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June 17, 2022

Submitted via email to: rule-comments@sec.gov
Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Special Purpose Acquisition Companies, Shell Companies and Projections Release Nos. 33-11048; 34-94546; IC-34549 (March 30, 2022); File No. S7-13-22

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**" or "**we**") of the Business Law Section (the "**Section**") of the American Bar Association (the "**ABA**"), in response to the request for public comments by the Securities and Exchange Commission (the "**Commission**") with respect to the above-referenced release published in the Federal Register on May 13, 2022 (the "**Proposing Release**") proposing new rules and certain amendments (the "**Proposed Rules**") applicable to special purpose acquisition companies ("**SPACs**") and shell companies.

The comments and recommendations regarding the Proposed Rules and the Proposing Release set forth in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors. This letter does not represent the official position of the ABA or the Section.

We are experienced securities law practitioners who are dedicated to preserving the integrity and consistent application of the federal securities law and to avoiding disruption of longstanding and accepted practices in the securities industry in the absence of clear justification. Our comments in this letter are given from that perspective and in an effort to assist the Commission to fulfill its mission of proper and effective administration of the federal securities law.

The Commission states that it issued the Proposed Rules to enhance investor protections in initial public offerings ("**IPOs**") by SPACs and in subsequent business combination transactions ("**De-SPAC Transactions**") between SPACs and operating companies ("**Targets**"). We support the Commission's investor protection mission with respect to SPAC IPOs and De-SPAC Transactions and agree that investors are entitled to robust disclosures by issuers in connection with the investors' investment decisions. We also believe that the goal of furthering investor protections should be accompanied by advancing another of the Commission's equally important missions, which is to facilitate capital formation and capital market access, so that investors may benefit from having a range of available investment opportunities. By having a range of investment opportunities, public investors can compare the risks and benefits available to them from each investment, have the option to choose or not to choose certain investments and ultimately identify appropriate financial products that meet their risk appetites and investment goals.

This letter sets forth a summary, followed by a detailed discussion, of our comments and recommendations regarding (i) the need to preserve the availability of distinct capital-raising alternatives for issuers and investors, (ii) the items in the Proposed Rules that we believe are useful enhancements, subject to our suggested modifications, (iii) those Proposed Rules relating to De-SPAC Transactions we believe require additional clarification in order to treat like cases alike, and (iv) those Proposed Rules we believe raise concerns.

1. Summary of Comments and Recommendations

1.1. The need to preserve the availability of distinct capital-raising alternatives for issuers and investors

The Commission's efforts to regulate SPAC IPOs and De-SPAC Transactions through the Proposed Rules in order to enhance investor protections should be balanced with the Commission's mission to promote capital formation and access to the capital markets for issuers and investors. The Proposed Rules fail to strike the right balance.

Targets should continue to have at least four distinct alternatives in order to reach the public markets: a traditional IPO, a De-SPAC Transaction, a direct listing and an outright sale to, or merger with, a public company. The merits of each alternative depend on market cycles and the particular characteristics of the Target, including, but not limited to, the Target's size, industry sector, stockholder base, development stage and objectives. The Commission has recognized the significant decline in the number of U.S. public companies in recent years, the increased reliance by both private companies and public companies on exempt offerings to raise capital and the popularity of business combinations with private equity firms rather than through transactions with public companies (which deprived public stockholders of opportunities to invest in many earlier-stage companies). It is not consistent with the public interest, through regulation, to foreclose a financing alternative that would facilitate a path to the public markets by private companies. Inasmuch as investors will be best served by keeping all of these options available, the Proposed Rules take the decision out of the hands of investors—the mere release of the Proposed Rules has had a chilling effect on the SPAC IPO and De-SPAC Transaction market because the Proposing Release continues to propagate a number of misconceptions related to

SPACs, SPAC IPOs and De-SPAC Transactions, which have featured prominently in statements made by Commissioners and other public figures. The Proposed Rules, for example, gloss over the fact that De-SPAC Transactions are fundamentally merger and acquisition ("**M&A**") transactions that often require the use and disclosure of projections. The Proposing Release suggests that the parties involved in the SPAC IPO and De-SPAC Transaction process are not already encouraged to undertake rigorous diligence and are not subject to securities liability for the statements made in connection with the materials prepared to seek stockholder approval for the business combination, simply because of the absence of a traditional underwriter in the process. As we discuss, the absence of a traditional underwriter does not mean that there are no gatekeepers or that there are no investor protections. Conflating the SPAC IPO and the De-SPAC Transaction into one continuing distribution of an issuer's securities and seeking to identify one or more statutory underwriters and associating them with this process is inconsistent with basic securities law principles regarding underwriter status and creates a level of uncertainty regarding potential and actual liability that adversely affects these transactions as viable capital-raising and capital markets alternatives. It is clear, as we discuss throughout this letter, that, if the Proposed Rules are adopted in substantially the form in which they have been currently proposed, SPACs and Targets would need to undertake additional measures, which would entail significant, new and additional costs, in order for market participants to be prepared to move forward. We note, however, that notwithstanding our concerns, there are significant parts of the Proposed Rules that the Committee supports, as indicated below, with modest revisions, and which the Committee believes would enhance investor protection and not foreclose a capital-raising alternative.

1.2. Items in the Proposed Rules that would enhance investor protection and that the Committee supports, subject to our suggested modifications

We generally support the additional disclosures included in proposed Items 1601 through 1605, 1608 and 1610 of Regulation S-K, as discussed in more detail later in this letter, as these largely codify current market practice. The disclosure requirements should, in our view, be adapted to account for the status of the issuer and provide appropriate accommodations, for example, for smaller reporting companies, emerging growth companies ("**EGCs**") and foreign private issuers ("**FPIs**").

1.3. Proposed Rules relating to De-SPAC Transactions that require additional clarification in order to treat like cases alike

We generally support the Commission's efforts to improve the quality of disclosure in connection with M&A transactions involving shell companies, which include De-SPAC Transactions. However, the Committee believes the description of "sale" in the context of proposed Rule 145a is unclear and that the imposition of liability under the Securities Act of 1933, as amended (the "**Securities Act**")[1] by requiring the filing of a registration statement on

[1] 15 U.S.C. §77a.

Form S-4 or F-4 (each, a "**Merger Registration Statement**") in all transactions is conceptually flawed.

In view of the desire for parity between the treatment of SPACs and traditional IPO issuers, as discussed in Section 2.3.4 of this letter, we support the Commission's proposal to align non-financial disclosure requirements in the De-SPAC Transaction's disclosure documents with the requirements in a traditional IPO.

1.4. Proposed Rules we believe raise concerns

We do not support the following proposed amendments in the Proposed Rules and Proposing Release, discussed in summary below, and in more detail later in this letter:

- <u>Determining fairness of the De-SPAC Transaction (proposed Items 1606 and 1607 of Regulation S-K)</u>. We believe that proposed Items 1606 and 1607 are outside the scope of the Commission's rulemaking authority. However, even assuming that the Commission has such authority, we believe that the scope of the fairness determination in proposed Item 1606 should cover the De-SPAC Transaction and any related financing transaction as a whole, and securityholders as a whole, rather than solely the SPAC's unaffiliated securityholders. In addition, the factors enumerated in proposed Item 1606(b) in determining fairness should be discussed only to the extent they were actually used by the SPAC in making its fairness determination; and registrants should not be required to assign a weight to each material factor underlying the fairness determination. Fairness determinations are not made in the context of traditional IPOs. Similarly, with respect to proposed Item 1607, we believe it is unnecessary and unrealistic to require the filing of board books and other written materials presented to the board in connection with the reports, opinions or appraisals, as in the case with going-private transactions. Again, these requirements are inconsistent with what would be required in a traditional IPO.

- <u>Making Target a co-registrant to Merger Registration Statement</u>. Requiring the Target in a De-SPAC Transaction to be a co-registrant (together with the SPAC) on Merger Registration Statement in connection with a De-SPAC Transaction (the "**Co-Registrant Amendment**") is inappropriate. Simply stated, the Target is not necessarily issuing any securities in a De-SPAC Transaction and there is, therefore, no basis for requiring the Target to be a co-registrant. Existing rules governing business combinations address when a party to the transaction is an issuer of securities and required to be a registrant. In addition, there are already strong incentives under the existing framework to ensure the Merger Registration Statement disclosures are accurate and complete, as well as liabilities available should the Merger Registration Statement contain material misstatements or omissions. As we discuss in Section 2.4.2 of this letter, the Co-Registrant Amendment is inconsistent with existing Securities Act rules and interpretations regarding co-registrant status, as well as market practice, and also raises significant questions and practical challenges.

- Imposing underwriting liability in De-SPAC Transactions. We oppose proposed Rule 140a and respectfully request the Commission to clarify its overly broad and unsupported interpretation in the Proposing Release relating to the entities that may be considered to be statutory underwriters. The Commission's desire to identify additional "gatekeepers" in connection with a De-SPAC Transaction is not supported by Section 2(a)(11) of the Securities Act. In its effort to justify its proposed amendments, the Commission advances an overly expansive view of the activities and connections that give rise to statutory underwriting liability. The Commission does this in order to identify an underwriter in a De-SPAC Transaction where, in fact, there is none. We believe the Proposing Release's concept of statutory underwriters in the context of a De-SPAC Transaction is flawed, is at odds with interpretations of existing law and disregards longstanding and accepted market practice. The interpretive position and proposed Rule 140a inappropriately stretch the concept of "distribution" in the definition of "underwriter." The SPAC IPO and De-SPAC Transaction are two completely separate transactions and should not be conflated. Not every De-SPAC Transaction involves a "distribution" of securities. Proposed Rule 140a would impose underwriting liability on a number of De-SPAC Transaction financial intermediaries without sufficient participation in the "distribution" of securities. It mischaracterizes basic securities law principles to find a gatekeeper, when there already are numerous parties with rigorous responsibilities in connection with the SPAC IPO and the De-SPAC Transaction. It fails to consider that the required level of "participation" to be a statutory underwriter in a De-SPAC Transaction should only be the activities that are "related to the actual distribution of securities"[2] and not those that merely facilitate the participation of others in a securities offering.

  Proposed Rule 140a purports to be retroactive, creating uncertainty as to what level of participation that has already occurred or that can be undertaken in transactions underway results in underwriter status. Because the Commission's statements in the Proposing Release are characterized as an interpretation of its current views, even though the language of proposed Rule 140a is more narrowly (but still broadly) written, the mere issuance of the Proposing Release has resulted in such uncertainty and market concern that there has been a chilling effect on legitimate capital formation transactions. If the Commission nevertheless decides to identify an "underwriter" in a De-SPAC Transaction, the Commission should do so only on the following basis: (i) any rule should be prospective only, with a suitable transition period, (ii) the rule should clearly define the nature and level of participation that is necessary for a SPAC IPO underwriter to be considered an "underwriter" in the De-SPAC Transaction, (iii) that participation should be limited to parties who, in fact, are in a position to perform the necessary diligence, (iv) the rule should define the scope of the "distribution" to which underwriter status relates, and (v) the disclosures to which underwriter responsibility relates should align with those in a traditional IPO, such as by excluding from the Merger Registration Statement merger-related disclosures like Background of the Merger and projections.

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

- Enhancing projection disclosures. Subject to certain comments and recommendations discussed in Section 2.4.4 of this letter, we generally support the proposed amendments to Item 10(b) and 1609 of Regulation S-K but believe that these amendments should apply to all filings in order to level the playing field as to disclosures related to projections.

- Rendering the PSLRA safe harbor inapplicable to De-SPAC Transactions. We do not support the proposed amendment to remove the current safe harbor under the Private Securities Litigation Reform Act of 1995 ("**PSLRA**"). There is no evidence of any legislative intent on the part of Congress that it intended to limit the scope of the safe harbor in the form in which the Commission proposes to amend it. We believe that there are important distinctions between a De-SPAC Transaction and a traditional IPO that justify maintaining the PSLRA safe harbor in the form enacted by Congress. As an initial matter, unlike companies undertaking a traditional IPO, SPACs are compelled by a combination of federal securities regulation and state corporate law to share Target projections with stockholders. Excluding De-SPAC Transactions from the safe harbor would not operate to silence projections the way the traditional IPO exclusion does, although it might operate to discourage De-SPAC Transactions. To truly place De-SPAC Transactions on a "level playing field" with traditional IPOs in connection with forward-looking statements, the Commission would have to change its disclosure requirements in connection with De-SPAC Transactions and somehow override the state fiduciary obligations that compel disclosure of projections. When coupled with other proposed amendments that would require disclosure of a fairness determination (effectively mandating the provision of projections) as well as impose underwriter liability in a De-SPAC Transaction, we believe removal of the PSLRA safe harbor protections would have a chilling effect on De-SPAC Transactions.

- Proposing a safe harbor under the Investment Company Act. SPACs are not investment companies under Section 3(a)(1)(A) because they are not, and do not hold themselves out as being, engaged primarily or propose to engage primarily, in the business of investing, reinvesting or trading in securities. There is no need or basis for the proposed "safe harbor," which in reality would act as an unnecessary and unjustified limitation.

- Transition period to comply with Proposed Rules. We recommend that the Commission delay the effectiveness of any final rules or amendments ("**Final Rules**") for three months after approval of the Final Rules, and adopt a transition period (i) for SPAC IPOs, of six months following the effective date of the Final Rules for any SPAC that has filed a SPAC IPO registration statement upon the effective date of the Final Rules and (ii) for De-SPAC Transactions, only as to business combination agreements that were signed and publicly announced following the effective date, at which point the underwriters' liability commences to the extent applicable assuming proposed Rule 140a were to be adopted in a form that provides the market with some certainty regarding the scope of activity that triggers liability.

2. DISCUSSION

2.1. The need to preserve the availability of distinct capital-raising alternatives for issuers and investors

The Commission's tripartite mission is to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation. The Committee supports the Commission's mission to protect investors in connection with SPAC IPOs and De-SPAC Transactions. The Committee believes that the Proposed Rules also should be calibrated to take into consideration the Commission's mission to "facilitate capital formation," as noted above.

At least prior to the release of the Proposed Rules, Targets had been considering four alternatives to access the public markets: a traditional IPO, a De-SPAC Transaction, a direct listing and an outright sale or merger with a public company. As we note above, each alternative has its place in the financing continuum. A traditional IPO is no longer the principal capital-raising alternative for private companies; these days, more capital is raised in exempt offerings than in registered offerings.[3] The need for liquidity often is the principal underlying reason for an IPO or a direct listing.

Also, as a number of Commissioners have observed in recent speeches, public investors frequently have asked why their ability to invest "at the ground floor" has been precluded by changes in the capital markets. This intensifies public investors' recurring sentiment that they are disadvantaged by the continuing decline in the number of U.S. public companies in which they are able to invest.[4] Through an investment in a SPAC, a public investor can secure an opportunity to invest, often in an earlier stage company, while preserving a redemption right (regardless of whether they vote in favor of or against the initial business combination, or at all). SPACs may afford public investors the following advantages, among others:

- Even if public investors in a SPAC elect to have their common shares redeemed in connection with a vote to approve a De-SPAC Transaction, they may retain the warrants that are part of the units purchased, which may provide potential upside even after having had their original investment returned.[5] A traditional IPO does not have a redemption feature for the common shares.

- A Target that raised funds from a private equity firm would customarily grant various downside and upside protections to the private equity firm, including the need to obtain prior written approval to undertake certain material transactions and other changes. In

[3] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Release No. 33-10884, Exchange Act Release No. 34-90300, Investment Act Release No. IC-34082; 86 Fed. Reg. 3496 (effective Mar. 15, 2021).

[4] In 1996, there were 8,090 U.S. publicly listed companies. In 2019, the number of U.S. publicly listed companies had declined to 4,266. Listed Domestic Companies, total – United States, THE WORLD BANK – DATA, https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?end=2020&locations=US&start=1975&view=chart (last visited Jun. 8, 2022).

[5] Though most SPAC warrants have an exercise price of $11.50 per share, the warrants will have a market price, and, therefore, a value, even if the price of the shares is below the exercise price. The warrants generally have a term of five years after the De-SPAC Transaction.

contrast, most Targets in De-SPAC Transactions have not taken on private equity investments that would have a dilutive effect on the value of public stockholders' investments, and are able to execute their business plans as they see fit.

- Although SPAC IPO registration statements do not typically limit the sectors in which the Targets will be focused, most SPACs already specify one or more sectors in which they intend to focus their Target search. These sectors often reflect those in which the Sponsor has industry experience and in which it can add significant value to the Target. Usually, the depth of support offered by a Sponsor exceeds that which most Targets have when they undertake traditional IPOs.

- The Sponsor often provides a level of industry, managerial or market expertise to the Target, which means that public stockholders have better quality companies to invest in, and companies can more readily enter public markets.

We believe that the current SPAC IPO rules provide adequate protection for public investors:

- The total proceeds raised from the public in a SPAC IPO (and oftentimes a greater amount) are held in a trust account ("**Trust Account**") maintained by an independent third-party trustee and invested only in short-term U.S. government securities or in money market funds invested in those securities. The funds in the Trust Account may not be released from the Trust Account until consummation of the De-SPAC Transaction ("**Closing**") or the redemption of public shares if the SPAC is unable to complete a business combination within the specified timeframe. SPACs generally require third-party contractual counterparties to execute "waivers against trust," ensuring that they will not assert claims against the Trust Account. The funds in the Trust Account are available to make payments to public stockholders who elect to have their shares redeemed in connection with a De-SPAC Transaction, to pay out public stockholders should the SPAC be required to liquidate or to provide capital to the Target upon Closing.

- Public stockholders have the right to vote on the business combination and other related transactions. Because of the need to obtain stockholder approval, the matters that would be presented to the stockholder in order to seek the vote generally include disclosure consistent with the disclosure that would be prepared for a public company merger. Traditional IPO stockholders do not get to vote on some matters that SPAC stockholders typically get to vote on at the time of their investment decision, which include corporate governance and executive compensation matters.

- There has never been an instance in which public stockholders who exercised their right to have their public shares redeemed in connection with a De-SPAC Transaction, and who previously purchased SPAC units (generally consisting of shares and redeemable

warrants)[6] for $10.00 per unit, received less than $10.00 per share on redemption of their public shares.

We note that the Commission has, for many years, viewed De-SPAC Transactions as hybrid transactions, subject to certain rules applicable to IPOs and certain rules applicable to business combinations. The following IPO-related regulations have been applied to De-SPAC Transactions:

- The Target is required to have its financial statements audited in accordance with the United States Public Company Accounting Oversight Board ("**PCAOB**") audit standards. Its auditor must be registered with the PCAOB and considered independent in accordance with the independence standards of the PCAOB and the Commission. In transactions other than SPAC IPOs and De-SPAC Transactions, a Target may not even be required to provide PCAOB audited financial statements in its public filings.

- A Target is not permitted to use short-form registration statements on Forms S-3/F-3 within one year of Closing.

In fact, some regulations applicable to Targets in De-SPAC Transactions are more burdensome than those that apply to issuers in traditional IPOs:

- If the combined company after Closing ("**Combined Company**") would be considered an EGC, and the SPAC has filed its initial annual report on Form 10-K before Closing, the SPAC is required to include in the proxy statement and/or prospectus filed in connection with the De-SPAC Transaction ("**Merger Proxy Statement**") the Target's audited financial statements for three fiscal years. If the Target were undertaking a traditional IPO, it would be required to provide audited financial statements for only two fiscal years.

- If the SPAC has already filed its initial annual report on Form 10-K before Closing, and either the SPAC or the Combined Company had a market float of at least $700 million as of the end of the second quarter, the Combined Company could have the obligations of a large accelerated filer with respect to the first annual report on Form 10-K filed by the Combined Company.

- A Combined Company is not permitted to file a registration statement on Form S-8 until 60 days after the filing of Form 10 information for the Target (through Form 8-K ("**Super 8-K**") has been filed with the Commission (within four business days after the Closing). This delay does not apply to traditional IPOs.

- A Target that is an FPI which reports its financial statements in accordance with the International Financial Reporting Standards ("**IFRS**"), as promulgated by the International Accounting Standards Board, may be required, depending on the

[6] In addition to shares and warrants, some SPAC IPO prospectuses include rights to receive shares upon a De-SPAC Transaction, and others include "subunits" consisting of shares and warrants, which are intended to minimize redemptions.

transaction, to report initially under U.S. generally accepted accounting principles ("**GAAP**") until the Target's next FPI determination date (*i.e.*, the end of the second fiscal quarter following Closing), when it can elect to report as an FPI. This requirement has considerable cost implications on the Target in a De-SPAC Transaction. If the Target were conducting a traditional IPO, it would not be required to report using GAAP and could use its IFRS financial statements.[7]

- SPAC stockholders holding securities other than the public shares are not permitted to rely on Rule 144[8] within one year of Closing.

If the Commission seeks to align the treatment of SPAC IPOs and De-SPAC Transactions with that of traditional IPOs, it should reconsider the current disparate treatment under the securities laws for "shell companies" and former shell companies, as we discuss below. Furthermore, as we note below, while there are a number of improvements that can be made in terms of additional disclosure requirements in connection with SPAC IPOs and De-SPAC Transactions, which the Committee supports, the Committee urges the Commission to reconsider the overall effect of the Proposed Rules and recalibrate these to focus more narrowly on the actual harms. Finally, as we note below, the Proposed Rules, if adopted in the form in which they have been proposed, instead of more closely aligning the treatment of SPAC IPOs and De-SPAC Transactions with traditional IPOs, in the spirit of treating purportedly similar transactions alike, do more to disadvantage further SPAC IPOs and De-SPAC Transactions vis-à-vis traditional IPOs.

2.2. Items in the Proposed Rules that would enhance investor protection and that the Committee supports, subject to our suggested modifications

The Committee generally supports the proposed items included in this subsection as they largely memorialize current market practice and would require disclosures consistent with those already being provided by SPACs to investors.

2.2.1. New definitions (proposed Item 1601 of Regulation S-K).

We support the Commission's proposed definition of the term "target company" and generally support its proposed definitions of the terms listed in the table below, subject to certain proposed changes as indicated below. We do not believe that there are any other terms that should be defined in Proposed Item 1601 of Regulation S-K.

No.	Defined Term	Definition per Proposed Rules	Proposed definition (underscoring changes)	Explanation
1	special purpose acquisition company	a company that has indicated that its business plan is to (1) register a primary offering of	a **blank check company as defined in § 230.419(a)(2) (Rule 419(a)(2)) under the Securities Act** that has	By specifying that SPACs are blank check companies, we believe that an exhaustive list of SPAC

[7] *See*, *e.g.*, Union Acquisition Corp. II, Registration Statement (Form S-1) F-9 (Sep. 27, 2019).
[8] 17 C.F.R. § 230.144.

No.	Defined Term	Definition per Proposed Rules	Proposed definition (underscoring changes)	Explanation
		securities that is not subject to the requirements of Rule 419; (2) complete a de-SPAC transaction within a specified time frame; and (3) return all remaining proceeds from the registered offering and any concurrent offerings to its shareholders if the company does not complete a de-SPAC transaction within the specified time frame	indicated that its business plan is to (1) register a primary offering of securities that is not subject to the requirements of Rule 419; (2) complete a de-SPAC transaction within a specified time frame; and (3) **redeem the equity securities issued in the registered offering** if the company does not complete a de-SPAC transaction within the specified time frame	features will no longer be necessary.
2	de-SPAC transaction	a business combination such as a merger, consolidation, exchange of securities, acquisition of assets or similar transaction involving a SPAC and one or more target companies (contemporaneously, in the case of more than one target company)	**an initial** business combination such as a merger, consolidation, **reorganization,** exchange of securities, acquisition of assets or similar transaction involving a SPAC and one or more target companies (contemporaneously, in the case of more than one target company)	Subsequent acquisitions by the former SPAC after Closing should not be considered a De-SPAC Transaction.
3	SPAC sponsor	the entity and/or person(s) primarily responsible for organizing, directing or managing the business and affairs of a SPAC, other than in their capacities as directors or officers of the SPAC as applicable	the entity and/or person(s) that **(1) own all or a portion of the privately-placed common equity securities of the special purpose acquisition company and (2)** are primarily responsible for directing and managing the business and affairs of a special purpose acquisition company other than in their capacities as (i) directors or officers of the special purpose acquisition company **or (ii) third-party service providers to the special purpose acquisition company,** as applicable.	We believe that the Sponsor should be the entity or persons who have both ownership of Sponsor shares and responsibility for directing and managing the SPAC. Under the proposed definition, certain third-party service providers who organize or manage the SPAC could be considered Sponsors even though they do not own any Sponsor shares or have a substantial ongoing role with the SPAC. We believe that our proposed definition will identify the entity or persons that are currently identified as Sponsors in registration statements for the SPAC.

2.2.2. Required disclosures on the prospectus cover page, in the prospectus summary box and about dilution (proposed Items 1602 & 1604 of Regulation S-K).

In general, and subject to certain modifications specified below, we support proposed Items 1602 and 1604 of Regulation S-K.

Proposed Item 1602(a) seeks to require plain English, SPAC-related disclosures, including the timeframe for the SPAC to consummate a De-SPAC Transaction, redemptions, Sponsor compensation, dilution and conflicts of interest. Proposed Item 1604(a) seeks to require that in De-SPAC Transactions, SPACs include information on the prospectus cover page about, among other things, the fairness of the De-SPAC Transaction, material financing transactions, Sponsor compensation and dilution and conflicts of interests. Subject to our comments on determining fairness of the De-SPAC Transaction in Section 2.4.1, we are not opposed to proposed Items 1602(a)(1)-(3) or (5) or 1604(a).

In an effort to present investors with important, SPAC-specific disclosures up front, proposed Item 1602(b) requires SPACs to present certain additional information in the prospectus summary in plain English. Proposed Item 1604(b) would require registrants in a De-SPAC Transaction to include in the prospectus summary, among other things, the background and material terms of the De-SPAC Transaction, the fairness of the De-SPAC Transaction, material conflicts of interest, tabular disclosure on Sponsor compensation and dilution. Subject to our comments on determining fairness of the De-SPAC Transaction in Section 2.4.1, we are not opposed to proposed Items 1602(b) or 1604(b).

Proposed Items 1602(a)(4), 1602(c) and 1604(c) seek to require additional disclosures regarding dilution in SPAC IPOs and De-SPAC Transactions to enable investors to better assess the potential impact of dilutive events occurring during a SPAC's lifespan. Proposed Item 1602(c) would require a description of material potential sources of dilution following a SPAC IPO, as well as tabular disclosure of the amount of potential future dilution from the IPO price that would be absorbed by non-redeeming SPAC stockholders. Proposed Item 1604(c) would require disclosure of each material potential source of additional dilution that non-redeeming stockholders may experience at different phases of the SPAC lifecycle by not redeeming their shares in connection with a De-SPAC Transaction. Proposed Item 1602(a)(4) would require simplified tabular dilution disclosure on the prospectus cover page in IPO prospectuses on Form S-1/F-1 that would show dilution as a function of various potential redemption levels, in addition to what SPACs already provide as estimates of dilution pursuant to Item 506.

We note the Commission's initiatives in recent years to remove less meaningful disclosure requirements from Regulation S-K. Generally, proposed Items 1602(a)(4), 1602(c) and 1604(c) require disclosures and the application of financial analysis tools that we do not believe are grounded in methodologies used by investors or financial experts in valuing a common share prior to a De-SPAC Transaction, while a De-SPAC transaction is announced and pending or immediately following a De-SPAC Transaction. We do not believe most investors find the dilution disclosures required by Item 506 to be meaningful to an investment decision in a De-SPAC Transaction, and we do not believe the investors will find those disclosures to be any more useful when presented at a range of redemption levels as would be required by proposed Item 1602(a)(4). We believe that additional quantified disclosures of the impact of the amount

of compensation paid or to be paid to the Sponsor, the terms of outstanding warrants and convertible securities, and underwriting and other fees on the value of a common share immediately following Closing could be useful to investors, but as proposed, proposed Items 1602(c) and 1604(c) are ambiguous as to what is required to be considered as dilution and how that dilution is to be measured and presented. We encourage the staff of the Commission's Division of Corporation Finance ("**Staff**") to modify the Proposed Rules to reflect financial analysis tools that are actually used by financial experts to value shares immediately following Closing and to more clearly describe and provide examples of the application of these tools. We note the proposed financial analysis tool presented in "SPAC Disclosure of Net Cash Per Share"[9] but do not endorse or oppose it. Any sensitivity analysis required for De-SPAC Transactions should be described within the broader framework of useful financial analysis tools and specificity as to the presentation required.

We propose that any additional information to be included in the dilution disclosure table should be presented in the dilution section and not in the summary box. We believe that adding all the proposed disclosures will unnecessarily convolute the already-verbose language on the prospectus cover page and in the prospectus summary box with language that will quickly become boilerplate and, as a result, be rendered not meaningful to investors. The Commission might instead consider instructing registrants to include on the prospectus cover page and in the prospectus summary box only the most important information for investors (*i.e.*, material potential sources of future dilution) in a streamlined, non-overwhelming manner and thereafter refer to the section where more complete discussions may be found.

2.2.3. Required disclosures about the Sponsor, its affiliates and SPAC promoters, including conflicts of interests between them and unaffiliated securityholders (proposed Item 1603 of Regulation S-K).

Proposed Item 1603 of Regulation S-K would require certain disclosures regarding (i) the Sponsor and its affiliates and any promoters of SPACs and (ii) conflicts of interest between the Sponsor, its affiliates or promoters, and unaffiliated securityholders. In general and subject to specific comments listed below, we support proposed Item 1603 as it largely memorializes current market practice, requiring disclosures consistent with those already being provided.

- In seeking to disclose agreements, arrangements or understandings that are in the nature of *binding* material obligations, proposed Items 1603(a)(5) and 1603(a)(8) should clarify the other types of disclosures, if any, that are not currently being provided by SPACs and are still needed.

- In addressing non-equity compensation and reimbursements, proposed Item 1603(a)(6) should explain its requirement to identify other compensation and reimbursements that are material, individually or in the aggregate; and that the required disclosure may be qualitative and not quantitative, except where amounts are above a specified *de minimis* threshold, similar to the approach taken in certain respects under the existing compensation disclosure framework in Item 402 of Regulation S-K.

[9] Michael D. Klausner, Michael Ohlrogge, and Harald Halbhuber, *SPAC Disclosure of Net Cash Per Share* (March 1, 2022), https://ssrn.com/abstract=4047180.

- In requiring disclosure of economic ownership interests of a person in or through a Sponsor who is not the beneficial owner of such Sponsor's equity interests in the SPAC, proposed Item 1603(a)(7) should clarify that, in treating like cases alike, an indirect economic interest in less than 10% of a SPAC's founder shares or warrants through ownership of equity interests in a Sponsor should not, in and of itself and absent other factors, be considered a direct or indirect material interest in the Sponsor. We note, however, that this approach departs from the traditional approach to beneficial ownership reporting and question why the distinction is necessary.

- In requiring disclosure of *known* actual or potential material conflicts of interest, proposed Item 1603(b) should clarify that a knowledge-based standard is the appropriate standard in determining whether disclosure is required under this item. As to disclosure of *potential* material conflicts of interest, it should benefit from safe harbor protection, as a forward-looking statement should not be required.

- Proposed Item 1603(c) should be limited to those situations where the fiduciary duties of the officer or director are owed to other companies and where such duties might reasonably be expected to present a potential conflict with respect to a potential De-SPAC Transaction or the SPAC's ability to pursue De-SPAC Transaction opportunities. For example, fiduciary duties owed to non-profit or charitable or community organizations that do not have an equity interest in the SPAC are not the type of relationships that should require disclosure, notwithstanding that fiduciary duties may be owed to those organizations.

- As to the Commission's other requests for comment, it is superfluous to require a description of any policies and procedures used or to be used to minimize potential or actual conflicts of interest in addition to what proposed Item 1603 has already prescribed.

We respectfully request that the Commission take as much of a principles-based approach to these disclosures as possible, rather than prescriptive line item requirements, and that the disclosures be appropriately calibrated to the context in which the disclosures are being made (*e.g.*, SPAC IPO, De-SPAC Transaction).

2.2.4. Required disclosures on De-SPAC Transaction background, reason, material terms and effects (proposed Item 1605 of Regulation S-K).

The objective of proposed Item 1605 is to provide investors with a more complete understanding of the background of, and the motivations of, the relevant parties underlying the proposed De-SPAC Transaction. The Proposing Release states that the requirements in proposed Item 1605 are modeled in large part on Items 1004(a)(2) and 1013(b) of Regulation M-A and Item 403 of Regulation S-K, and are intended to provide investors with an enhanced basis on which to evaluate the SPAC's reasons for proposing the particular De-SPAC Transaction and for

choosing a particular structure and financing, through a specialized disclosure rule tailored to SPACs that would address disclosure issues more specific to De-SPAC Transactions.[10]

We agree that the information required by proposed Item 1605 would provide investors with important information. However, these required disclosures are duplicative of those already prescribed in the existing regulatory schemes for proxy materials and registration statements filed in connection with De-SPAC Transactions. To eliminate duplication, we recommend against adoption of Item 1605. In lieu thereof, we recommend a more uniform methodology to address conflicts of interest arising from business combinations in general by revising Items 1004(a)(2) and 1013(b) of Regulation M-A and Item 403 of Regulation S-K to incorporate the provisions of proposed Item 1605 taking into consideration that many issues addressed in proposed Item 1605 may arise and be applicable to business combinations that are not effected by a SPAC or a blind pool.

2.2.5. Tender offer filing obligations in De-SPAC Transaction (proposed Item 1608 of Regulation S-K).

We support the proposed Item 1608 requirement that if a SPAC files a Schedule TO in connection with a De-SPAC Transaction, it should contain substantially the same information about the Target that is required under the proxy rules, and that the SPAC should be required to comply with the procedural requirements of the tender offer rules when conducting the De-SPAC Transaction for which the Schedule TO is filed. However, proposed Item 1608 should codify and clarify that a SPAC filing a Schedule 14A or 14C in connection with a De-SPAC Transaction (or seeking an extension of time to complete a De-SPAC Transaction) would neither need to file a Schedule TO nor comply with the tender offer rules.

We believe that a SPAC stockholder's ability to redeem its shares at its option does not constitute a tender offer because, among other reasons, (i) the repurchase obligation is not volitional, but is a term of the SPAC itself, embedded in the provisions of its certificate of incorporation, memorandum and articles of association or other governing document; (ii) the amount a holder receives is also not volitional, but is a function of the amount in the Trust Account and (iii) the investors are not required to make hasty decisions with respect to redemptions, but effectively have the same time, always a matter of weeks, to consider whether to exercise the redemption right. In addition, tender offer rules are intended to protect investors from aggressive, high-pressure tactics that are meant to induce an investor to sell their shares at a premium to either the issuer or a third party. In the case of a SPAC redemption, these high-pressure tactics do not exist because the SPAC and the Target generally want as few redemptions as possible.

[10] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,472 (proposed May 13, 2022).

The legal bases of our position that conventional SPAC redemptions do not constitute tender offers are as follows:

- *Legislative deliberations on the meaning of tender offer*. The Senate subcommittee report on the proposed Williams Act included an introduction with a brief description of a typical tender offer: "[t]he offer normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the [current] market price."[11] The Senate report identified as attributes of a tender offer a bid, a premium price, tender by the solicitees and the conditional nature of the buyer's obligation. In the case of a SPAC, (i) there is no bid per se, but the obligation to redeem is an attribute of the security itself, (ii) there is generally no premium price (in fact, the redemption price in some instances is lower than the market price of the SPAC common stock) and (iii) the SPAC's redemption obligation is not conditional. It is obligated to repurchase the shares redeemed upon a De-SPAC Transaction or, in the case of a stockholder vote to extend the life of the SPAC, upon the approval of the extension. The House subcommittee's definition of a tender offer was identical to that adopted by the Senate.[12] Congress was also concerned that investors would choose to sell without the information necessary for a reasoned decision for fear that if they failed to tender quickly, their shares would not be taken up at all. SPAC redemptions have none of the attributes that concerned Senator Williams.

- *Wellman v. Dickinson*.[13] The court identified the principal features of a tender offer: (i) active and widespread solicitation of public stockholders for the shares of an issuer; (ii) a solicitation made for a substantial percentage of the issuer's stock; (iii) an offer to purchase made at a premium over the prevailing market price; (iv) terms of the offer are firm rather than negotiable; (v) an offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (vi) an offer open only a limited period of time; and (vii) an offeree subject to pressure to sell his stock. None of these features are present in SPAC redemptions. With respect to the first two factors, there is no active and widespread solicitation for the purchase of a substantial portion of the SPAC shares. The SPAC and the Target are not soliciting stockholders to exercise their redemption right; the role of the SPAC is simply ministerial. Second, there is generally no premium over the prevailing market price—and as stated above, the amount to be paid is not within the SPAC's discretion. Third, while the terms of the redemption right are fixed, they are embedded in the SPAC corporate documents, and do not constitute an offer. Fourth, the redemption right is not contingent on the redemption of a fixed number of shares. In De-SPAC Transactions, all redeeming stockholders that meet the redemption criteria will have their shares redeemed. Fifth, the redemption period extends for weeks, not "only a limited period of time." Last, the SPAC stockholders are not subject to any pressure to sell their shares.

[11] S. REP. No. 90-1711, at 2 (1967).
[12] H.R. REP. No. 1711, at 2; 113 CONG. REC. 855.
[13] Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979).

- *No-action letters*.[14] Since redemptions at the option of the securityholder are not tender offers or tender offer equivalents, we are also of the view that neither Rule 13e-4 of the Securities Exchange Act of 1934 (the "**Exchange Act**")[15] nor Regulation 14E should be applicable to redemptions. Their inappropriate application would impose an artificial limitation that would restrict the ability of SPACs and Combined Companies to raise capital in a PIPE or other transactions to the detriment of stockholders. In various no-action letters, the Staff has recognized repeatedly that honoring the redemption rights of stockholders is not an issuer tender offer subject to Rule 13e-4. The Cole Real Estate Income Strategy no-action letter is typical. In that case, the purpose of the planned redemption was to provide stockholders with liquidity for their investments. Stockholders could redeem all or a portion of their holdings. The issuer provided full disclosure to its stockholders, including all terms, conditions and features of the redemption plan, and the issuer did not solicit redemptions. Based on these facts, among others, the Staff concluded that no enforcement action would be recommended.

Additionally, we believe the Commission should not require FPI SPACs to effect redemptions by way of tender offers for the reasons discussed above, as well as for the following additional reasons:

- The Commission notes in the Proposing Release that the disclosures required by Regulation 14A or Regulation 14C provide substantially the same disclosures as would be required in a tender offer. Even though FPIs are not subject to such regulations, we believe the Commission should note that all FPI SPACs have elected to report generally on domestic forms, and the documentation prepared by FPIs in connection with a business combination tends to be identical to that prepared by a domestic issuer filing a proxy statement pursuant to Regulation 14A or 14C. Even though the disclosure may be filed with, or furnished to, the Commission under cover of Form 8-K, the Staff nonetheless has the ability to review and comment on such disclosure in the same manner as it would in the case of a domestic registrant. We are, therefore, of the view that a proxy or information statement prepared by an FPI SPAC, which contains substantially the same information as would be set forth in a domestic proxy or information statement pursuant to Regulations 14A or 14C, should be sufficient to permit the FPI SPAC to effect redemptions without a requirement to use tender offer forms.

- We also have experience with tender offers conducted by FPIs to effect redemptions, and have found that such offers lead to significant investor confusion and significant additional issuer burdens for registrants without any commensurate investor protection benefits. In many situations, because the issuer is required to prepare and disseminate a proxy statement or prospectus, the obligation to prepare and disseminate an Offer to Purchase as a tender offer poses an additional burden for issuers. More importantly, the Offer to Purchase is disseminated at an earlier date than the proxy statement or

[14] See, e.g., Black Creek Diversified Property Fund, Inc., SEC No-Action Letter, 2017 WL 3868256 (Sept. 1, 2017); IMH Financial Corporation, SEC No-Action Letter, 2013 WL 3773976 (Jul. 17, 2013); Cole Real Estate Income Strategy, SEC No-Action Letter, 2011 WL 6071983 (Dec. 6, 2011).
[15] 15 U.S.C. §78.

prospectus, and will therefore typically need to be repeatedly updated to reflect proxy statement or prospectus amendments. This process is often very confusing to investors. A tender offer is required to have a definite termination date. As a result, FPI SPACs would insert the earliest possible date on which the offer will be completed so as to not delay the closing, and then extend the offer period repeatedly with each successive proxy statement or registration statement amendment. Also, some investors tender their shares prior to each termination date, and then withdraw the tenders if the termination date is extended. We see no commensurate investor protection benefits from such process.

2.2.6. Required tagging in a structured, machine-readable data language (proposed Item 1610 of Regulation S-K).

We support proposed Item 1610's requirement to tag using Inline XBRL format such disclosures as the Commission ultimately requires.

2.3. Proposed Rules relating to De-SPAC Transactions that require additional clarification in order to treat like cases alike

2.3.1. Deemed "sale" of securities in De-SPAC Transactions (proposed Rule 145a under the Securities Act).

We generally support the Commission's efforts to improve the quality of disclosure in connection with M&A transactions involving shell companies, including De-SPAC Transactions. However, the Committee believes the Proposing Release's description of what constitutes a "sale" is unclear and the proposed requirement to file a Merger Registration Statement in every instance is conceptually flawed.

- *The Proposed Rule is unclear in identifying what constitutes the "sale" in a De-SPAC Transaction for purposes of the Securities Act*. In general, Section 5 of the Securities Act prohibits the "sale" of a security unless, in the absence of an exemption, a registration statement filed pursuant to the Securities Act is in effect. Section 2(a)(3) of the Securities Act defines a "sale" to "include every contract of sale or a disposition of a security or interest in a security, for value." Similar to an ordinary M&A transaction, a De-SPAC Transaction will not result in a fundamental change in the nature of the security held by SPAC stockholders that would constitute an exchange of value and, thus, should not be deemed to constitute consideration in connection with the business combination. Whether a De-SPAC Transaction should result in a "sale" within the meaning of Section 2(a)(3), and trigger a registration requirement under Section 5 of the Securities Act, should be analyzed by examining the form of the transaction using existing legal principles that already provide SPAC stockholders adequate protections. The Commission should not create a "sale" and, therefore, a possible "distribution," where none exists. There is no "sale," even if proposed Rule 145a were to pertain to the SPAC's offer to buy its shares upon exercise of the SPAC stockholders' redemption rights. Section 5 of the Securities Act does not require registration of an offer to buy in a De-SPAC Transaction. Not only does the legislative history of Section 5 make it clear

"that the 'offer to buy' prohibition in Section 5 was originally inserted solely for the purpose of preventing dealers from making offers to buy from underwriters during the waiting period—or as Section 5 has now been amended, before filing of the registration statement;"[16] but also "the whole registration structure of the [Securities] Act is utterly inconsistent with any concept of issuers' registering public offerings to buy as distinct from public offerings to sell."[17]

- *Proposed Rule 145a should specify which "sale" of which securities is being addressed.* Proposed Rule 145a would deem any business combination of a reporting shell company[18] (purportedly including a SPAC) with another entity that is not a shell company to involve a "sale" of securities to the reporting shell company's stockholders. Assuming, but without conceding, that proposed Rule 145a supersedes in its entirety the legislative mandate of Section 2(a)(3) of the Securities Act, which "sale" of *which securities to the SPAC stockholders* does the Commission intend to have trigger the application of proposed Rule 145a? In a De-SPAC Transaction, there ordinarily is only the "sale" of SPAC securities to Target holders. This sale might be made in a transaction that is exempt from the registration requirements of Section 5 of the Securities Act and, from time to time, might be structured in that manner for reasons having nothing to do with avoiding Securities Act liability. The holders of Target's equity securities may be few in number and may be sophisticated entities or institutional or other accredited investors not needing the protections of a registration statement. Also, there ordinarily is no "sale" of Target stock to the SPAC stockholders. As we discuss in connection with our comments on proposed Rule 140a, a De-SPAC Transaction is not necessarily a "distribution." Proposed Rule 145a would appear to recharacterize the stockholder vote as an investment decision on the sale of Combined Company securities. However, at the time of the vote, the Combined Company does not yet exist, there is no assurance of Closing, and no commonality of interests yet exist between the SPAC and the Target. The Target is generally not offering any securities for sale. The Target, like any other target in an M&A transaction, is providing to an acquiror its corporate and business information for inclusion in the proxy statement or Merger Registration Statement. Just as with proposed Rule 140a, proposed Rule 145a begins down a slippery slope where every merger or business combination going forward would potentially be viewed as a *distribution* involving a *sale* by the Combined Company.

  The Commission should leave existing rules applicable to M&A transactions to operate and not adopt new rules out of expediency that are inconsistent with a longstanding

[16] 57th Street General Acquisition Corp., Response Letter to SEC Staff Comments on Form S-1, No. 333-163134 (Jan. 22, 2010) c*iting* LOUIS LOSS, JOEL SELIGMAN, AND TROY PAREDES, 1 FUNDAMENTALS OF SECURITIES REGULATION Ch. 2(B)(4)(a) (6th ed. 2011).
[17] *Id.*
[18] Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,464 n.43 (proposed May 13, 2022) ("For purposes of proposed Rule 145a . . ., the term 'reporting shell company' is defined as a company, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has: (1) no or nominal operations; (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets; and (3) an obligation to file reports under Section 13 or Section 15(d) of the Exchange Act.)

framework based on well-founded principles that are understood by market participants, and supported by legislative history and court interpretations.

Neither the redemption of SPAC stock nor the vote to approve a De-SPAC Transaction should be covered as a deemed sale by Proposed Rule 145a because, when SPAC stockholders' redemption rights become exercisable or when the stockholders vote on a De-SPAC Transaction, they are not required to make a second investment decision (i.e., whether or not to redeem and "sell" their SPAC shares or if the SPAC may enter into its initial business combination), there being no new offer but, rather, an obligation that relates back to the original issuance of the SPAC IPO shares, to which the SPAC stockholders agreed at the time of the IPO. SPAC stockholders' subsequent election to exercise their redemption right or to vote in favor of a De-SPAC Transaction (or by contrast, to continue to hold their SPAC securities, all of which are terms contained in the SPAC IPO securities) should not be deemed a new investment decision separate and apart from such SPAC stockholders' initial decision to purchase the SPAC IPO securities.[19]

- *Proposed Rule 145a is incongruous with the present Rule 145 and the Commission should explain how proposed Rule 145 applies to the investment decision concept*. Current Rule 145 generally provides that an "offer," "offer to sell," "offer for sale" or "sale" occurs within the meaning of Section 2(3) of the Securities Act 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.[20] Proposed Rule 145a entirely misses the new investment decision concept because the Proposing Release fails to identify any new investment decision in a De-SPAC Transaction. The SPAC stockholder vote is decoupled from, and has no economic tie to, the redemption right—a SPAC stockholder can vote to approve the De-SPAC Transaction but, nevertheless, exercise its redemption right.[21] We believe that proposed Rule 145a does not align with the current Rule 145 because in order for the two to be logically consistent,

[19] *See* 57th Street General Acquisition Corp., Response Letter to SEC Staff Comments on Form S-1, No. 333-163134 (Jan. 22, 2010). In general, the courts have ruled that the purchase or sale of securities occurs on the date the parties are bound to the provisions of a securities transaction, even though full performance of the transaction does not occur until a later date. *See* Department of Economic Development v. Arthur Anderson & Co., 685 F. Supp. 1463 (S.D.N.Y. 1988); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 890-91 (2d Cir. 1972). If a party to a purchase of a security has the right to terminate the transaction, such party is considered to be making an investment decision at each point that it forgoes the right to terminate the transaction. This is not the case with De-SPAC Transactions. The exercise of the redemption right in a De-SPAC Transaction is the fulfillment of the terms of the investment in a SPAC IPO and not a termination. Thus, the investment decision must be viewed as of the date of the closing of the SPAC IPO. *See*, *e.g.*, Goodman v. Epstein, 582 F.2d 388, 409-414 (7th Cir. 1978), *cert. denied*, 440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979); Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1183-84 (S.D.N.Y. 1974). The investment decision doctrine applies only in cases where a party has the right to avoid going forward with a purchase or sale of securities. *See*, *e.g.*, Stephenson v. Calpine Conifers II, Ltd., 652 F.2d 808, 812-13 (9th Cir. 1981); Issen v. GSC Enterprises, Inc., 508 F.Supp. 1278, 1286-87 (N.D. Ill. 1981); *Ingenito*, 376 F. Supp. at 1182-88.
[20] Green Bankshares, Inc., Response Letter to SEC Staff Comments on Schedule 14A, No. 000-14289 (Jul. 1, 2011).
[21] *See* SEC Staff Compliance and Disclosure Interpretations Securities Act Sections, question no.239.13 (Nov. 26, 2008) ("Recognizing the legitimate business reasons for seeking lock-up agreements in the course of business combination transactions, the [S]taff has not objected to the registration of offers and sales where lock-up agreements have been signed in [certain] circumstances.").

SPAC stockholders who vote to approve the De-SPAC Transaction should not be allowed to exercise their redemption rights, which is not the reality for De-SPAC Transactions.

- *In any event, the adopting release relating to any Final Rules ("**Adopting Release**") should explain which liability provisions in business combinations involving reporting shell companies proposed Rule 145a seeks to address by disallowing in a De-SPAC Transaction the use of a proxy statement and, instead, requiring the filing of a Merger Registration Statement*. As noted above, in the case of a De-SPAC Transaction in which the Target is a private company, the private company often is closely held and there may be no need to use a Merger Registration Statement if a private placement or other exemption is available (e.g., Section 4(a)(2) of the Securities Act, Rule 506(b) of Regulation D, etc.). In that case, a proxy statement could be used to seek stockholder approval from SPAC stockholders. Proposed Rule 145a would foreclose that possibility, because it would require any De-SPAC Transaction to either be registered or qualify for an applicable exemption, with the goal of extending to investors the protections of the anti-fraud provisions in Section 17(a) of the Securities Act and Section 10(b) of, and Rule 10b-5 under, the Exchange Act. In doing so, proposed Rule 145a impliedly considers a De-SPAC Transaction as separate and distinct from the SPAC IPO, contrary to proposed Rule 140a's (incorrect) underlying view that the SPAC IPO and De-SPAC Transaction are part of a single, continuing transaction. According to the Proposing Release, requiring a Merger Registration Statement enhances the liabilities of registration statement signatories, potential underwriters and experts under Section 11(a)(4) of the Securities Act.

- *The Adopting Release should also explain why and how proposed Rule 145a should apply to business combinations involving reporting shell companies, regardless of transaction structure.* When a business combination with a private company is undertaken as an exempt private offering, the terms of the business combination are privately negotiated among sophisticated parties: the SPAC, the Target and their advisors. The Target stockholders who are offered SPAC securities have available to them information about the SPAC, since it is already a public company, and they are existing Target stockholders. Generally, the Target stockholders are the persons being "offered" the SPAC shares, and they have already made their "investment decision" to accept the SPAC shares prior to the filing of the Merger Registration Statement. So, if the purpose of having a "gatekeeper" that is a "statutory underwriter" is to protect investors, those would not have been the investors participating in the distribution of securities, since no securities of Target are offered to the public. If the Commission is instead concerned about the SPAC stockholders that are making an investment decision with respect to the Combined Company, their voting in a stockholders' meeting in any M&A transaction is not indicative of an investment decision. Where would the Commission draw the line between a De-SPAC Transaction and any other M&A transaction involving a significant acquisition? We cannot think of a time where the Commission expressed a concern that a company holding a stockholder vote for a major acquisition that had provided all of the information required in a proxy statement did not provide sufficient information to its investors voting on the transaction. An M&A

transaction is not the type of transaction that has historically been considered a "distribution" in the context of the cases that the Commission cites.

If proposed Rule 145a is to be adopted as proposed, the Adopting Release also should explain for the benefit of market participants why the Merger Registration Statement disclosure requirements would not be sufficient for investor protection, especially in the De-SPAC Transaction context, when going forward, these would be bolstered by the additional disclosures that will now be included in the filings at the time of the stockholder vote that might once have been made available only in the Super 8-K. A SPAC that is qualified to file (and actually files) a proxy statement should not be seen (as proposed Rule 145a seems to suggest) as trying to escape Securities Act liability by relying on Section 14A of the Exchange Act. Based on our experience, we have not encountered any De-SPAC Transaction that was structured to use a proxy statement (and not a Merger Registration Statement) with the purpose of avoiding liability. Nor has the use of a proxy statement in connection with a De-SPAC Transaction prevented the Commission from bringing actions with respect to disclosures in the proxy statement pursuant to Section 14(a) of, and Rule 14a-9 under, the Exchange Act.[22]

2.3.2. Aligning financial statement requirements in business combinations involving shell companies (proposed Article 15 of Regulation S-X).

The Proposed Rules set forth amendments to the Commission's forms, schedules and rules to more closely align the financial statement reporting requirements in business combinations involving a shell company and a Target with those in traditional IPOs. We support proposed Article 15 of Regulation S-X and related amendments to address certain inconsistencies in the reporting of financial information that can arise when applying existing requirements to business combination transactions involving shell companies (*e.g.*, the need for a Target to be audited in accordance with PCAOB standards by an auditor that is independent based on PCAOB and Commission independence requirements, explaining why financial information of the shell company is not relevant to investors following Closing, etc.), subject to the following comments:

- *A SPAC's first annual report should have no bearing on (i) the number of years of the Target's financial statements required to be included in a Merger Proxy Statement or Merger Registration Statement or (ii) the Combined Company's status as accelerated filer or large accelerated filer in its first year of reporting as a Combined Company*. We welcome the expansion of the circumstances in which EGC Targets may report two years of financial statements ("**two-year accommodation**") by removing the condition that the shell company has not previously filed its first annual report. In our view, the filing of the SPAC's first annual report should have no bearing on the number of years of the Target's financial statements required to be included in a Merger Proxy Statement or Merger Registration Statement. However, whether or not the shell company has filed its first annual report should, in our view, have no bearing on the number of years of required Target financial statements. The requirement for the third year of PCAOB-

[22] *See* Merger of Stable Road Acquisition Company and Space Transportation Company Momentus Inc., SEC Press Release, U.S. SECURITIES AND EXCHANGE COMMISSION (Jul. 13, 2021).

audited financial statements imposes significant burdens on operating companies and is inconsistent with what would have been required had such EGCs undertaken traditional IPOs. We are pleased that the Proposed Rules eliminate this.

- *The age of financial statements of the predecessor depends on whether the Target would qualify as smaller reporting company if filing its own initial registration statement.* We support proposed Rule 15-01(c), which would provide that the age of financial statements for a Target that would be the predecessor to a shell company in a registration statement or proxy statement would be based on whether the Target would qualify as a smaller reporting company if it were filing its own initial registration statement. We acknowledge and concur that the existing provisions in Articles 3 and 8 of Regulation S-X for reporting companies required to file under Sections 13(a) or 15(d) of the Exchange Act would continue to apply to shell companies.

- *Proposed Rule 15-01(d) to apply on acquisitions of businesses by a shell company registrant or its predecessor that are not or will not be the predecessor.* We support proposed Rule 15-01(d) of Regulation S-X to require application of Rules 3-05 or 8-04 (or Rule 3-14 as it relates to a real estate operation), the Regulation S-X provisions related to financial statements of an acquired business, to acquisitions of businesses by a shell company registrant or its predecessor that is not or will not be the predecessor to the registrant. We agree that the proposed amendment would further align financial reporting for a shell company business combination contained in a Merger Registration Statement and a Merger Proxy Statement with what would be required to be included in a Securities Act registration statement for a traditional IPO of a Target.

  We also support the proposed amendment to Rule 1-02(w) of Regulation S-X that requires the significance of the acquired business to be calculated using the Target's financial information as the denominator instead of that of the shell company registrant. We agree that using the Target's financial statements for the denominator should produce results more consistent with the sliding scale approach in Rule 3-05 and recognize that certain acquisitions have a greater impact than others.

  We also support, subject to the qualification set forth below, proposed Rule 15-01(d)(2), which will specify when the financial statements of a recently acquired business (or real estate operation) that is not the Target that will be the predecessor, which are omitted from a shell company registration, proxy or information statement under Regulation S-X, would be required to be filed when the Target is not yet subject to Exchange Act reporting requirements and, thus, may not be able to file a Form 8-K. Proposed Rule 15-01(d)(2) would provide that the financial statements of the acquired business omitted from the previously filed registration, proxy or information statement would be required in Item 2.01(f) of the Form 8-K filed with Form 10 information. However, we are of the view that in some cases the financial statements of a recently acquired business may not be available at the time the Form 8-K, with Form 10 information, is filed, and the predecessor may not have any control over the date on which such financial statements would be available. In this instance, we recommend that, if the financial statements

cannot be provided at the time the Form 8-K is filed without unreasonable effort or expense, the predecessor should have 71 days following the deadline for the filing of the Form 8-K to provide such financial statements by way of an amendment to the Form 8-K.

Additionally, we note that Canadian issuers engaged in an IPO are permitted, if they meet the criteria of the multijurisdictional disclosure system ("**MJDS**"), to have their financial statements audited in accordance with Canadian generally accepted auditing standards ("**C-GAAS**"), rather than the auditing standards of the PCAOB. In light of the Commission's view that De-SPAC Transactions are the equivalent of traditional IPOs, we recommend that the Commission adopt an exception to the audit requirements applicable to SPACs to permit the audits of the financial statements of operating companies that would otherwise be eligible for MJDS to be able to rely on C-GAAS. We believe this would eliminate a distinction that would otherwise unfairly disadvantage Canadian Targets engaged in transactions with SPACs.

2.3.3. Aligning other De-SPAC Transaction characteristics with traditional IPOs.

Subject to the need for parity in the treatment of SPACs and traditional IPO issuers if the Proposed Rules are adopted as proposed, as discussed in Section 2.3.4 of this letter, we support the Commission's proposal to align the non-financial disclosure requirements in De-SPAC Transaction disclosure documents with the requirements that would apply to an IPO issuer on Form S-1/F-1. This reflects current best practice and we believe does not impose a significant burden on the Target, and the information would otherwise be disclosed in the Super 8-K filing following Closing. We also support the Commission's proposal to require that disclosure documents in De-SPAC Transactions be disseminated to investors at least 20 calendar days in advance of a stockholders' meeting.

We do not object to the Commission's proposal to require the Combined Company to determine its status as a smaller reporting company based on its public float within a short time following Closing. We note, however, that this will not put the Combined Company on exactly the same footing as a company that has recently undertaken an IPO, because the Combined Company will inherit the SPAC's reporting history. If the SPAC had already filed a Form 10-K prior to the De-SPAC Transaction, then (depending on its size) the Combined Company may find itself subject to accelerated filing obligations shortly after Closing, which would disadvantage it.

2.3.4. Parity for Shell Companies and Former Shell Companies if Proposed Rules are adopted as proposed.

Historically, the Commission distinguished between a shell company and a former shell company on the one hand, and operating companies on the other, because there was a concern that shell companies might be used to commit fraud in the securities markets.[23] Now that the

[23] *See* Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Securities Act Release No. 33-8587, Exchange Act Release No. 34-52038, 70 Fed. Reg. 42,234 (Jul. 21, 2005); Use of Form S-8 and Form 8-K by Shell Companies, Securities Act Release No. 33-8407, Exchange Act Release No. 34-49566, 69 Fed. Reg. 21,650 (proposed Apr. 15, 2004).

Proposed Rules aim to treat SPACs and traditional IPO issuers alike, it should obviate the need for the disparate treatment for former shell companies.

Because "like cases" should be treated "alike,"[24] we propose the Commission adopt a parity principle between SPACs and traditional IPO issuers and eliminate these disparities. Based on the foregoing, the following limitations should be removed:[25]

- the requirement to file within four business days from Closing the Target's financial statements and the Combined Company's inability to avail itself of the 71-day extension period;[26]

- the Combined Company's inability to incorporate Exchange Act reports, or proxy or information statements filed pursuant to Section 14 of the Exchange Act, by reference on Form S-1 until three years after Closing;[27]

- the Combined Company's inability to use Form S-8 for the registration of compensatory securities offerings until at least 60 calendar days after the Combined Company has filed current Form 10 information;[28]

- inclusion of these entities as "ineligible issuers" under Rule 405 of the Securities Act;

- the differences in Rule 144 currently applicable to shell and former shell companies; and

- the need for a Target to be audited in accordance with PCAOB standards by an auditor that is independent based on PCAOB and Commission independence requirements.

2.4. Proposed Rules we believe raise concerns

2.4.1. Determining fairness of the De-SPAC Transaction (proposed Items 1606 and 1607 of Regulation S-K).

We do not believe that proposed Items 1606 and 1607 are within the scope of the Commission's rulemaking authority as noted above. As a general matter, U.S. federal securities laws are disclosure-based and do not regulate the fairness or advisability of securities transactions. This overarching principle is a policy decision made by Congress and codified in federal statute. As a federal administrative agency, the Commission's rulemaking authority is

[24] Chair Gary Gensler, Remarks Before the Healthy Markets Association Conference, U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 9, 2021), https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921#_ftnref1 (last visited Jun. 8, 2022).
[25] *See* Division of Corporation Finance, Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 31, 2021).
[26] *See* United States Securities and Exchange Commission Form 8-K, at 22 (Item 9.01(c)), https://www.sec.gov/about/forms/form8-k.pdf.
[27] *See* United States Securities and Exchange Commission Form S-1, at 3, https://www.sec.gov/files/forms-1.pdf.
[28] *See* United States Securities and Exchange Commission Form S-8, at 1-3, https://www.sec.gov/files/forms-8.pdf.

limited to the specific grants of authority provided by Congress.[29] A useful example of this principle is the Commission's rulemaking authority pursuant to Section 10(b) of the Exchange Act. When interpreting the scope of conduct prohibited by Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, the Supreme Court has held[30] that a claim brought by a stockholder alleging simply that the stockholder has been treated "unfairly" by a fiduciary, without more, is not valid, writing that if "full and fair disclosure is made, transactions eliminating minority interests are beyond the purview of Rule 10b-5."[31]

The Proposing Release states that proposed Items 1606 and 1607 have been modeled on Items 1014 and 1015 of Regulation M-A, which apply to going-private transactions subject to Rule 13e-3 under, and Section 13(e) of, the Exchange Act.[32]

Section 13(e) applies to *purchases* of equity securities registered under Section 12 of the Exchange Act by the issuer thereof that contravene such rules and regulations as the Commission, *in the public interest or for the protection of investors*, may adopt (A) to define acts and practices which are *fraudulent, deceptive or manipulative*, and (B) to prescribe means reasonably designed to prevent such acts and practices.[33]

Section 13(e)(1) goes on to list the types of rules that the Commission is authorized to promulgate:

> Such rules and regulations may require such issuer to provide holders of equity securities of such class with *such information* relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and *such additional information*, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

Section 13(e) does not confer authority on the Commission to regulate the substantive fairness of an issuer's purchase of its own registered equity securities; instead, the Commission may prescribe disclosure requirements for the offer or proxy statement materials presented to stockholders in connection with such transactions. The legislative history of Section 13(e) also supports the conclusion that Congress did not intend for the Commission to take the "improbable

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[29] Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" (citation omitted)).

[30] *Id.* at 473-74 ("[T]he claim of fraud and fiduciary breach in this complaint states a cause of action under any part of Rule 10b-5 only if the conduct alleged can be fairly viewed as "manipulative or deceptive" within the meaning of the statute."). The court went on to state that "[case law does] not support the proposition, adopted by the Court of Appeals below and urged by respondents here, that a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure, violates the [Section 10(b) of the Exchange Act] and [Rule 10b-5]. *Id.* at 476.

[31] *Id.* at 469.

[32] Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,473 n.96 (proposed May 13, 2022).

[33] Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (2015).

interpretation" that the Commission could issue rules not "designed solely to prevent acts and practices which are fraudulent, deceptive or manipulative."[34]

Moreover, Rule 13e-3 was promulgated following adoption of the Williams Act[35] in 1968, which introduced Section 13(e) into the Exchange Act to address, among other things, specific Congressional concerns with respect to abusive transactions. The Commission began rulemaking proceedings with respect to going-private transactions in 1975 and proposed two alternative rules, Rule 13e-3A and 13e-3B.[36] Both rules would have regulated the substantive fairness of going-private transactions. However, following heavy criticism of those proposed rules, the Commission adopted Rule 13e-3 in 1979 eliminating the proposed fairness standards.[37]

Proposed Items 1606 and 1607 stop short of expressly requiring business combination transactions to be substantively fair and instead require *disclosure* of the issuer's reasonable belief as to a transaction's fairness or unfairness to unaffiliated securityholders. However, the practical effect of these proposed rules is to require substantive fairness. A SPAC could hardly state in the disclosure materials sent to its investors that it believes a De-SPAC Transaction is unfair to unaffiliated stockholders. Such a position would be untenable; no such transaction would be able to proceed as every stockholder would run to their state courthouse to file a complaint for breach of fiduciary duty under applicable state corporation law. Proposed Item 1606 also provides that an issuer cannot abstain from stating whether it believes the business combination is fair or unfair. Thus, proposed Items 1606 and 1607 impose such stringent disclosure requirements regarding the fairness of a business "that a fairness objective is clearly implicit in its provisions."[38] Following the reasoning of the Supreme Court in *Santa Fe Indus., Inc. v. Green,* we believe that the Commission does not have the statutory authority to impose a substantive fairness standard on business combinations.

While Items 1014 and 1015 of Regulation M-A may also go beyond the Commission's authority because they effectively require substantive fairness in going-private transactions, they at least are supported by the enhanced rulemaking authority contained in Section 13(e), as well as Section 13(e)'s background of being a way for Congress to "fill in" the gaps of the securities laws through the Williams Act. In adopting proposed Items 1606 and 1607, the Commission is not relying on any new or specific statutory authority. To date, Congress has not passed any new statutes that regulate SPACs, SPAC IPOs or De-SPAC Transactions.

We note that in the Proposing Release, the Commission lists a litany of statutory provisions authorizing the Proposed Rules. Given how close proposed Items 1606 and 1607 are to Items 1014 and 1015 of Regulation M-A, the Commission's strongest point of authority in the cited litany would presumably be Section 13(e). However, the most charitable reading of

[34] *See* Randal J. Brotherhood, *Rule 13e3 and the Going Private Dilemma: The SEC's Quest for a Substantive Fairness Doctrine*, 58 WASH. U. L. REV. 883, 908-09 (1980) (quoting statements from members of Congress regarding Section 13(e)).
[35] Securities Exchange Act of 1934, Pub. L. No. 90-439, 82 Stat. 454.
[36] "Going Private" Transactions By Public Companies or their Affiliates, Securities Act Release No. 33-5567, Exchange Act Release No. 34-11231, Investment Act Release No. IC-8665, 40 Fed. Reg. 7947, 7950 (proposed Feb. 24, 1975).
[37] Securities Act Release No. 6100, 17 C.F.R. §240.13e-3 (1980).
[38] *See* Brotherhood, *supra* note 34, at 884 (discussing the practical effect of Items 1014 and 1015 of Regulation M-A).

Section 13(e) would be that it perhaps could be the basis for regulating a SPAC's offer to redeem its shares of Class A[39] common stock undertaken concurrently with a De-SPAC Transaction since the redemption is in fact a "purchase" by the SPAC of its own registered equity security. Also, if perhaps the Commission had proposed a rule requiring a statement regarding a SPAC's reasonable belief that the *redemption offer to purchase* was itself fair or unfair to unaffiliated securityholders, that would be defensible under Section 13(e). However, expanding the fairness determination disclosure requirement's scope to cover De-SPAC Transactions (to say nothing of any related financing transactions) goes beyond Section 13(e) because a De-SPAC Transaction itself (again, to say nothing of related financing transactions) does not involve the purchase by the issuer of its securities. In fact, a De-SPAC Transaction is the exact opposite: the *issuance* of securities. Since Section 13(e) of the Exchange Act cannot support the adoption of proposed Items 1606 and 1607 and we see no other statutory basis for the proposed items, we believe that proposed Items 1606 and 1607 are unauthorized.

Assuming, for the sake of discussion, that the Commission has the statutory authority to adopt proposed Item 1606, we believe that:

- *The scope of the fairness determination should cover the De-SPAC Transaction and any related financing transaction as a whole*. We do not believe that separate determinations regarding any aspect of the De-SPAC Transaction as proposed are appropriate. For example, it is unclear how the board of directors of a SPAC (or a financial advisor providing a fairness opinion to support the board's determination) would evaluate the fairness of any financing transaction itself. This is especially true if the related financing transaction consists of debt financing. De-SPAC Transactions involve multiple complex and, often, mutually dependent steps and should be viewed on a combined basis. Furthermore, from the standpoint of the SPAC's continuing stockholders, they will continue to own shares of the Combined Company that reflect all of these transactions. As part of analyzing the fairness of the De-SPAC Transaction, we would expect the SPAC's board of directors to take into account all of these transactions and look at the Combined Company, including its pro forma capitalization as a result of related financing transactions. We propose that the Commission clarify that a fairness assessment should apply to the De-SPAC Transaction and all of its components taken as a whole.

- *The fairness determination should be as to the SPAC's securityholders as a whole, rather than solely to the SPAC's unaffiliated securityholders*. A fairness determination should be made as to a SPAC's securityholders as a whole. For most SPACs, this would include both holders of the publicly registered and traded shares of Class A common stock and the holders of privately held shares of Class B common stock awarded to a Sponsor as part of the Sponsor promote. A fairness evaluation is a complex analytical process and the methodology used to determine the enterprise value of a particular Target will vary depending on the circumstances. However, at its core, fairness involves determining whether the *enterprise value* of the Target that is implied by the terms of the definitive

[39] There are two different SPAC ownership structures in the marketplace; all references in this letter to Class A common stock are also meant to include founders' shares in a single class structure.

documentation for a De-SPAC Transaction is higher or lower than the implied consideration being paid. Financial advisors that undertake this analysis in relation to a SPAC's enterprise value have sometimes used a discounted cash flow analysis, a precedent transactions analysis or a comparable companies analysis, among others, to estimate a range for a SPAC's enterprise value and then evaluate whether a particular value implied by a subject transaction's terms is fair or unfair. However, taking the analysis a step further and attempting to determine whether a De-SPAC Transaction is fair to a subset of a SPAC's securityholders would necessarily require a SPAC (or financial advisor) to opine on whether the *allocation of the rights to a Target's enterprise value* as between the Class A and Class B stockholders is fair or unfair. Whether any allocation of value as between classes of stockholders is fair or unfair has less to do with the imperfect science of enterprise valuation traditionally undertaken by financial advisors and more to do with the business deal that Class A and Class B stockholders have struck as part of a SPAC IPO.

- *The factors enumerated in proposed Item 1606(b) in determining fairness should be discussed to the extent they were actually used by the SPAC in making its fairness determination*. Proposed Item 1606(b) would require a SPAC to discuss in reasonable detail the material factors upon which it bases its belief on the fairness of a De-SPAC Transaction and any related financing transaction to unaffiliated securityholders of the SPAC. Proposed Item 1606(b) then states that "such factors *shall* include… the consideration of any financial projections…" Since proposed Item 1606(b) would require a SPAC to discuss and, thus, disclose its Target's financial projections as part of the description of the basis of its fairness determination, the Proposed Rules should provide that the PSLRA's safe harbor for forward-looking statements applies to financial projections disclosed by a SPAC in response to this proposed item. It is patently unfair, on the one hand, to heighten the potential liability for forward-looking information and then require SPACs to include this inherently uncertain information in its public filings, on the other. What if a Target, having established attractive historical results, would like to opt not to present its forward-looking projections to mitigate its liability and given its concern that the future is, by definition, uncertain? This tension is further exacerbated by proposed Rule 145a, which effectively requires virtually all De-SPAC Transactions to be conducted pursuant to a registration statement, which would render projections presented in response to this proposed item subject to the liability provisions of the Securities Act.

  In a related vein, proposed Item 1606(b)'s list of factors that "shall" be included in a discussion of a fairness determination is at odds with the Commission's history of implementing a principles-based disclosure regime. The factors relevant to making a fairness determination will vary from company to company and different fairness assessors may take different views on which factors are appropriate for the same company. Instruction 2 to Item 1014 states: "[t]he factors that are important in determining the fairness of a transaction to unaffiliated securityholders and the weight, if any, that should be given to them in a particular context will vary." By prescribing which factors "shall" be discussed, the Commission may force the SPAC to disclose information not actually considered by the SPAC in making its fairness determination.

We propose that the Commission modify proposed Item 1606(b) to provide that the factors should be discussed "to the extent" they were actually considered by the SPAC in making its determination.

- *The costs to comply with the disclosures required by proposed Item 1606(a) will discourage De-SPAC Transactions*. We believe proposed Item 1606(a) will dramatically reduce the number of De-SPAC Transactions that will be undertaken. First, we believe transaction costs will increase materially as a result of the additional work that will need to be done to reach the fairness determination, including the cost of obtaining a fairness opinion from a financial advisor and the expected increase in premiums for D&O liability insurance given the increased potential liability. Separately, requiring a fairness determination may halt some De-SPAC Transactions even when it would be a reasonable business decision to proceed because of the difficulties in reaching a fairness determination or in obtaining a fairness opinion. Moreover, because of the potential liability attendant to delivering a fairness opinion, we believe that some transactions may be financially attractive and yet will not be "opinion-able" by a financial advisor. This will have the undesired result of some De-SPAC Transactions not proceeding as no fairness opinion will be able to be given and the SPAC board of directors will not proceed without a fairness opinion for fear of liability. In short, investors may miss out on otherwise attractive transactions because of the difficulty or liability associated with declaring them "fair."

- *Registrants should not be required to assign a weight to each material factor underlying the fairness determination*. A fairness determination is a complex analytical process. Ultimately, some professional judgment based on experience and/or business acumen will be required in each case. It is neither practical nor workable to assign a weight to various factors and could result in investors placing too much or not enough emphasis on the factors described by the SPAC.

Assuming, for the sake of discussion, that the Commission has the authority to adopt proposed Item 1607, we believe it is inappropriate to require the filing of board books and other written materials presented to the board in connection with the reports, opinions or appraisals, as is the case with going-private transactions. Free flow of information is critical to a board's deliberative process and necessary for it to discharge its fiduciary duties. Requiring filing of board materials will inevitably result in a reduction of information presented to, and considered by, a SPAC's board of directors. Board materials are typically not prepared with a view that they will be included in public filings and subject to Securities Act and Exchange Act liability. If filing these materials was required, it would require board materials to be drafted to withstand scrutiny under the Securities Act and the Exchange Act's liability provisions. This is impractical and unworkable. Most professionals preparing these materials are not trained to prepare these documents in a manner that would be appropriate for public disclosure. Some materials may reflect management's preliminary analysis or some draft documents that will later be refined after new information comes to light as a result of the due diligence process. Some other materials may be prepared by a third party that will not consent to their use in a public filing.

Some information may be immaterial, speculative or ultimately determined to be unreliable. As a result of these and other unforeseeable factors, the inevitable result of required public filing of materials presented to a board of directors will be a reduction in the information presented.

2.4.2. Making Target a co-registrant to Merger Registration Statement.

We believe the Co-Registrant Amendment is not appropriate because the Target ordinarily is not issuing any securities in a De-SPAC Transaction. We also believe the Co-Registrant Amendment will not result in any new or enhanced disclosures regarding the Target. There are already strong liability incentives under the existing framework to ensure the Merger Registration Statement disclosures are accurate and complete. The Co-Registrant Amendment is inconsistent with existing Securities Act rules and interpretations regarding co-registrants, as well as market practice, raises significant questions and practical challenges, and introduces substantial incremental transaction costs and uncertainties into the De-SPAC Transaction process that will deter Targets from participating in De-SPAC Transactions.

We believe that the Co-Registrant Amendment is inconsistent with existing Securities Act rules and interpretations and market practice:

- *As to the definitions of "issuer" and "registrant" under the Securities Act.* Under Section 6(a) of the Securities Act, each "issuer" must sign a Securities Act registration statement, as well as the issuer's principal executive officer or officers, principal financial officer, comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer). Section 2(a)(4) of the Securities Act in turn defines "issuer" to generally mean "every person who issues or proposes to issue any security." The term "registrant" is interchangeable with "issuer," as Rules 100(4) and 405 under the Securities Act both define a "registrant" as "the issuer of securities for which a registration statement is filed."

  The Co-Registrant Amendment is inconsistent with both the statutory definition of "issuer" under Section 2(a)(4) of the Securities Act and the definition of "registrant" in Rules 100(4) and 405 of the Securities Act. The Target in a De-SPAC Transaction ordinarily is not issuing or proposing to issue any securities pursuant to the Merger Registration Statement—it is the SPAC's securities to be issued—and none of the explicit exceptions included in the definition of "issuer" apply.

  To suggest the Target is offering its securities to SPAC stockholders in the typical De-SPAC Transaction ignores both the legal structure and substance of the transaction. At the time the Merger Registration Statement is declared effective, SPAC stockholders hold shares in the SPAC and SPAC alone. They do not hold a security or any contingent interest in the Target, whether the Closing occurs or not. Inasmuch as a De-SPAC Transaction is fundamentally an M&A transaction, and no different than business combinations in other contexts, the Commission has never required targets in other

business combinations in these circumstances to be added as co-registrants of a merger registration statement.

- *As to Rule 140 of the Securities Act.* The Commission has identified additional situations in which it is appropriate for parties with certain relationships with the primary issuer to sign registration statements as "co-issuers" or "co-registrants," as set forth in Rule 140 under the Securities Act.[40]

  Rule 140 is designed to apply to situations in which there is a "primary issuer" with no or minimal business conducting an offering of securities that is designed to fund an investment in a "funded company." In these circumstances, if the primary issuer's registration statement is limited to the information about the primary issuer without the corresponding information about the funded company, then potential investors would not have the necessary information to make an informed investment decision about the primary issuer's securities offering—the ultimate purposes of the investment proceeds and the actual potential for return and the attendant risks would be absent. In practice, there are generally three types of transactions that give rise to the need for co-registrants under Rule 140: (1) two-tiered limited partnership (LP) or "master feeder" fund offerings, (2) sale-leaseback transactions and (3) certain finance company offerings.[41] Rule 140 does not, either by its terms or by analogy, apply to De-SPAC Transactions.

  The Co-Registrant Amendment is also inconsistent with the purpose and policy considerations of Rule 140. As noted above, Rule 140 ensures that the requisite information about the underlying issuer is adequately disclosed so new investors are fully informed of the attendant risks and returns relating to a potential investment. This is not a concern in De-SPAC Transactions because the current requirements of the Merger Registration Statement are designed to elicit full Form 10-type information about both the SPAC and the Target. An effective Merger Registration Statement would already include fulsome Form S-1 level disclosures for the Target and the SPAC, and the SPAC and its directors and officers would be subject to Section 11 and 12 liability for the information contained therein. In addition, the Target and its affiliates—while not signatories of the Merger Registration Statement—may nonetheless still be subject to liability for disclosures in the Merger Registration Statement under Rule 10b-5 of the Exchange Act and potential enforcement actions by the Commission under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act,[42] and under the proxy rules as participants in the proxy solicitation by the SPAC. Furthermore, in a De-SPAC

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[40] Rule 140 states: "A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of Section 2(11) of the Act." 17 C.F.R. § 230.140 (1959).
[41] *See*, *e.g.*, SEC Staff Compliance and Disclosure Interpretations Securities Act Rules, question no. 524.01 (Jan. 26, 2009).
[42] *See, e.g.,* Complaint, SEC v. iFresh, Inc. and Long Deng, No. 1:22-cv-03200 (E.D.N.Y. May 31, 2022) (for repeatedly filing materially inaccurate financial statements that failed to fully disclose related party transactions connected to its chief executive officer); Complaint, SEC v. Cornerstone Acquisition & Management Company LLC, Derren Lee Geiger & She Hwea Ngo, No. 3:22-cv-00765 (S.D. Cal. May 27, 2022) (for misstatements concerning the ownership of Cornerstone, the existence of collateral and other material issues).

Transaction, the securities to be registered on a Merger Registration Statement are being delivered to the Target's existing equityholders, and no new proceeds are being received by the Combined Company. This is a notable difference from the existing Rule 140 situations where *new* investors are contributing *new* proceeds to the primary issuer, and ultimately to the funded company.

- *Comparison to business combinations other than De-SPAC Transactions.* The Commission's proposal is premised on the notion that in a De-SPAC Transaction, "investors look to the business and prospects of the private operating company in evaluating an investment in the [C]ombined [C]ompany," and therefore it is critically important to ensure that there are no material misstatements or omissions about the Target in the Merger Registration Statement. However, the same could be said for business combinations in other contexts; yet the Co-Registrant Amendment, as proposed, would only apply to De-SPAC Transactions. For example, if a publicly traded shell company (other than a SPAC or business combination related shell company) acquires a Target in a stock-for-stock merger, it would certainly be the case that investors are looking to the Target's disclosures in making a decision about whether to vote in favor of the transaction or whether to invest in the Combined Company; yet the Target would not be required to be added as a co-registrant and its officers and directors would not be required to sign the shell company's Merger Registration Statement. Similarly, if a public operating company acquires a target that is of the same size or larger than the acquirer in a stock-for-stock merger (in which an acquirer stockholder vote is required), the acquirer's business and financial statements post-acquisitions will likely look materially different relative to the pre-acquisition period, and investors will rely to a significant extent on the disclosures about the target in the acquirer's merger registration statement in any voting or investment decision they make with respect to the acquisition and/or combined company's common stock. Yet the Commission has never required the target or its directors and officers to sign the acquirer's merger registration statement in such a scenario, even though the same policy considerations that ostensibly justify the need for the Co-Registrant Amendment in the De-SPAC Transaction context would also apply. As a result, the Co-Registrant Amendment, as proposed, leads to inconsistent treatment of factually similar and closely analogous business combination transactions, requiring a privately held target to be added as a co-registrant when it proposes to merge with a SPAC but not when it proposes to merge with a non-SPAC public shell company; for example, despite the same theoretical concerns relating to the adequacy of Target's disclosures and the need to hold Target's officers and directors accountable and potentially liable for material misstatements or omissions applying equally in both contexts.

We also believe that the Co-Registrant Amendment raises significant practical challenges and unanswered questions, including the following:

- *Target's premature reporting obligations.* In a traditional IPO, typically the Form S-1 registration statement will not be declared effective until shortly before pricing of the IPO. On the IPO pricing date, the IPO issuer will enter into a definitive underwriting

agreement with the IPO underwriters, and the IPO closing typically occurs two or three business days later. Although the IPO closing is subject to the satisfaction of various conditions precedent set forth in the underwriting agreement, such conditions precedent are quite customary, and it is rare for an IPO to be terminated after the IPO has priced. Therefore, the IPO Form S-1 registration statement does not become effective until the tail end of the process and at a time when the likelihood of completing the IPO is quite high. The practical result is that the officers and directors signing the Form S-1 do not become subject to Section 11 liability—and the company does not become subject to ongoing Exchange Act reporting obligations—until the IPO is nearly a *fait accompli*. Given that a De-SPAC Transaction is, at its core, an M&A transaction and not an IPO, there is a significant gap between the effectiveness timing and closing of the De-SPAC Transaction (attributable to the proxy solicitation period) and, at the time the Merger Registration Statement is declared effective, often there are significant closing contingencies to be satisfied, and it is not a *fait accompli* that the De-SPAC Transaction will close.

This effectiveness timing "mismatch" raises significant practical problems and questions, none of which are addressed in the Proposing Release. The Co-Registrant Amendment, if adopted as proposed, would subject Targets to reporting obligations pursuant to Section 15(d) of the Exchange Act following effectiveness of the Merger Registration Statement. Given the proposed 20-day minimum solicitation period prior to the SPAC stockholders' meeting, it is entirely possible that the SPAC acquirer and the Target could each be required to file a quarterly report on Form 10-Q or annual report on Form 10-K prior to the Closing date. How would that work practically? Subsequent to a De-SPAC Transaction, typically only the Target's financial statements are reported (including in respect of periods prior to the De-SPAC Transaction), since the Target is usually the accounting acquirer. Presumably both the SPAC and the Target would need to file separate Form 10-Qs, which could be confusing and perhaps misleading to investors, since the De-SPAC Transaction has not been completed and may not ever close, and SPACs do not hold any security (or residual interest) in the Target unless and until Closing happens. Perhaps more significantly, there is a risk that the parties may terminate a De-SPAC Transaction subsequent to the Merger Registration Statement effectiveness date, including (among other reasons) for failure to obtain stockholder approval, failure to satisfy a "minimum cash" or "maximum redemption" closing condition, or failure to obtain a required regulatory or third-party approval. However, once the Merger Registration Statement has been declared effective, under the Co-Registrant Amendment, the Target would nonetheless be subject to ongoing Exchange Act reporting obligations for at least 12 months, even if a De-SPAC Transaction is terminated. While presumably this is not the intention, the Proposing Release, the Proposed Rules and the new instructions to the Merger Registration Statement do not address how the Target could deregister or otherwise terminate its reporting obligations in the event of a failed De-SPAC Transaction. Without a way to deregister for terminated transactions, the Target would face the real possibility of becoming subject to the significant, time-consuming and costly obligations of being a publicly reporting company

without the stockholder liquidity or proceeds resulting from Closing, thus creating a strong disincentive against De-SPAC Transactions.

- *Liability misalignment for Target's directors.* Another misalignment created by the Co-Registrant Amendment relative to traditional IPOs is the group of persons to whom Securities Act liability attaches. In traditional IPOs, most directors and officers of the newly public company are almost always the same as those who sign the Form S-1 registration statement (given the proximity in time to IPO completion and high degree of closing certainty at the time of registration statement effectiveness, as described above). On the other hand, in many (if not substantially all) De-SPAC Transactions, given the minimum 20-day gap period between the Merger Registration Statement's effectiveness and Closing, and significant Closing uncertainty at the time of registration statement effectiveness, additional directors (such as "outside" independent directors or Sponsor designees) will join the Combined Company board just prior to or concurrent with Closing. In many De-SPAC Transactions, certain legacy Target directors (and sometimes officers) will resign immediately prior to Closing. So the group of individuals to whom Securities Act liability attaches (*i.e.*, the persons signing the Merger Registration Statement) under the Co-Registrant Amendment is at the same time both under-inclusive and over-inclusive. Any individual director or officer who is to resign prior to the De-SPAC Transaction will likely be incentivized under the Commission's proposal to resign earlier in the process—*i.e.*, prior to the first public filing under the Merger Registration Statement—in order to avoid Section 11 liability. It is unclear how investors would be advantaged if non-continuing directors and officers resigned before the registration statement is filed rather than in connection with Closing.

- *Increased transaction costs.* Requiring the Target to sign as a co-registrant will increase Target's transaction expenses. Targets will be forced to substantially enhance their D&O liability insurance coverage to cover potential federal securities law liability substantially earlier in the De-SPAC Transaction process than is currently the case. Moreover, if the De-SPAC Transaction is never completed for some reason, Targets would likely not be able to "ratchet down" their coverage to more typical private company levels until the next policy renewal date. Additionally, the new avenue of potential for liability for the Target's consultants and experts would be expected to increase the fees required to compensate these service providers and additional documentation would likely be required, adding even further costs to the process.[43]

- *Uncertain benefits relative to current disclosure and liability framework.* It is unclear if the Co-Registrant Amendment would meaningfully enhance disclosures and protections for investors in practice. First, the current requirements of the Merger Registration Statement are designed to elicit full Form 10/Form S-1 type information about the Target. There is no deficiency in the adequacy of information provided about the Target under

[43] *See* Comm. Robert J. Jackson Jr. The Middle-Market IPO Tax, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 25, 2018), https://www.sec.gov/news/speech/jackson-middle-market-ipo-tax#_ftnref8 (last visited Jun. 8, 2022) (discussing an entrepreneur's need for the help of a team of bankers, accountants and lawyers to navigate the process in tapping public markets; how their fees function as a tax which takes capital away from investment, research and job; and whether the team should be paid *something* for the value it adds).

the current rules or discrepancy between the level of disclosure required in a traditional IPO Form S-1 or F-1 registration statement and a Merger Registration Statement.

Second, the Target's directors and officers have meaningful incentives to prepare accurate disclosures for the Merger Registration Statement. Many of Target's officers, and many of its directors, will continue on as officers and directors of the Combined Company, signing the Super 8-K, go-forward Exchange Act reports and post-Closing Form S-1 resale shelf registration that almost universally draw on the prior disclosures in the Merger Registration Statement. The Target's directors and officers will "own" the disclosures going forward. Any inconsistencies between the Merger Registration Statement disclosures and post-Closing Form 10-K or S-1 disclosures would subject the Combined Company to potential federal securities law liability, so there is already a strong incentive for the Target's directors and officers to ensure the accuracy and completeness of the initial Merger Registration Statement disclosures. As a practical result, the Target's officers and directors who sign the post-Closing Exchange Act reports and registration statements of the Combined Company are already subject to liability under Sections 11, 12 and 17 of the Securities Act and/or Section 10, Section 18 and Rule 10b-5 of the Exchange Act with respect to the Merger Registration Statement disclosures. Further, as the Proposing Release recognizes, the Target and its affiliates may be subject to potential enforcement actions by the Commission, including under Section 17(a) of the Securities Act and Section 10(b) and Rule 10(b)(5) of the Exchange Act, and under the proxy rules as participants in the proxy solicitation by the SPAC.

Finally, there are additional sources of investor protection in a De-SPAC Transaction that are not present in an IPO. While a De-SPAC Transaction can be structured in a number of ways that trigger different disclosure requirements under current federal securities laws, rules and regulations (*e.g.*, Merger Registration Statement or a proxy solicitation), a De-SPAC Transaction exposes the SPAC and its directors and officers to potential liability under Sections 11, 12 and 17 of the Securities Act; Section 10, Section 18 and Rule 10b-5 of the Exchange Act; the proxy rules; and applicable fiduciary duties under the corporate law of the SPAC's jurisdiction of incorporation. Importantly, SPAC directors and officers assume personal liability for material misstatements or omissions contained in the Merger Registration Statement and have strong incentives to ensure the adequacy and completeness of all disclosures contained therein, including with respect to the Target. In addition to a potential Commission enforcement action and securities class action lawsuits by private plaintiffs, SPAC directors and officers also face potential liability for breaches of fiduciary duties if they do not perform adequate due diligence to ensure the reliability of the Target's disclosures.

2.4.3. Imposing underwriting liability in De-SPAC Transactions.

Although, as discussed in this letter, the Committee supports the Commission's efforts to improve the quality of disclosure in connection with SPAC IPOs and De-SPAC Transactions and to encourage participants in these transactions to undertake thorough diligence, the Committee believes that the SPAC IPO is distinct from the De-SPAC Transaction for purposes of

determining underwriter status because, among other reasons, after the underwritten SPAC IPO, the securities would have "come to rest" in the hands of the investors. The Commission has at different times said that "holding securities for six months is a reasonable indication that an investor has assumed the economic risk of investment in those securities."[44] Therefore, the period between the SPAC IPO and the De-SPAC Transaction should not be construed as one long, continuous offering. Rather, these are two separate and distinct transactions. In the case of a SPAC IPO, there are named "underwriters" who take on a traditional underwriter role; in the case of a De-SPAC Transaction, just like other M&A transactions, there may be no one who by virtue of their role in the transaction, and based upon longstanding practice and understanding, should be designated a statutory "underwriter." We understand the Commission's desire to identify additional "gatekeepers" in connection with a De-SPAC Transaction, but that does not justify going beyond what Section 2(a)(11) of the Securities Act permits. In fact, the context of an M&A transaction provides heightened responsibility for participants to perform a gatekeeper role, just not as an "underwriter" with underwriter liability. For example, as a negotiated transaction, the parties already perform diligence that is reflected in a merger or business combination agreement with representations and warranties and disclosure schedules. The SPAC's board of directors has a fiduciary duty and disclosure obligations as a matter of state law, which compel conducting a thorough diligence review, including in connection with any fairness determination (see Section 2.5.1 of this letter) and with respect to projections (see Section 2.5.4 of this letter), and in insuring high quality disclosure.[45] Moreover, as we discuss throughout this letter, there already are various parties with securities law liability, which, as a result, have an incentive to undertake a rigorous diligence inquiry and insure full and fair disclosure in connection with a De-SPAC Transaction.

In its effort to justify its proposal, the Commission advances an overly expansive view of the activities and connections that give rise to statutory underwriting liability. The Committee believes the Proposing Release's description of the types of persons that may be viewed as statutory underwriters in the context of a De-SPAC Transaction is conceptually flawed, is at odds with interpretations of existing law and disregards longstanding and accepted market practice. Because the Commission's statements in the Proposing Release are characterized as an interpretation of its current views, even though the language of proposed Rule 140a is more narrowly (but still broadly) written, the mere issuance of the Proposing Release has resulted in such uncertainty and market concern that there has been a marked chilling effect on legitimate capital formation transactions. As a result, regardless of whether and in what form Rule 140a is ultimately adopted, the Committee respectfully requests that the Commission clarify the overly broad statements included in the Proposing Release that are at odds with current law. We set out below the Committee's views regarding the ways in which we believe this to be the case.

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[44] Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates, Securities Act Release No. 33-8813, 72 Fed. Reg. 36,822, 36,825 (proposed Jul. 5, 2007).
[45] *See* In re Multiplan Corp. Stockholder Litigation, 268 A.3d 784 (Del. Ch. 2022).

2.4.3.1. The interpretive position and proposed Rule 140a inappropriately stretch the concept of "distribution" in the definition of "underwriter"

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." [emphasis added] As the Commission notes in the Proposing Release, the definition of underwriter is indeed expansive and does not simply cover persons or entities engaged in the business of underwriting. This term has always been understood to require a functional analysis—premised on assessing the nature of the transaction and the actual role undertaken by the person in connection with the transaction, and extends to anyone who acts for an issuer in connection with the distribution of securities, or that functions as a "link in the chain of distribution." It further extends to affiliates of the issuer whether they are acting on behalf of the issuer or on their own behalf,[46] which is a "difficult factual [question], not merely a question of who receives the proceeds."[47] Underwriter status is based on the individual's relationship with the issuer and the nature and extent of the individual's involvement in the proposed offering.[48] Historically, the Commission has taken the position that the individual or entity in question is in the best position to determine whether it is an "underwriter."[49] The Commission has routinely refused to make specific factual determinations as to who is an "underwriter" through requests for no-action relief.[50] It is not clear what the justification is for the Commission to depart from past practice and to now take a prescriptive approach rather than to acknowledge that who is a statutory underwriter is a factual determination to be made based upon the particular circumstances as they relate to the statutory definition.

Through its interpretation and proposed Rule 140a, the Commission's view is that various parties involved in a De-SPAC Transaction may nonetheless be deemed underwriters

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[46] SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005) ("Underwriter" includes any person who is engaged in steps necessary to the distribution of securities.); Ackerberg v. Johnson, 892 F.2d 1328, 1335 (8th Cir. 1989) (Congress intended "to cover all persons who might operate as conduits for the transfer of securities to the public.").

[47] SEC Staff Compliance and Disclosure Interpretations, Questions and Answers of General Applicability, question no. 612.09 (Jan. 26, 2009) acknowledges that the analysis of whether an offering is a primary or secondary offering is "a difficult factual one," rather than the position expressed in the Proposing Release. "Consideration should be given to how long the selling shareholders have held the shares, the circumstances under which they received them, their relationship to the issuer, the amount of shares involved, whether the sellers are in the business of underwriting securities, and finally, whether under all the circumstances it appears that the seller is acting as a conduit for the issuer." Even where the facts suggest a primary offering, the Staff has permitted exceptions. *See id.* question 139.11 (Nov. 26, 2008) (where an issuer privately placed convertible securities in reliance on the exemption provided by Section 4(2) of the Securities Act and has not yet issued some or all of the convertible securities, filing a registration for resale of the common stock underlying the unissued convertible security would not be viewed as a valid secondary offering but instead treated as an indirect offering by the issuer, and thus a primary offering, with the investor being identified in the registration statement as an "underwriter"); *Id.* question 139.13 (Nov. 13, 2020) (private equity line financings (not PIPEs) considered as indirect primary offerings, even though the "resale" form of registration is sought in these financings).

[48] Nelson v. Quimby Island Reclamation Dist. Facilities Corp., 491 F. Supp. 1364, 1371 (N.D. Cal. 1980) (holding that the definition of underwriter includes "any person who performs one of the specified functions in relation to the offering . . . even though he is not a broker or dealer.") (citation omitted).

[49] *Id.*

[50] Butler Manufacturing Co., SEC No-Action Letter, 1989 WL 246101 (Jul. 19, 1989); Shopsmith, Inc., SEC No-Action Letter, 1978 WL 12233 (Dec. 6, 1978); Ward Foods Inc., SEC No-Action Letter, 1977 WL 15051 (Sept. 20, 1977).

because of their "direct or indirect participation" in the distribution of securities of the issuer. We disagree.

- *The SPAC IPO and De-SPAC Transaction are two separate transactions and should not be conflated*. Proposed Rule 140a purports to use Section 2(a)(11) and case law on "statutory underwriter" status to extend underwriting liability to various parties in the SPAC IPO and the De-SPAC Transaction process. In so doing, it fails to recognize the nature of a De-SPAC Transaction and conflates two separate transactions. Although the Commission may want to equate a De-SPAC Transaction to a traditional IPO of the Target, a De-SPAC Transaction is in reality a hybrid transaction and not the same as a traditional IPO of the Target. In a traditional IPO, the identity of the underwriters is seldom in doubt—an investment bank purchases securities from the issuer for immediate resale to the purchasers in the registered offering. The underwriter purchases securities from the issuer, makes the purchase with a view to a distribution, offers and sells the securities for the issuer and makes offers and sales in connection with the distribution (the public offering). While a SPAC IPO has all of these elements and the investment banks engaged by the SPAC clearly serve as underwriters, there are no parties performing similar functions in a De-SPAC Transaction. A De-SPAC Transaction typically operates as an M&A transaction and should be regulated as such. The Commission's proposal, if it were to be applied consistently across like transactions, would suggest that every M&A transaction involving a registered offering would involve a statutory underwriter. We know that is not the case.

- *Not every De-SPAC Transaction is a "distribution" of securities*. Proposed Rule 140a is not clear as to which "securities" are being distributed, who is the "seller" of such securities, when the "distribution" is occurring and to whom the distribution is being made. If the securities are the SPAC common shares, proposed Rule 140a fails to recognize the ability of SPAC investors to elect to have their shares redeemed, resulting in not all SPAC stockholders becoming stockholders of the Combined Company. Moreover, as discussed in Section 2.3.1 of this letter, particularly in relation to statutory underwriters who are persons who have purchased with a view to distribution of a security, not all De-SPAC Transactions are "distributions." Neither every M&A transaction with stock as consideration, nor every M&A transaction registered on a Merger Registration Statement[51] is a "distribution" that involves a statutory underwriter. Is the "distribution" that the Commission references a distribution of the SPAC stock that constitutes the merger consideration since those are the only "new" securities introduced into the market? How should this be distinguished from the merger consideration in any other M&A transaction? And how is a financial intermediary that acted as a capital markets adviser, or a buy side or a sell side advisor, a statutory underwriter in this context? Target is not "selling" or "distributing" any securities in the transaction (at least in most De-SPAC Transactions), so is the Commission focused only on the status of the advisor to the SPAC?

[51] *See* Section 2.3.1 of this letter where we discuss how proposed Rule 145a would foreclose the use of a proxy statement to seek stockholder approval from SPAC stockholders, if a private placement or other exemption is available.

2.4.3.2. Proposed Rule 140a imposes underwriting liability on a number of De-SPAC Transaction financial intermediaries without sufficient participation in the "distribution" of securities

There are two types of underwriters: (i) a *traditional underwriter* which includes investment banks engaged to render a firm commitment underwriting on behalf of an issuer[52] and (ii) a *statutory underwriter* as described in Section 2(a)(11) of the Securities Act, which includes any party that participates in a distribution of securities. We believe Proposed Rule 140a, as well as the Commission's interpretive statements in the Proposing Release, goes beyond what is authorized by the Securities Act by inappropriately expanding the concept of a statutory underwriter in order to find an underwriter in a De-SPAC Transaction where there is none.

- *Proposed Rule 140a mischaracterizes basic securities law principles to find a gatekeeper, when there already are numerous parties with rigorous responsibilities in connection with the SPAC IPO and the De-SPAC Transaction.* Proposed Rule 140a suggests that there needs to be a party characterized as an underwriter taking Section 11 liability in connection with the De-SPAC Transaction in order to provide investor protections. While that might be a salutary policy objective, there are many securities transactions in which no underwriter is involved. There are many parties involved in the SPAC IPO and in the De-SPAC Transaction process that are already subject to securities law liability and that must discharge fiduciary and other obligations, thereby requiring them to act as gatekeepers. Moreover, the acquisition process itself involves a discipline not present in a traditional IPO. In a De-SPAC Transaction, a diligence review is undertaken not only by the SPAC and its counsel, but also by the Target and its counsel and also often by the PIPE placement agent and its counsel. The registrant has strict Section 11 liability without a due diligence defense.

- *Proposed Rule 140a fails to consider that the required level of "participation" to be a statutory underwriter in a De-SPAC Transaction should only be the activities that are "related to the actual distribution of securities"*[53] *and not those that merely facilitate the participation of others in a securities offering*.[54] Based on the definition provided in Section 2(a)(11) of the Securities Act,[55] there are three types of statutory underwriters: (1) a person who purchases from an issuer "with a view to" the distribution of a security, (2) a person who offers or sells for an issuer "in connection with" the distribution of a security and (3) a person who "participates" in any distribution of a security. The first type does not necessarily apply to a De-SPAC Transaction because, depending on its structure, existing SPAC stockholders may continue to hold shares of the SPAC following Closing. The second type also does not apply to a De-SPAC Transaction because, as discussed in Section 2.3 of this letter, there is no "redistribution" of a security at issue in a De-SPAC Transaction. The third type is most relevant in analyzing proposed Rule 140a.

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[52] See LOUIS LOSS, JOEL SELIGMAN, AND TROY PAREDES, 1 FUNDAMENTALS OF SECURITIES REGULATION 97–126 (6th ed. 2011).
[53] *See* In re Lehman Brothers Mortgage-Backed Securities Litigation, *supra* note 2.
[54] In this sub-section, we adopt the case summaries provided in Benjamin J. Nickerson, Comment, *The Underlying Underwriter: An Analysis of the Spotify Direct Listing*, 86 U. CHI. L. REV. 985, 1008-1014 (2019).
[55] 15 U.S.C. §77b(a)(11).

Participation alone does not make one a statutory underwriter unless it is participation in the distribution. Finding underwriter status of the third type depends on the interpretation of "participates" and "any such undertaking."[56] Courts have taken several approaches to defining these terms. More broadly, some courts ask whether the party's actions were simply distribution-related. Some courts look to whether the public relies on a party's expertise when purchasing the securities. Others consider whether the party's actions were necessary to the distribution, similar to the analysis undertaken in *SEC v. Chinese Consolidated Benevolent Association,*[57] which the Commission cites and in which the Second Circuit considered whether a charitable association that promoted the sale of Chinese government war bonds should be characterized as an underwriter when it offered to sell the Chinese securities to American investors. In particular, the association marketed the securities to members of Chinese communities in New York, New Jersey and Connecticut through meetings and newspaper advertisements. The association then exchanged funds that it collected for the securities and distributed them to its members. The court determined that the association should be considered an underwriter because the language of the statute should be read "as covering continual solicitations . . . which normally would result in a distribution of [securities]."[58] The court continued to state that the definition includes any person who "engaged in steps necessary to the distribution of securit[ies]."[59]

We address each interpretation below:

- First, if the public relies on the party's expertise in evaluating the registration statement, then that party may be considered to have participated in a distribution and would be considered an underwriter. This interpretation does not apply to a De-SPAC Transaction. In *McFarland v. Memorex Corp*,[60] the court concluded that institutional investors that exercised registration rights in a securities offering were not underwriters because they did not have control over the registration statement and the public did not rely on their expertise when making investment decisions.[61] The court observed that "underwriters are subjected to liability because they hold themselves out as professionals who are able to evaluate the financial condition of the issuer."[62] Although this case demonstrates the importance of considering the role the SPAC IPO investment banks had in drafting the registration statement when analyzing underwriter status, its doctrine does not apply to a De-SPAC Transaction because, unlike in a SPAC IPO, the

[56] *Id*. For a full discussion of "participation in an underwriting" and a collection of relevant case law, see Loss, Seligman, and Paredes, *supra* note 52, at 471–74.
[57] 120 F.2d 738 (2d Cir. 1941).
[58] *Id*. at 741.
[59] *Id*.
[60] 493 F. Supp. 631 (N.D. Cal. 1980), modified on other grounds, 581 F. Supp. 878 (N.D. Cal. 1984).
[61] *Id*. at 646.
[62] *Id*. *See also* In re Activision Securities Litigation, 621 F. Supp. 415, 424 (N.D. Cal. 1985) ("[U]nderwriters who participate in the preparation of the registration statement are liable [under § 11]."). For further discussion of *McFarland* and *Activision*, see Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability under Section 11 of the Securities Act of 1933*, 1996 WIS. L. REV. 217, 239–45.

SPAC IPO underwriters do not necessarily have any role in drafting the Merger Registration Statement.

- Second—an expansion of the Chinese Consolidated approach, if the person's role was "necessary to the distribution,"[63] that party may be considered an underwriter but only if its activities are "related to the *actual* distribution of securities." In *Harden v. Raffensperger, Hughes & Co*,[64] the Seventh Circuit considered whether a qualified independent underwriter was subject to Section 11 liability as a statutory underwriter.[65] Firstmark Corporation, a financial services company, issued debt securities through a subsidiary and was required to retain a "qualified independent underwriter" in connection with the offering.[66] The court rejected the defendant's argument that it was not an underwriter solely because it did not purchase the issuer's securities. Instead, the court held that the third party Firstmark retained "participated" in the distribution—and was therefore a statutory underwriter—because its actions were "necessary to the distribution."[67] In contrast to other circuits, the Second Circuit takes a narrower approach and looks at whether the party engaged in distribution-related activities. In *In re Lehman Brothers Mortgage-Backed Securities Litigation*,[68] the Second Circuit concluded that credit rating agencies involved in structuring mortgage-backed securities did not "participate" in a distribution because their activities were not "distribution-related." The plaintiffs asserted that the rating agencies qualified as underwriters because their actions were a "necessary predicate to the securities' distribution."[69] The court, in rejecting the plaintiffs' argument, distinguished between entities "who provide services that facilitate a securities offering" and those who "participate in the statutorily specified distribution-related activities."[70] The court interpreted Section 2(a)(11) to mean that the underwriter definition encompasses only activities that are "related to the actual distribution of securities."[71] The rating agencies merely facilitated the participation of others in the offering; they did not participate in the offering themselves and were therefore

[63] *See*, *e.g.*, SEC v. Kern, 425 F.3d 143, 152–53 (2d Cir. 2005) (holding a corporation who "engaged in steps necessary to the distribution" to be a statutory underwriter (quoting SEC v. Chinese Consolidated Benevolent Assoc., 120 F.2d 738, 741 (2d Cir. 1941)). *See also*, e.g., SEC. v. Universal Major Industries Corp., 546 F.2d 1044, 1046–47 (2d Cir. 1976) (holding that an attorney who wrote letters in connection with transfers of unregistered stock that expressed his opinion that such transfers were legal violated Section 5 of the Securities Act). *But see* SEC. v. North American Research and Development Corp., 424 F.2d 63, 71–72 (2d Cir. 1970) (observing that "joining in the common effort" to sell unregistered shares subjects one to "the injunctive and other powers of the SEC and the federal courts").
[64] 65 F.3d 1392 (7th Cir. 1995).
[65] *Id*. at 1394.
[66] *Id*. at 1394–95. A minimum yield on a bond offering is similar to a minimum price on an equity offering.
[67] *Id*. at 1400–01 (quoting SEC v. Holschuh, 694 F.2d 130, 139 n.13 (7th Cir. 1982)). The Ninth Circuit takes a similarly broad approach. See generally SEC v. Platform Wireless Int. Corp., 617 F.3d 1072, 1086 (9th Cir. 2010) (interpreting the underwriter definition to include "[a]ny intermediary between the issuer and the investor that is an essential cog in the distribution process" (citation omitted)).
[68] *Supra* note 2.
[69] *Id*. at 175. In addition to passively evaluating the credit risk of each pool of mortgage-backed securities, the rating agencies allegedly aided in the structuring and securitization process. Id at 172–73.
[70] *Id*. at 176.
[71] *Id.* In reaching its conclusion, the court looked to *In re Refco, Inc. Securities Litigation*, 2008 WL 3843343, *4 (S.D.N.Y 2008) ("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.").

not statutory underwriters. The *In re Lehman Brothers Mortgage-Backed Securities Litigation*[72] doctrine has been historically followed and correctly applied in analyzing underwriter status,[73] and its application should be extended to De-SPAC Transactions.

- *Proposed Rule 140a imposes underwriting liability on any number of financial intermediaries without justification and without providing sufficient legal certainty*. Proposed Rule 140a and the interpretation in the Proposing Release wrongly assumes that underwriter liability attaches in a broad set of circumstances. As discussed in Section 2.4.3.1 of this letter, the Commission reads into the case law much more than the case law actually holds. The case law turns on participation in distribution-*related* activity; however, the Commission would include as statutory underwriters entities that are not selling securities to the public, that are not in privity of contract with the issuer of the securities that are the subject of the purported distribution, that are performing advisory services only, and that have no direct nexus to the purported distribution.[74] We consider below the various parties in the process and their roles.

    - <u>SPAC IPO underwriters</u>. Proposed Rule 140a would deem a SPAC IPO underwriter who "takes steps to facilitate the De-SPAC Transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the De-SPAC Transaction" to be engaged in the *distribution* of the securities of the Combined Company within the meaning of Section 2(a)(11) of the Securities Act, and thereby subject to underwriting liability. However, there is no necessary nexus between the SPAC IPO, a completed transaction, involving a distribution of securities, and the subsequent De-SPAC Transaction. The two transactions may be separated by a period of a year or more. A general reference to "steps to facilitate" the De-SPAC Transaction is overly broad and imprecise by not identifying actual steps, if any, that would qualify as participation in a distribution so as to make a SPAC IPO underwriter an underwriter in the De-SPAC Transaction. For example, the Commission references the receipt of deferred compensation, but that alone cannot be a basis for participation in a distribution

[72] *Id.*
[73] *Id*. at 178 n.7 (the Second Circuit pointing out that the ruling in *Chinese Consolidated Benevolent Association* was to explain a registration exemption and not to interpret the underwriter definition).
[74] All the cases the Commission relies on found that an actor was an underwriter when it played a *necessary* or *crucial* role in the distribution: *SEC v. Chinese Consolidated Benevolent Association*, 120 F.2d 738, 740-741 (2d Cir. 1941) addressed a defendant who engaged in the solicitation and sales of bonds. The defendant actively engaged in the sale of bonds, and its only argument for exemption was that its solicitation was not authorized by the Chinese government, which was the issuer; SEC v. Kern, 425 F.3d 143 (2d Cir. 2005) only discusses sellers of securities; *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392, 1401 (7th Cir. 1995) found that underwriter liability attaches only because the actor's actions were "necessary to the distribution of … [the] securities" in question; *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) addressed the actor's role (finding the buyer, negotiating the terms, facilitating the resale) as "crucial;" SEC v. Allison, No. C-81-19 RPA, 1982 WL 1322 (N.D. Cal. 1982) (the court holds that defendants who "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" are underwriters through the participation prong of section 11, regardless of their intent). *See also* Securities Industry and Financial Markets Association letter to SEC, Appendix B (Jun. 10, 2022), https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-on-SECs-SPAC-Proposal.pdf, for a fulsome analysis on how all the judicial precedents cited by the Proposing Release to justify proposed Rule 140a have failed to support the broad claims for which the Proposing Release cites them.

sufficient to trigger statutory underwriter status because that compensation is earned for the work that has been completed by the time of the SPAC IPO closing and deferred for the benefit of the SPAC and its stockholders. Deferring payment is really just the receipt of owed compensation and not compensation for work undertaken between the SPAC IPO closing and the Closing.

- PIPE placement agent. While a PIPE placement agent may appear to perform some functions that one might associate with those of a statutory underwriter (identifying potential purchasers for securities, and assisting in the introduction of such securities into the market), all those functions relate to an investment by institutional accredited investors in the PIPE transaction, which itself, as an exempt transaction, does not involve a distribution. The PIPE placement agent's activities are completed when subscription agreements are executed, which typically is concurrently with the public announcement of the De-SPAC Transaction and well before preparation of the Merger Registration Statement. There also is no necessary nexus between the services provided by the PIPE placement agent (solely in that role) and the SPAC stockholder vote on the De-SPAC Transaction, or the De-SPAC Transaction itself.

- PIPE investors. PIPE investors are sophisticated investors, usually institutional accredited investors, who have an opportunity to evaluate an investment in the securities offered by the SPAC in connection with a De-SPAC Transaction. The PIPE investors may conduct their own diligence, are given an opportunity to meet with SPAC and Target representatives and have their questions answered, and may also rely on representations and warranties contained in the subscription agreement negotiated in connection with the PIPE transaction. Consistent with the doctrine in *American Council of Life Insurance,*[75] there would seem to be no reason to suggest, as the Proposing Release does, that a PIPE investor, investing without a view to a distribution, may be a statutory underwriter.[76]

- Financial advisor to SPAC or Target. Each of the SPAC and the Target typically engages one or more investment banks to provide financial advisory services, which may include identifying potential counterparties, assisting with determining valuation and preparing materials about the company, assisting with structuring a potential transaction, and assisting with negotiating the terms of the De-SPAC Transaction. The financial advisor or another service provider also might provide a fairness opinion. These advisors may or may not have been the SPAC IPO underwriters. In the case of Target's advisor, the advisory services are provided for Target's benefit, which has an incentive to maximize its valuation for the benefit of its stakeholders. Its interests are not aligned with the interests of the SPAC public stockholders. Target's advisor clearly has no nexus to the SPAC

[75] American Council of Life Insurance, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2542 (May 10, 1983).
[76] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,486 (proposed May 13, 2022).

public stockholders. It is not clear how a financial advisor to Target functions in the role of a statutory underwriter—it is not acting on behalf of the SPAC, it has no privity of contract with the SPAC, it is not distributing SPAC securities, nor is it distributing Target securities. The SPAC advisor, while it may assist the SPAC to identify Target, structure the transaction, and negotiate the transaction is still performing an advisory function, not an underwriter function—it is not buying SPAC securities to resell, nor is it participating in a chain of sale of securities to the public market, or otherwise participating in a distribution in any way beyond what similar advisors have always done in connection with like transactions. The SPAC advisor is rendering services to the SPAC's board of directors, which has certain duties, as we have discussed elsewhere, and is not recommending the purchase of securities to any investor.

It is inconsistent with longstanding principles regarding statutory underwriter status to find parties that are acting merely in an advisory capacity—not offering securities of the SPAC or the Target, not acting as principal and buying and reselling securities, not providing any financing to facilitate the consummation of the De-SPAC Transaction, and not recommending the purchase of securities, but rather solely identifying potential Targets, or providing tax, corporate, capital markets, restructuring or other financial advisory advice—to be statutory underwriters. A financial advisor is not distributing securities, participating in a chain of sales of securities to the public, or introducing investors to an investment in securities. The overbroad language of the Proposing Release creates uncertainty in this regard that, as we indicated, the Commission should clarify. In this connection, financial advisors play an important role in transactions that serve to protect the interests of investors and maximize value. It would be counterproductive for the Commission to discourage performance of such roles by seeking to impose unjustified liability impediments.

In a traditional M&A transaction, there is no "gatekeeper" in the form of a statutory underwriter and there is no compelling reason to distinguish the business combination that is part of the De-SPAC Transaction from a traditional M&A transaction. There are other protections for the stockholders, as discussed elsewhere in this letter.

- Capital markets advisor to Sponsor. An investment bank, which may or may not have been the SPAC IPO underwriter, may be asked by the Sponsor to assume the role of a "capital markets advisor" and assist in various activities as the SPAC searches for a Target.[77] The capital markets advisor, while it may assist the SPAC in (i) wall crossing accounts to discuss their views on a potential qualifying transaction, (ii) arranging meetings with accounts prior to, and during, the proxy solicitation process and (iii) assisting the SPAC with the preparation of

[77] MAYER BROWN LLP, WHAT'S THE DEAL?: SPECIAL PURPOSE ACQUISITION COMPANIES 7, https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/08/whats-the-deal--spacs.pdf.

presentation materials,[78] is performing an advisory function, not an underwriter function—it is not buying SPAC securities to resell, nor is it participating in a chain of sale of securities to the public market, or otherwise participating in a distribution in any way beyond what similar advisors have always done in connection with like transactions.

- Fairness opinion provider. The financial advisor engaged by the SPAC's board of directors to provide a fairness opinion is typically unrelated to the SPAC IPO underwriters in order to ensure the independence of the advisor. Nevertheless, regardless of whether such financial advisor has a prior relationship to the SPAC, it provides its services solely for the purpose of delivering an opinion to the board of directors in connection with the board's fulfilling its duties, and that opinion is not addressed to the stockholders. The fairness opinion giver may be viewed as an "expert" under the Securities Act in connection with its opinion if it is contained in the Merger Registration Statement, but that does not make it an underwriter. The Adopting Release should clarify that a fairness opinion giver (on that basis alone) will not be viewed as a statutory underwriter. Again, such role protects the interest of SPAC investors and should not be discouraged by the Commission.

2.4.3.3. Proposed Rule 140a and the interpretive position are inconsistent with market practice and replete with practical challenges

Proposed Rule 140a and the interpretive position are inconsistent with market practice because the Commission's rationale in relying on underwriters as "gatekeepers" is not justified *after* the SPAC IPO. The Commission cites *WorldCom, Inc. Sec. Litig,* 346 F. Supp 2d 628, 684 (S.D.N.Y) for the proposition that "[u]nderwriters … have special access to information about an issuer at a critical time in the issuer's corporate life, at a time it is seeking to raise capital. The public relies on the underwriter to obtain and verify relevant information and then make sure that essential facts are disclosed." Yet in the De-SPAC Transaction, there is no underwriter *intermediating*. The public can obtain information about the publicly traded SPAC, without the need for the SPAC IPO underwriter to play any special role. The Commission's opinions about underwriters' due diligence obligations refer only to the "representations made in the prospectus and other sales literature,"[79] and to the event of "undertaking a distribution."[80] In the De-SPAC Transaction context, these rationales are not relevant.

If proposed Rule 140a is adopted, a third-party advisor would be subject to potential liability as an underwriter and would need to establish a due diligence defense, which it may not be in a position to undertake or may be able to do so only with considerable difficulty and additional costs. This poses a number of significant issues. The disclosure in the Merger Registration Statement is prepared following announcement of the signing of a merger agreement. As a result, the advisor will need to remain involved in the transaction following

[78] *Id.*
[79] In the Matter of Charles E. Bailey & Co., Exchange Act Release No. 34-4,806, 35 S.E.C. 33, 41 (Mar. 25, 1953).
[80] In the Matter of Brown, Barton & Engel, Exchange Act Release No. 34-6,821, 41 S.E.C. 59, 64 (Jun. 8, 1962).

completion of the performance of the services for which it was engaged. The advisor will need to perform extensive due diligence with respect to the Target and the information contained in the Merger Registration Statement following announcement of the merger agreement. While an advisor may be able to perform due diligence and may negotiate in the terms of its advisory engagement for the right to conduct due diligence, including participation in the preparation of the Merger Registration Statement and access to information, differences in the process of completing a De-SPAC Transaction from a traditional IPO create practical challenges. For example, in a traditional IPO, the underwriters are not bound to purchase securities in the transaction until the underwriting agreement is executed, which coincides with the Commission's declaration of effectiveness of the IPO registration statement. This occurs at the end of the process, and the underwriters are engaged through pricing and review and sign off on any changes to the registration statement. However, in the context of a De-SPAC Transaction, the third-party advisors may have completed their engagements prior to the preparation and finalization of the Merger Registration Statement. Third-party advisors may have little influence over the contents of the Merger Registration Statement. Similarly, the underwriting agreement in a traditional IPO contains closing conditions to the underwriters' obligations to complete an IPO, including receipt of a comfort letter from the independent auditors and legal opinions and negative assurance letters from counsel to the issuer and counsel to the underwriters. While these requirements could be incorporated in an engagement letter between the third-party advisor and the SPAC or Target, the lack of leverage as of Closing to address non-performance would remain an issue. In addition, unlike in a traditional IPO, the number of advisors in a De-SPAC Transaction would be expanded to include independent auditors and counsel for both the SPAC and the Target, as well as counsel for any other advisors. Moreover, unlike in a traditional IPO in which the closing occurs a few days after the effectiveness of the registration statement, in a De-SPAC Transaction, approximately a month typically elapses between the effectiveness of the Merger Registration Statement and the Closing, raising the likelihood that disclosures will require updating. All of this activity will result in significant increased transaction costs, indeed making some transactions uneconomic or reducing value received by the investors. This is compounded when there are multiple advisors or other parties who may be deemed to be statutory underwriters, all of whom would seek to engage in diligence and obtain third-party comfort. We have indeed seen this phenomenon occur just as a result of the Commission's suggestions in the Proposing Release as to who might be considered a statutory underwriter.

As discussed elsewhere in this letter, unlike a traditional IPO, a De-SPAC Transaction includes the preparation of financial projections, necessitated by the fact that it is fundamentally an M&A transaction. Projections are inherently forward-looking and should be protected under the safe harbor for forward-looking information contained in the PSLRA. However, the Proposed Rules would eliminate the availability of the safe harbor. Given that projections are forward-looking and cannot be objectively verified, the ability of the underwriters to perform due diligence is limited. While the underwriters may obtain Target representations and warranties with respect to such projections and ask questions to ascertain the reasonable basis for the projections, due diligence efforts cannot eliminate the risk that the projections ultimately do not come to fruition, limiting the utility of this exercise to investors, especially when compared to the anticipated costs of defending against litigation.

Finally, proposed Rule 140a purports to be retroactive, creating uncertainty as to what level of participation that has already occurred or that can be undertaken in transactions underway results in underwriter status. In fact, the Commission's views stated in the Proposing Release to justify proposed Rule 140a and characterizing it as a clarification already has been read to have retroactive application and to expose SPAC IPO underwriters and others to liabilities in De-SPAC Transactions. The result of that interpretation, in fact, makes proposed Rule 140a unnecessary to achieve the Commission's basic goals. However, for the reasons explained above, we do not believe that proposed Rule 140a should be adopted and, therefore, consider it important for the Commission to clarify its overly broad and unsupported interpretation of who may be considered a statutory underwriter.

2.4.3.4. Proposed Rule 140a, if adopted as proposed, requires additional clarification and changes

If the Commission nevertheless decides to identify an "underwriter" in a De-SPAC Transaction, the Commission should do so only on the following basis: (i) any rule should be prospective only, with a suitable transition period, (ii) the rule should clearly define the nature and level of participation necessary for a SPAC IPO underwriter to be considered an "underwriter" in the De-SPAC Transaction, (iii) that participation should be limited to parties who, in fact, are in a position to perform the necessary diligence, (iv) the rule should define the scope of the "distribution" to which underwriter status relates, and (v) the disclosures to which underwriter responsibility relates should align with those in a traditional IPO, such as by excluding from the Merger Registration Statement merger-related disclosures like Background of the Merger and projections.

If the Commission were to adopt proposed Rule 140a as proposed, which we do not support, it should provide additional clarification or guidance regarding what it views as the "distribution" (what "securities" are being distributed, to whom is the distribution made, and who is the "seller" of such securities, especially in light of the Co-Registrant Amendment), and clarify the nature of the SPAC IPO and the De-SPAC Transaction as separate and distinct transactions. Once the Commission has identified what "securities" of which "issuer" or "seller" are being "distributed," it would be helpful to market participants to understand (i) how the Commission would view underwriting liability in the absence of an underwriting syndicate, (ii) how "time of sale" would be viewed where there is no "sale," (iii) to whom a "sale" would be deemed made since the SPAC stockholders ordinarily are simply voting for or against a transaction and not making an investment decision other than whether to exercise a redemption right, (iv) how a "loss" arising from an underwriting liability would be assessed, and (v) how "traceability" would work since there has been no "issuance" of securities other than, in most cases, the issuance of the SPAC shares to Target and Target stockholders. The Commission should also provide clarification or guidance on how a De-SPAC Transaction that is deemed by

proposed Rule 140a to involve a distribution differs from an M&A transaction involving stock consideration that historically does not involve a "distribution."

2.4.4. Enhancing projection disclosures.

2.4.4.1. Proposed amendments to Item 10(b) of Regulation S-K

We generally support the proposed amendments to Item 10(b) of Regulation S-K and believe that these amendments should apply to all filings in order to level the playing field for all disclosures related to projections. We believe that these proposed amendments will assist all registrants with their presentation of projections, as applicable, which in turn should facilitate investors' evaluation of the projections, assessment of the reasonableness of the bases for these projections (particularly when compared to historical performance and results), and determinations about the appropriate reliance to place on the projections when making an investment or voting decision. However, the resulting transparency and clarity in disclosures should not be limited to De-SPAC Transactions. Hence, we respectfully request that the Commission confirm the continued applicability of existing Staff guidance that the general requirements of Item 10(e) and Regulation G for non-GAAP financial measures are not applicable if (i) the non-GAAP financial measures in the projections were provided to the financial advisor for purposes of rendering a fairness opinion or were provided to bidders in the transaction, and/or (ii) the non-GAAP financial measures in the projections are being disclosed to comply with state or foreign law (including case law) or to avoid anti-fraud liability under the federal securities laws.[81]

Federal securities laws and state corporate law directly or indirectly, as applicable, require the disclosure of projections. Often, these disclosures are required in the "Background of the Merger" and "Fairness Opinion" sections of the Merger Registration Statement. To this end, most registrants already organize the disclosure of projections through the use of headings in the merger proposal section under the "Background of the Merger" section and under a separate sub-caption, usually titled "Projected Financial Information." Therefore, we believe that requiring registrants to present some or all financial projections in a separately captioned section of a Commission filing would be consistent with current practice and unlikely to lead to significant changes in information disclosed to investors or undue burdens on registrants.

Our comments and recommendations to specific proposed changes to Item 10(b) are as follows:

- *As to the preamble on projections of future economic performance of persons other than the registrant*. The first proposed change to Item 10(b) is to add a clarification to the preamble that the guidelines set forth in Item 10(b) apply to projections of future economic performance of persons other than the registrant, such as the Target in a De-SPAC Transaction, and are included in the registrant's Commission filings. Historically, companies engaging in business combinations have been compelled to disclose to

[81] *See* SEC Staff Compliance and Disclosure Interpretations, Non-GAAP Financial Measures, question no. 101.01 (Oct. 17, 2017); *id.* question no.101.03 (Apr. 4, 2018).

stockholders the projections that their boards relied upon in deciding to pursue the transaction. This stems from a combination of formal Commission disclosure rules, informal Commission requests when the Staff reviews and approves the disclosure documents that must be filed in connection with these transactions, and the effect of state corporate law.

The Staff has a relatively straightforward approach to the issue by typically calling for disclosure of projections that the Target provided to the acquirer and other bidders. For example, the Staff has historically asked for disclosure of projections exchanged between an acquirer and Target if the projections are material to stockholders in assessing the value of the consideration offered in the merger. Additionally, while not expressly stated that projections are required, Item 4(a)(2) of Form S-4 and Item 14(b)(4) of Schedule 14A each require the registrant to include disclosure of the reasons for engaging in the transaction. Item 4(b) of Form S-4 and Item 14(b)(6) each refers to Item 1015(b) of Regulation M-A, which requires disclosure regarding certain reports obtained from a third-party advisor, including a fairness opinion. Item 1015(b)(6) of Regulation M-A requires disclosure of "the bases for and methods of arriving at" the findings and recommendations contained in an investment bank's fairness opinion; thus, resulting in a frequent comment from Staff reviewers for disclosure of projections furnished to the bank in connection with the preparation of its opinion.[82] Further, the background of the transaction discussion provides disclosures material to an understanding of the retention of advisors in the search for a Target, the search itself, any negotiation with the Target and with any potential additional investors, and the actions taken by the Sponsor. Items 5(a) and 14(b)(7) of Schedule 14A, Item 6 of the Merger Registration Statements and general principles of materiality as set forth in Section 10(b), Rule 10b-5 and Rule 12b-20 of the Exchange Act, have been cited as sources of authority to support a request by the Staff for material information on the background of the transaction, including the disclosure of projections. The Staff's position in interpreting the above rules virtually ensures that disclosure documents in connection with public company M&As will include some projections. Specifically, the Staff's position has generally been that projections provided by the target to the acquirer are likely material and should be disclosed to the target's stockholders.[83]

In addition, state law and related case law often require extensive disclosures of the transaction's background, with a particular focus on demonstrating that the boards fulfilled their fiduciary duties. In particular, Delaware law requires the board of directors to disclose fully and fairly all material information when seeking stockholder action, and information is generally considered material if "from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the 'total mix' of information made available.'"[84] Accordingly, if the board of directors relies on projections when approving a transaction, which is often the case, then those projections

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[82] See Nick Grabar, Ethan Klingsberg, Sandra Flow, Meredith Kotler, and Neil Markel, *Setting the Record Straight: Regulation G Doesn't Apply to M&A Forecasts,* 11 DEAL LAWYERS1, 2 (Nov.-Dec.2017).
[83] Thomas Cole, *Projections in Public Company M&A,* 9 DEAL LAWYERS 1, 3 (Nov.-Dec. 2015).
[84] *In re Solera Holdings, Inc. Stockholder Litig.*, 2017 WL 57839, at *9 (Del. Ch. Jan. 5, 2017) (quoting Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1277 (Del. 1994)).

are typically considered at least potentially "material" and, thus, disclosed to stockholders (though the decision to disclose them does not itself establish their materiality).

- *As to proposed changes to Item 10(b)(1).* The proposed changes to Item 10(b)(1) would not change the required basis for the projections, including (i) management's reasonable basis for the projections, (ii) permissibility of disclosure of projections without any prior history of operations or experience in projecting and (iii) a requirement that, if a third-party report that reviews such projections is included in the Merger Registration Statement, then the reviewer's qualifications and relationship to the registrant must be disclosed and the reviewer will be considered an expert if the report is included in a Securities Act filing.

- *As to proposed changes to Item 10(b)(2).* Proposed Item 10(b)(2)(ii) and (iii) would require the disclosure of historical information that should be readily available. These changes would increase transparency of disclosure to investors without creating undue disclosure burdens on parties to De-SPAC Transactions and other participants in public company M&As, as these proposed changes are not limited to De-SPAC Transactions.

  Proposed Item 10(b)(2)(iv) would add required disclosures relating to the use of forward-looking, non-GAAP financial measures. We believe these requirements would enhance the disclosure provided to investors without creating undue disclosure burdens on parties to De-SPAC Transactions or other participants in public company M&As, as long as the Commission clarifies that the guidance provided in Questions 101.01, 101.02 and 101.03 of the Staff's Compliance and Disclosure Interpretations relating to Non-GAAP Financial Measures (last updated April 4, 2018) will continue to apply, exempting non-GAAP financial measures included in Merger Registration Statements as part of the disclosure of projections related to the background of the transaction, the SPAC board's reasons for the approval of the transaction and the bases for the third-party advisor's fairness opinion from Item 10(e) of Regulation S-K and Regulation G, notwithstanding adoption of proposed Item 10(b)(2)(iv).

2.4.4.2. Projections under Item 1609 of Regulation S-K

Similar to our earlier comment on Item 10(b) of Regulation S-K, we believe that proposed Item 1609 of Regulation S-K should also apply to all companies that disclose financial projections in Commission filings (and not just to De-SPAC Transactions as proposed), specifically in connection with any business combination where (a) the Target is at an early stage and has a limited financial track record, which may result in more speculative forecasts and (b) the transaction may involve more significant dilution, which may undermine the reliability or relevance of forecasts to investors where they are presented on an unadjusted income or cash flow basis, especially if those forecasts are not presented alongside dilution forecasts. We also believe that the Commission should not prohibit the disclosure of any specific financial measures or metrics. Projections often include or consist of forecasts of the Target's revenue, earnings and cash flow (operating profit or earnings before interest and taxes). Since these projections are prepared for the use of the board and third-party advisor providing a fairness opinion, we believe

that the parties to the transaction should have the flexibility to determine which metrics are most useful.

We generally support proposed Item 1609 of Regulation S-K, subject to the following comments:

- *As to proposed Item 1609(b)*. Proposed Item 1609(b) states that "[t]he disclosure referred to in this section should include a discussion of any material growth rates or discount multiples used in preparing the projections, and the reasons for selecting such growth rates or discount multiples." This requirement is unduly prescriptive, as the inputs and assumptions used in preparing projections vary widely by transaction. Although the requirement is qualified by materiality, we are concerned that registrants will tend towards a conservative approach of disclosing growth rates and/or discount multiples in order to protect against future claims that such inputs were material. This may lead to the over-inclusion of inputs and assumptions that are not material to an investor's understanding of the projections, diluting the quality of disclosure provided. Accordingly, we recommend that the Commission remove these detailed requirements and consider including examples of where it might require additional disclosure related to "material growth rates" or "discount multiples" in these contexts. For example:

    - Where projections that may be driven by simple assumptions about growth rates are included for new or pre-revenue businesses beyond three years, the Commission may ask companies to provide an explanation for the basis of the projections beyond year three and if the forecasts reflect more than simple growth rate assumptions. We understand that significant growth rates are difficult to sustain over long periods of time, and companies assuming such growth rates should be able to explain why they think they are reasonable.

    - Where projections are not in line with historic operating trends, the Commission may ask that the disclosure address why the change in trends is appropriate or assumptions are reasonable. If a Target has no historic operations but projects highly optimistic revenue growth rates in the near future, the disclosure should clearly describe the basis for projecting this revenue growth and the factors or contingencies that would affect such growth ultimately materializing.

    - If the assumptions or the projections do not seem reasonable, the Commission may seek disclosures of the process undertaken to formulate the projections and assumptions, the parties who participated in the preparation of the projections and how they participated.

    - A company may have multiple "sets" of projections, with some sets reflecting optimistic assumptions and others reflecting more conservative assumptions. If multiple sets of projections were prepared in connection with the De-SPAC Transaction, the Commission may ask to include a disclosure that discusses whether alternative "cases" or "sets" of projections exist, what these projections

are and why they were prepared, in order to present the projections in the disclosure document as materially complete.

- *As to proposed Item 1609(c)*. Proposed Item 1609(c) relates to the timing of the preparation of projections and the views of the parties to the De-SPAC Transaction with respect thereto. We believe that it is appropriate to require clear disclosure as to the identity of the preparer of the projections, including where the Target has prepared the projections and whether the Target's management or board has reviewed and affirmed such projections. To require the SPAC or the Target's board or management to reaffirm or update its view of the projections as of the date of the definitive proxy statement is unduly burdensome and inconsistent with the purpose of the preparation of the projections to assist the SPAC board and its advisors in assessing the terms of the transaction. If the SPAC or the Target is required to express a view of the projections as of the date of the definitive proxy statement, it may be required to prepare an updated set of projections, which will be expensive and time-consuming, solely to include such projections in the Merger Registration Statement. Such an approach would be inconsistent with the Commission's concern that investors excessively rely upon projections by placing greater emphasis on them. Conversely, we propose that the Merger Registration Statement be required to disclose (i) the date as of which the projections were prepared and (ii) the views of the preparer of the projections as of such date of preparation and, if different, the date upon which the SPAC board approved the transaction, but be permitted to disclaim any duty to update the projections as of a later date except to the extent there is a material lapse in time and change in circumstances, the Commission may seek disclosure confirming whether the projections still reflect management's views on future performance and/or describing what consideration the board gave to obtaining updated projections or a lack of reliance upon the projections.

2.4.4.3. Impact on use of projections under Item 1609

If forward-looking information (including projections) is neither protected nor mandated, companies will typically not publicly release it, at least where there is significant litigation risk. Not surprisingly, as a matter of practice, IPO issuers discuss (but do not disclose in the registration statements) projections, and instead limit their forward-looking disclosures to the small number of items required to be included in their registration statements. IPO issuers are able to avoid disclosure because, unlike registrants in De-SPAC Transactions, IPO issuers are not subject to the provisions of Regulation M-A, Form S-4, Schedule 14A or state corporate law requiring disclosure of projections. Similarly, proposed Item 1609(b) would discourage the use of financial projections in De-SPAC Transactions but registrants in De-SPAC Transactions would still be unable to avoid such disclosure because they are compelled to disclose to stockholders the projections that their boards and third-party advisors relied upon in deciding to pursue the transactions. As noted above, this stems from a combination of formal Commission disclosure rules, informal Commission requests when the Staff reviews and approves the

required disclosure documents,[85] and the effect of state corporate law.[86] These proposed rules are unlikely to significantly impact the willingness of parties to De-SPAC Transactions to continue preparing and disclosing projections since it is compelled as we discuss.

Moreover, if a projection turns out to be incorrect, issuers fear that investors could bring a securities fraud action against the issuer and various collateral participants. Some cases hold issuers liable for incorrect projections on the theory that an uninformed projection or one that was made without a reasonable basis is false. Furthermore, as discussed elsewhere in this letter, the proposed imposition of underwriter liability pursuant to proposed Rule 140a would result in potential liability for the investment banks and other transaction participants for disclosure in the Merger Registration Statement, which, if the PSLRA safe harbor is rendered unavailable in De-SPAC Transactions, would include inaccuracies in the projections even if such transaction participants have little or no role in their preparation.

In light of the inherently forward-looking nature of projections and the impossibility of obtaining objective verification despite extensive due diligence, we believe that it is unreasonable to impose liability on underwriters for any misstatements contained in projections. While the description of the fairness opinion and the bases thereof may be "expertized," eliminating the underwriters' exposure under Section 11 with respect thereto, the portion of the disclosure that is "expertized" is limited to the description of the fairness opinion, not including the projections. Accordingly, we strongly urge the Commission to expressly provide that the projections are excluded from any potential liability of underwriters pursuant to proposed Rule 140a, if adopted.

2.4.4.4. Impact of enhanced projection disclosures on investors

We believe that reasonable investors are just as interested in projections in De-SPAC Transactions as they are in any other business combinations; and they are just as capable of discounting that information for bias. For example, reasonable investors are likely to be as interested in management's predictions and the assumptions that underlie these when they invest in a new issue as when they invest in a seasoned one—probably more so in the case of a new issue because there will be fewer alternative information sources about the company. This is borne out in market practice: underwriters regularly ask for financial projections from IPO

[85] *See, e.g.*, John Jenkins, *Disclosure of Projections: Will Delaware's Approach Still Rule the Roost?*, 13 DEAL LAWYERS 7, 8 (Sept.-Oct. 2019) (explaining that the Staff "virtually ensures that public company M&A disclosure documents will include some financial projections"); BRANDON VAN DYKE, EILEEN T. NUGENT, AND LOU R. KLING, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 5.03(2)(b) (1992) (explaining that, although the Commission has not made by rulemaking the disclosure of projections in proxy statements or prospectuses mandatory, "in any given case the SEC, through its review and comment process, might insist upon their disclosure," and noting that "[d]isclosure of third[-]party appraisals materially related to a going[-]private transaction is required").

[86] *See*, *e.g.*, George Casey, Adam Hakki, and Roger Morscheiser, *SEC Considering Heightened Scrutiny of Projections in De-SPAC Transactions*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE (May 17, 2021), https://corpgov.law.harvard.edu/2021/05/17/sec-considering-heightened-scrutiny-of-projections-in-de-spac-transactions/ (explaining that "Delaware law requires the board of directors to disclose fully and fairly all material information when seeking shareholder action," so "if the board of directors relies on projections when approving a transaction, which is often the case, then those projections are typically considered at least potentially 'material' and thus disclosed to shareholders"); Michael B. Tumas and Michael K. Reilly, *The Disclosure of Projections Under Delaware Law*, POTTER, ANDERSON & CORROON LLP (Apr. 2008) https://www.potteranderson.com/media/publication/155_TheDisclosureofProjectionsUnderDelawareLaw.pdf (discussing recent case law on point).

issuers, as do PIPE investors.[87] IPO investors who tend to be sophisticated institutions also privately seek access to projections.[88]

An alleged benefit to this mandated projection disclosure is the elimination of a "black market" in projected information which is provided privately in certain transactions. Proponents of this view suggest that analysts and other institutional investors regularly attempt to gain access to nonpublic management projections. In a traditional IPO, the issuer is not yet subject to Regulation FD and there is no active trading market. Accordingly, the issuer may provide projections to analysts without violating selective disclosure requirements. These analysts then use the information to prepare their research reports. By contrast, in a De-SPAC Transaction, existing disclosure requirements discussed above typically result in the disclosure of the material projections, as well as disclosure of the assumptions underlying those projections. Currently, investors in De-SPAC Transactions have greater access to information than investors in other types of transactions. The imposition of additional requirements with respect to projections, particularly exposure to liability, is likely to result in the disclosure of less information to investors. Reduction of information is contrary to the goal of promoting transparency and the Commission's aim to democratize opportunities for retail investors.

2.4.4.5. Impact on the ability to comply with state or foreign law obligations relating to projection disclosure obligations

As further discussed below, we do not believe that proposed Item 1609 of Regulation S-K may impact registrants' ability to comply with state or foreign law obligations insofar as the requirements call for projections that are already being disclosed pursuant to federal securities laws or state corporate law, or projections that are newly required that do not appear to conflict with state law requirements based on the state we reviewed—Delaware, the dominant jurisdiction for public companies, including public M&A litigation jurisprudence.[89]

The nature and extent of a company's obligation to disclose financial projections when soliciting stockholder approval of a business combination transaction is a particularly complex area. Despite generally requiring their disclosure, the Commission and federal courts have not addressed the issues surrounding which financial projections may be material and the extent of the required disclosure. That burden has largely fallen on Delaware's shoulders. As a result, Delaware remains dominant in litigation contesting the terms and disclosure relating to M&A

[87] *See* LATHAM & WATKINS LLP, U.S. IPO GUIDE 23-24 (2021 ed.), https://www.lw.com/thoughtLeadership/lw-us-ipo-guide (explaining that, "[g]iven that the IPO process can take many months, an IPO issuer may want, or need, to pursue a private offering that is not registered with the Commission on the same schedule as the IPO," and that "private investors may expect information that is not typically part of the IPO disclosure package, *particularly projections*" (emphasis added)).
[88] While neither the company or underwriters will provide projections to these investors directly (due to liability risk), the company will provide projections to analysts who work them into their models and then verbally discuss them with these investors. *See id*. at 9. It is also common for venture capital firms to demand projections when deciding whether to invest in a start-up. *See* Martin Zwilling, *5 Rules of Thumb for Startup Financial Projections*, ALLEYWATCH.COM (May 2013), https://www.alleywatch.com/2013/05/5-rules-of-thumb-for-startup-financial-projections/ ("making no projections, or non-credible projections will get your startup marked as unfundable").
[89] As of May 10, 2022, the state of Delaware accounted for 56% of all public companies incorporated in the United States. Data sourced from Capital IQ, Company Screening Report. Additionally, in FY 2020, 67.6% of all Fortune 500 companies were incorporated in Delaware. See Delaware Division of Corporations' 2020 Annual Report Statistics, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf.

transactions notwithstanding some migration toward the federal courts.[90] Hence, this letter focuses on Delaware's approach to the materiality of projections and suggests some reasons why that approach does not conflict with proposed Item 1609.

Delaware courts have generally endorsed the view that financial projections prepared by management and shared with the Target's financial advisor must, as a matter of Delaware fiduciary law, be disclosed to stockholders.[91] How extensive that disclosure needs to be in connection with a merger is more uncertain. It is settled Delaware law that directors have a duty to disclose to stockholders all material information in their possession when seeking stockholder approval of an M&A transaction.[92] Information is material "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote."[93] Further projections cases tend to involve a handful of recurring issues: disclosure of multiple sets of projections, disclosure of free cash flow and the impact of the transaction structure on the disclosure obligation:

- *Multiple sets of projections*. It is fairly common to see multiple sets of projections generated during the course of a business combination transaction. Often, the projections initially shared with potential buyers are fairly aggressive "puff pieces." In other settings, projections may be updated to reflect changes in the business during the course of the transactions, or the board may be provided with "best case," "base case" and "bank case" projections reflecting different potential performance ranges. Delaware courts recognize that these multiple sets of projections are not per se material, and instead tend to focus on their reliability and whether the board or its financial advisors actually relied upon them.[94] In doing so, they often provide wide latitude to boards and their advisors in determining which projections were appropriate to rely upon and to disclose to stockholders.[95] In some instances, Delaware courts have decided that projections were insufficiently reliable to require their disclosure—even in cases where they had been presented to the target's board of directors.[96] In other cases, Delaware courts have been less deferential to decisions not to disclose multiple sets of projections. For example, a recent Chancery Court decision held that disclosure of projections that reflected a downward adjustment to prior projections made after the board approved the final deal

[90] *See*, *e.g.*, In re Trulia Shareholders Litig., 129 A.3d 884 (Del. Ch. 2016). According to Cornerstone Research, only 13% of merger objection litigation for Delaware corporations was filed in the Chancery Court in 2018. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES 5 (2019) at 5, https://www.cornerstone.com/wp-content/uploads/2021/12/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-2018.pdf. Notwithstanding, there is reason to believe that Delaware's approach to the materiality of projections and various issues surrounding the extent to which they need to be disclosed as a matter of directors' fiduciary duty may remain influential for federal courts that will be called upon most frequently to interpret the requirements of the federal securities laws in the context of merger objection litigation.
[91] Cole, *supra* note 83, at 5.
[92] *See* Arnold v. Society for Sav. Bancorp. Inc., 650 A.2d 1270, 1277 (Del. 1994).
[93] Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135, 143 (Del. 1997).
[94] *See*, *e.g.*, Frank v. Elgamal, 2014 WL 957550, *34 (Del. Ch. 2014) ("American Surgical only disclosed the updated midpoint case projections, but these projections were the only ones relied upon by HFBE when it delivered its second and then final fairness opinion presentations in December 2010.").
[95] *See*, *e.g.*, In re Orchid Cellmark Inc. Shareholder Litig., 2011 WL 1938253, *6 (Del. Ch. 2011) ("[i]n evaluating the fairness and advisability of this tender offer, the Special Committee and its financial advisor [were] not precluded from considering various sets of financial projections before determining that one set reflect[ed] the best estimate of future performance.").
[96] Transcript of Oral Argument on Plaintiffs' Motion for Preliminary Injunction at 100, In re BEA Systems, Inc. Shareholder Litig., 2009 WL 1931641 (Del. Ch. 2009) (No. C.A. 3298) ("the fact that something is included in materials that are presented to a board of directors does not, ipso facto, make that something material.").

price was insufficient, and that the company should have disclosed both the more optimistic prior version of the projections and the reasons for the downward adjustment.[97] This is consistent with the requirements of proposed Item 1609.

- *Free cash flow projections*. Another recurring issue relating to projections is the need to disclose assumptions about free cash flow made in connection with fairness opinions. These are often targeted by plaintiffs, because those assumptions form the foundation for any discounted cash flow analysis, and changes in them can result in dramatically different valuations. Delaware case law on this issue has been characterized as standing for the proposition that if a discounted cash flow analysis is used as part of the financial advisor's fairness opinion, disclosure of the free cash flow assumptions "will often, but not always, be required."[98]

  The identity of the party preparing the free cash flow projections is often a critical factor. Some Delaware courts have treated management's free cash flow projections as per se material.[99] Other courts have held that free cash flow projections prepared by the company's financial advisor were not material and need not be disclosed.[100] While some Chancery decisions indicate the free cash flow projections are per se material, other decisions indicate that disclosure of free cash flow projections may not be required under some circumstances. In his bench ruling in *Cox v. Guzy*, then-Vice Chancellor Strine held that if other forecasts were disclosed, the target had negligible debt and the free-cash flow proxy EBITDA could be calculated based on the publicly disclosed forecasts, as further disclosure regarding projected free cash flow was unnecessary.[101]

- *Impact of different transaction structures*. Delaware case law also suggests that in evaluating the materiality of projections, the structure of the deal is also an important consideration. The materiality of projections is heightened in cash-out M&A transactions, where the stockholders are asked to evaluate whether to accept the merger consideration or to continue as stockholders of the corporation. The materiality of projections is heightened uniquely in going-private transactions, and particularly where "key managers seek to remain as executives and will receive options in the company once it goes private."[102] While most Delaware litigation has focused on issues surrounding the seller's projections, that is not always the case. In certain stock-for-stock transactions,

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[97] Chester County Employees' Retirement Fund v. KCG Holdings, Inc., 2019 WL 2564093, *14 (Del. Ch. 2019).
[98] Krishna Veeraraghavan and Scott B. Crofton, *Financial Projection Disclosure Requirements in M&A Deals: Preparing, Using and Disclosing Projections* 26 (Jul. 20, 2016), http://media.straffordpub.com/products/financial-projection-disclosure-requirements-in-manda-deals-preparing-using-and-disclosing-projections-2016-07-20/presentation.pdf.
[99] Maric Capital Master fund, Ltd. v. Plato Learning, Inc., 11 A.3d 1175, 1178 (Del. Ch. 2010) ("[I]n my view, management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information.").
[100] *See*, *e.g.*, In re BioClinica, Inc. Shareholder Litig., 2013 WL 5631233 (Del. Ch. 2013); Nguyen v. Barrett, 2015 WL 5882709 at *4 (Del. Ch. 2015).
[101] Veeraraghavan & Crofton, *supra* note 98, at 28 (citing Transcript of Status Conference at 9, Cox v. Guzy, No. C.A.7529 (Del. Ch. Jun. 8, 2012)).
[102] Michael Tumas and Michael Reilly, *The Disclosure of Projections Under Delaware Law*, POTTER ANDERSON & CORROON LLP CLIENT MEMO (Apr. 2008), http://www.potteranderson.com/media/publication/155_TheDisclosureofProjectionsUnderDelawareLaw.pdf.

Delaware courts have also held that the buyer's projections may be material to the seller's stockholders and should be disclosed.

The salient points from Delaware case law are as follows:[103]

- *"Fair summary" requirement*. A "fair summary" of the substantive work performed by a financial advisor must be disclosed, including (i) the basic valuation exercises, (ii) the key assumptions and (iii) the range of values generated. Whether the "fair summary" requirement has been satisfied in a particular situation is decided on a case-by-case basis. Proposed Item 1609 would not conflict with this "fair summary" requirement.

- *Materiality remains the touchstone*. Only projections that are material, not those that are merely helpful, must be disclosed. Proposed Item 1609(c) may conflict with this standard if the impact results in disclosure that is not material. However, if our recommendations are adopted, we believe that may mitigate against the inclusion of information that would not be material.

- *Reliability*. As demonstrated in the Delaware precedents, projections that are unreliable or misleading need not be disclosed.[104] If projections are reliable, however, the materiality of those projections is significantly heightened at least in the context of cash-out or going-private M&A transactions. We believe proposed Item 1609 seeks to elicit reliable disclosure and would therefore not conflict with Delaware law.

- *The transaction structure*.[105] Because of dilution and conflicts of interest issues, as well as the nature of the target operating companies, which are often early stage and pre-revenue, the materiality of projections is heightened and proposed Item 1609 would not conflict with Delaware law.

- *Utility of projections*. If projections are reliable, disclosure may not be required if the projections are of questionable utility to stockholders. This approach is consistent with proposed Item 1609.

- *Target's unique circumstances*. Any unique circumstances should be considered when determining whether projections are material. This approach is consistent with proposed Item 1609.

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[103] *Id*.

[104] In re Netsmart Technologies, Inc. Shareholders Litig., 924 A.2d 171, 201 (Del. Ch. 2007); In re CheckFree Corp. Shareholders Litig., 2007 WL 3262188, at *3 (Del. Ch. 2007); Globis Partners, L.P., v. Plumtree Software, Inc., 2007 WL 4292024, at *11 (Del. Ch. 2007).

[105] The materiality of projections is heightened in cash-out merger transactions, where the stockholders are asked to evaluate whether to accept the merger consideration or to continue as stockholders of the corporation. The materiality of projections is heightened uniquely in going-private transactions. Although not addressed in the recent cases, it follows that the materiality of a buyer's projections is heightened in stock-for-stock merger transactions, in which the target corporation's stockholders must evaluate the "price" to be paid in the form of the buyer's shares. *See* Michael Tumas and Michael Reilly, *The Disclosure of Projections Under Delaware Law*, POTTER ANDERSON & CORROON LLP CLIENT MEMO (Apr. 2008).

- *Reliance by the financial advisor and board; sharing with bidders*. Projections relied upon by Target's financial advisor and board, as well as those shared with bidders, are more likely to be material and, thus, to require disclosure.[106] Those facts standing alone do not necessitate disclosure, however, as the projections must still be reliable and otherwise material in the particular circumstances.[107] This is not consistent with federal securities laws and the Proposed Rule that would require disclosure in such instances.

- *Partial or incomplete disclosure*. The partial disclosure of financial projections that fail to offer the best estimate of a corporation's future financial performance triggers a broader fiduciary obligation to supplement the proxy with materially complete information.[108] Once a board "opens the door" to partial disclosure, more complete information may be necessary. This approach is consistent with proposed Item 1609.

The Delaware courts have not articulated a rote legal standard or checklist providing clear guidance whether projections must be disclosed in a particular situation. Rather, a context-specific analysis is required to determine whether projections must be disclosed. As such, we do not believe that proposed Item 1609 would conflict with Delaware law.

2.4.5. Rendering the PSLRA safe harbor inapplicable to De-SPAC Transactions.

The Commission has proposed a definition for "blank check company" that would encompass SPACs and certain other blank check companies for PSLRA purposes, such that the safe harbor for forward-looking statements under the PSLRA would not be available to SPACs. For purposes of the PSLRA, the Commission stated that, among other things, it sees no reason to treat forward-looking statements made in connection with a De-SPAC Transaction differently than forward-looking statements made in a traditional IPO.

We do not support this proposed amendment. We believe there are important distinctions between a De-SPAC Transaction and a traditional IPO that justify maintaining the PSLRA safe harbor in the form enacted by Congress. In particular, when coupled with other proposed amendments that would require disclosure of a fairness determination (effectively mandating the provision of projections) as well as impose underwriter liability in a De-SPAC Transaction, we believe removal of the PSLRA safe harbor protections would have a chilling effect on De-SPAC Transactions and significantly disadvantage a De-SPAC Transaction compared to a traditional IPO. We also believe there is substantial doubt as to the Commission's authority to narrow the scope of the safe harbor as currently proposed.

2.4.5.1. Rationale and perspective shift on PSLRA safe harbor

In an earlier era, the Commission was willing to let liability risk operate to discourage the corporate release of forward-looking information, including projections, by prohibiting inclusion

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[106] In re Pure Resources, Inc., Shareholders Litig., 808 A.2d 421, 450 (Del. Ch. 2002); In re JCC Holding Co., Inc., 843 A.2d 713, 720 (Del. Ch. 2003).
[107] Transcript of Oral Argument on Plaintiffs' Motion for Preliminary Injunction at 100, In re BEA Systems, Inc. Shareholder Litig., 2009 WL 1931641 (Del. Ch. 2009) (No. C.A. 3298).
[108] *Netsmart*, 924 A.2d at 199-200; *Pure Resources*, 808 A.2d at 448.

of forward-looking information in Commission filings.[109] The Commission's position was based on a concern that unsophisticated investors would place undue reliance on even non-fraudulent forward-looking information, leading them to make poor investment decisions. Reasonable investors rallied against the Commission's paternalistic position, emphasizing the importance of forward-looking information to their investment decisions and their ability to discount management forecasts for bias. In the 1970s, the Commission began to address these concerns, and seemingly changed its position. Instead of prioritizing the interests of investors who might overreact to management forecasts, it began to take steps to encourage companies to share their forecasts. To this end, the Commission adopted two safe harbors from liability for forward-looking statements. After these safe harbors proved ineffective in encouraging disclosure, Congress adopted the more robust PSLRA safe harbor.[110]

The PSLRA safe harbor, however, does not cover all forward-looking statements. It contains a number of exclusions. Some can easily be justified as advancing goals independent to those that motivated the safe harbor's adoption. In this category are a variety of "bad boy" disqualifiers that apply to companies that have violated certain provisions of the securities laws in the past three years. Other exclusions cover tender offers, roll-up and going-private transactions, as well as IPOs and communications by blank check companies and penny stock issuers.

Presumably these exclusions balanced Congress' goal to provide additional information to investors by expanding the use of projections with the risks associated with providing projections in those situations.

In a traditional IPO, where liability risk is meaningful (and, hence, the safe harbor's applicability of significance), denying voluntary management forecasts the protection of the safe harbor does not merely deter dishonest forecasts, it silences all public forecasts. If given the choice, reasonable investors may rather risk an occasional fraud by a bad actor than be denied access to valuable forward-looking information.[111] Instead, the exclusion in a traditional IPO may reflect heightened risk of fraud due to greater information asymmetries in the absence of an efficient market. As Holger Spamann has observed, efficient markets provide a critical "indirect investor protection" to unreasonable investors.[112]

The exclusion for communications in connection with an IPO disappears for most companies the moment the company becomes a public reporting entity. Most importantly, Congress did *not* exclude communications in connection with traditional M&A transactions. Nor did it exclude communications by public shell companies (like most SPACs) that raise more than $5 million in a firm commitment underwritten IPO. In such cases, presumably Congress

[109] *See* Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage* (May 19, 2021), https://ssrn.com/abstract=3945975 (last visited Jun. 17, 2022).
[110] *Id.*
[111] *Id.*
[112] Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings*, 14 J. L. ANALYSIS (forthcoming 2022), https://ssrn.com/abstract=3707249 (arguing that although "the vast majority of retail investors lack the financial expertise to value a security or to vote sensibly," these investors are nevertheless protected when they trade in efficient markets that, due to the trading behavior of more sophisticated investors, produce informed and unbiased prices).

determined the market should be able to have access to projections (even projections that turn out to be wrong) and be able to make its own assessments as to the reliability of such projections. Congress' line-drawing also takes into account an important distinction between the merger context and traditional IPOs – publicly silencing projections in the merger context is not an option. Unlike companies undertaking a traditional IPO, SPACs are compelled by a combination of federal securities regulation and state corporate law to share Target projections with stockholders. Excluding De-SPAC Transactions from the safe harbor would not operate to silence projections the way the traditional IPO exclusion does, although it might operate to discourage De-SPAC Transactions. To truly place De-SPAC Transactions on a "level playing field" with traditional IPOs in connection with forward-looking statements, the Commission would have to change its disclosure requirements in connection with De-SPAC Transactions and somehow override the state fiduciary obligations that compel disclosure of projections. We also do not believe that creating a new safe harbor exclusion for communications in connection with De-SPAC Transactions will solve the problem of "regulatory arbitrage" or protecting investors, at least not without further regulatory reform making the release of projections in connection with De-SPAC Transactions voluntary.

2.4.5.2. Fundamental differences between De-SPAC Transactions and traditional IPOs

Putting De-SPAC Transactions on parity with traditional IPOs for this purpose fails to take into account significant differences between these transactions. For example, while it is clear that the PSLRA safe harbor by its terms does not apply to IPOs, there has customarily been no practice or requirement in IPOs to include projections in the registration statement and thereby impose underwriter liability for those projections. That is not to say, however, that projections are not provided in IPOs. Instead, an IPO issuer will typically prepare under the guidance of underwriters a model containing projections that the issuer shares with analysts associated with the underwriting syndicate.

The Commission's statement that, for purposes of the PSLRA, it sees no reason to treat forward-looking statements made in connection with De-SPAC Transactions differently than forward-looking statements made in traditional IPOs is based on the view that "both instances involve private issuers entering the public U.S. securities markets for the first time and similar informational asymmetries that exist between these issuers (and their insiders and early investors) and public investors."[113] However, contrary to this supposition, the common practice in IPOs of disseminating projections significantly reduces the informational asymmetry between issuers and public investors, enhancing a price discovery process that is most certainly influenced by the issuer's projections. We believe this transmission of the issuer's projections to the market is an important feature of IPOs and beneficial to efficient capital markets. At the same time, we believe this practice survives because underwriters have found it to fall within an acceptable liability profile: outside of Section 11 of the Securities Act and where the absence of a PSLRA safe harbor is moot.

[113] Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,482 (proposed May 13, 2022).

In contrast, in the case of a De-SPAC Transaction, there are several reasons why projections are provided in the public disclosure document as discussed above. We believe these reasons will continue to encourage, if not effectively require, public disclosure of projections.

For these reasons, we believe that although the Commission's proposed enhanced projections disclosures alone would not likely curb the use of projections, they may provide useful benefits to investors. However, we believe the removal of the PSLRA safe harbor would have a significant chilling effect on De-SPAC Transactions (as demonstrated by the market reaction we have witnessed as a result of the mere proposal of the Proposed Rules). This chilling effect is also demonstrated by the fact that IPO issuers rarely publicly include projections in the registration statement.

We note that certain De-SPAC Transactions, as structured with a new issuer, may constitute an "initial public offering" and therefore fall outside of the PSLRA safe harbor. An issuer's ability to rely on the judicial "bespeaks caution" doctrine may mitigate to some extent liability concerns associated with providing projections. However, we believe the express unavailability of the safe harbor, particularly when coupled with the proposed amendments regarding underwriter liability, represents a significant departure from the treatment of projections in M&A deals other than a De-SPAC Transaction. One immediate practical effect could be the elimination of the De-SPAC Transaction as a capital-raising option for Targets that do not have lengthy operating histories. At best, we believe removal of the PSLRA safe harbor will add significant additional costs for De-SPAC Transactions as transaction participants seek compensation for any real or perceived increase in liability exposure.

Considering that IPO issuers can (and almost uniformly do) avoid liability exposure for management projections through silence (i.e., non-disclosure of projections in the registration statements) whereas companies going public via a De-SPAC Transaction would not be able to remain silent, creating a new safe harbor exclusion for De-SPAC Transactions—as the Proposed Rules do—would not place them on a "level playing field" with traditional IPOs. Instead, it disadvantages De-SPAC Transactions. Market participants in traditional IPOs have a mechanism to transmit projections while limiting exposure to liability, while those in De-SPAC Transactions are either unlikely to avoid publicly disclosing projections or they will continue to do so at significantly increased cost, which may be prohibitive. For these reasons, we entreat the Commission to retain the PSLRA safe harbor as it currently applies to De-SPAC Transactions.

2.4.5.3. Question as to the Commission's authority to amend legislation

While the Commission has assumed Congress gave it authority to narrow the statutory safe harbor through changing the definitions of key terms that inform the scope of the safe harbor, we believe there is substantial doubt as to the Commission's authority to narrow the safe harbor as currently proposed, particularly when it is clear that Congress' intent was to protect and thereby encourage the provision of forward-looking information. As the Commission noted, the current definition of "blank check company" predates the enactment of the PSLRA in 1995 and evidences a clear intent to exclude from that definition SPACs that raise more than $5 million in a firm commitment underwritten IPO for not selling "penny stock." So while the

Commission sees "no reason to treat blank check companies differently for purposes of the PSLRA safe harbor depending on whether they raise more than $5 million in a firm commitment underwritten IPO and thus are not selling penny stock," there is no doubt that the statute Congress enacted did in fact make that distinction.

The PSLRA states that "the terms 'blank check company,' 'rollup transaction,' 'partnership,' 'limited liability company,' 'executive officer of an entity' and 'direct participation investment program' have the meanings given those terms by rule or regulation of the Commission." The Commission appears to read "meanings *given* those terms" to mean "meanings *given* those terms and that *may be given those terms from time to time in the future*." To read that language as authorizing the Commission to narrow the scope of "blank check company" and thereby narrow the scope of the PSLRA, when the meaning "given" the term "blank check company" by rule or regulation then in effect was well-established, seems inconsistent with Congressional intent and legislates a loss of protection that Congress provided at the time. This also appears inconsistent with the exemptive authority found in Section 27A(g) and (h), which makes clear the Commission's ability to extend the scope of the safe harbor protections rather than narrow them. These sections emphasize the Commission's authority to "provide exemptions from or under any provision of this title, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information" and to "adopt similar rules and regulations with respect to forward-looking statements." We believe these expressions of Commission authority are designed to promote the Congressional intent of encouraging disclosure of forward-looking information, rather than narrowing it by supplanting Congress' intent with the Commission's own policy initiatives.

2.4.6. Proposing a safe harbor under the Investment Company Act

Proposed Rule 3a-10 provides a safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act for SPACs that meet the conditions of the safe harbor. To justify the need for this safe harbor, the Commission professes four concerns, namely: (i) "some SPACs have sought to operate in novel ways that suggest that SPACs and their Sponsors should increase their focus on evaluating when a SPAC could be an investment company;"[114] (ii) "[the Commission is] concerned that SPACs may fail to recognize when their activities raise the investor protection concerns addressed by the Investment Company Act;"[115] (iii) SPACs may engage in "regulatory arbitrage, which may be used by some SPACs in an attempt to operate like an investment company without investment company registration"[116] and (iv) "[the Commission is] concerned that, the longer the SPAC operates with its assets invested in securities and its income derived from securities, the more likely investors

[114] *Id.* at 29,497.
[115] *Id.*
[116] *Id.* at 29,540.

will come to view the SPAC as a fund-like investment and the more likely the SPAC will appear to be deviating from its stated business purpose."[117]

We believe that the Commission's concerns are unjustified. SPACs simply are not investment companies under Section 3(a)(1)(A) because they are not, and do not hold themselves out as being engaged primarily, or propose to engage primarily, in the business of investing, reinvesting or trading in securities. Assuming, but without admitting, otherwise, we still believe that there is no apparent need or basis for this "safe harbor" which, in reality, would operate as a rule.

The transaction that seems to have prompted this proposed rule was the highly unusual, acquisition proposed by Pershing Square Tontine Holdings, Ltd. ("**PSTH**"), a SPAC, of a ten percent stake in the common stock of Universal Music Group B.V. ("**UMG**"). As soon as this transaction was announced, SPAC market participants (and the Staff in its review of the transaction[118]) questioned how PSTH proposed to complete this acquisition of a non-control, minority interest in the common stock of UMG without registration under the Investment Company Act. As a result, PSTH restructured the transaction in an attempt to avoid having to register under the Investment Company Act. Ultimately, the transaction was abandoned. We do not believe that this one novel transaction, out of the hundreds of prior and subsequent successful De-SPAC Transactions, signifies a trend of SPACs seeking to operate in a manner that would raise investor protection concerns under the Investment Company Act, or that SPACs generally fail to recognize when their activities raise investor protection concerns under the Investment Company Act.

In addition, we do not believe there is evidence that SPACs seek to engage in "regulatory arbitrage" to operate like an investment company. SPAC management and Sponsors would have nothing to gain from engaging in such a strategy, as they are not paid any management or performance fees based on the amount of assets held by the SPAC or income gained on those assets. Instead, they may benefit only from the increase in value of their founder shares and private placement warrants, if any, if and only if the SPAC successfully completes a business combination transaction.

Finally, we do not believe there is evidence that the longer the SPAC operates with its assets invested in securities and its income derived from such securities, the more likely investors will come to view the SPAC as a fund-like investment and the more likely the SPAC will appear to be deviating from its stated business purpose, thereby justifying the need to impose the hard-and-fast duration limitations proposed by the Commission. As discussed in more detail below, no rational investor interested in investing in the types of government securities that SPACs invest in would choose to invest in a SPAC rather than directly in a fund that invests in such securities, given the inherently different characteristics of SPACs that reduce the returns from such investments. And given the incentives that SPAC management and Sponsors have to Close, and the lack of incentive to seek to operate like an investment company as discussed above, SPAC management and Sponsors would have no reason to seek to deviate

[117] *Id.* at 29,498.
[118] See Pershing Square Tontine Holdings Ltd., SEC Staff Comment, No. 5-91594 (Jul. 16, 2021).

from the SPAC's stated business purpose even if the SPAC is unable to quickly identify a Target and Close. Further, imposing such limitations would chill the SPAC market and harm investors by significantly impairing the ability of De-SPAC Transactions to proceed in a measured and orderly manner.

We note that the proposed rule is styled as a safe harbor, and, thus, in theory a SPAC could operate outside it without violating the Investment Company Act. In the Proposing Release, however, the Commission stresses "that the inability of a SPAC to identify a target and complete a De-SPAC Transaction within the proposed timeframe would raise serious questions concerning the applicability of the Investment Company Act to that SPAC."[119] In addition, William Birdthistle, the Director of the Division of Investment Management, has publicly warned that "certainly for those SPACs that also fall outside the safe harbor, [he] would expect that the Staff would also be taking a look at them."[120] Accordingly, it appears that while the proposed duration limitations are styled as a safe harbor, in effect they would operate as part of a firm rule.

2.4.6.1. Analysis of SPACs under Investment Company Act Section 3(a)(1)(A)

Under Section 3(a)(1) of the Investment Company Act, an "investment company" for purposes of the federal securities laws, is a company that (A) is or holds itself out as being engaged *primarily*, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities (sometimes called the "subjective test") or (B) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of government securities and cash items) on an unconsolidated basis (sometimes called the "objective test").

As noted in the Proposing Release, the safe harbor only addresses investment company status for SPACs under the subjective test because if a SPAC owns or proposes to acquire 40% or more of investment securities (which in any case is prohibited by SPAC constitutional documents), it would likely need to register and be regulated as an investment company under the Investment Company Act under the objective test.

The Proposing Release also mentions that in determining whether an issuer is "primarily engaged" in a non-investment company business, the Commission and courts look to the following factors, which are commonly referred to as the "*Tonopah* factors:" (a) the company's historical development, (b) its public representations of policy, (c) the activities of its officers and directors, (d) the nature of its present assets, and (e) the sources of its present income.[121]

[119] Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,502 (proposed May 13, 2022).
[120] Commission Open Commission Meeting, YOUTUBE (Mar. 31, 2022), https://www.youtube.com/watch?v=t6qX8FGiI_8 (discussion at 43:25-44:45).
[121] The *Tonopah* factors were set forth by the Commission in In the Matter of the Tonopah Mining Co. of Nevada, Investment Company Act Release No. 812-241, 26 S.E.C. 426 (Jul. 21, 1947).

The Commission acknowledges in the Proposing Release that SPACs are formed to identify, acquire and operate a Target through a business combination, and not with a stated purpose of being an investment company, and that SPACs typically view their public representations, historical development and efforts of officers and directors as consistent with those of issuers that are not investment companies.[122] It appears, therefore, that the Commission believes that the first three *Tonopah* factors generally are satisfied. However, as to the last two *Tonopah* factors, the Commission notes:

> [M]ost SPACs ordinarily invest substantially all their assets in securities, often for a period of a year or more, meaning that investors hold interests for an extended period in a pool of securities. Moreover, whatever income a SPAC generates during this period is generally attributable to its securities holdings. The asset composition and sources of income for most SPACs may therefore raise questions about their status as investment companies under Section 3(a)(1)(A) of the Investment Company Act and, in assessing this status, these factors would need to be weighed together with the other *Tonopah* factors.[123]

However, when first articulating the *Tonopah* factors, the Commission stated that the purpose of considering the assets and income of a company as part of the *Tonopah* factors is to determine whether the nature of the assets and income would "lead investors to believe that the principal activity of the company was trading and investing in securities."[124] "In other words, the Commission thought in *Tonopah* that what principally matters are the beliefs the company is likely to induce in investors. Will its portfolio and activities lead investors to treat a firm as an investment vehicle or as an operating enterprise? The Commission has never issued an opinion or rule taking a different view."[125]

In the Proposing Release, the Commission states that a duration limitation is necessary under the proposed safe harbor because it is concerned that the longer a SPAC operates without having identified a business combination, the more likely investors will come to view it as a fund-like investment and the more likely the SPAC will appear to be deviating from its stated business purpose. However, the staff of the Division of Investment Management has said that, even if an issuer's assets consist largely of money market fund securities, "an issuer's 'primary engagement' remains a benchmark for determining whether the issuer is an investment company for purposes of section 3(a)(1)(A)."[126]

It is clear that a SPAC's primary engagement is to find and acquire a Target and not to invest in government securities and money market funds. SPAC IPO prospectuses typically state that the Trust Account is intended as a holding place for funds pending the earliest to occur of either the Closing or the failure to Close within a limited period of time. They further state that the offering is not intended for persons who are seeking a return on investments in government securities or investment securities. Moreover, investors seeking exposure to the limited

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[122] *Special Purpose Acquisition Companies, Shell Companies, and Projections*, 87 Fed. Reg. at 29,497.
[123] *Id.*
[124] *In the Matter of the Tonopah Mining Co. of Nevada*, 26 S.E.C. at 430.
[125] S.E.C. v. Nat'l Presto Indus., Inc., 486 F.3d 305, 315 (7th Cir. 2007).
[126] Willkie, Farr & Gallagher, SEC No-Action Letter, 2000 WL 1585635 (Oct. 23, 2000).

investments permitted to be made by SPACs would be better served by investing directly in the treasury securities or money market funds in which SPACs are permitted to invest, as SPACs often experience periods when some or all of their investments are liquidated as they move their assets between investments or after treasury securities mature. In addition, SPACs are permitted to withdraw interest to pay income and franchise taxes, and, upon liquidation, pay certain liquidation costs, which would reduce overall returns. Further, unlike typical investment funds, including those that invest solely in government securities, a SPAC's stock price does not generally move in response to changes in its investment income. In line with its stated business purpose, the SPAC's stock price generally moves in response to market perceptions about the ability of the SPAC to identify a Target and upon and after announcement of progress toward a De-SPAC Transaction based on market perception of that particular proposed transaction. Accordingly, we do not believe that investors view SPACs as a fund-like investment.

We also note that a SPAC's management has no incentive to deviate from its purpose of identifying a Target and Closing. Members of a SPAC's management do not receive any management or performance fees based on the amount of assets held by the SPAC or the income earned on such assets. Their only ability to profit is from a successful Closing.

2.4.6.2. Analysis of Proposed Rule 3a-10

Proposed Rule 3a-10 includes several conditions, each of which must be met in order for a SPAC to rely on the safe harbor, relating to: (i) the nature and management of SPAC assets, (ii) SPAC activities and (iii) the duration of time the SPAC has to announce and complete a business combination.

The first two categories generally are codifications of longstanding SPAC practices that support the conclusion that SPACs are not investment companies, and thereby simply ensure that a company seeking to rely on these conditions indeed is a SPAC. The third category of the proposed safe harbor requires a SPAC to (i) announce that it has entered into a business combination agreement with a Target no later than 18 months after the effective date of the SPAC IPO's registration statement and (ii) consummate the business combination no later than 24 months after such effective date. If the SPAC fails to meet either of the aforementioned deadlines, it would be required to distribute its assets in cash to investors as soon as reasonably practicable thereafter in order to rely on the safe harbor.

As discussed above, we do not believe that a duration limitation is necessary for a SPAC to avoid classification as an investment company because we believe that a SPAC is engaged primarily in a business other than investing in government securities and government money market funds for purposes of Section 3(a)(1)(A) and, thus, is not an "investment company" that should be regulated under the Investment Company Act.

Nevertheless, if the Commission believes it to be important to include a duration limitation in proposed Rule 3a-10, we think the proposed duration is much too short. As the Commission acknowledges, many SPACs have not announced De-SPAC Transactions within 18 months or Closing within 24 months. Imposing duration limitations would run contrary to the

stated intent of many of the other Proposed Rules, and would put pressure on SPACs to prioritize speed over diligence and quality, to the detriment of stockholders and contrary to a SPAC board's fiduciary obligations. The Commission, in fact, acknowledges this concern in the Proposing Release by saying:

> SPACs that are seeking to meet the proposed safe harbor conditions may in some cases compromise on the quality of the type of targets pursued to speed up their search, or offer to pay more for the target to complete a De-SPAC Transaction sooner, compared to under the baseline. In some circumstances, the duration conditions may give sponsors of SPACs seeking to avail themselves of the proposed safe harbor increased incentives to complete a De-SPAC Transaction even if liquidation would be the better choice for investors. That is, the duration conditions may increase the agency costs of the sponsors' managerial control.[127]

While the Commission goes on to claim that such agency costs would be mitigated by other provisions of the proposal, the extent of such mitigation, if any, is questionable. In addition, from a practical perspective, such short duration limitations would chill the market.

Further, as the Commission notes in the Proposing Release, the New York Stock Exchange and The Nasdaq Stock Market each require listed SPACs to complete their business combinations within 36 months. Recognizing that most SPACs are listed on one of these exchanges, the Commission further notes that "[f]or such SPACs the proposed safe harbor duration condition would have reduced benefits since the exchange rules already provide a limit on the duration of the SPAC, albeit 12 months longer that the proposed limit."[128] Although the Commission states that the stock exchange duration limitations were adopted for a different regulatory purpose,[129] it is our understanding that they were, in fact, adopted, after consultation with market participants as to the appropriate length of time, for just this reason: to ensure that the SPAC remains focused on consummating a business combination, not operating indefinitely as a "cash box."

We acknowledge that after some period of time without Closing, a SPAC would appear not to be focused on consummating a De-SPAC Transaction. We submit, however, that a duration limitation in a safe harbor is unnecessary given that exchange-listed SPACs are already subject to a 36-month limitation and all SPACs have duration limitations in their organizational documents that are the product of investor requirements.[130] Nevertheless, to the extent the Commission believes it to be important to include a duration limitation in Proposed Rule 3a-10, this limitation should be the same 36-month period for consummating a De-SPAC Transaction required by stock exchange rules that were previously approved by the Commission.

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[127] Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546, Investment Act Release No. IC-34549, 87 Fed. Reg. 29,458, 29,541 (proposed May 13, 2022).
[128] *Id.* at 29,540.
[129] *Id.* at 29,501.
[130] Investors always require a duration limitation and are not willing to lock up their money indefinitely.

2.5. Transition period to comply with Proposed Rules

Neither the Proposed Rules nor the Proposing Release addresses whether the Final Rules will be effective immediately or whether there will be a transition period. Accordingly, it is unclear how the Final Rules would apply to SPAC IPOs and De-SPAC Transactions at various stages. For example, the Proposed Rules do not address the effect of any Final Rules on SPAC IPOs that are in registration or on De-SPAC Transactions that have a signed business combination agreement or that also have submitted or filed, as the case may be, a Merger Registration Statement, nor do the Proposed Rules address future SPAC IPOs and De-SPAC Transactions. We believe the Final Rules should provide a sufficient transition period for market participants to analyze them, structure transactions to comply with them, and, to the extent needed, restructure any pending transactions.

The Final Rules will require multiple transaction participants to change how they conduct SPAC IPOs and De-SPAC Transactions, as well as related financings. A transition period is necessary to allow such parties adequate time to absorb the full import of the Final Rules and to implement the new requirements and comply with the Final Rules with the least possible disruption to transactions that are already in process. Moreover, we believe that certainty in the application of the rules is necessary, given the complex legal and practical issues underlying the rules.

We believe that a clear transition period is consistent with the Commission's prior practice and strikes the appropriate balance between the Commission's mission to protect investors and facilitate capital formation. Notably, in prior instances in which the Commission proposed or adopted comprehensive rules, it recognized the necessity of, and provided, reasonable transition periods. For example, when the Commission proposed *Securities Offering Reform*,[131] it not only included an effective date that was nearly six months after the rule was adopted, but the Staff subsequently published a series of "Transition Questions and Answers" to address difficult interpretive questions related to the final rules.[132] *Securities Offering Reform* presented complex procedural and substantive interpretive issues as registrants prepared to transition in compliance with the newly adopted rules, necessitating supplemental guidance after the fact. We believe that the Commission should take a proactive, transparent approach in the Final Rules to provide clarity for market participants. In addition, more recently, in the adopting release for *Universal Proxy*,[133] the Commission adopted an extended transition period. The *Universal Proxy* adopting release was published in November 2021 and indicated that the rules would be effective on January 31, 2022. Nevertheless, the Commission noted that "[b]ecause the rule amendments we adopt in this document involve significant changes to the manner in which election contests are conducted, a transition period is appropriate." In the Commission's view, "to avoid disruption to the upcoming proxy season" the rule changes included a transition period whereby the amended rules would apply to meetings held after August 31, 2022. Similarly, in the proposing release for *The Enhancement and Standardization of Climate-Related Disclosures*

[131] *See* Securities Offering Reform, Securities Act, Exchange Act, Investment Company Act Release No. 33-8591, 70 Fed. Reg, 44,721 (Jul. 19, 2005), setting an effective date of December 1, 2005.
[132] *See* Securities Offering Reform Transition Questions and Answers, U.S. Securities and Exchange Commission (Sept. 13, 2005), http://www.sec.gov/divisions/corpfin/transitionfaq.htm (last visited Jun. 8, 2022).
[133] *See* Universal Proxy, Exchange Act SEC Release No. 34-93596. 86 Fed. Reg. 68,330 (Dec. 1, 2021).

for Investors,[134] the Commission proposed multiple transition periods based on filer status and extended transition periods for Scope 3 disclosures and third-party attestation requirements.

We believe that the nature of the issues implicated by the Proposed Rules and Final Rules justify a similarly clear and practicable transition period to minimize the potential for market disruption.

We recommend that the Commission delay the effectiveness of Final Rules for three months after approval of the Final Rules, and adopt a transition period (i) for SPAC IPOs, of six months following the effective date of the Final Rules for any SPAC that has filed a SPAC IPO registration statement upon the effective date of the Final Rules and (ii) for De-SPAC Transactions, only as to business combination agreements that were signed and publicly announced following the effective date, at which point the underwriters' liability commences to the extent applicable assuming proposed Rule 140a were to be adopted in a form that provides the market with some certainty regarding the scope of activity that triggers liability. We believe that the recommended transition periods are reasonable and would provide the transaction participants in SPAC IPOs and De-SPAC Transactions sufficient time to consider and implement the new rules.

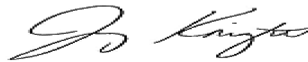
* * *

[134] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11042, Exchange Act Release No. 34-94478, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022).

3. CONCLUSION

We appreciate the opportunity to participate in the comment process and respectfully request that the Commission consider our comments and recommendations. We are available to meet and discuss these comments or any questions the Commission and the Staff may have, which may be directed to the individuals listed below.

Very truly yours,



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