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June 15, 2022

Vanessa A. Countryman
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Via email to rule-comments@sec.gov

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

Dear Ms. Countryman:

We submit this letter in response to the request for public comments by the Securities and Exchange Commission (the "**Commission**") with respect to proposed rules (any individual proposed rule or disclosure item, a "**Proposed Rule**" or "**Proposed Item**" and, collectively, the "**Proposals**") referenced above regarding special purpose acquisition companies ("**SPACs**"), as set forth in a release published in the Federal Register on May 13, 2022 (the "**Proposing Release**").

We appreciate the opportunity to submit comments and acknowledge that the staff of the Commission (the "**Staff**") has put a great deal of time and effort into the Proposing Release. We support the goal of ensuring consistent, comparable and meaningful disclosure oriented to assisting investors in assessing any transaction. While we support enhancing disclosure for investors, we do have some concerns about certain aspects of the Proposing Release that may significantly impair capital formation without providing commensurate investor protection. As written, we are concerned that the Proposing Release will narrow the avenues by which companies can access the public markets, which we believe ultimately disadvantages investors.

In our view, certain Proposals will likely have the effect of discouraging participants from engaging in de-SPAC transactions. Below we detail our concerns with the Proposals, including the following principal aspects thereof: (1) the definition of a "de-SPAC transaction"; (2) Proposed Rule 145a; (3) Proposed Rule 140a; (4) the amendment of the term "blank check company" for purposes of the Private Securities Litigation Reform Act of 1995 ("PSLRA"); (5) Proposed Item 1606; (6) Proposed Item 1609(c); and (7) the proposed safe harbor from the Investment Company Act of 1940, as amended (the "**Investment Company Act**").

I. Aligning a traditional IPO and a de-SPAC transaction

A. Definition of de-SPAC transaction

We are concerned regarding the potential adoption and use of the term "de-SPAC transaction" as proposed in Proposed Item 1601(a). Although the proposed definition tracks the purpose of SPACs and focuses on the business combination transaction, the Commission's use of this term throughout the Proposing Release is reflective of the colloquial understanding of the term, which encompasses a series of transactions that accompany the SPAC's initial business combination transaction. In industry parlance, the "de-SPAC transaction" references this initial business combination, concurrent debt or equity financing transactions, if any, and the activities related to the SPAC's shareholder meeting called to consider the proposed business combination and the exercise of the redemption right by the SPAC's shareholders. The adoption of the colloquial use of the term reflects the Commission's effort to equate a de-SPAC transaction with an initial public offering ("**IPO**") by a private company, which is a single offer of securities.[1] In contrast, the de-SPAC transaction may include multiple offers of securities, including an offer to the shareholders of the private operating company (the "**Target**"), a concurrent private placement of securities (referred to as the "**PIPE**") to accredited investors and, as contemplated in Proposed Rule 145a, a deemed exchange offer to the existing shareholders of the SPAC. The simplified view of a de-SPAC transaction as the public distribution of the securities of a previously private company requires the integration of these multiple offers of securities, not all of which qualify as distributions, and leads to an expansive view of Section 11 liability reaching various participants in the wider de-SPAC transaction, even though such participation is not oriented towards a distribution of securities. We urge the Commission to replace the colloquial term de-SPAC transaction with "initial business combination," that is, the merger transaction between the SPAC and the Target.

B. Proposed Rule 145a

We believe the current regulatory regime of the federal securities laws, coupled with the fiduciary duties created by the laws of the jurisdiction in which a SPAC is organized, provide sufficient incentives for participants in de-SPAC transactions to conduct appropriate due diligence and provide investors with robust disclosure. Furthermore, we believe the disclosure rules proposed in various sections of Subpart 1600 will further enhance information to allow investors to make informed decisions. As a result, and for the reasons detailed below, we are concerned about Proposed Rule 145a, which would deem any business combination of a reporting shell company with an entity that is not a shell company to involve a sale of securities to the reporting shell company's shareholders, thus requiring a registration statement unless an exemption exists.

1. The comparison of reporting shell company transactions and de-SPAC transactions as the basis of this proposal is imperfect.

A de-SPAC transaction is dissimilar to a transaction involving a non-SPAC reporting shell company, which we agree can raise concerns regarding information asymmetries between insiders and the investing public.[2] However, a de-SPAC transaction is not a transaction that creates a public market in the securities of a private company without a comprehensive disclosure process.[3] In fact, the de-SPAC

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1 *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) (the "**Proposing Release**") at 29485-29486 ("The de-SPAC transaction marks the introduction of the private operating company to the public capital markets and 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.").

2 *Id.* at 29536 ("Proposed Rule 145a is intended to address concerns regarding the use of reporting shell companies generally as a means by which private unregistered companies access the U.S. capital markets.").

3 *Id*. at 29536-29537 ("Proposed Rule 145a is intended to address potential disparities in the types of disclosure and liability protections available to reporting shell company shareholders depending on the transaction structure used in a reporting shell company business combination, and thus, is expected to bolster investor protection for reporting shell company shareholders. This could be of particular benefit to shareholders in

transaction involves a substantial Staff-reviewed disclosure document, which the SPAC provides to investors before the consummation of a de-SPAC transaction. Accordingly, the remedial purposes of the Securities Act of 1933, as amended (the "**Securities Act**") are often not implicated in de-SPAC transactions and, when there is a new offering of securities, a registration statement is used as evidenced by the numerous de-SPAC transactions reviewed by the Commission. Furthermore, the goal of this proposal is unclear in light of Question 95 in the Proposing Release, which considers limiting the application of Proposed Rule 145a to SPACs only, notwithstanding the fact that investors are provided a tremendous amount of information prior to the consummation of a transaction as opposed to what is provided to shareholders of non-SPAC reporting shell companies. In our view, this proposal, especially if limited to SPACs, will not serve the Commission's articulated goal of inhibiting the creation of a public market in securities of an issuer about which there is inadequate current information.

In light of the existing disclosure rules and the robust Commission review process, and with the abundance of rules in Proposed Subpart 1600, many of which codify existing Staff positions and market practice on disclosures, we do not believe the lack of a registration statement under the Securities Act in certain de-SPAC transactions deprives investors of critical disclosures. In fact, the disclosures required by the proxy rules promulgated under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") have been viewed by the Commission as providing adequate disclosure for both SPAC and non-SPAC transactions. We further note that reporting shell companies do not typically have exchange listings as do nearly all SPACs. This is a critical difference between SPACs and non-SPAC reporting shell companies that should inform the consideration of whether the "remedial purposes" of the Securities Act need to be deployed to protect SPAC shareholders. As companies listed on the New York Stock Exchange and The Nasdaq Stock Market, SPACs are subject to quantitative and qualitative listing standards. In particular, SPACs must adhere to corporate governance guidelines substantially similar to other listed public companies. Accordingly, the de-SPAC transaction is announced to shareholders well ahead of consummation and shareholder approval is obtained, where required, by the applicable listing rules. Therefore, we believe analogizing de-SPAC transactions to reporting shell company transactions ignores the significant disclosure and investor protections present in de-SPAC transactions and is not an appropriate basis for additional regulation of de-SPAC transactions.

2. De-SPAC transactions are not always an offer of securities to the SPAC's existing shareholders.

We are concerned with the Commission's analysis that every de-SPAC transaction is a disposition of a security for value by the SPAC's existing shareholders requiring registration.[4] Fundamentally, the investment in a SPAC security is an investment in a management team searching for a target company and not just a "pile of cash." The inherent value of a SPAC's security is the ability of the management team to identify a target company within the scope of the SPAC's limited timeline. Moreover, the investment in a specific SPAC is not interchangeable with an investment in any other SPAC. Each security represents a differentiated business objective and sourcing opportunities for potential business combination transactions. Even though the specific target company is unidentified at the time of the SPAC's IPO, when acquired, a SPAC security represents an investment in a Target because the sole purpose of a SPAC is to engage in a business combination. As a result, the consummation of a business combination does not result in a "for value" disposition for the SPAC

reporting shell companies that may not otherwise receive information about the intended target, or potentially even notification that a specific business combination will be entered into, until after the transaction has occurred.").

4 *Id.* at 29488.

shareholders because the value proposition of a SPAC security includes the post-closing company.[5] This view is reflected in the Commission's discussion of Proposed Rule 140a.[6] Finally, as highlighted above, SPAC shareholders receive robust information relating to a proposed Target under the existing regulatory regime.

An investment in a SPAC is not comparable to an interest in a non-SPAC reporting shell company. An investor in a non-SPAC reporting shell company did not necessarily invest in a company seeking a business combination opportunity. For example, an operating company may cease operations and become a reporting shell company with nominal assets and operations. In a typical transaction involving a reporting shell company, the controlling shareholders will enter into arrangements to sell their entire interests in the reporting shell company to a new investor. Because such transaction involves the sale of existing securities from one investor to another, it is usually exempt from the registration requirements of the Securities Act pursuant to Section 4(a)(1) thereof. Moreover, as a non-listed entity, there are no corporate governance requirements relating to disclosures about change-in-control transactions. Following such transaction, the new controlling shareholders may contribute an existing business to the former reporting shell company or start an entirely new business. As a result of such transaction, the reporting shell company's existing shareholders become shareholders of an entirely different and unexpected venture about which they may have received no prior information. A non-SPAC reporting shell company is the prototypical creation of a public market in the shares of a private company. This is not akin to the consummation of a de-SPAC transaction.

Many de-SPAC transactions already involve the use of a registration statement under the existing regulatory regime where the structure of the business combination results in new securities being offered to the SPAC's existing shareholders (e.g., through a "double dummy" transaction structure, a change in the jurisdiction of incorporation, or when the private operating company files a registration statement as the registrant). However, in many cases where the SPAC is the surviving public entity and is not changing its jurisdiction of incorporation, there is no a sale of securities and a proxy statement is required to solicit shareholder approval instead. The Commission suggests all transactions should be "deemed exchanges" and therefore registered on a registration statement "so that shareholders more consistently receive the full protections of the Securities Act disclosure and liability provisions in business combinations involving reporting shell companies, regardless of the transaction structure."[7] However, the Commission has not explained why the disclosures required in a registration statement are more protective of shareholders than those required in a proxy statement. If there are items required in a registration statement that are not in the proxy statement, we urge the Commission to propose revisions to the proxy statement form to make the two consistent, especially given the numerous non-SPAC transactions that are presented to investors for approval without the use of a registration statement. As for liability, again, it is not necessary to twist a SPAC business combination into a "deemed exchange" to create an appropriate liability framework as Section 14(a) of the Exchange Act and Rule 14a-9 thereunder prohibit the solicitation of proxies by means of a proxy statement containing a materially false statement.

Proposed Rule 145a is also inconsistent with the Commission's prior conclusion that certain business combinations and other transactions involve an offer or sale of securities within the meaning of

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5 *Id.* at 29489, Footnote 229.

6 *See, e.g.*, Proposing Release at 29486 ("[T]he SPAC IPO underwriter is participating in the distribution of target company securities.").

7 *Id.* at 29489.

Section 2(a)(3) of the Securities Act. The Preliminary Note to Rule 145[8] provides a useful comparison to Proposed Rule 145a. The thrust of Rule 145 is an offer to sell, offer for sale, or sale occurs when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance *a new investment decision*, whether to accept a new or different security in exchange for their existing security.[9] Each type of transaction subject to Rule 145 includes a shareholder vote or consent and a new investment decision. In contrast, Proposed Rule 145a identifies the de-SPAC transaction as the covered transaction but fails to articulate how and when an investment decision is being made by existing SPAC shareholders with respect to a new or different security in exchange for their existing security.

Proposed Rule 145a is also inconsistent with the Commission's interpretive guidance under Compliance and Disclosure Interpretation ("C&DI") Section 239.13. C&DI Section 239.13 articulates the view that, a vote in favor of, or a consent to, a business combination transaction is an investment decision and therefore the transaction involves an offer of securities. A SPAC shareholder makes two decisions - a vote decision and a redemption decision, neither of which constitute an investment decision with respect to an offer to sell, offer for sale, or sale of securities. Thus, the premise of the Commission's view that a SPAC's business combination involves the sale of securities within the meaning of Section 2(a)(3) of the Securities Act is not correct.[10] For these reasons, we do not support the adoption of Proposed Rule 145a.

3. If a de-SPAC transaction were to involve a sale of securities, Section 3(a)(9) of the Securities Act should provide an exemption from the registration requirements of the Securities Act.

If we were to assume that a de-SPAC transaction involves an offer or sale of securities to the SPAC's existing shareholders requiring registration under the Securities Act or an exemption from registration, we disagree with the Commission's conclusion that Section 3(a)(9) of the Securities Act is unavailable to exempt such offer or sale from registration where the SPAC remains the issuer.[11] Although we disagree with the premise, we assume for the discussion below that the business combination is a "deemed exchange" vis-à-vis the SPAC's existing shareholders.

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8 17 C.F.R. § 230.145.

9 *Id.* (emphasis added).

10 In recognition of this fact, and for the stated aim of enhancing "investor protections," Question 152, bullet 2, asks whether the availability of the exclusion from the requirements of Rule 419 should be conditioned on the requirement that a shareholder voting to approve a de-SPAC transaction must continue to hold an interest in the combined company. *See* Proposing Release at 29504. It is unclear why denying the redemption right to shareholders that approve the de-SPAC transaction would enhance investor protection. We note that the purpose of the Securities Act is not to protect investors from the decisions made by other investors. *Id*. at 29507 ("Additionally, in cases where the SPAC is structured so that the shareholders are able to vote in favor of a merger but also redeem their shares, this could present a moral hazard problem, in economic terms, because the redeeming shareholders would not bear the full cost of a less than optimal choice of target.").

11 Proposing Release at 29489.

We do not believe the "deemed exchange" should be integrated with the exchange of the private company's securities for interests in the SPAC.[12] The Commission itself acknowledges in Footnote 230 that there are separate offers in a de-SPAC transaction that must be analyzed separately for purposes of the Securities Act.[13] Moreover, the unavailability of the non-excusive safe harbor under Rule 152(b) is not conclusive evidence that concurrent offerings of securities must be integrated. As set forth in Rule 152(a), offers will not be integrated if the issuer can establish that each offer complies with the registration requirements of the Securities Act or an available exemption from registration.[14] It is our view that the offer of securities to the Target shareholders is distinct from any deemed exchange by the SPAC's existing shareholders. We note there are significant substantive distinctions between an offer of securities to Target shareholders and a "deemed exchange" to SPAC shareholders pursuant to Proposed Rule 145a. To a Target shareholder, the business combination transaction represents an offer to purchase a newly issued share in a public company. In contrast, a SPAC shareholder continues to hold its interest in the SPAC. Moreover, if there were an offer to the existing SPAC shareholder, it may not occur at the same time as the offer to the Target shareholders. Typically, Target shareholders consent to a business combination with a SPAC prior to the business combination's announcement. In accordance with C&DI Section 239.13, the investment decision is deemed to be made when the consent is delivered or the vote is cast. The "deemed exchange" offer to the SPAC shareholders would not occur until after the registration statement relating to the de-SPAC transaction is declared effective by the Commission several months later.

We further disagree that Section 3(a)(9) of the Securities Act is unavailable because a proxy solicitor is paid to solicit proxies from SPAC shareholders in connection with the shareholder vote on a de-SPAC transaction.[15] The proxy solicitor is soliciting participation in a shareholder vote, not in a "deemed exchange." As noted above, even Proposed Rule 145a itself does not identify the shareholder vote in a de-SPAC transaction as an investment decision, and the shareholder vote in a de-SPAC transaction does not equate to the investment decision made in other transactions covered by Rule 145. Therefore, as the proxy solicitation is not in connection with an exchange or an investment decision, the payment to a proxy solicitor is irrelevant for purposes of the Section 3(a)(9) analysis.

Although the Commission states that a de-SPAC transaction may still make use of an available exemption from registration, we find it difficult to identify what exemption would be available if Section 3(a)(9) of the Securities Act is unavailable. The SPAC is a publicly traded company with widely-held shares. In order to complete a valid private offering pursuant to Section 4(a)(2) of the Securities Act,

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12 *Id.* ("In these circumstances, we believe that the deemed exchange by the reporting shell company's existing shareholders for the combined company's securities should be viewed as part of the same offering as the exchange of the private company's securities for their interests in the combined company.").

13 *Id*. at 29489 Footnote 230 ("We note that [Proposed Rule 145a] does not change the conclusion that a merger with a reporting shell company may constitute the offer and sale of securities to other parties for which registration under the Securities Act or an exemption would be required. For example, where a SPAC survives the de-SPAC transaction, the SPAC will frequently issue its securities to shareholders of the private company in exchange for their interests in the private company. Such a transaction would still require registration or an exemption from registration.").

14 17 C.F.R. § 230.152(a).

15 Proposing Release at 29489 ("[W]e note that Section 3(a)(9) would not be available where a commission or other remuneration is paid or given directly or indirectly for soliciting of participation in the deemed exchange. This would occur, for example, if a proxy solicitor is compensated to solicit the approval of the reporting shell company's shareholders for the business combination.").

especially one for which general solicitation has been established by the announcement of the de-SPAC transaction, we believe only Rule 506(c)[16] promulgated under the Securities Act would be available. As the SPAC would be unable to verify the accreditation status of each and every shareholder, the SPAC would practically be unable to make use of such exemption from the registration requirements of the Securities Act. Therefore, we believe it is necessary for the Commission to define what exemptions it believes may be available with respect to a de-SPAC transaction if Proposed Rule 145(a) is adopted and the Commission does not reverse its position that Section 3(a)(9) of the Securities Act is unavailable.

C. Proposed Rule 140a

We are concerned regarding the potential adoption of Proposed Rule 140a, which purports to "clarify" that an underwriter in a SPAC IPO that takes steps to "facilitate the de-SPAC transaction" will be deemed to be engaged in the distribution of the surviving public entity's securities. The purported goal is to apply the liability framework in underwritten IPOs to de-SPAC transactions. We believe that Proposed Rule 140a cannot be supported under the definition of "underwriter" in Section 2(a)(11) of the Securities Act because a de-SPAC transaction does not involve the SPAC IPO underwriters as "persons playing roles essential in the actual distribution of securities" through any of the activities described therein. The SPAC IPO underwriters do not have any role as such in the business combination. The advisors and other participants in a de-SPAC transaction are not distributing securities in the later de-SPAC transaction. The distribution is conducted by the issuer to the counterparties in the business combination, without the involvement of underwriters.

Furthermore, in response to Question 83 in the Proposing Release, we believe Proposed Rule 140a is unnecessary to achieving the aim of ensuring investors receive robust disclosure prior to the consummation of a de-SPAC transaction. As the activities of various entities providing services relating to the de-SPAC transaction do not rise to the level of the distribution activity required by Section 2(a)(11) of the Securities Act, the assessment of whether such professionals have conducted appropriate due diligence would not be oriented towards the analysis of a due diligence defense.[17] In the context of this merger transaction, whether "appropriate due diligence" has been conducted is a determination better addressed by the corporate laws of the jurisdictions in which the SPAC or Target are formed, namely that the directors have performed their fiduciary duties, including being fully informed, when entering into a business combination agreement and recommending the business combination agreement for approval by their shareholders. The imposition of Section 11 liability is not only achieved by a convoluted application of statutory underwriter status under Section 2(a)(11) of the Securities Act, it is also unnecessary to achieve the aim of enabling investors to make fully informed decisions.

1. Proposed Rule 140a is not a clarification of existing law.

We disagree with the assertion that Proposed Rule 140a clarifies that the underwriter of a SPAC IPO that take "steps to facilitate" or "otherwise participates (directly or indirectly)" in the related de-SPAC transaction (or the related financing) is deemed a statutory underwriter with respect to the distribution of the surviving public company's securities in a de-SPAC transaction[18]. This assertion does not account for (1) the lack of statutory support, Commission rules or regulations, Commission guidance or comments from Staff in their review of hundreds of SPAC-related transactions reflecting this view, and

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[16] 17 C.F.R. § 230.506(c).

[17] Proposing Release at 29484.

[18] *Id.* at 29486.

(2) existing rules defining the commencement and termination of offers. It is important to highlight that framing Proposed Rule 140a as a clarification or codification of existing law raises the concern that this proposed rule, if adopted, would be applied or (asserted as a claim by plaintiffs) retroactively, including with respect to consummated de-SPAC transactions. This raises a fundamental question of fairness because it imposes liability when it is too late for a de-SPAC participant to alter their behavior. Moreover, we find no evidence supporting the Commission's statement that Proposed Rule 140a clarifies an existing position. Having reviewed hundreds of de-SPAC transactions, we have been unable to find any comment letters or other public positions reflecting a view that a SPAC IPO underwriter or any other participant was deemed an underwriter in the de-SPAC transaction by virtue of their services in the SPAC IPO. For these reasons, we ask the Commission to review the letter from the Securities Industry and Financial Markets Association to the Commission, dated June 10, 2022 (the "**SIFMA Letter**") and reconsider its position.

2. If the de-SPAC transaction includes a "distribution" of securities, neither the IPO underwriter nor any other service provider is engaged in distributional activities relating to the de-SPAC transaction.

The term underwriter is defined in the Securities 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 the direct or indirect underwriting of any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.[19]

Section 2(a)(11) of the Securities Act reflects three criteria to satisfy the underwriter status: (1) a purchase from an issuer with a view to distribution; (2) an offer or sale for the issuer in connection with the distribution; or (3) participation, direct or indirect, in the purchase, offer or sale of securities acquired from the issuer. Facilitating the de-SPAC transaction does not equate to participation in a distribution without distributional activities reflected in Section 2(a)(11) of the Securities Act.

As an initial matter, in order to deem a person an underwriter within the meaning of Section 2(a)(11) of the Securities Act, we must identify a distribution on which to base such status.[20] As discussed above, a de-SPAC transaction may include multiple offers of securities, not all of which qualify as a distribution. The Commission argues that the SPAC IPO is the distribution of securities based on which underwriter liability attaches to the SPAC IPO underwriter in the de-SPAC transaction.[21] In other

[19] 15 U.S.C. § 77b(a)(11).

[20] Proposing Release at 29485 ("Underwriter status depends upon a person's activities occurring "in connection with" a "distribution" of any security."); *see also id.* at 29486, Footnote 197 ("[T]he rules we are proposing would apply to all de-SPAC transactions involving a registered offer of securities.").

[21] *Id.* at 29485 ("The purpose of a SPAC initial public offering is to raise a pool of cash in order to subsequently merge with a private operating company in a de-SPAC transaction that will convert the private operating company into a public company. Although the timing of a SPAC initial public offering and a de-SPAC transaction is bifurcated because a private operating company is not identified at the SPAC initial public offering stage, the result of a de-SPAC transaction, however structured, is consistent with that of a traditional initial public offering. The substance of a de-SPAC transaction is, in many ways, analogous to the distribution that occurs in a traditional IPO….").

words, the de-SPAC transaction is a public distribution of the Target's shares to the public by way of the SPAC IPO underwriter.[22] The Commission combines the SPAC IPO, which for all intents and purposes under various sections of the Securities Act, is a completed offering,[23] with the de-SPAC transaction, which itself may involve multiple concurrent offers of securities, to create one super-offering that is the basis of underwriter liability for the SPAC IPO underwriter. A SPAC IPO underwriter's distributional activities terminate with the consummation of the SPAC IPO.[24] In accordance with Rule 152(d)(4)(v) promulgated under the Securities Act, the completion of the SPAC IPO is denoted by the filing of a Current Report on Form 8-K announcing the completion. The Commission acknowledges the lawful trading that occurs following the SPAC IPO.[25] Accordingly, the IPO cannot be part of the "public offering" forming the basis of underwriter liability with respect to the de-SPAC transaction as the offer made in the SPAC IPO has been completed.[26]

We also consider whether any other offer of securities encompassed by a de-SPAC transaction may be the distribution in relation to which the SPAC IPO underwriter or any other actor may be deemed an underwriter in connection with the de-SPAC transaction. The offer of securities in the PIPE financing occurs pursuant to a valid private placement under Section 4(a)(2) of the Securities Act and does not involve a distribution of securities on which underwriter status can be based.[27] The business combination transaction itself may reflect two offers of securities - one to the shareholders of the Target and one, accepting Proposed Rule 145a for purposes of discussion, to the SPAC's existing shareholders. For purposes of discussion, we assume that both offers are distributions of securities to the public. In the business combination, in the case of either the offer to the Target shareholders or to the SPAC's existing shareholders under Proposed Rule 145a, the issuer makes an offer of securities directly to these groups of security holders. The chain of distribution is directly from the issuer to the security holder exchanging their securities for combined company stock with no intermediary.[28] The solicitation of proxies, and the

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22 *Id.* at 29845 ("The de-SPAC transaction marks the introduction of the private operating company to the public capital markets and 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.").

23 Please see the SIFMA Letter for an in-depth discussion.

24 *See* the SIFMA Letter.

25 *See* Proposing Release at 29460 ("Following its initial public offering, a SPAC generally places all or substantially all of the offering proceeds into a trust or escrow account, and the SPAC's shares and warrants are typically registered under Section 12(b) of the Exchange Act and then begin trading on a national securities exchange.").

26 We note Question 80 in the Proposing Release, which asks whether Rule 419 should be amended, in some respects, so that some or all of its conditions are applicable to SPACs. We further note Question 152, bullet 1, which asks whether SPACs should be subject to conditions similar to Rule 419. Pursuant to Rule 419, the securities issued by a blank check company do not trade until the consummation of an acquisition. The adoption of such a provision, whether to support the Commission's view that the SPAC IPO is a continuous offering ending with the distribution of the surviving company's securities or otherwise, would fundamentally change the character of SPACs and we would urge the Commission not to amend Rule 419 in this fashion.

27 In response to Question 86 in the Proposing Release, we are concerned that Proposed Rule 140a references a related financing as the basis of a deemed distribution where such financing transaction may be conducted in accordance with an available exemption from registration.

28 *See In re Lehman Bros. Mortgage-Backed Securities Litig.*, 650 F.3d 167, 175-176 (2d Cir. 2011) ("The plain language of [Section 2(a)(11) of the Securities Act] limits liability to persons who participate in the purchase, offer, or sale of securities for distributions. While such participation may be indirect as well as direct, the

participation of third parties in such solicitation, should not be confused with the offer and sale of securities in the business combination. There is no "purchase" from the issuer or an offer or sale made on behalf of the issuer by the SPAC IPO underwriter or any third party in the business combination transaction. Moreover, Question 87 of the Proposing Release implies that Proposed Rule 140a relates to "a distribution of the private operating company's securities." The text of Proposed Rule 140a refers to "the securities of the surviving public entity."[29] Although these references appear to be substantively the same, if we adopt the view that a de-SPAC transaction is the equivalent of an IPO, this shift reflects the blurring of lines between otherwise distinct offerings, to the extent there is an offer, and securities[30] for the purpose of achieving the equation de-SPAC = IPO.[31]

Underwriter liability requires participation in activities involving the distribution of securities to the public.[32] Playing even an essential role in a transaction without participating in the purchase, offer or sale of securities to the public is insufficient to meet the statutory definition of an underwriter. Participation in the de-SPAC transaction is not oriented to the purchase, offer or sale in a distribution to the public, even if a person's role facilitates an eventual sale or offer to the public.[33] The SPAC IPO underwriter is not acting as a conduit to the distribution. Taking steps to facilitate a de-SPAC transaction does not rise to the level of distributional activities required to be deemed an underwriter if such steps are not oriented towards the distribution of securities by the SPAC to the Target shareholders or, accepting Proposed Rule 145a for purposes of discussion, to the SPAC's existing shareholders. With respect to a de-SPAC transaction, neither the IPO underwriter nor any other service provider purchases securities from the SPAC or Target, or offers or sells for the SPAC or Target, with a view to distribution. The non-distributional services provided relating to the broader de-SPAC transaction are not oriented to any distribution that may be present in a de-SPAC transaction and therefore the activities of such participants do not rise to underwriter status as contemplated in Proposed Rule 140a. Proposed Rue 140a and the related commentary are also inconsistent with the long-standing understanding in the market that "underwriter" liability does not attach to participants in traditional business combination transactions registered on Form S-4 or F-4, such as financial advisors, fairness opinion providers and other service providers. We are not aware of a transaction in which the Commission has taken a position that contradicts this long-standing principle.

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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.").

29 Proposing Release at 29567.

30 *Id.* at 29486 ("It [the de-SPAC transaction] is the method by which the target company's securities, as securities of the combined company, are distributed into the hands of public investors.").

31 *Id.* at 29479-29480 ("A de-SPAC transaction marks the introduction of the private operating company to the U.S. public securities markets, and investors look to the business and prospects of the private operating company in evaluating an investment in the combined company. Accordingly, it is the private operating company that, in substance issues or proposes to issue its securities, as securities of the newly combined public company.").

32 *See, e.g., In re Lehman Brothers*, 650 F.3d at 177 ("[T]o 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.").

33 *Id.* at 180 ("[W]e do not interpret this discussion as supporting imposition of § 11 underwriter liability on *everyone* playing a facilitating role in the eventual sale or offer of securities.").

3. The Commission's focus on "lack" of gatekeepers discounts the SPAC Board's Exercise of Fiduciary Obligations

Proposed Rule 140a reflects the Commission's view that the lack of an underwriter in a de-SPAC transaction adversely affects the quality of due diligence performed in the transaction.[34] Nonetheless, robust due diligence is conducted prior to the announcement of a de-SPAC transaction by the SPAC's management and board of directors. In fact, the due diligence and documentation in relation to the public company merger transaction goes well beyond an IPO underwriting agreement with in-depth representations and warranties, disclosures and covenants.

In our experience, a lack of an underwriter or the perception that the liability regime is different in de-SPAC transactions are not reasons that Targets have cited in their choice to pursue a de-SPAC transaction in lieu of an IPO.[35] As discussed above, we disagree with the viewpoint that the lack of an underwriter results in the lack of sufficient due diligence in connection with merger transactions, such as a de-SPAC transaction. We respectfully submit that the corporate laws of the jurisdiction of incorporation of the parties to the de-SPAC transaction, with a well-developed body of law applicable to public company merger transactions, are better suited to address the concerns relating to the due diligence obligations of the SPAC's directors, officers and sponsor entity.

II. Liability Proposals

A. Amendment of "blank check company" for purposes of the Private Securities Litigation Reform Act of 1995 (PSLRA)

In our experience, the availability of the PSLRA safe harbor for forward-looking statements in certain de-SPAC transactions does not alter the decision on the presentation of projections. Conversely, where the safe-harbor is clearly available, such as for follow-on offerings by existing public companies, it remains rare to see the inclusion of projections in the actual offering documents despite the availability of the safe-harbor.

Projections are an important tool in many major transactions for a company. We agree that, as stated by the then Acting Director of the Division of Corporation Finance at the Commission, ". . . . projections are woven into the fabric of business combinations." They may help "sell" the deal, but they can also be a key component for boards and other participants in negotiating and understanding the economics—indeed, the fairness—of the transaction.[36] Projections are effectively required in Chapter 11 disclosure statements and stock-for-stock mergers (such as a de-SPAC transaction). They are also often used in IPOs where analysts are sharing projections with certain accounts. Given all this, while we do not object to the change in the definition of "blank check company," we urge the Commission to take a

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[34] Proposing Release at 29506 ("Alternative ways of going public have emerged that may allow companies to avoid some of the costs of the traditional initial public offering process, though this also might involve forgoing some of the benefits typically considered desirable by market participants (*e.g.,* potentially better pricing due to underwriter help with the placement of securities as well as more robust due diligence and disclosure).").

[35] *Id.* at 29506 ("[W]e further acknowledge that in some cases management and other insiders in target companies may find that a de-SPAC transaction is a more attractive option for becoming a public reporting company than a traditional initial public offering for reasons that conflict more directly with adequate investor protections. These reasons may include the lack of a named underwriter or actionable liability.").

[36] Statement by Acting Director Coates on SPACs, IPOs and Liability Risk under the Securities Laws (Friday, April 9, 2021).

holistic view of all transactions that use projections and work with Congress to enact legislation to make available the PSLRA safe-harbor to IPOs, as well.

We further urge the Commission to consider whether this proposed amendment will have the anticipated effect of "improving" the presentation of projections. We believe the Commission's proposed amendments to Item 10(b) of Regulation S-K, many of which are consistent with current market practice, would serve that purpose of enhancing disclosures relating to such projections. We do have a concern that the proposed amendment may discourage the disclosure of projections - especially given the Commission's broad statements on potential underwriter liability.

1. The Proposal to redefine "blank check company" is not a clarification of existing law.

We disagree with the Commission that the proposed amendment to the definition of "blank check company" is a clarification that the statutory safe harbor of the PSLRA is not available for forward-looking statements made in connection with offerings by SPACs.[37] As noted by the Commission, the current definition of a "blank check company" predates the enactment of the PSLRA[38] and this amendment changes the applicability of the PSLRA safe harbor.

2. In our view, the reasons behind this Proposal are overstated.

It is our view that the proposed amendment with respect to the PSLRA will not meaningfully affect the quality of projections made available for the review of the SPAC's board of directors and PIPE investors, if any. The motivation of de-SPAC transaction participants to structure transactions to use the protection offered by the PSLRA to make lofty projections is overstated. Structuring of a SPAC's initial business combination is driven by tax considerations, regulatory compliance matters and the effects on the target company's ongoing business. In many recent examples, these factors have driven structures in which the target company files a registration statement instead of a SPAC and, as a new registrant, forward-looking statements contained in the filing do not have the protection of the PSLRA.

We further disagree with the Commission's assertion that the potential uncertainty regarding the availability of the PSLRA safe harbor results in the use of "unreasonable and aspirational projections in connection with de-SPAC transactions that may misrepresent the benefits and risks involved in such transaction."[39] The projections included in a disclosure document filed by a SPAC represent information the board of directors of the SPAC considered in the exercise of its fiduciary obligations, including the duty of care, in reviewing a proposed business combination. The amendment to the definition of "blank

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37 Proposing Release at 29482 ("Some market participants are of the view that the PSLRA safe harbor for forward-looking statements is available in de-SPAC transactions when a SPAC is not a blank check company under Rule 419 an thus may not exercise the same level of care in preparing forward-looking statements, such as projections, as in traditional initial public offerings."); *see id.* ("Amending the definition of 'blank check company' in this manner would clarify that the statutory safe harbor in the PSLRA is not available for forward-looking statements, such as projections, made in connection with de-SPAC transactions involving an offering of securities by a SPAC or other issuer that meets the definition of 'blank check company' as amended, such that forward-looking statements by SPACs, such as statements regarding the projections of private operating companies in these transactions, would not fall under the safe harbor.").

38 *Id*.

39 *Id.* at 29508.

check company" will not spur directors to conduct due diligence not already being conducted to meet their fiduciary obligations.

The protections of the PSLRA do not, in our view, incentivize target companies to prepare what commentators believe are unreasonable projections nor does it shift the focus of the parties' attention from the underlying statements to cautionary language.[40] It is not appropriate in our view to separate the development of cautionary statements from the forward-looking statements in the case of the projections.[41] To do so reflects neither an accurate view of how projections are prepared for use by the board of directors of the SPAC and PIPE investors nor of how due diligence on such projections and financial models is conducted. When forward-looking information is to be presented in the PIPE investor presentation and in materials presented to the board of directors for their review in connection with a proposed business combination, counsel for the SPAC and target and the principals conference to discuss and summarize key assumptions underlying the projections. The key assumptions are summarized in the PIPE presentation and in the board presentation and the cautionary language included in the registration statement reflects the key assumptions that may change the results reflected in the forward-looking statements. We do not believe the preparation of meaningful cautionary statements dis-incentivizes Targets from producing "reliable forward looking statements."

It is our view that the proposed revisions to Item 10(b) and Item 1609(a) will assist in the comparability of projections included in the disclosure of materials reviewed by the board of directors of a SPAC. In this way, investors will be able to assess for themselves whether underlying assumptions are reasonable rather than rely on the assertions of commentators in the market. Whether a company meets or fails to meet projections does not speak to their reasonableness.

B. The Adverse Effect of the Commission Statements concerning the Expanded Class of Underwriters

The Commission's statements in relation to Proposed Rule 140a reflect a willingness to apply underwriter liability indiscriminately to participants in de-SPAC transactions. "Guidance" the Commission offers to provide will not carry the weight of regulation and may change at any time.[42] As the Second Circuit noted in *In re Lehman Bros.*, the strict liability nature of Section 11 suggests a narrow reading of the group subject to this responsibility. Basing liability on distributional activity:

> avoids the implausible result of transforming every lawyer, accountant, and other 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.[43]

The uncertainty generated by the Proposing Release may have the effect of dissuading professionals and investors from participating in de-SPAC transactions because it would be impossible to

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40 *Id*. at 29482. The Commission cites "market participants" as raising concerns that insufficient care is used in preparing projections in a de-SPAC transaction as in traditional IPOs. The Commission cites two news articles and a statement by the Commission and it is unclear if the authors are market participants.

41 *Id.* at 29535.

42 *Id.* at 29487.

43 *In re Lehman Bros.*, 650 F.3d at 181.

predict the level of liability in which their activities will result. Question 88 of the Proposing Release asks whether Proposed Rule 140a "[s]hould . . . instead deem any party playing a significant role at the de-SPAC transaction stage to be an underwriter."[44] In effect, the Proposing Release casts substantial doubt on long-standing understandings of what constitutes underwriter activity[45] and leaves professionals and investors unable to properly ascertain their prospective liability.

C. Focus on Applying Section 11 Liability Notwithstanding the Applicability of Alternative Statutory Liability Schemes.

As the Commission acknowledges, alternative statutory liability schemes cover various aspects of the de-SPAC transaction, including Section 11 where appropriate.[46] In fact, the Commission has pursued actions against market participants under Section 14(a) of the Exchange Act of 1934 and Rule 14a-9 thereunder. We are concerned that efforts to curtail "regulatory arbitrage" to fulfill a policy objective undermines the statutory liability regime created by Congress.[47] For example, the proposed amendments to Form S-4 and Form F-4 contemplate the addition of the Target as an additional registrant. As the shareholders of the Target will take a controlling interest in the combined company, practically speaking, those shareholders ultimately bear economic responsibility for any misstatements or omissions in the disclosure documents relating to the de-SPAC transaction. However, these amendments drive at applying Section 11 liability directly to the directors and officers of the Target.[48] Even before the transaction is consummated, the Target and the SPAC are deemed to be combined.[49] In response to Question 66 in the Proposing Release, notwithstanding whether amending the form of registration statement to pre-suppose the consummation of the registered transaction, we believe this policy imperative needs to be balanced against the outline of the statutory regime adopted by Congress.

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44 Proposing Release at 29487.

45 *In re Lehman Bros.*, 650 F.3d at 181 ("[T]he legislative history signals that § 11 was designed to impose its exacting standards regarding the provisions of accurate and complete information only on the people (or entities) responsible for distributing securities to the public, that is, on those engaged in the public offering.").

46 Proposing Release at 29480, Footnote 140 ("Even when not liable under Section 11, the private operating company and its affiliate, however, may be subject to enforcement actions by the Commission, including those under Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5, as well as potential liability under 17 CFR 240.10b-5 (Exchange Act Rule 10b-5) in private rights of action.").

47 *Id.* at 29480 ("While similar policy considerations can arise in other business combination contexts, given the substantial increase in the number of SPAC transactions in recent years, the number of shareholders typically impacted by such transactions, and concerns that are unique to the SPAC structure, we are concerned that a narrow approach to registrant status in de-SPAC transactions could undermine the statutory liability scheme that Congress applied to initial public offerings of securities.").

48 *Id.* ("This requirement would make the additional signatories to the form, including the principal executive officer, principal financial officer, controller/principal accounting officer, and a majority of the board of directors or persons performing similar functions of the target company, liable (subject to a due diligence defense for all parties other than the SPAC and the target company), for any material misstatements or omissions in the Form S-4 or Form F-4 and would thereby mitigate the risk that the target company's directors and management would not be held accountable to investors for the accuracy of the disclosures in the registration statement due to the absence of the deterrent threat of liability under Section 11.").

49 *Id.* ("[T]he term 'registrant' for purposes of the signature requirements of the form [S-4] would mean the SPAC and the target company.").

III. Proposed Disclosure Rules

A. Proposed Item 1606 (Fairness)

While many of the Commission's proposals on disclosure are already reflected in current market practice and we do not believe they will be overly burdensome, we are concerned regarding the potential adoption of Proposed Item 1606. We believe this proposal may not effectively address the Commission's stated principal objective of providing investors with additional information about potential conflicts of interest or "misaligned incentives". Disclosure of potential conflicts of interest and the interests of all parties to a de-SPAC transaction, as is currently done and further expanded by the Proposals, provides relevant information that investors can use to assess the de-SPAC transaction without imposing a new substantive burden on the SPAC and the transaction. The Commission suggests the rational for this Proposed Item 1606 is to "incentivize sponsors to avoid transactions that *could potentially be viewed* as unfair."[50] However, Proposed Item 1606 may also reflect a view that retail investors cannot be sophisticated consumers of disclosure.[51] Furthermore, a fairness determination is not a requirement in an IPO nor in many other transactions required to be filed for review with the Commission. This requirement would be a substantive departure from the Commission's purpose of ensuring appropriate disclosure for investors.

To the extent a de-SPAC transaction creates actual or potential conflicts of interest, we believe available corporate law mechanisms provide a superior alternative to Proposed Item 1609. For example, in a conflicted transaction, a Delaware court may subject the transaction to the "entire fairness" standard of review unless certain procedural safeguards are implemented. Under the "entire fairness" standard, the SPAC's board may have the burden of proving that the transaction was effected at a fair price through a course of fair dealing.

1. Rule 13e-3 does not provide an appropriate model for the fairness determination requirement reflected in Proposed Item 1606.

The disclosure requirements of Rule 13e-3[52] do not provide an appropriate model for the fairness determination requirement in Proposed Item 1606 because a going-private transaction is fundamentally inconsistent with a de-SPAC transaction.[53] Section 13(e) of the Exchange Act, on the basis of which Rule 13e-3 was promulgated, relates to an issuer's repurchase of its equity securities. A Section 13(e) transaction results in an issuer (1) being eligible to deregister under the relevant provisions of the Exchange Act or (2) de-listing the issuer's securities from a national securities exchange or inter-dealer quotation system. A comparison of a de-SPAC transaction to a going-private transaction as the basis of

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50 *Id.* at 29527 (emphasis added).

51 *Id.* at 29508 ("As a result of the complexity inherent in the SPAC structure, investors may lack or otherwise be unable to readily decipher critical information regarding certain financial incentives (such as contingent sponsor or IPO underwriter compensation or the potential dilutive effects of PIPE financing) of the SPAC, the target company, their respective affiliates, or other parties in a manner necessary to properly assess the value of an investment position;" *see id*. ("There is also a question of whether investors, particularly retail investors, fully understand the costs involved in de-SPAC transactions and how these costs may affect investors' post-de-SPAC transaction returns on their original investments.").

52 17 C.F.R. § 240.13e-3.

53 Proposing Release at 29473, Footnote 96.

this Proposed Item 1606 is diametrically opposed to the basis of Proposed Rule 140a, which is based on the de-SPAC transaction involving a distribution of securities.

The disclosure requirements of Rule 13e-3 address actual or potential conflicts of interest that arise from the relationship between an affiliated acquirer and the target issuer. The affiliated acquirer offers to purchase the target issuer's outstanding equity interests held by the unaffiliated shareholders. In contrast, as a result of the de-SPAC transaction, the combined company is not owned by a person or group (i.e., the SPAC sponsor) with a prior "control" relationship with the SPAC. Oftentimes, the sponsor and former management of the SPAC are also minority shareholders of the combined company similar to the SPAC's existing unaffiliated shareholders. The de-SPAC transaction does not involve the SPAC's sponsors or management standing on both sides of the transaction and the transaction does not empower them to structure the transaction to coerce unaffiliated shareholders into selling their shares. To the extent a redemption offer is an offer to buy securities similar to a transaction subject to Rule 13e-3, the goal of a de-SPAC transaction is to reduce redemptions. For these reasons, we believe Rule 13e-3 is inapposite to a de-SPAC transaction and does not provide an ideal model for the proposed disclosure rule in this context.

2. Because Rule 13e-3 is an inappropriate model for de-SPAC transactions, the proposed fairness determination requirement may be impossible to address in the context of a de-SPAC transaction.

In the de-SPAC transaction, the purpose of assessing conflicts and the interests of various parties is to provide investors with sufficient information to make informed decisions and not the application of a fairness determination requirement that, in our view, may be impossible to address to address in practice.

We are not aware of other instances where the federal securities laws have a requirement to assess the fairness of a financing transaction. In addition, this Proposed Item 1606 does not reflect the customary process for fairness evaluations in merger transactions. Moreover, financing transactions related to de-SPAC transactions, which also must be assessed for fairness pursuant to Proposed Item 1606, take many forms and may not involve the issuance of securities at all. Rule 13e-3 requires an assessment of the fairness of the price at which unaffiliated shareholders' interests will be purchased by affiliates of the issuer. The assessment compares the value being paid per share as against the value of the enterprise. The fairness assessment in the case of merger transactions, such as the de-SPAC transaction, requires the board of directors of the SPAC to assess fairness of a merger transaction and related financing to the public shareholders of a SPAC only.

Ultimately, this disclosure requirement does not put the de-SPAC transaction and relating financing on level ground with an IPO. The board of directors of a company conducting an IPO is not required to make a statement on the fairness of the IPO pricing to IPO investors. Similar to an IPO, price is negotiated in the de-SPAC transaction and such a fairness determination requirement should be unnecessary to protect investors.

B. Proposed Item 1609(c) (Projections)

We are concerned regarding the potential adoption of Proposed Item 1609(c). When included in a disclosure document relating to a de-SPAC transaction, projections are part of a package of information the board of directors of the SPAC has reviewed in making its determination with respect to approving the SPAC's business combination. Projections are among a wide range of information the SPAC management and board obtain during a comprehensive due diligence process of a proposed Target as opposed to the sole piece of information.[54] Furthermore, the proposal reflects a view that the use of projections is problematic in the context of de-SPAC transactions specifically as opposed to their use in other equity financings or merger transactions.[55] Such projections are indeed used in the valuation process in many de-SPAC transactions as one of a variety of factors and they are used in IPOs in the price discovery process, as well. The projections provided to the SPAC by the Target in the context of due diligence and the update obligations presented in Item 1609(c) do not align. The projections, as presented in the disclosure document, clearly indicate that such projections speak as of a specific date when they were delivered to the SPAC and have not been updated. There is clear and sufficient information that the projections speak only as of the date on which they were delivered to the board of the SPAC.[56]

For purposes of discussion, we assume the reference to the "date of the filing" means as of the effective date of a registration statement or the mailing date of a proxy statement.[57] An obligation to affirm the projections as of the date of the filing in which they are presented is unduly burdensome and does not, in our view, add sufficient value to support this significant burden. The preparation of projections and the underlying financial models require a substantial investment of management time. The timing of the filing in the course of the Commission's review of a disclosure document for a de-SPAC transaction is unpredictable. Moreover, the benefit and purpose of such updates is unclear. The collective effect of Proposed Item 1609(c) and Proposed Item 1606 also create concern that such fairness statement also needs to be updated at the date of the filing if management of the Target is required to update projections, on which the fairness statement requirement and related fairness opinion are based in part. In essence, Proposed Item 1609(c) create uncertainly about the SPAC's commitment to complete a transaction - if projections change for any given reason, would the SPAC have a related right to terminate the transaction? Additionally, the requirement on the Target to prepare such updates at an unknown time adversely affects the feasibility of completing a de-SPAC transaction. In response to Question 115 in the Proposing Release, we urge the Commission to consider the effect such a proposal would have if this proposal were applicable to all public companies. We further urge the Commission not to change the purpose for which such projections have been prepared by creating as a separately captioned section for the disclosure of projections as suggested in Question 113 of the Proposing Release.

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[54] *Id.* at 29496 ("In particular, such projections could be used to value the private operating company and may influence how investors evaluate a proposed de-SPAC transaction.").

[55] *Id.* ("The nature of the SPAC structure and de-SPAC transactions raise heightened concerns about the use of projections in such transactions. As noted above, a sponsor's compensation may depend to a large extent on the completion of the de-SPAC transaction, and thus the SPAC and its sponsor may have an incentive to use a private operating company's financial projections in seeking support for the de-SPAC transaction."); s*ee also id.* ("In particular, such projections could be used to value the private operating company and may influence how investors evaluate a proposed de-SPAC transaction.").

[56] As a sample, language surrounding the discussion of projections typically includes the following information: The Target provided the SPAC with its internally prepared forecasts. The SPAC's management reviewed the forecasts and presented key elements of the forecasts to the SPAC's Board as part of the SPAC Board's review and subsequent approval of the Business Combination. In connection with the proposed Business Combination, management of the SPAC used the financial forecasts as part of its comprehensive analysis of the Target and its prospects. The forecasts were prepared in good faith by the Target's management, reflecting their best available estimates and judgment as of [the date they were delivered] and presenting, to the best of the Target management's knowledge and belief, the expected course of action and the expected future financial performance of the Target.

[57] If the proposal instead refers to the date of each amendment filing to the disclosure document, the concerns raised in this section are compounded.

IV. Proposed Safe Harbor under the Investment Company Act

We are concerned regarding the potential adoption of the proposed safe-harbor for SPACs under the Investment Company Act. We believe that SPACs simply are not "investment companies." A SPAC's primary business purpose is to effect a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more businesses. If a SPAC is unable to do so within a specified period of time (often 12 to 24 months), it must liquidate its trust account and redeem the shares held by its public investors for cash.

Given that a SPAC's primary business purpose is not investing, reinvesting or trading in securities, nor does a SPAC hold itself out as such, a SPAC is not an "orthodox" investment company under Section 3(a)(1)(A) of the Investment Company Act. Furthermore, a SPAC also is not an investment company under Section 3(a)(1)(C) of the Investment Company Act because the proceeds raised are held in a trust account which is not invested in "investment securities" (as defined in the Investment Company Act). The trust account simply holds funds pending the earliest to occur of either (i) the completion of an initial business combination or (ii) the failure to complete a business combination within a limited period of time.

The Commission developed a five-factor test[58] in 1947 to determine whether a company is engaged primarily in an investment company business. The five factors are:

(i) the company's history (SPACs have no historical operations to suggest they are investment companies);

(ii) the way the company represents itself to the investing public today (SPACs represent that they seek to enter into a business combination);

(iii) the activities of the company's officers and directors (SPAC officers and directors are focused on completing the SPAC's business combination, and not on the minor investment returns offered by short-term U.S. government securities in the form of which the trust funds are held);

(iv) the nature of the company's assets (while there is a time where a SPAC's only assets are securities and cash and only source of income consists of interest earned on assets held in the trust account, the assets held change significantly when it completes a business combination); and

(v) the sources of its income (again, upon completion of a business combination the sources of income change dramatically).

Sixty of our nation's leading law firms share this position. Since 2003, there have been over 1,000 SPAC initial public offerings that have undergone Commission review, completed their IPOs, and operated without registration under the Investment Company Act. We are not aware of any case where the Staff prevented a SPAC IPO from proceeding on the basis that a SPAC was an unregistered investment company.

In short, SPACs do not fit within the definition of an investment company under Section 3(a)(1)(A) of the Investment Company Act because they are not, and do not hold themselves out as, being engaged primarily, or do not propose to engage primarily, in the business of investing, reinvesting or

[58] See *In the Matter of Tonopah Mining Co. of Nevada* (Investment Company Act Release No. 1084, 26 SEC 426 at 427, July 22, 1947).

trading in securities. SPACs seek to acquire or combine with one or more operating businesses. While there are various ways to structure business combination transactions, the result is that the SPAC's shareholders become the shareholders of the combined company, which thereafter carries out the operating company's business.

Adopting a safe-harbor would likely have the effect of causing SPACs to rush into a business combinations to satisfy a safe harbor that simply is not needed, a result we are sure the Commission wants to avoid. Should the Commission nevertheless feel compelled to adopt a safe-harbor, we urge that the safe-harbor simply require that an initial business combination be completed within 36 months from an IPO, consistent with the listing rules of the New York Stock Exchange and The Nasdaq Stock Market for SPACs, which were previously approved by the Commission.

V. Addressing Economic Analysis

A. Additional Costs of the de-SPAC transaction

The Proposals will have the effect of significantly increasing the cost of completing de-SPAC transactions. As an example, although a fairness opinion is not a technical necessity to the fairness statement requirement, we believe the boards of directors of SPACs will seek to obtain such an opinion in order to satisfy the fairness statement requirement. The Commission highlights the fact that obtaining a fairness opinion would add a new cost to the de-SPAC Transaction and indicates that the average cost of a SPAC obtaining such an opinion was $270,000.[59] In our experience, this is not a fair assessment of the current cost of a fairness opinion. In our historical experience, many SPAC teams were unable to seek a fairness opinion because of the prohibitive cost. Before the Proposals, the opinions could cost multiples of the Commission's estimate. That is a significant additional cost to the transaction because typically the SPAC is working with a limited budget of approximately $2 million in working capital to complete its de-SPAC transaction. In connection with a de-SPAC transaction, professional fees are typically paid at closing. Payment for a fairness opinion is typically due when the opinion is rendered, which is when the SPAC board considers whether to approve the proposed business combination. As a result, the need to fund upwards of an additional $1 million of capital prior to the announcement of a transaction will significantly and adversely affect a SPAC team's ability to complete a deal, especially for those SPAC teams that did not account for such an additional requirement when their SPAC IPO was consummated. This will require the SPAC team to raise additional equity capital to support this obligation and, if such funds are available, would result in the issuance of additional equity to the SPAC sponsor team, which the Commission deems to be a "misaligned incentive."

B. A Cycle of Misaligned Incentives.

The misaligned incentives the Commission references focus on the equity holder status of the SPAC founders. Rather than take cash compensation, the SPAC sponsor, directors and officers receive founder shares equal to 20% of the SPAC's issued and outstanding capital stock at the time of the IPO. While the Commission notes that this interest is obtained at a nominal price ($25,000), this is not reflective of the full investment the SPAC sponsor makes. The SPAC sponsors separately invest millions of dollars in the form of equity known as "at risk" capital to fund the costs of conducting the IPO and the working capital needs of the SPAC in its search for a prospective target company. Thus, there is a substantial investment of time and money by the sponsor team.

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[59] Proposing Release at 29528.

The SPAC sponsor is not unlike the founder of a company planning an IPO. Such founder also likely owns a controlling interest in the company and has made significant investments in time and money. Both SPAC sponsors and the founders of private operating companies pursuing IPOs have paid significantly less than public shareholders for their shares. However, the securities held by SPAC sponsors have restrictions and limitation that the shares held by the founders of a company pursuing an IPO typically do not. Moreover, founders of IPO companies may have superior voting rights, which SPAC sponsors typically do not following the de-SPAC transaction. Management of a company pursuing an IPO are usually subject to a six-month lock up period following the closing of the offering. SPAC sponsors are subject to the same restrictions and, oftentimes, they are subject to a longer one-year lock up period following the closing of the de-SPAC transaction. SPAC sponsors further subject their securities to vesting and earn-out provisions whereas founders of private operating companies do not. Furthermore, many de-SPAC transactions require the forfeiture of a portion of the SPAC securities held by the sponsor, directors and officers. The potential gross value of the SPAC sponsor's interest may be substantial but such securities are, to the extent not forfeited to complete a deal, subject also to numerous deal-specific restrictions ensuring the securities become vested when value is also generated for the SPAC shareholders. To have a complete view of the incentives of the SPAC sponsors, directors and officers, we believe it is important to take into considerations such restrictions and forfeitures when assessing the "misaligned incentives" of SPAC sponsor.

Conclusion

As the Investor Advisory Committee suggested,[60] focus on disclosure is the best means for ensuring investors have the information needed to consider their investment in de-SPAC transactions. We are supportive of the goal of creating consistent, comparable and meaningful disclosure in relation to SPAC IPOs and de-SPAC transactions. We believe that disclosures and requirements specifically aligned to the business combination structure will most benefit shareholders in their review of de-SPAC transactions. We appreciate the opportunity to participate in the Commission's rulemaking process. We are available to discuss our comments or any questions that the Commission or the Staff may have, which may be directed to Norm Champ, Tamar Donikyan, Scott Moehrke, Christian Nagler or Peter Seligson at (212) 446-4800.

Sincerely,

Kirkland & Ellis LLP

KIRKLAND & ELLIS LLP

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60 *Id*. at 29462.