de-SPAC transaction involve two separate and distinct distributions of different securities. And, in any event, the SPAC IPO underwriter's only distributional activities occur in connection with the SPAC IPO.

1. The Distribution in the SPAC IPO Ends When the SPAC Sells the IPO Securities to Public Investors

In a SPAC IPO, the SPAC offers its securities to the public in a firm-commitment underwritten offering in which investment banking firms purchase securities from the SPAC and distribute them to public investors. Concurrently with the IPO, the SPAC's securities are listed for trading on a stock exchange. Thereafter, ordinary trading in the SPAC's securities takes place in secondary market transactions. In this sense, the distribution of securities that occurs in a SPAC IPO is no different from the distribution that occurs in an underwritten IPO by an operating company. Any investment bank that purchases securities from the SPAC and distributes the securities to public investors in the IPO "is clearly an 'underwriter'" of the SPAC IPO securities, as the Release states.[49] But the distribution of securities in the SPAC IPO transaction ends with the SPAC's completion of its sale of securities to the IPO investors. At that point, the SPAC IPO's "block of securities is dispersed and ultimately comes to rest in the hands of the investing public," marking the completion of the SPAC IPO.[50]

2. The Distribution in the Later De-SPAC Transaction Is Separate and Distinct from the SPAC IPO Distribution

An altogether separate distribution of securities occurs when a SPAC engages in a de-SPAC transaction months or years after the SPAC has originally raised capital in the SPAC IPO. The later de-SPAC transaction is a *business combination* involving the SPAC and one or more operating company targets, and can take a number of forms. Often, the SPAC acquires the operating company outright. Alternatively, the operating company can acquire the SPAC, or a new holding company can acquire both the SPAC and the operating company. As with any business combination transaction, a number of such structural variations are also possible. Regardless of the form chosen from among those variations, the end result of the de-SPAC transaction is fundamentally different than that of the earlier SPAC IPO: the de-SPAC transaction creates a combined entity to conduct the business of the operating company.

Needless to say, the business combination in the de-SPAC transaction will frequently involve the distribution of securities, for example in a share exchange in which one party to the transaction issues securities as merger consideration in exchange for all of the outstanding securities of the other party. As the Commission explains in the Release, that distribution of securities ultimately entails "a registered offer of securities" and is effectively how the combined company's "securities 'come to rest'—in other words, are distributed—to public investors."[51]

But there is nothing exotic about this fact: in this respect, the de-SPAC transaction is exactly the same as any other business combination between two operating companies conducted via a share exchange in which no SPAC is involved. Public merger transactions often take the form of securities offerings registered on a Securities Act registration statement. In nearly all such transactions, an investment banking firm will have acted as a financial advisor or will have

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[49] Release at 29484.

[50] *See id.* at 29485 & n.196 (quoting Hicks, *supra* note 21, § 9:18).

[51] *Id.* at 29485 & 29485 n.197.

rendered a fairness opinion. And we have identified no case in which either the Commission or a court has imposed underwriter liability on a party in that scenario.

In sum, unlike the earlier underwritten distribution of securities in a SPAC IPO, in the later de-SPAC transaction no person acts as an underwriter. This is so because the de-SPAC transaction involves the direct issuance of securities by the issuer to the business combination counterparty's shareholders. As a result, de-SPAC transactions do not involve underwriters because no person engages in any of the distributional activities described in Section 2(a)(11).

E. Even if the Two Separate Distributions of the SPAC IPO and the De-SPAC Transaction Were Viewed Together, the SPAC IPO Underwriters Distribute Only the SPAC IPO Securities, Which Are Separate and Distinct from the De-SPAC Transaction Securities

Treating the two distributions of the SPAC IPO and the de-SPAC transaction as one single distribution collapses the months or even years separating the SPAC IPO from the de-SPAC transaction and ignores the lawful ordinary trading on an exchange that the Securities Act permits only after the completion of the SPAC IPO distribution. But even if the two distributions could be viewed together as one single distribution, the logic of proposed Rule 140a would then become (i) underwriting the distribution of one security *plus* (ii) taking steps to facilitate the distribution of another security *equals* (iii) underwriting the latter security.

The problem with this logic is that a person's underwriting activity with respect to one security cannot automatically confer underwriter status with respect to a different security for which the person does not engage in statutorily enumerated distributional activity—even in the case of a single transaction in which multiple securities are issued simultaneously. SPAC IPO underwriters engage in statutorily enumerated distributional activity only with respect to the IPO securities, which they purchase with a view to distribution. By contrast, the SPAC IPO underwriters engage in no such activity with respect to the securities issued as merger consideration in the de-SPAC transaction. This is a critical point because an investment bank has no underwriting responsibility for a security that it does not distribute. And that is true even if the bank engages in distributional activity in one offering involving the distribution of multiple classes of securities.

A recent case illustrates this principle. The plaintiff in *FDIC v. First Horizon Asset Securities Inc.* purchased senior class certificates in an offering involving different classes of securities offered simultaneously and underwritten by different investment banks.[52] The plaintiff sued all of the underwriters in the offering to recover damages under Section 11 of the Securities Act, and defendant RBS Securities Inc. ("**RBS**") moved for summary judgment because it had distributed (*i.e.*, purchased from the issuer and sold to public investors) only the subordinated class certificates in the offering, not the senior class certificates that the plaintiff had purchased.[53] The court granted summary judgment in favor of RBS because it was not an underwriter of the senior class certificates in the same public offering. "Section 11 gives a purchaser of a security"

[52] 443 F. Supp. 3d 505, 506-07 (S.D.N.Y. 2020).

[53] *Id*. at 507.

the right "to sue 'every underwriter with respect to *such security*,' or 'underwriters of the *security at issue*,'"[54] the court explained, but the "right does not encompass suing every underwriter" in the entire offering "and each of its securities."[55]

Although RBS was involved in all facets of the offering—performing due diligence, verifying the prospectus supplements, obtaining comfort letters from accountants, obtaining negative assurance from legal counsel, and approving the final prospectus supplements—RBS was not an underwriter of the securities that the plaintiff purchased from other banks. RBS had purchased and distributed only the subordinated certificates, which the plaintiff had not acquired. The court explained:

> Although RBS's performance of due diligence and review of the prospectus supplements *helped facilitate* the securities offerings, those activities do *not* involve the purchase, offer, or sale of the securities and thus are not part of their distribution. RBS's only distributional activities are in connection with the subordinated certificates.[56]

The court concluded that even if RBS's actions had been "essential to the distribution of the certificates" that the plaintiff did purchase, RBS had not acted as an underwriter of those securities.[57] This was because RBS's involvement in the offering—even if the plaintiff's securities "would never have been offered" without the activities of RBS—was "not part of the purchase, offer, or sale of the senior certificates" that the plaintiff had purchased in the offering.[58]

Even under proposed Rule 140a's incorrect premise of a single distribution spanning from the SPAC IPO to the conclusion of the de-SPAC transaction, an underwriter of SPAC IPO securities would not become an underwriter of other securities in the offering that it does not distribute. As the holding in *First Horizon* demonstrates, an underwriter of SPAC IPO securities is not an underwriter of the securities issued in the subsequent business combination that occurs in the de-SPAC transaction. Just like in *First Horizon*, the SPAC IPO underwriter's "only distributional activities" occur in connection with the securities it sold to public investors—*i.e.*, the SPAC IPO securities.

[54] *Id.* at 508 (first quoting 15 U.S.C. § 77k(a), then quoting *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.2d 167, 175 (2d Cir. 2011) (emphasis added)).

[55] *Id*. at 508 (citations omitted).

[56] *Id*. at 509 (emphasis added).

[57] *Id.* at 510.

[58] *Id*.

F. The Commission Cannot Rely on Policy Arguments to Override the Limits Congress Created in Section 2(a)(11)

The Commission does not explain how its expansion of underwriter liability is justified by Section 2(a)(11)'s text. Rather, proposed Rule 140a would "deem" the former underwriters of the SPAC IPO to be underwriters of the de-SPAC transaction.

The Commission lacks the authority to declare that the subsequent de-SPAC transaction is part of a single, continuous distribution with the SPAC IPO. The two distributions are separate and distinct: initially, the SPAC IPO's "block of securities is dispersed and ultimately comes to rest in the hands of the investing public,"[59] and months or years later, the combined company's "securities 'come to rest'—in other words, are distributed—to public investors as shareholders of the combined company."[60] And because those transactions are distinct, the Commission cannot rely on underwriter status in the SPAC IPO to create "participation" (and therefore underwriter status) in the de-SPAC transaction. Indeed, as the sources the Commission itself cites in the Release make clear, when the SPAC IPO is complete, the SPAC IPO underwriter will be only "a *former* underwriter of a SPAC IPO," precisely because the SPAC IPO and the de-SPAC transaction are separate and distinct distributions.[61]

Unsupported by the statutory text, the Commission relies on policy considerations to justify proposed Rule 140a rather than on statutory authority conferred by Congress. In particular, it emphasizes that "underwriters play a critical role as 'gatekeepers' to the public markets," and leans on its desire for gatekeeper liability in de-SPAC transactions to parallel the liability that the underwriter definition creates for IPO transactions.[62] But the Commission's policy goals cannot override the plain meaning of the statutory language enacted by Congress in the Securities Act. The Commission has no authority to "deem" persons to be "gatekeepers" and therefore "underwriters" without reference to the statutory definition created by Congress. This is particularly the case where, as noted above, de-SPAC transactions follow the well-worn path of business combinations between operating companies, and the Commission has never suggested that banks acting as financial advisor or rendering a fairness opinion risk being deemed an underwriter under Section 2(a)(11).

II. Proposed Rule 140a Conflicts with Multiple Other Provisions of the Securities Act

Proposed Rule 140a not only exceeds the definition of "underwriter" in Section 2(a)(11) but also runs afoul of multiple other provisions of the Securities Act, including Section 4(a)(1), Section 5, Section 6, Section 7(a), Section 11(a), Section 11(e) and Schedule A of the Securities

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59 Release at 29485 (quoting Hicks, *supra* note 21, at § 9:18).

60 *Id.* (describing the de-SPAC transaction, which "marks the introduction of the private operating company to the public capital markets").

61 4 Robert J. Haft et al., TAX-ADVANTAGED SECURITIES § 6:134.60 (Mar. 2022 update) (emphasis added) (cited at Release at 29486 n.204).

62 Release at 29483; *see also id*. at 29463.

Act. As a result, proposed Rule 140a would render many aspects of these multiple provisions meaningless and contradict well-settled canons of statutory construction.

A. Proposed Rule 140a Conflicts with Section 4(a)(1) and Section 5 of the Securities Act

The Securities Act is designed to require disclosure of material facts concerning securities when they are distributed by an issuer or controlling stockholder.[63] Section 5(a) of the Securities Act, subject to exemptions provided by Sections 3 and 4, forbids the sale, or delivery after sale, of securities, by means of the mails or instruments of interstate commerce, unless a registration statement is in effect as to such securities.[64] By contrast, the Securities Act imposes no registration requirements after securities have "come to rest in the hands of investors" and are the object of ordinary trading transactions between those persons.[65] The Securities Act accomplishes this end through Section 4(a)(1), which expressly states that Section 5's requirements "shall not apply to transactions by any person other than an *issuer*, *underwriter*, or *dealer*."[66] Section 4(a)(1) exempts from the registration requirements those transactions that are not customarily a part of the distribution (*i.e.*, public offering[67]) of securities. In other words, Section 4(a)(1) exempts transactions in which no issuer, underwriter, or dealer (selling during the period of distribution) takes part.

As the Commission has explained, the exemption in Section 4(a)(1) is

> rooted in the fundamental distinction between distributions . . . and ordinary trading. "The term 'distribution' refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public." Thus, the registration requirement applies to all sales until the shares come to rest in the hands of independent investors.[68]

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[63] Brief for the Securities and Exchange Commission at 3, *SEC v. Chinese Consol. Benevolent Ass'n*, 120 F.2d 738 (2d Cir. 1941) [hereinafter "SEC Brief"].

[64] 15 U.S.C. § 77e.

[65] SEC Brief at 3; *see also* Compl. ¶ 7, *SEC v. Procopio*, No. 3:20-cv-00182 (S.D. Cal. Jan. 29, 2020), available at https://www.sec.gov/litigation/complaints/2020/comp24730.pdf ("Section 5 applies to both a company (or 'issuer' of the stock) and its 'affiliates,' and it is designed to distinguish between securities offerings by the issuers (which require registration) and subsequent trading once the securities have come to rest in the hands of investors (which is generally exempt).").

[66] 15 U.S.C. § 77d(a)(1) (emphasis added).

[67] Hicks, *supra* note 21, § 9:18 ("[T]he SEC and the courts equate the phrase 'public offering' with the word 'distribution' for purposes of the Securities Act."); *see, e.g.*, *Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989) ("The definition of 'distribution' as used in § 2(a)(11) is generally considered to be synonymous with a public offering."); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 466 (2d Cir. 1959) (holding that "a 'distribution' requires a 'public offering'"); *SEC v. Lybrand*, 200 F. Supp. 2d 384, 393 (S.D.N.Y. 2002) ("A 'distribution' is equivalent to a public offering of securities.").

[68] SEC Post-Hearing Reply Brief at 2, *In re Bioelectronics Corp.*, No. 3-17104 (SEC Nov. 18, 2016) (quoting *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004)), available at https://www.sec.gov/litigation/apdocuments/3-

The distinction between a distribution (*i.e.*, public offering) and ordinary trading is fundamental to the Securities Act's entire statutory framework, including registration requirements, the involvement of underwriters, and the ability to engage in ordinary trading in securities outside of the distribution context. Central to all of these circumstances is the statutory definition of "underwriter." Under the Securities Act, a distribution of securities requires registration under Section 5(a) and involves underwriters as defined in Section 2(a)(11),[69] whereas ordinary trading benefits from the exemption in Section 4(a)(1), which does not apply to any transaction involving an underwriter.[70]

Said differently, the basic registration requirement of Section 5 of the Act demands that every sale of securities be made pursuant to an effective registration statement or an available exemption. That is why there is a registration statement for the SPAC IPO, and a separate registration statement (or an available exemption) for the de-SPAC transaction. In between those two polar events, investors and the banker acting as market maker trade the securities under yet another effective registration statement or an available exemption, such as Section 4(a)(1). In sum, there is no single registration statement or exemption to cover the SPAC IPO and the de-SPAC transaction taken as a whole, and all trading in between. Nor could there be under Section 5—because the two distributions are legally and factually distinct.

The Release repeatedly acknowledges that lawful ordinary trading in SPAC securities occurs after the SPAC IPO. That is permissible under the Securities Act *only* because—pursuant to Section 4(a)(1)—the distribution of securities in the SPAC IPO is complete when the investment banks that arrange for the public sale of the IPO securities deliver those securities to public investors in the IPO.[71] Indeed, as the Commission has long acknowledged, a SPAC's security holders other than its promoters and affiliates are able to use the Section 4(a)(1) exemption, a result that is possible only after the SPAC IPO distribution has been completed.[72]

17104-event-116.pdf; *see also* Compl. ¶ 16, *SEC v. Loflin*, No. 2:19-cv-02548 (D. Ariz. Apr. 19, 2019), available at https://www.sec.gov/litigation/complaints/2019/comp24457.pdf ("While Section 5 generally requires registration for the flow of securities from an issuer to investors, the premise of the Section 4(a)(1) exemption is that registration is no longer necessary for further sales once the shares come to rest with public investors."); SEC Release No. 33-4552, 1962 WL 69540 (Nov. 6, 1962) (emphasizing the question "whether the securities offered have come to rest in the hands of the initial informed group or whether the purchasers are merely conduits for a wider distribution" and that persons acting in the latter capacity, "whether or not engaged in the securities business, are deemed to be 'underwriters' within the meaning of section 2(a)(11) of the Act") (citation updated).

[69] *See* 15 U.S.C. §§ 77e, 77b.

[70] *See id.* § 77d(a)(1).

[71] *See* Release at 29504 (noting that "*[f]ollowing* its initial public offering" the SPAC's securities "*then begin trading* on a national securities exchange"); *id.* at 29559 (describing "secondary trading markets" for the securities previously issued "in SPAC initial public offerings"); *id.* at 29469 n.72 (noting that "the *initial* purchasers in SPAC initial public offerings often *resell* . . . their shares" (emphasis added)).

[72] *See* Division of Corporation Finance Letter to Ken Worm, NASD Regulation, Inc., 2000 WL 64968, at *2 & n.7 (SEC Jan. 21, 2000) (explaining that "both before and after the business combination or transaction with an operating entity or other person, the promoters or affiliates of blank check companies, as well as their transferees, are 'underwriters' of the securities issued" in the SPAC IPO and that their securities "can only be resold through registration under the Securities Act," while noting in contrast that *securities* "*purchased by non-affiliates in a registered transaction . . . would not be subject to this restriction*" (emphasis added)).

Contrary to that reality, however, proposed Rule 140a rests on the mistaken notion of a continuous distribution of SPAC securities following the SPAC IPO until the de-SPAC transaction. That notion cannot be reconciled with Section 5 and Section 4(a)(1) of the Securities Act.

B. Proposed Rule 140a Conflicts with Section 6 of the Securities Act

Proposed Rule 140a purports to consider the SPAC IPO and the de-SPAC transaction to constitute a single, unitary distribution. Putting aside for one moment the obvious difficulty that the two separate and distinct distributions are covered by equally separate and distinct registration statements under the Securities Act, the Commission's theory of a single, unified transaction conflicts with Section 6 of the Securities Act.

Section 6(a) provides that a "registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered." But the SPAC IPO registration statement does not describe the securities to be issued in the de-SPAC transaction.

Similarly, Section 6(b) requires payment of a registration fee at the time of filing a registration statement, and Section 6(c) provides that a registration statement shall not be deemed to have been filed until the fee is paid. The filing fee is an integral statutory requirement because Section 5 draws a fundamental distinction between activities permitted before or after the filing of a registration statement. But no filing fee is paid at the time of the SPAC IPO relating to the securities issued in the later de-SPAC transaction.

C. Proposed Rule 140a Conflicts with Section 7(a) and Schedule A of the Securities Act

Section 7(a) of the Securities Act requires every registration statement under the Securities Act to "contain the information . . . specified in Schedule A" of the Securities Act.[73] Paragraph (5) of Schedule A of the Securities Act, in turn, requires disclosure of "the names and addresses of the underwriters," as well as a wide variety of information about the issuer, its business, its officers and directors, its shareholders and its financial condition.[74]

If the SPAC IPO and the de-SPAC transaction were one and the same distribution, then the SPAC IPO registration statement could not comply with Section 7(a) and Schedule A. This is so, because, at the time of the IPO, the SPAC has not yet identified the target operating company that will be the subject of the de-SPAC transaction. As a result, the SPAC has no way to make the statutorily required disclosure about the as-yet unknown operating company. The SPAC will not be able to do so until months or even years later, when the de-SPAC transaction occurs.

[73] 15 U.S.C. § 77g(a)(1).

[74] *Id.* § 77aa(5).

D. Proposed Rule 140a Conflicts with Section 11(a) of the Securities Act

Section 11(a) of the Securities Act provides the purchasers of registered securities with strict liability protection for material misstatements or omissions in the registration statement at the time of its effectiveness, but liability is limited to statutorily enumerated parties: (1) signatories of the registration statement; (2) directors or partners of the issuer; (3) director nominees who consent to be named; (4) accountants and other experts who consent to be named as having prepared or certified part of the registration statement; and (5) underwriters of the security.[75]

Expanding Section 11(a) to cover the conduct described in proposed Rule 140a would contradict Section 11(a)'s "specific enumeration of liable parties, which does not include a number of persons necessary to" the de-SPAC transaction—such as PIPE placement agents, advisors who helped structure the transactions, or advisors who issued fairness opinions—and therefore proposed Rule 140a "would render these narrowly drawn categories meaningless and contradict well-settled canons of statutory construction."[76] The mere structuring of the de-SPAC transaction, acting as placement agent in a PIPE or providing transaction advisory services or fairness opinions does not constitute participation in statutory underwriting.

Similarly, the attempt in proposed Rule 140a to impose Section 11 liability on any former SPAC IPO underwriter who later "takes steps to facilitate the de-SPAC transaction" resembles a liability theory that courts have repeatedly rejected. Plaintiffs have often argued, without success, that financial intermediaries and their lawyers who play a substantial role in drafting a registration statement are thereby responsible under Section 11 for misstatements in the registration statement. Rejecting this argument, one court explained that

> participants in the drafting process can be sued for violations of Section 10(b) and Rule 10b-5 [under the Securities Exchange Act of 1934] for fraud when they participate in making fraudulent statements with scienter. But Section 11 liability attaches to the parties specified in that provision even without scienter. To hold all of the myriad of participants in the drafting process—and not merely the specific categories of individuals defined in Section 11 as the proponents of the statement—responsible for any material misstatement in the document would make anyone who commented on a draft statement, however innocently, a guarantor of every assertion in the registration statement. . . .[77]

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[75] 17 U.S.C. § 77k(a); *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (noting the "limited" scope of Section 11 evidenced by the fact only "certain enumerated parties in a registered offering" may be sued under Section 11 for "false and misleading statements").

[76] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 184 (2d Cir. 2011) (citing surplusage canon).

[77] *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *3 (S.D.N.Y. Aug. 14, 2008); *see also Lehman Bros.*, 650 F.3d at 184-85 (concluding that "merely commenting on draft offering documents does not constitute the requisite participation in underwriting").

E. Proposed Rule 140a Conflicts with Section 11(e) of the Securities Act

Section 11(e) of the Securities Act provides that underwriters are liable only for "damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public," unless the "underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share *in proportion* to their *respective interests* in the underwriting."[78] In essence, Section 11(e) creates a special rule limiting the exposure of underwriters—unless they receive a disproportionate benefit for acting as an underwriter. As a leading treatise puts it:

> [T]he usual rule in Section 11 cases is joint and several liability for all defendants. Section 11(e) contains a so-called "hold-down" provision, however, that modifies the joint and several rule for underwriters. . . . Thus, an underwriter's exposure is ordinarily limited to the aggregate public offering price of the securities that constituted its underwriting commitment.[79]

The Commission fails to acknowledge Section 11(e), or the significant and intractable questions that are posed by the need to reconcile it with proposed Rule 140a. For instance, proposed Rule 140a will "deem" financial advisors who merely issued fairness opinions related to the de-SPAC transaction to be underwriters of the de-SPAC transaction. But that financial advisor will have no underwriting commitment for the de-SPAC transaction, meaning its exposure cannot be limited by the price of its underwriting commitment for that distribution. It is hard to see how Section 11(e) would operate in that context, or whether it is capable of being applied at all. And relying on the SPAC IPO distribution to provide the limitation does not solve the problem. Comparing the underwriting commitments of underwriters in the SPAC IPO and the de-SPAC transaction is not practically feasible, given the fact that these are two separate and distinct distributions, each of which is registered on a separate registration statement, leaving no discernible principle for allocating the respective interests of parties involved in the two distributions.

III. Proposed Rule 140a Conflicts with Proposed Rule 145a and Longstanding Commission Policy and Practice

In addition to conflicting with multiple provisions of the Securities Act, proposed Rule 140a also conflicts with another key aspect of the Release, proposed Rule 145a, as well as the Commission's own longstanding policies and practices governing the many ways in which private operating companies can become public reporting companies.

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[78] 15 U.S.C. § 77k(e) (emphasis added).

[79] Charles J. Johnson, Jr., Joseph McLaughlin & Anna T. Pinedo, CORPORATE FINANCE AND THE SECURITIES LAWS § 5.02[f] (6th ed. 2019, 2021 Supp.).

A. Proposed Rule 140a Conflicts with Proposed Rule 145a

Proposed Rule 145a establishes that the business combination of a SPAC and an operating company will be "deemed to involve an offer, offer to sell, offer for sale, or sale" under the Securities Act.[80] As a result, all de-SPAC transactions must be registered under the Securities Act.

But if, as proposed Rule 145a suggests, a de-SPAC transaction must itself be registered under the Securities Act as an offer and sale, the premise of that requirement is that a de-SPAC transaction is a distribution that is *separate and distinct* from the SPAC IPO. Indeed, the Release repeatedly describes the SPAC IPO and the de-SPAC transaction as separate and distinct offerings of securities, each involving a different security and a separate distribution to public investors.[81]

Proposed Rule 145a's treatment of the de-SPAC transaction as a separate and distinct distribution from the SPAC IPO is directly inconsistent with proposed Rule 140a, which treats both the SPAC IPO and the de-SPAC transaction as a single, unitary distribution. Notably, however, Rule 145a's treatment is consistent with the broader statutory framework, which allows trading by non-affiliates in the securities of the SPAC after the SPAC IPO under Section 4(a)(1). This inherent contradiction between Rule 140a and Rule 145a highlights the fact that Rule 140a conflicts with the broader statutory framework established by the Securities Act and, in particular, that the distribution of securities in the SPAC IPO becomes complete when the investment banks that arrange for the public sale of the IPO securities enter into a contract of sale to deliver those securities to public investors in the IPO.[82]

B. Proposed Rule 140a Conflicts with the Policies and Practices of the Commission and Its Staff

The Release justifies proposed Rule 140a based on the "critical role" that underwriters play "in the securities offering process as gatekeepers to the public markets."[83] The Release then says that "affirming the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions" will "better motivate SPAC underwriters to exercise the care necessary to

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[80] Release at 29567 (proposing 17 C.F.R. § 230.145a).

[81] *See id.* at 29460-61 (explaining that a SPAC "conducts a firm commitment underwritten initial public offering" *after which* a subsequent "securities offering" will occur "in the de-SPAC transaction"); *id.* at 29463 (noting that the Commission is "proposing new rules" applicable *both* to "initial public offerings by SPACs" *and* to "de-SPAC transactions"); *id.* at 29465 (defining "special purpose acquisition company" by reference to an intended "primary offering of securities" *and* "a de-SPAC transaction"); *id.* at 29466 (describing the "business combination transaction" to occur "*[f]ollowing* the initial public offering"); *id.* at 29469 n.72 (noting that "the initial purchasers in SPAC *initial public offerings* often *resell* . . . their shares *prior to* the completion of the de-SPAC *transaction*"); *id.* at 29469 & n.74 (explaining dilution based on "the initial public offering price" versus "net tangible book value . . . *after* the offering"); *id.* at 29470 (proposing disclosure for "registered offerings (including initial public offerings) by SPACs *other than* de-SPAC transactions") (emphasis added to each).

[82] *Cf.* Securities Act Rule 159, 17 C.F.R. § 230.159 (requiring for purposes of Section 12(a)(2) of the Securities Act that relevant information must be "conveyed to the purchaser" before the "time of sale" of the securities).

[83] Release at 29463.

ensure the accuracy of the disclosure" in de-SPAC transactions.[84] The Release speaks of de-SPAC transactions as if they are an anomalous "way for private operating companies to become public reporting companies" without "the safeguards for investors" available in comparison to "the typical initial public offering process."[85]

In fact, however, de-SPAC transactions are one of many different types of transactions involving the initial listing of securities on a U.S. stock exchange. And the Commission is well aware that "underwriter" is not "a term of unlimited applicability that includes anyone associated with a given transaction."[86] As a result, the Commission and its Staff have long permitted initial listing transactions to proceed *without* asserting that any person in those situations acts as underwriter who must serve a gatekeeping function, even though many of these transactions also involve investment banks serving as financial advisers to the subject companies and involve investment decisions by purchasers and sellers of securities. Examples of these situations include:

- business combination transactions registered under the Securities Act in which two operating companies effect an acquisition between themselves (through one acquiring the other, or through the creation of a wholly new entity, in a share exchange);

- business combination transactions exempt from registration under the Securities Act (such as under Section 3(a)(10)) in which two operating companies effect an acquisition between themselves, through one acquiring the other, or through the creation of a newly formed entity, in a share exchange;

- spin-offs, which under Staff Legal Bulletin No. 4 may be effected via a registration statement under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), without registration under the Securities Act;[87]

- spin-offs that do not come within Staff Legal Bulletin No. 4 that are effected through a Securities Act registration statement, or direct listing transactions that are similarly effected through a Securities Act registration statement;

- dual listings effected on a U.S. stock exchange by foreign private issuers through an Exchange Act registration statement;

- up-listings from the over-the-counter market to a U.S. stock exchange listing for companies that had previously registered under Exchange Act Section 12(g); and

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[84] *Id.*

[85] *Id.* at 29461.

[86] *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *4 (S.D.N.Y. Aug. 14, 2008) (citing *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989)).

[87] *See* Staff Legal Bulletin No. 4, 1997 WL 33831770 (Sept. 16, 1997).

- offerings that are qualified under Tier 2 of Regulation A under the Securities Act, in which the issuer lists shares on a U.S. stock exchange.[88]

We respectfully submit that the Commission and its Staff do not attempt to impose underwriter liability in these transactions based on a longstanding consensus regarding the limits of Section 11. It is a narrow provision that applies to persons acting as a statutory underwriters only when they engage in statutorily enumerated distributional activities under Section 2(a)(11).

IV. Proposed Rule 140a Violates the Administrative Procedure Act

The APA requires a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary" or "capricious."[89] Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[90] agency interpretations of a statute that the agency administers are not entitled to deference when the statute is unambiguous or the interpretation is unreasonable.[91]

Proposed Rule 140a is not entitled to deference under *Chevron* or any other deference doctrine. As an initial matter, a court defers under *Chevron* only if a statute is ambiguous after the court has exhausted all the "traditional tools of statutory construction."[92] Accounting for those tools here, there is no ambiguity in the meaning of "distribution" or of each of the clauses of Section 2(a)(11). But even if Section 2(a)(11) were ambiguous in some sense, proposed Rule 140a is not a reasonable interpretation of Section 2(a)(11) because an agency interpretation is "reasonable" only if "the agency's answer is based on a permissible construction of the statute."[93] That is not the case here. As a result, the manner in which proposed Rule 140a purports to "clarify" the statute "does not merit deference" under *Chevron*.[94]

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[88] *See Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, SEC Release No. 33-9741 (Mar. 25, 2015), 80 Fed. Reg. 21805 (Apr. 20, 2015).

[89] 5 U.S.C. § 706; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

[90] 467 U.S. 837 (1984).

[91] *See id*. at 842-44.

[92] *Id*. at 843 n.9; *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that *Chevron* deference applies "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent").

[93] *See Chevron*, 467 U.S. at 843-44 (equating "reasonable" with the question whether "the agency's answer is based on a permissible construction of the statute").

[94] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (finding an agency interpretation unreasonable because it did not fit with the statute's design and structure); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("It follows that an 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" (citation and alterations omitted)).

Because of these deficiencies, proposed Rule 140a is unlikely to survive judicial review under the APA.[95] A court confronted with an APA challenge to Rule 140a would likely "hold unlawful and set aside" the rule as an agency action that is "not in accordance with law" and "in excess of statutory jurisdiction."[96]

V. The Commission Should Limit the Proposal If the Commission Does Not Abandon Proposed Rule 140a Altogether

Proposed Rule 140a cannot be reconciled with the Securities Act and should be abandoned. If the Commission chooses nonetheless to proceed to adopt Rule 140a, we respectfully urge the Commission to limit the overbreadth of this flawed rule by declining to expand it further, withdrawing the Commission's expansive statements about underwriter liability outside of the proposed rule and confirming that proposed Rule 140a will apply only on a prospective basis.

A. The Commission Should Not Expand Proposed Rule 140a to Encompass Entities Without Any Involvement in the SPAC IPO

The Commission asks (in Question 88 of the Release) whether proposed Rule 140a "should . . . be expanded to expressly include" other "additional parties that are involved in a de-SPAC transaction."[97] In other words, the Commission seeks comment on whether an entity that had no involvement with the SPAC IPO, and merely has involvement in the de-SPAC transaction in some fashion, could be considered a statutory underwriter.

We urge the Commission not to compound the flaws of proposed Rule 140a by attempting to sweep in entities with no involvement in the SPAC IPO. Just as the Commission lacks the authority to adopt proposed Rule 140a, so too it lacks the authority to expand proposed Rule 140a further to cover entities with no involvement in the SPAC IPO. A further expansion of proposed Rule 140a would purport to create new statutory underwriters from a category of persons that never engaged in any statutorily enumerated distributional activities in a manner that exceeds the Commission's statutory authority in the same way that proposed Rule 140a does.

B. The Commission Should Withdraw Its Expansive Statements Regarding Potential Underwriter Liability Outside of Proposed Rule 140a

The actions that proposed Rule 140a will encompass are not sufficient to create underwriter liability under the well-established meaning of Section 2(a)(11). After stretching the statutory definition of underwriter beyond all limits of text, legislative history and controlling

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[95] *See, e.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007); *Goldstein v. SEC*, 451 F.3d 873, 883-84 (D.C. Cir. 2006); *Chamber of Com. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006); *Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 755-56 (D.C. Cir. 1986).

[96] 5 U.S.C. § 706.

[97] Release at 29487.

judicial precedents, the Commission notes that proposed Rule 140a is not "intended to limit the definition of underwriter for Section 2(a)(11)."[98]

The Commission then claims that "courts and the Commission may find that other parties" in de-SPAC transactions "are 'statutory underwriters'" in the de-SPAC transaction without having any involvement in the SPAC IPO.[99] These statements are no more supportable than proposed Rule 140a itself and, like the proposed rule, should be formally withdrawn.

C. The Commission Should Confirm That Proposed Rule 140a Applies Only Prospectively

Even if the Commission adopts Rule 140a notwithstanding its legal defects and other flaws, at a minimum the Commission should confirm that the proposed rule applies only prospectively. As the Release itself acknowledges, the Commission is proposing a "new rule" that "would deem" a covered person "to be an underwriter in the de-SPAC transaction."[100] And the Release notes the new and prospective implications of that change, including that current SPACs may incur greater costs to "comply with the full set of new requirements" if the Commission's changes become effective after a SPAC's IPO but before its de-SPAC transaction.[101] Given the manner in which these statements describe the effects of a new rule, we believe that proposed Rule 140a is best read to apply only prospectively, and not retroactively, after adoption.

Nonetheless, the Release's phrasing remains uncertain on this point. Even though proposed Rule 140a should apply only prospectively, some statements in the Release are unclear about the proposed rule's prospective application. For example, the Release repeatedly suggests that proposed Rule 140a is intended to "clarify" underwriter status in de-SPAC transactions.[102]

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[98] *Id.* at 29486.

[99] *Id.*

[100] *Id.* at 29463.

[101] *Id.* at 29512 ("[T]o the extent that regulatory changes we are proposing, if adopted, would become effective while some current SPACs are in the process of completing a de-SPAC transaction, these SPACs may incur greater unanticipated transaction costs to comply with the full set of new requirements.").

[102] *Id.* at 29486 (explaining that "*[c]larifying* the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions" will affirm that they are subject to Section 11 liability and thereby motivate them to "help ensure the accuracy of the disclosures in these transactions" (emphasis added)); *id*. at 29486 (noting that "proposed Rule 140a would *clarify* that the SPAC IPO underwriter is an underwriter with respect to the distribution that occurs in the de-SPAC transaction" (emphasis added)); *id*. at 29487 (asking whether to "limit underwriter status as *clarified* by Rule 140a to the entities acting as traditional underwriter in a SPAC IPO" (emphasis added)); *id*. at 29508 (noting that "proposed Rule 140a *clarifies* the underwriter status of SPAC IPO underwriters at the de-SPAC transaction stage" (emphasis added)); *id*. at 29534 (noting that proposed Rule 140a "would *clarify* the underwriter status of SPAC IPO underwriters in registered de-SPAC transactions" (emphasis added)); *id*. (noting that proposed Rule 140a "would *clarify* that a person who has acted as an underwriter in a SPAC IPO and . . . participates (directly or indirectly) in the de-SPAC transaction will be deemed" to be a statutory underwriter in the de-SPAC transaction (emphasis added)); *id*. at 29536 (discussing expected effects of proposed Rule 140a in "*clarifying* the application of underwriter liability" (emphasis added)); *id*. at 29558 (explaining that the proposed rule would "*clarify* the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions" (emphasis added)).

Similarly, the Release states that the Commission is "affirming" that the category of persons described in Rule 140a is subject to Section 11 liability.[103] In combination, these statements leave significant uncertainty concerning the potential retroactivity of the proposed rule.

Retroactive application of the proposed rule would be unconstitutional and violate longstanding Supreme Court precedent. "Retroactivity," the Supreme Court has long held, "is not favored in the law."[104] Basic "considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[105] In the case of administrative agencies, an agency cannot announce retroactive rules "unless that power is conveyed by Congress in express terms."[106] And even where Congress has conveyed that authority, the general presumption is that a rule has no retroactive effect unless the agency unambiguously states otherwise.[107] The Commission has not explicitly made the rule retroactive here, and with good reason. A retroactive rule would not only upset settled expectations and disrupt de-SPAC transactions currently in progress but also runs afoul of the United States Constitution's Ex Post Facto Clause in light of the Securities Act's criminal penalties.[108]

As a result, if the Commission adopts proposed Rule 140a, the Commission should clarify any final rule to confirm the most natural reading of Rule 140a—that it will apply on an exclusively prospective basis, and *only* to de-SPAC transactions involving SPACs whose IPO registration statements become effective under the Securities Act *after* the effective date of the final rule. Any other attempted application of proposed Rule 140a, if adopted, would be contrary to basic tenets of statutory construction under the Securities Act.

Conclusion

The Commission's proposal raises important questions about investor protection in connection with de-SPAC transactions. SIFMA recognizes the Commission's desire to help safeguard investors through the involvement of gatekeepers—a role that entities such as underwriting broker-dealers play in connection with securities offerings.[109] But the

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[103] *Id*. at 29463, 29486, 29542.

[104] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[105] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

[106] *Bowen*, 488 U.S. at 208.

[107] *Id.* ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result."); *see also Landgraf*, 511 U.S. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.").

[108] The Securities Act imposes criminal penalties on "[a]ny person who willfully violates" the Act or any "rules and regulations promulgated by the Commission" that are authorized by the Act. 15 U.S.C. § 77x. If proposed Rule 140a were read retroactively, it would arguably make "an action done before the passing of the law, and which was innocent when done, criminal," in violation of the Ex Post Facto Clause. *Peugh v. United States*, 569 U.S. 530, 538 (2013) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)); *see also* U.S. Const. art. I, § 9, cl. 3.

[109] *Cf.* FINRA Regulatory Notice 10-22, Obligation of Broker-Dealers to Conduct Reasonable Investigations in Regulation D Offerings (Apr. 2010), https://www.finra.org/rules-guidance/notices/10-22.

Commission's attempt to pursue those admirable goals runs headlong into a direct and unyielding conflict with the statutory framework that Congress crafted in the Securities Act.

While this submission has focused its attention on proposed Rule 140a, SIFMA recognizes that the Commission's proposal also implicates a number of important issues regarding the future of SPAC transactions, and thriving capital markets more broadly. We would welcome the opportunity for constructive dialogue about SIFMA's on-the-ground experience in this area and to discuss those additional issues with the Commission. If you have any questions or require additional information, please do not hesitate to contact us by calling Rob Toomey at (212) 313-1124 or Joe Corcoran at (202) 962-7383.

Very truly yours,

Kenneth E. Bentsen, Jr.
President and CEO

Cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Allison Herren Lee, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner

APPENDIX A

This Appendix provides extensive excerpts from three recent leading cases from key courts analyzing the definition of "underwriter" under Section 2(a)(11). None of these cases is mentioned or cited *anywhere* in the Release, although *all* of them are much more recent than the cases that the Release does cite.

The cases below provide a detailed and comprehensive analysis of "the text, case law, legislative history, and purpose" of Section 2(a)(11).[110] The analysis demonstrates that proposed Rule 140a exceeds the scope of Section 2(a)(11) because "Congress did not intend for strict underwriter liability to extend to persons merely interested in a distribution by virtue of their provision of non-distribution services to an offeror."[111]

1. *In re Lehman Brothers Mortgage-Backed Securities Litigation*, 650 F.3d 167 (2d Cir. 2011)

Plaintiffs . . . appeal from judgments of the United States District Court for the Southern District of New York . . . , dismissing their class-action complaints seeking to hold defendants . . . Standard & Poor's ("S & P"), Moody's Investors Service, Inc. ("Moody's"), and/or Fitch, Inc. ("Fitch") (collectively, "Rating Agencies"), liable as underwriters . . . for misstatements or omissions in securities offering documents in violation of §§ 11 . . . of the Securities Act of 1933 ("1933 Act"). Plaintiffs submit that the Rating Agencies are "underwriters" as defined by 15 U.S.C. § 77b(a)(11) because they helped structure securities transactions to achieve desired ratings. . . . We reject these arguments as without merit. . . .

[P]laintiffs allege that the Rating Agencies, which ordinarily serve as passive evaluators of credit risk, exceeded their traditional roles by actively aiding in the structuring and securitization process. Specifically, plaintiffs allege that issuing banks engaged particular Rating Agencies through a "ratings shopping" process . . . .

During and after this negotiation, the Rating Agencies engaged in an "iterative process" with the banks, providing "feedback" on which combinations of loans and credit enhancements would generate particular ratings. . . . As one Moody's officer described the process: "You start with a rating and build a deal around a rating." . . . Plaintiffs submit that the Rating Agencies thus helped determine the composition of loan pools, the certificates' structures, and the amount and kinds of credit enhancement for particular tranches.

Toward this end, the Rating Agencies allegedly provided their modeling tools to the banks' traders to help them pre-determine the combinations of credit enhancements and loans needed to achieve specific ratings. . . . [T]he models calculated the amount of credit enhancement required for a specific pool of loans to receive a AAA rating. . . . The Rating Agencies, however, had purportedly failed to update their models to reflect accurately the higher risks of certain underlying loans, such as subprime, interest-only, and negative amortization mortgages. The models also failed to account for deteriorating loan origination standards. As a result, plaintiffs complain that the certificates' AAA or investment-grade ratings did not accurately represent their risk. . . .

Section 11 provides the purchasers of registered securities with strict liability protection for material misstatements or omissions in registration statements filed with the SEC. The imposition of strict liability is limited, however, to statutorily enumerated parties . . . [including] underwriters of the security at issue. Plaintiffs assert that the Rating Agencies are strictly liable under § 11 as "underwriters" and that the district court erred in construing that term as limited to persons involved in the distribution of securities.

[110] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 182 (2d Cir. 2011).

[111] *Id*. at 181.

The term "underwriter" is defined in the 1933 Act 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.

15 U.S.C. § 77b(a)(11). Plaintiffs submit that the Rating Agencies qualify as underwriters because they structured the certificates here at issue to achieve desired ratings, which was a necessary predicate to the securities' distribution in the market. We are not persuaded. The plain language of the statute limits liability to persons who participate in the purchase, offer, or sale of securities for distribution. While such participation may be indirect as well as direct, the statute does not reach further to identify as underwriters persons who provide services that facilitate a securities offering, but who do not themselves participate in the statutorily specified distribution-related activities. . . .

Applying these principles [of statutory plain meaning] here, we conclude that common to all categories of persons identified as "underwriters" by the plain language of § 77b(a)(11) is activity related to the actual distribution of securities. With respect to the first two categories of persons qualifying as "underwriters"—those who (1) purchase from an issuer or (2) offer or sell for an issuer—this is evidenced by the fact that the distribution requirement is set off from the two antecedent activities by a comma. . . . Indeed, this interpretation is especially warranted here because the first category, persons "purchasing from an issuer with a view to," is incomplete unless read in conjunction with "the distribution of any security."

With respect to the last two categories of persons qualifying as "underwriters," their connection to the activity of distribution is evidenced by use of the phrase "such undertaking," which plainly references the aforesaid purchases, offers, or sales relating to the distribution of securities. . . .

Thus, to qualify as an underwriter under the participation prongs of the statutory definition, a person must participate, directly or indirectly, in purchasing securities from an issuer with a view to distribution, in offering or selling securities for an issuer in connection with a distribution, or in the underwriting of such an offering. . . . Nothing in the statute's text supports expanding the definition of underwriter to reach persons not themselves participating in such purchases, offers, or sales, but whose actions may facilitate the participation of others in such undertakings. . . .

Plaintiffs acknowledge that § 77b(a)(11) references activities relating to the distribution of securities. Nevertheless, they submit that our precedent has construed the term "underwriter" broadly to "include any person who is 'engaged in steps necessary to the distribution of security issues.'" *SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005) (quoting *SEC v. Chinese Consol. Benevolent Ass'n, Inc.*, 120 F.2d 738, 741 (2d Cir. 1941)). Relying on this language, plaintiffs submit that any persons playing an essential role in a public offering—including the Rating Agency defendants—may be liable as underwriters. We disagree.

Contrary to plaintiffs' contention, our prior cases do not hold that anyone taking steps that facilitate the eventual sale of a registered security fits the statutory definition of underwriter. . . . Indeed, the cases cited by plaintiffs all involved defendants who themselves participated in distributing securities. . . .

In reaching this conclusion, we note that the "steps necessary to the distribution" language . . . was originally employed by this court to explain a registration exemption, not the underwriter definition. In *SEC v. Chinese Consolidated Benevolent Association, Inc.*, we concluded that a corporation soliciting buyers for unregistered Chinese government bonds was a statutory underwriter because it sold securities for an issuer despite not acting at the issuer's behest. As an underwriter, the corporation did not qualify for § 4[(a)](1)'s registration exemption for "'[t]ransactions by any person other than an issuer, underwriter, or dealer.'" We alternatively concluded that the corporation was ineligible for the § 4[(a)](1) registration exemption, even if it was not itself an underwriter, because it participated in a transaction involving an issuer. In this context, we stated that "[i]t," meaning the exemption, "does not . . . protect those who are engaged in steps necessary to the distribution of" securities because it is limited to transactions between individual investors.

Many of plaintiffs' cases are, in fact, of questionable relevance because they involved SEC enforcement actions against defendants for selling unregistered securities in violation of § 5 rather than § 11 liability for misstatements or omissions in registration statements. *See, e.g.*, *SEC v. Kern*, 425 F.3d at 147-48; *SEC v. N. Am. Research Dev. Corp.*, 424 F.2d at 70-72, 80-82; *SEC v. Culpepper*, 270 F.2d at 245-48; *SEC v. Chinese Consol. Benevolent Ass'n, Inc.*, 120 F.2d at 739-41. "[I]n the context of an enforcement action," courts have held "any person who is a 'necessary participant' or a 'substantial factor' in" a sale of unregistered securities liable pursuant to § 5. 1 Thomas Lee Hazen, Law of Securities Regulation § 2.2[1][A] (6th ed. 2011); *see SEC v. Holschuh*, 694 F.2d at 137-38 (noting "doctrine of participant liability" in § 5 actions and concluding defendants were "necessary participant[s]" or a "substantial factor" in sale by forming entities). Although the underwriter definition includes participants in the listed distributional activities, it is not clear that the broad "substantial factor" test should be imported wholesale into § 11.

In urging otherwise, plaintiffs also rely on *Harden v. Raffensperger, Hughes Co.*, 65 F.3d 1392 (7th Cir. 1995), wherein the Seventh Circuit held a qualified independent underwriter ("QIU") subject to § 11 underwriter liability because it was "necessary to the distribution." That conclusion, however, is not as broad as plaintiffs urge because the court in Harden made clear that its inquiry was limited to the statutorily enumerated activities, i.e., whether defendant had participated in "purchas[ing] . . . notes with a view to distribution," or offering or selling notes "in connection with their distribution." Moreover, Harden is easily distinguished . . . . There, the Seventh Circuit emphasized the appropriateness of imposing § 11 liability on a QIU who voluntarily and explicitly assumed the liabilities of an underwriter because, in accordance with NASD rules, the issuer could not use a nonindependent affiliate as its underwriter without a QIU. . . .

[Invoking] participant liability does not answer the question: participation in what? A plain reading of the text points us to one answer: participation in the distribution of securities, either through the purchase of securities from an issuer with a view towards distribution, the sale or offer of such securities by an issuer, or the underwriting of such undertakings.

A House Report explains that "underwriter" was "defined broadly enough to include not only the ordinary underwriter, who for a commission promises to see that an issue is disposed of at a certain price, but also . . . the person who purchases an issue outright with the idea of then selling that issue to the public." H.R. Rep. No. 73-85, at 13 (1933). Additionally, the definition encompassed "two other groups of persons who perform functions, similar in character, in the distribution:" (1) underwriters of the underwriter, and (2) "participants in the underwriting or outright purchase . . . who are given a certain share or interest." Id. A later House Report states that changes were made to exclude from the definition those who merely furnish an underwriter money, and to adopt a test "of participation in the underwriting undertaking rather than that of a mere interest in it." H.R. Rep. No. 73-152, at 24 (1933).

By focusing on persons playing roles similar to those disposing of or reselling securities, or those participating in such actions, these reports indicate that "congressional intent was to include as underwriters all persons who might *operate as conduits* for securities being placed into the hands of the investing public." 2 Thomas Lee Hazen, Law of Securities Regulation § 4.27[1] (6th ed. 2011) (emphasis added) . . . . In short, Congress did not intend for strict underwriter liability to extend to persons merely interested in a distribution by virtue of their provision of non-distribution services to an offeror. See *In re WorldCom Sec. Litig.*, 308 F. Supp. 2d at 344 ("Having a relationship with an issuer or underwriter . . . does not transform one into an underwriter."). . . .

To be sure, "direct or indirect participation" in underwriting subjects a person to strict liability. 15 U.S.C. § 77b(a)(11). But the participation must be in the statutorily enumerated distributional activities, not in non-distributional activities that may facilitate the eventual distribution by others. This approach avoids the implausible result of transforming every . . . professional whose work is theoretically "necessary" to bringing a security to market into an "underwriter" subject to strict liability under § 11, a dramatic outcome that Congress provided no sign of intending.

[L]imiting liability to those who participate in the listed distributional activities does not render the direct or indirect participation prong of the underwriter definition superfluous. Persons may be liable for participation even though they did not themselves directly sell or offer securities or purchase securities for resale. For example, defendants might "participate" in underwriting by referring investors to sellers or offerors for a fee, *cf. Sirianni v. SEC*, 677 F.2d 1284, 1287 (9th Cir. 1982); organizing selling efforts, *cf. Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) (concluding defendant participated in distribution of unregistered securities by finding buyer, negotiating terms, and facilitating resale); *SEC v. Int'l Chem. Dev. Corp.*, 469 F.2d 20, 31 (10th Cir. 1972) (concluding defendant participated in distribution of unregistered securities by role in publicizing company and interacting with transfer agent); or acting as an intermediary in a purchase of securities for resale. . . . [T]his case presents none of these circumstances.

In sum, we conclude that the text, case law, legislative history, and purpose of the statute demonstrate that Congress intended the participation clause of the underwriter definition to reach those who participate in purchasing securities with a view towards distribution, or in offering or selling securities for an issuer in connection with a distribution, but not further.

The complaints contain extensive descriptions of the Rating Agencies' activities in structuring the certificate transactions, dictating the kinds and quantity of loans or credit enhancements needed for desired ratings, and providing modeling tools to traders to pre-structure loan pools. Plaintiffs submit that these allegations demonstrate that the Rating Agencies played a necessary role in the securities' distribution . . . . We disagree. Like all of the district courts to have considered similar claims, we conclude that structuring or creating securities does not constitute the requisite participation in underwriting.

[E]ven [if] . . . the Rating Agencies "had a good deal to do with the composition and characteristics of the pools of mortgage loans and the credit enhancements of the [c]ertificates that ultimately were sold," plaintiffs failed to allege that defendants "participated in the relevant" undertaking: that of purchasing securities from the issuer with a view towards distribution, or selling or offering securities for the issuer in connection with a distribution. . . .

Furthermore, expanding § 11 to cover the conduct of the Rating Agencies would contradict that section's specific enumeration of liable parties, which does not include a number of persons necessary to the creation of securities, such as banks that originated the underlying loans, traders who structured the transactions, or experts who did not consent to being named. Because plaintiffs' theory would render these narrowly drawn categories meaningless and contradict well-settled canons of statutory construction, *see, e.g.*, *Corley v. United States*, 556 U.S. 303, 129 S.Ct. 1558, 1566, 173 L.Ed.2d 443 (2009) (noting that "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 49 (2d Cir. 2010), we decline to adopt it. Rather, we conclude that the mere structuring or creation of securities does not constitute participation in statutory underwriting.

Plaintiffs' attempts to distinguish Refco, a case on which the district court relied, are unavailing. In that case, the district court dismissed a § 11 claim alleging that attorneys participated in underwriting by commenting on a registration statement because drafting offering documents did not constitute participation in purchasing securities for resale. *See In re Refco, Inc. Sec. Litig.*, 2008 WL 3843343, at *3. Plaintiffs here submit that the Rating Agencies' role in creating securities is not equivalent to commenting on a draft registration statement. That may be true. But any difference in the type of participation is immaterial when neither the attorneys in Refco nor the Rating Agencies here took part in distributing securities to the public. *See id.* at *4.

For the same reason, we reject Wyoming's claim that the Rating Agencies' alleged review of and comments on draft prospectus supplements incorporated into the registration statements stated a § 11 claim. Similarly, we reject the Union Plaintiffs' conclusory pleading that S & P and Moody's are liable under § 11 for their alleged participation in drafting and disseminating offering documents. As discussed, § 11 imposes strict liability only on enumerated parties, excluding "certain individuals who play a part in preparing the registration statement," such as "corporate officers other than those" specified and experts "not named as having prepared or certified" any part of the registration statement. *Herman MacLean v. Huddleston*, 459 U.S. at 386 n. 22, 103 S.Ct. 683; *see also In re Refco, Inc. Sec. Litig.*, 2008 WL 3843343, at *3. Holding "the myriad of participants in the drafting process" strictly liable would eviscerate the "specific categories of individuals defined in § 11 as the proponents of the [registration] statement," making "anyone who commented on a draft statement, however innocently, a guarantor of every assertion" therein. *In re Refco, Inc. Sec. Litig.*, 2008 WL 3843343, at *3. Accordingly, we conclude that merely commenting on draft offering documents does not constitute the requisite participation in underwriting. . . .

Contrary to plaintiffs' assertion, this conclusion will not absolve rating agencies of all liability for their roles in fraudulent securities offerings. As plaintiffs acknowledged at oral argument, they may bring securities fraud claims against the Rating Agencies pursuant to § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), although liability under that section is, of course, subject to scienter, reliance, and loss causation requirements not applicable to § 11 claims. It is precisely because § 11 "give[s] rise to liability more readily," however, that it is applies "more narrowly" than § 10(b). *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d at 359-60.

In sum, because plaintiffs failed to plead facts sufficient to bring the Rating Agencies within the statutory definition of underwriter, their § 11 claims against these defendants were properly dismissed.

2. *In re REFCO, Inc. Securities Litigation*, 2008 WL 3843343 (S.D.N.Y. Aug. 14, 2008)

[P]laintiffs . . . alleged that Refco covered up massive losses resulting from uncollectible loans, and that this deliberately fraudulent non-disclosure rendered materially misleading (among other Refco financial statements and prospectuses for the sale of securities) the Bond Registration Statement filed with the Securities and Exchange Commission ("SEC"), pursuant to which Refco offered registered bonds for public sale in April 2005. Prior to this offering, Refco had offered unregistered bonds through an underwriting by the 144A Defendants, who purchased the securities and immediately resold them to certain institutional investors, including some of the plaintiffs. These bonds were exempt from registration under SEC Rule 144A, 17 C.F.R. § 230.144A, which exempts private placements to qualified institutional buyers from the registration requirements of the Securities Act of 1933. Holders of the unregistered bonds were permitted to exchange their securities for registered bonds issued in the 2005 public offering in a transaction referred to as an "Exxon Capital exchange," and certain of the plaintiffs undertook such exchanges. . . .

[P]laintiffs . . . allege that the 144A Defendants and their lawyers played a substantial role in drafting and editing the Bond Registration Statement on the basis of which the registered bonds were sold to the public. Plaintiffs argue that this is sufficient to make the 144A Defendants responsible under § 11 for the misstatements contained in the Bond Registration Statement. The 144A Defendants argue that involvement in the drafting or editing of an offering document in connection with a public offering is insufficient for § 11 liability. . . .

[P]articipants in the drafting process can be sued for violations of § 10(b) and Rule 10b-5 for fraud when they participate in making fraudulent statements with scienter. But § 11 liability attaches to the parties specified in that provision even without scienter. To hold all of the myriad of participants in the drafting process—and not merely the specific categories of individuals defined in § 11 as the proponents of the statement—responsible for any material misstatement in the document would make anyone who commented on a draft statement, however innocently, a guarantor of every assertion in the registration statement. . . .

While the definition of "underwriter" is indeed broad and is to be interpreted broadly, it must be read in relation to the underwriting function that the definition is intended to capture. Thus, a careful reading of the definition refutes plaintiffs' mistaken contention that a literal reading of the statute favors their interpretation. The definition primarily references those who "purchase from an issuer with a view to . . . the distribution of any security." 15 U.S.C. § 77b(a)(11). The language on which plaintiffs rely then adds to this definition anyone who "participates . . . direct[ly] or indirect[ly] . . . in any such undertaking." Id. (emphasis added). The "participation" in question is participation in the "undertaking" referred to immediately before: that of purchasing securities from an issuer with a view to their resale—that is, the underwriting of a securities offering as commonly understood. Whatever conduct may be covered by this language, it cannot easily be read to include the 144A Defendants' merely commenting on a draft of a registration statement for a bond offering in which they took no part in the distribution of the bonds.

The general judicial understanding of the statute has been in accord with this Court's interpretation, as courts have emphasized that the breadth of the definition of "underwriter" is intended to sweep up all—but only—those who play a role in the distribution of the securities. As this Court stated in its earlier opinion, while the definition is indeed broad, "'[u]nderwriter' is not . . . a term of unlimited applicability that includes anyone associated with a given transaction." Indeed, the Eighth Circuit has held that "[t]he congressional intent in defining 'underwriter' was to cover all persons who might operate as conduits for the transfer of securities to the public." *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989) (citing legislative history). . . .

Plaintiffs' citation to *Harden v. Raffensperger, Hughes Co.*, 65 F.3d 1392 (7th Cir. 1995), is similarly inapposite as the Seventh Circuit's definition of "underwriter" in that case "dealt with an entirely different animal, the 'qualified independent underwriter,' that accepts § 11 liability per NASD regulations," *In re Adelphia Commc'ns Corp. Sec. Deriv. Litig.*, No. 03 MD 1529, 2007 WL 2615928, at *9 (S.D.N.Y. Sept. 10, 2007). . . .

In short, like the prior complaint, the Second Amended Complaint fails to state a claim against the 144A Defendants for liability under § 11. . . .

Accordingly, for the reasons stated above, the motion of defendants Credit Suisse Securities (USA), Banc of America Securities LLC, and Deutsche Bank Securities, Inc. to dismiss Count Three of the . . . Class Action Complaint as against them is granted.

3. Federal Deposit Insurance Corp. v. First Horizon Asset Securities Inc., 443 F. Supp. 3d 505 (S.D.N.Y. 2020)

[P]laintiff Federal Deposit Insurance Corporation ("FDIC") brought this action [as receiver] on Colonial Bank's behalf against defendants that underwrote and sold the certificates it purchased.

To create the securities, . . . [a] sponsor . . . purchases loans from [an] originator and transfers them to a depositor. The depositor, or issuer, transfers the loans to a trust, which sells the certificates. An underwriter purchases certificates . . . and distributes them to investors. . . . In more complex securitizations, the cash flow is divided into different parts called tranches, and the certificates are divided into different classes. . . .

FDIC claims that defendant RBS underwrote the certificates in . . . two securitizations at issue in this motion . . . . RBS argues that it is not liable because it was not an underwriter of the . . . [two] certificates, and moves for partial summary judgment dismissing claims against it with respect to those two certificates. . . .

Under the Securities Act, an "underwriter" is defined 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." 15 U.S.C. § 77b(a)(11).

Although both securitizations' prospectus supplements list RBS . . . as an underwriter, they specify that RBS is an underwriter of the subordinated class certificates, not the senior class certificates that Colonial Bank purchased. Rather, Credit Suisse and HSBC are named as the underwriters of . . . [those two] senior certificates . . . .

FDIC argues that RBS's liability as an underwriter is not limited to the tranche or class of subordinated certificates. However, the right to sue that Section 11 gives a purchaser of a security is to sue "every underwriter with respect to such security," 15 U.S.C. § 77k(a), or "underwriters of the security at issue," Lehman, 650 F.3d at 175. That right does not encompass suing every underwriter with respect to the entire securitization and each of its securities. . . . The only securities at issue here are the two senior certificates Colonial Bank purchased, which RBS did not purchase, offer, sell, or distribute.

FDIC argues that RBS participated in the distribution of the certificates by performing due diligence on the loans backing the certificates in the securitization, verifying the accuracy of the statements in the prospectus supplements, asking accountants to perform procedures on the prospectus supplements, obtaining counsel's opinions on the prospectus supplements, and approving the prospectus supplements' final content. . . .

Although RBS's performance of due diligence and review of the prospectus supplements helped facilitate the securities offerings, those activities do not involve the purchase, offer, or sale of the securities and thus are not part of their distribution. RBS's only distributional activities are in connection with the subordinated certificates. . . .

FDIC further argues that RBS participated in the underwriting of the senior certificates because its actions were essential to the distribution of the certificates to Colonial Bank. Specifically, FDIC contends that RBS's purchase, offer, and sale of the subordinate certificates "were a condition to the closing of the . . . transactions," and thus "the senior certificates that Colonial Bank bought would never have been offered without RBS's participation." . . . . Even if those statements are true, those relationships are not part of the purchase, offer, or sale of the senior certificates. . . . "Congress enacted a broad definition of underwriter status in order to 'include as underwriters all persons who might operate as *conduits* for securities being placed into the hands of the investing public.'" *SEC v. Lybrand*, 200 F. Supp. 2d 384, 393 (S.D.N.Y. 2002), *aff'd*, *SEC v. Kern*, 425 F.3d 143 (2d Cir. 2005) (emphasis added) (quoting Thomas Lee Hazen, The Law of Securities Regulation 431 (4th ed. 2002)).

Accordingly, there is no genuine issue whether RBS is an underwriter of the senior certificates at issue: it is not.

RBS's motion for partial summary judgment . . . dismissing claims against it with respect to the . . . [two] certificates is granted.

APPENDIX B

This Appendix analyzes each of the judicial precedents that the Release cites in support of proposed Rule 140a. Despite the sweeping breadth of this proposed new rule, the Commission devotes only three paragraphs in the Release to describe the new rule's purported legal basis. And this three-paragraph discussion cites only nine judicial precedents in support of the assertions regarding statutory underwriter status. As described below, none of these precedents supports the broad claims for which the Release cites them.

1. *SEC v. Chinese Consolidated Benevolent Association* (1941)

The Release cites *SEC v. Chinese Consolidated Benevolent Association*,[112] for these five propositions:

- underwriter status may attach to persons who are "deemed 'statutory underwriters' under the underwriter definition, such as by 'selling for an issuer.'"[113]
- selling "for an issuer" does not require "a relationship with the issuer";[114]
- selling "for an issuer" does not require compensation for the statutory underwriter's services;[115]
- selling "for an issuer" does not require privity of contract with the issuer;[116] and
- selling "for an issuer" does not require having been "retained to act as firm commitment underwriters in the de-SPAC transaction."[117]

These statements from the Release suggest a sweeping, seemingly boundless, breadth that is absent from both Section 2(a)(11) and the holding of *Chinese Consolidated Benevolent Association*.

Instead, the teaching of *Chinese Consolidated Benevolent Association* is much more limited. As a leading securities law treatise notes, "the second clause of Section 2(a)(11)—'sells for an issuer'—has been used sparingly in determining whether particular persons qualify as underwriters."[118] Nearly all of those infrequent instances, moreover, involved *unregistered* distributions—*i.e.*, public offerings of securities conducted without any filing of a registration

[112] 120 F.2d 738 (2d Cir. 1941).

[113] Release at 29484 & n.186.

[114] *Id.* at n.186.

[115] *Id*. at 29485 & n.189; *id*. at 29486 n.203.

[116] *Id*. at 29485 & n.191; *id*. at 29486 n.203.

[117] *Id*. at 29486 & n.202.

[118] Hicks, *supra* note 21, § 9:39.

statement, in flagrant violation of Section 5 of the Securities Act.[119] This was the factual setting of *Chinese Consolidated Benevolent Association*, which involved a patriotic association engaged in a continuous solicitation of orders to buy unregistered bonds of the Chinese government. Through "mass meetings, advertising in newspapers . . . and personal appeals," the association engaged in "systematic continuous solicitation, followed by collection and remission of funds to purchase the securities, and ultimate distribution of the bonds in the United States," albeit without profit to the association.[120] No registration statement under the Securities Act had ever been filed with respect to the public offering (*i.e.*, distribution) of the securities.[121] The court, noting that Section 2(a)(3) of the Securities Act defines "sale" or "offer to sell" as including every "solicitation of an offer to buy" a security, found that the association had violated Section 5(a) of the Securities Act because "it engaged in selling unregistered securities issued by the Chinese government when it solicited offers to buy the securities" and that "a series of events were set in motion by the solicitation of offers to buy which culminated in a distribution" that the association had initiated.[122] As a result, the court held that the association had acted as an underwriter under the second clause of Section 2(a)(11), as a "person who . . . sells for an issuer" in connection with the distribution of the Chinese government bonds.[123]

Thus, *Chinese Consolidated Benevolent Association* held that a person can become a statutory underwriter under the second clause of Section 2(a)(11) when that person: (i) solicits orders to buy the issuer's securities; (ii) engages in a systematic continuous solicitation; (iii) collects funds from buyers and remits payment to the issuer; and (iv) directly facilitates the purchase and ultimate distribution of securities without registration.[124] At no point, however, does the Release acknowledge the holding in the case—instead citing *Chinese Consolidated Benevolent Association* to assert only that underwriter status requires no relationship with the issuer, no compensation for the underwriter's services, no privity of contract with the issuer, and no retention as firm commitment underwriters.

More recently, in 2011, the Second Circuit explained that its prior decision in *Chinese Consolidated Benevolent Association*, 81 years ago, does *not* hold that the definition of underwriter includes "any person who is 'engaged in steps necessary to the distribution of security issues,'" and that the case also does "*not* hold that anyone taking steps that facilitate the eventual sale of a registered security fits the statutory definition of underwriter."[125] The Second Circuit also noted that the reference in *Chinese Consolidated Benevolent Association* to "steps necessary to the distribution" was "originally employed by this court to explain a registration

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[119] *See id*. at § 9:39 n.19.

[120] 120 F.2d at 739, 741.

[121] *Id*. at 739.

[122] *Id*. at 740-41.

[123] *Id*. at 741.

[124] *See id*. at 739, 741.

[125] *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 177 (2d Cir. 2011) (quoting *SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005)).

exemption, *not* the underwriter definition."[126] The Second Circuit explained that its previous decision in *Chinese Consolidated Benevolent Association* held (i) that "a corporation soliciting buyers for unregistered Chinese government bonds was a statutory underwriter because it sold securities for an issuer despite not acting at the issuer's behest" and that, "[a]s an underwriter, the corporation did not qualify for § 4[(a)](1)'s registration exemption for '[t]ransactions by any person other than an issuer, underwriter, or dealer'"; and (ii) in the alternative, that the corporation was ineligible for the Section 4(a)(1) exemption even if the corporation was not an underwriter because the seller "participated in a transaction involving an issuer." The court explained that it was in the context of this *latter* holding—not the former holding, relating to the underwriter definition—that *Chinese Consolidated Benevolent Association* held that the *exemption* in Section 4(a)(1) "'does not . . . protect those who are engaged in steps necessary to the distribution of' securities because it is limited to transactions between individual investors."[127]

Finally, the Second Circuit dismissed the applicability of *Chinese Consolidated Benevolent Association* in the context of a *registered* offering under the Securities Act. The court highlighted the "questionable relevance" of the case because it involved an enforcement action by the Commission "against defendants for selling *unregistered* securities in violation of § 5 rather than § 11 liability for misstatements or omissions in registration statements."[128]

2. *Harden v. Raffensperger, Hughes & Co.* (1995)

The Release cites *Harden v. Raffensperger, Hughes &Co.*,[129] for these two propositions:

- "Both federal courts and the Commission previously have found that other parties involved in securities offerings can be deemed 'statutory underwriters' under the definition, such as by . . . directly or indirectly 'participating' in a distribution by engaging in activities 'necessary to the distribution' or in 'distribution-related activities.' Such parties can attain underwriter status even if they . . . do not sell securities directly to the public . . . ."[130]

- "The defendant argued that it was not an underwriter because it had neither purchased nor sold any of the distributed securities. The court held that the defendant's activities fell within the 'participates' and 'has a participation' language of Section 2(a)(11), reasoning that Section 2(a)(11) is broad enough to encompass all persons who engage in the steps necessary to the distribution of securities."[131]

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[126] *Id.* at 178 n.7 (emphasis added).

[127] *Id.* (quoting *Chinese Consol. Benevolent Ass'n*, 120 F.2d 738, 741 (2d Cir. 1941)).

[128] *Id.* at 178 n. 8 (emphasis added) (quoting *Chinese Consol. Benevolent Ass'n*, 120 F.2d at 739-41).

[129] 65 F.3d 1392 (7th Cir. 1995).

[130] Release at 29484-85 & n.187.

[131] *Id.* at 29485 n.187.

But as the Release acknowledges, *Harden*'s holding was limited to the context of a qualified independent underwriter ("QIU").[132] Under FINRA (then-NASD) rules, the issuer in that case could not use a nonindependent affiliate as its underwriter.[133] For that reason, it needed a QIU instead.[134] The QIU then *voluntarily* and *explicitly assumed* the liabilities of an underwriter.[135] Thus, *Harden* does not support the Commission's approach in proposed Rule 140abecause *Harden* turned on the special context and role played by QIUs.[136] *Harden* is "inapposite as the Seventh Circuit's definition of 'underwriter' in that case 'dealt with an entirely different animal, the "qualified independent underwriter," that accepts § 11 liability per NASD regulations.'"[137]

3. *SEC v. Kern* (2005)

The Release cites *SEC v. Kern*,[138] for this proposition: "[T]he statutory definition of underwriter is much broader. Both federal courts and the Commission previously have found that other parties involved in securities offerings can be deemed 'statutory underwriters' under the underwriter definition, such as by selling 'for an issuer' . . . ."[139]

Again, the Release suggests that *Kern* supports a sweepingly broad interpretation of the underwriter definition, but *Kern* supports no such thing. Indeed, *Kern* did not address the underwriter definition at all. Instead, *Kern* held that the defendant made sales that "were part of the same 'transaction'" as a distribution with actual underwriters, and therefore did not satisfy Section 4(1)'s exemption of "*transactions* by any person other than an issuer, underwriter or dealer."[140] The sales at issue in *Kern*, moreover, were of *unregistered securities*[141]—a fact pattern that bears little resemblance to a SPAC IPO or de-SPAC transaction, which (assuming proposed Rule 145a is adopted) will both require registration under the Securities Act. *Kern*, then, does not stand for the proposition that those who do not satisfy Section 2(a)(11)'s definition of statutory underwriter may nonetheless be "deemed" underwriters.

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[132] *Id.* ("[A] third party retained as a 'qualified independent underwriter' to perform due diligence and recommend a minimum yield for a bond offering deemed a statutory underwriter.").

[133] 65 F.3d at 1397.

[134] *Id.*

[135] *Id.*

[136] *See In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 179 (2d Cir. 2011) (distinguishing *Harden* on these grounds as inapposite for determining "participation" under Section 2(a)(11)).

[137] *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *4 n.6 (S.D.N.Y. Aug. 14, 2008) (quoting *In re Adelphia Commc'ns Corp. Sec. Deriv. Litig.*, 2007 WL 2615928, at *9 (S.D.N.Y. Sept. 10, 2007)).

[138] 425 F.3d 143 (2d Cir. 2005).

[139] Release at 29484 & n.186.

[140] *Kern*, 425 F.3d at 152-53 (emphasis in original).

[141] *Id.* at 145.

4. *SEC v. Allison* (1982)

The Release cites *SEC v. Allison*,[142] for this proposition: "Similarly, courts have interpreted the underwriter definition broadly to include promoters, officers, and control persons who have arranged for public trading of an unregistered security through advertisements, research reports, or other promotional efforts."[143] The implication being that facilitating a distribution of securities is enough to qualify as an underwriter under Section 2(a)(11).

But *Allison* does not support the Commission's inferential leap. In that case, "Defendants *directly participated in the offers and sales* of the securities: they *arranged for public trading* to commerce through market makers, brokers, and transfer agents; they *stimulated demand* through advertisements, research reports, and television promotions; and, through these efforts, they were able to sell a substantial amount of stock in SNG and Olympic to the public."[144] In other words, the defendants did not merely facilitate sales of securities, they had extensive participation in the offer and sale. And, again, this case involved the sale of unregistered securities[145]—a difference in kind and not degree from a SPAC IPO and de-SPAC transaction.

5. *Gilligan, Will & Co.* (1959)

The Release cites *Gilligan, Will & Co. v. SEC*,[146] for the following propositions:

- The Release characterizes the case as one "holding that a distribution exists if there are sales to those who cannot 'fend for themselves.'"[147]
- "Accordingly, as in a traditional underwritten public offering, public investors—who were unfamiliar with the formerly private company—would benefit from the additional care and diligence exercised by SPAC underwriters in connection with the de-SPAC transaction."[148]

As the Release correctly notes, *Gilligan* held that "a 'distribution' requires a 'public offering.'"[149] But that axiomatic statement does not support the Commission's attempt in proposed Rule 140a to treat different distributions as a single, continuous distribution. Moreover, the Commission cannot rely simply on the policy goal that "public investors . . . would benefit" from deeming SPAC underwriters as underwriters of the de-SPAC transaction

[142] No. C-81-19 RPA, 1982 WL 1322 (N.D. Cal. 1982)

[143] Release at 29485 & n.192.

[144] *Allison*, 1982 WL 1322, at *3 (emphasis added).

[145] *Id.* at *1.

[146] 267 F.2d 461 (2d Cir. 1959)

[147] Release at 29485 & n.193 (quoting *Gilligan* as citing *Ralston v. Purina Co.*, 346 U.S. 119 (1953)).

[148] *Id.* at 29486 & n.199.

[149] *Id.* at 29485 & n.193 (quoting 267 F.2d at 466).

while ignoring the plain text.[150] *Gilligan*'s actual holding demonstrates that an individual or entity can be an underwriter under Section 2(a)(11) only in limited circumstances. For instance, in *Gilligan* the court held that there was a public offering, of which Gilligan, Will & Co. was an underwriter, when Gilligan purchased unregistered securities from the issuer, and Gilligan then sold those unregistered securities to the public.[151] That limited holding does not support the Commission's sweeping interpretation.

6. *Geiger v. SEC* (2004)

The Release cites *Geiger v. SEC*,[152] for three propositions:

- "[T]he statutory definition of underwriter is much broader. Both federal courts and the Commission previously have found that other parties involved in securities offerings can be deemed 'statutory underwriters' under the underwriter definition, such as by . . . directly or indirectly 'participating' in a distribution by engaging . . . in 'distribution-related activities.'"[153]

- Summarizing *Geiger* as a case in which a "defendant 'participated' in a distribution as a statutory underwriter through its actions in finding a buyer, negotiating the terms of the transaction, and facilitating resale of securities."[154]

- Characterizing *Geiger* as a case "where the court agreed with the SEC that the petitioners, Charles F. Kirby and Gene Geiger (head trader and salesman, respectively, at a securities brokerage firm), who made resales in broker transactions over a two-week period of 133,333 shares of the roughly 25 million shares then outstanding, were engaged in a distribution within the meaning of Section 2(a)(11) of the Securities Act and that one 'did not have to be involved in the final step of [a] distribution to have participated in it.'"[155]

Again, the Release makes an inferential leap from *Geiger*'s actual holding to a sweepingly broad view of Section 2(a)(11) that *Geiger* does not support. In *Geiger*, the court held that the defendant "participated" (within the meaning of Section 2(a)(11)) in the distribution of unregistered securities by finding a buyer, negotiating terms, and facilitating resale of the securities.[156] That kind of extensive participation in the sale of unregistered securities is a far cry from the level of participation that proposed Rule 140a would reach—*i.e.*, no participation at all.

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[150] *Id.* at 29485-86.

[151] *Gilligan*, 267 F.2d at 464-67.

[152] 363 F.3d 481 (D.C. Cir. 2004)

[153] Release at 29484-85 & n.188.

[154] *Id.*

[155] *Id.* at 29485 & n.196 (alteration in original) (quoting *Geiger*, 363 F.3d at 487).

[156] 363 F.3d at 487.

7. *R. A. Holman & Co., Inc. v. SEC* (1966)

The Release cites *R. A. Holman & Co., Inc. v. SEC*,[157] for two propositions:

- "A distribution has been said to comprise 'the entire process by which in the course of a public offer a block of securities is dispersed and ultimately comes to rest in the hands of the investing public.'"[158]

- Summarizing *R. A. Holman* as "finding that an ongoing distribution and related manipulation had occurred where a broker-dealer sold securities on a 'delayed delivery' basis and there was a real possibility at the time of purchase that the purchaser would cancel the order."[159]

R. A. Holman's core holding is merely that a distribution is not complete until the securities have come to rest in the hands of public investors. But the Commission takes that unobjectionable holding and extrapolates that it can deem securities from the SPAC IPO not to have come to rest in the hands of the public when they clearly have. *R. A. Holman* does not support the Commission's unprecedented proposition that the distribution of securities from a SPAC IPO is continuous after those securities have come to rest in the hands of public investors. The "entire process" ends when the securities come to rest, not indefinitely.

8. *In the Matter of Oklahoma-Texas Trust* (1937)

The Release summarizes *In the Matter of Oklahoma-Texas Trust*,[160] to stand for the following proposition: "finding an ongoing distribution where portions of a registered offering continued to be held by securities dealers."[161]

But that is not *Oklahoma-Texas Trust*'s central holding, nor does the case's actual holding support the Commission's broad reimagining of Section 2(a)(11). To the contrary, *Oklahoma-Texas Trust* concluded that the Commission had authority to suspend the effectiveness of a registration statement despite the "*completion of the original distribution*."[162] In other words, it reinforces the notion that the Commission cannot "deem" a distribution to be continuous, or reinterpret two separate distributions to be one single distribution.

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[157] 366 F.2d 446 (2d Cir. 1966).

[158] Release at 29485 & n.196 (citation and alteration omitted).

[159] *Id.* n.196.

[160] 2 SEC 764, 769, 1937 WL 32951 (Sept. 23, 1937), *aff'd*, 100 F.2d 888 (10th Cir. 1939).

[161] Release at 29485 n.196.

[162] 1937 WL 32951, at *6 (emphasis added).

9. ***SEC v. Datronics Engineers, Inc.* (1973)**

The Release cites *SEC v. Datronics Engineers, Inc.*,[163] for the following propositions:

- "The de-SPAC transaction . . . is effectively how the private operating company's securities 'come to rest'—in other words, are distributed—to public investors as shareholders of the combined company."[164]
- "A court has addressed in dicta whether a somewhat analogous situation [to a de-SPAC transaction] involving the introduction of private companies to the public markets through an existing shareholder base was a distribution."[165]
- Summarizing the case as follows: "Datronics, a public corporation, acquired a number of privately-held, target companies in merger transaction. A subsidiary of the defendant would merge with the target company, with the subsidiary surviving the merger. Both the shareholder-principals of the target and Datronics received stock in the surviving subsidiary. After the merger, Datronics distributed some of its shares to its shareholders as a dividend. In this way, formerly privately-held companies became publicly owned without going through a registered public offering. The court stated in dicta, 'we think that Datronics was an underwriter within the meaning of the 1933 Act. Hence its transactions were covered by the prohibitions, and were not within the exemptions, of the Act. By definition, the term underwriter "means 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." By this underwriter distribution Datronics violated Section 5 of the 1933 Act—sale of unregistered securities.'"[166]

While the Release attempts to analogize the de-SPAC transaction to the business combination transaction at issue in *Datronics*, an evaluation of the facts of *Datronics* belies that contention. *Datronics* fundamentally is a case about spin-off transactions—not mergers or other combinations like those at issue in a de-SPAC transaction. And while the Fourth Circuit's dicta might support the idea that a de-SPAC transaction itself *can* be a public offering of securities, it does *not* support the contention that the de-SPAC transaction is a continuation of the distribution that took place *in the SPAC IPO*. In *Datronics*, the company acquired various businesses and subsequently spun off those businesses to its shareholders via dividends of unregistered securities.[167] That fact pattern bears virtually no resemblance to the registered distribution of

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[163] 490 F.2d 250 (4th Cir. 1973)

[164] Release at 29485 & n.198.

[165] *Id.* at n.198.

[166] *Id.* (alterations and citations omitted) (quoting *Datronics*, 290 F.2d at 254).

[167] 490 F.2d at 252-53.

securities that takes place in a de-SPAC transaction, and the passing reference in four sentences of dicta cannot bear the weight the Commission would place on it.