WHITE & CASE

White & Case LLP
1221 Avenue of the Americas
New York, NY 10020-1095
T +1 212 819 8200

whitecase.com

June 17, 2022

Vanessa A. Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

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

Dear Secretary Countryman:

We appreciate the opportunity to present our views to the U.S. Securities and Exchange Commission (the "***Commission***") on the above-captioned release (the "***Proposing Release***")[1] and the new rules the Commission proposes for special purpose acquisition companies ("***SPACs***"). Members of our firm have advised clients in initial public offerings ("***IPOs***") of SPACs and initial business combination transactions of SPACs ("***de-SPAC transactions***") since 2005. Since 2020, we have advised clients on more than 120 SPAC IPOs and more than 40 de-SPAC transactions.

In announcing the proposed rules, the Commission's Chairman, Gary Gensler, stated that the proposed rules "would strengthen disclosure, marketing standards and gatekeeper and issuer obligations by market participants in SPACs, helping ensure that investors in these vehicles get protections similar to those when investing in traditional IPOs."[2] The "overarching principle," Mr. Gensler said, is Aristotle's maxim: "Treat like cases alike."[3] However, although both traditional IPOs and de-SPAC transactions result in a private operating company becoming a public company, the means employed to get to that end are significantly different, and therefore they are not truly like cases. Moreover, even if they were like cases as the Commission suggests, the proposed rules would impose significant asymmetrical obligations and liabilities on a wide range of market participants in de-SPAC transactions as compared to traditional IPOs, and, therefore, would cause disparate treatment of the two. The rules would also create uncertainty for participants and advisors in other similar transactions such as transformative mergers or acquisitions by public companies, ultimately undermining

---

1 *Special Purpose Acquisition Companies, Shell Companies, and Projections*, 87 Fed. Reg. 29458 (May 13, 2022).

2 SEC Chair Gary Gensler, *Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies and Projections* (Mar. 30, 2022), https://www.sec.gov/news/statement/gensler-spac-20220330.

3 *Id*.

two of the Commission's core missions: facilitating capital formation, and maintaining fair, orderly and efficient markets.

The proposed rules have already had a chilling effect on the SPAC market causing significant disruption amid a wider market downturn, with prominent financial institutions such as Goldman Sachs and Citigroup announcing that they are significantly curtailing their involvement in the SPAC market,[4] again undermining the Commission's mission.

In this letter, we provide our comments on certain of the proposed rules, and in some cases offer suggestions for changes where we believe the proposed rules go beyond the Commission's stated intentions or would impose costs that would significantly exceed any benefits to investors.

I. Underwriter Status and Liability

One of our primary concerns with the Commission's proposed rules is the expansive underwriter liability imposed by the operation of proposed Rules 140a and 145a on a potentially wide range of participants in SPAC transactions. The proposed rules would deem any underwriter of the securities of a SPAC in its IPO who takes steps to facilitate a de-SPAC transaction or any related financing transaction or otherwise participates (directly or indirectly) in the de-SPAC transaction to be engaged in a distribution and therefore an underwriter in the de-SPAC transaction, with the attendant civil liability under Sections 11 and 12 of the Securities Act (but without the safe harbor protections under the Private Securities Litigation Reform Act of 1995) for the disclosures in the de-SPAC registration statement, including any financial projections included therein.

We believe that the Commission does not have the authority to adopt Rule 140a and that it represents an unprecedented expansion of underwriter status under Section 11. If, nonetheless, the Commission decides to adopt proposed Rule 140a, or any other final rule imposing Section 11 liability on underwriters in a de-SPAC transaction, we urge the Commission to limit any such statutory underwriter liability to only the disclosure in filings with the Commission in de-SPAC transactions that also would be required to be included in a registration statement if the target company were instead engaging in a traditional IPO, which would exclude information such as financial projections.

A. Underwriter Liability for de-SPAC Registration Statements Should be Limited

As proposed, Rule 140a purports to "clarify" that a person who has acted as an underwriter in a SPAC IPO and participates in the de-SPAC transaction will be deemed to be engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction (the "***combined company***") within the meaning of Section 2(a)(11) of the Securities Act. Accordingly, that person would have Section 11 liability for the disclosure in the registration statement on Form S-4 or F-4 filed in connection with the de-SPAC transaction (the "***de-SPAC Registration Statement***"). The theory underpinning Rule 140a is that the SPAC IPO distribution somehow continues over the entire period of the SPAC's life until the closing of its de-SPAC transaction.[5] We believe that proposed Rule 140a is not a "clarification" but rather is an

[4] Sridhar Natarajan and Ruth David, *Goldman Is Pulling Out of Most SPACs Over Threat of Liability*, Bloomberg (May 9, 2022), https://www.bloomberg.com/news/articles/2022-05-09/goldman-is-pulling-out-of-most-spacs-over-threat-of-liability; Gillian Tan, *Citi to Pause New SPAC Issuance as SEC Signals Crackdown*, Bloomberg (Apr. 4, 2022), https://www.bloomberg.com/news/articles/2022-04-04/citi-said-to-pause-new-spac-issuance-as-sec-signals-crackdown.

[5] Proposing Release at 29485. ("Although the timing of a SPAC initial public offering and a de-SPAC transaction is bifurcated because a private operating company is not identified at the SPAC initial public offering stage, the result of a de-SPAC transaction, however structured, is consistent with that of a traditional initial public offering.")

unprecedented expansion of the Securities Act with respect to what constitutes a single distribution and what activities render a person an underwriter with respect to a distribution, which is beyond the scope of the Commission's authority.[6]

If, nonetheless, the Commission disagrees and decides to adopt Rule 140a, the universe of information in de-SPAC filings with the Commission for which underwriters should have liability under Section 11 should be limited to the information that would be required to be included in a registration statement on Form S-1 or F-1 for a traditional IPO (an "***IPO Registration Statement***") if the target company were engaging in a traditional IPO. The Commission's reasoning for seeking to impose Section 11 liability on a SPAC IPO underwriter is that "[t]he de-SPAC transaction marks the introduction of the private operating company to the public capital markets" and "[a]ccordingly, as in a traditional underwritten initial public offering, public investors—who were unfamiliar with the formerly private company—would benefit from the additional care and diligence exercised by SPAC underwriters in connection with the de-SPAC transaction."[7] The Commission's stated goal, therefore, is to impose "gatekeeper" liability for the information about the private operating company that would be provided to investors in a traditional IPO.

In a de-SPAC transaction, however, the information included in the de-SPAC Registration Statement goes well beyond the information that would be included in an IPO Registration Statement for the private operating company because the nature of a de-SPAC transaction is fundamentally different from an IPO. It is a business combination that is being voted upon by the SPAC's shareholders. Accordingly, the de-SPAC Registration Statement includes a "proxy statement/prospectus" which serves as a proxy statement for the vote by the SPAC's shareholders on the de-SPAC transaction as well as a prospectus for the offering of securities pursuant to the registration statement. If the Commission's goal is to incentivize a gatekeeper to conduct due diligence on the information included in the de-SPAC Registration Statement to the same extent it would do so if the private operating company were conducting a traditional IPO, then the deemed underwriter in a de-SPAC transaction should only have Section 11 liability for information about the private operating company that would be included in an IPO Registration Statement (the "***IPO Information***"). However, the information in a de-SPAC Registration Statement goes beyond the IPO Information because it covers not only the registration of securities in the de-SPAC transaction but also the proposals being voted upon by the shareholders.

Most significantly, the information in a de-SPAC Registration Statement very often includes financial projections for the combined company which, under applicable state or foreign corporate law, Regulation M-A and/or the anti-fraud provisions of the Federal securities laws, must be disclosed in the de-SPAC Registration Statement when discussing the reasons the SPAC's board of directors decided to enter into the de-SPAC transaction or as one of the items reviewed by a financial advisor rendering a fairness opinion.[8] Thus, the expansive underwriter liability contemplated by the proposed rules would "collide" with such existing obligations of a SPAC and target company, and would result in underwriter liability for the financial projections included in a de-SPAC Registration Statement. This represents a significant expansion of the scope of information for which there would be underwriter liability compared to a traditional IPO or direct listing. In traditional IPOs and direct listings, issuers rarely include financial

---

6 See, e.g., Kenneth E. Bentsen, Jr., *Re: Special Purpose Acquisition Companies, Shell Companies, and Projections; File No. S7-13-22; Release Nos. 33-11048, 34-94546*, Securities Industry and Financial Markets Association ("SIFMA") (June 10, 2022), https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-on-SECs-SPAC-Proposal.pdf.

7 Proposing Release at 29485 – 29486.

8 Proposing Release at 29494. While most de-SPAC transactions do not currently include a fairness opinion (unless the transaction involves a conflict of interest), we expect that many SPACs may seek fairness opinions to substantiate their "reasonable belief" as to the fairness of the de-SPAC transaction as a result of proposed Item 1606 of Regulation S-K.

projections in their registration statements. Thus, the institutions acting as underwriters or financial advisors in those transactions are not exposed to Securities Act liability for financial projections. Yet, as the Commission undoubtedly is aware, issuers in IPOs indirectly provide investors with financial projections by sharing their financial models, including projections, with research analysts, who then provide their models to their institutional investor clients considering whether to participate in the IPO. Similarly, in direct listings, financial projections are confidentially shared directly with investors during the marketing of the offering and later made public through a Current Report on Form 8-K (a "***Form 8-K***") that is filed after the registration statement becomes effective. Accordingly, under the proposed rules, deemed statutory underwriters in de-SPAC transactions would not be treated like underwriters or financial advisors in IPOs and direct listings, which is what the proposed rules are purportedly attempting to achieve. If the intent is to achieve parity between traditional IPOs and de-SPAC transactions, underwriter liability in de-SPAC transactions should be limited to sections of the de-SPAC Registration Statement for which underwriter liability would apply in the IPO context. Moreover, as discussed above, the Commission's stated goal is for gatekeepers to have Section 11 liability for disclosure about the private operating company which is being introduced to the public capital markets.[9] Therefore, Section 11 liability imposed on underwriters should be limited to the sections of the de-SPAC Registration Statement that would be included in an IPO Registration Statement.

Further, projections are inherently speculative. They are highly idiosyncratic, and are developed in different ways and for different purposes across transactions. By definition, they lack precision and require the subjective judgment of the management team involved in the day-to-day operations of the company. Information in respect of future periods is inherently uncertain, and the further into the future one projects, the greater the uncertainty. Any number of factors both within and outside the control of the combined company, ranging from changes in operating conditions or managerial decisions, to changes in the competitive or industry landscape of the combined company, may affect the assumptions underlying the projections. Accordingly, in our view, projections are too speculative, uncertain and susceptible to change to be appropriately within the purview of statutory underwriter liability. It has been our experience that investment banks acting as underwriters in traditional IPOs have generally been unwilling to assume Section 11 liability for financial projections because the nature of projections makes it inherently difficult for them to establish a due diligence defense. We think that imposing such liability with respect to projections that are required to be included in de-SPAC Registration Statements would frustrate the intent of Congress in establishing the due diligence defense for underwriters.

In addition, if the proposed rules are enacted as drafted, the risk of frivolous litigation for investment banks will rise dramatically. Investment banks have expressed concern that in circumstances where a registrant's stock performance suffers following the closing of a de-SPAC transaction, notwithstanding Securities Act Rule 175 and Exchange Act Rule 3b-6, they could face frivolous lawsuits challenging—with the benefit of hindsight—the reasonableness of the assumptions underlying the projections disclosed in connection with de-SPAC transactions, which, as discussed above, are necessarily speculative. Even if investment banks are ultimately able to prove that the claims brought against them are without merit, litigation would entail significant diversions of time and bank resources. While the same would be true for registrants, banks would be in a far worse position given the large number of transactions they are involved in at any given time.

We recognize that, as discussed above, the Commission hopes to strengthen investor protection by extending gatekeeper obligations as applied in traditional IPOs to de-SPAC transactions. A limitation on

9 *See supra* note 7.

underwriter liability to the IPO Information included in the de-SPAC Registration Statement would not change that result. To the extent that the final rules limit statutory underwriter liability in de-SPAC transactions to the IPO Information included in a de-SPAC Registration Statement, we expect that the investment banks deemed underwriters under the final rules would perform all of the traditional gatekeeping functions, such as due diligence, and would be subject to liability under Section 11 of the Securities Act for untrue statements of material facts or omissions of material facts with respect to that information. And even though underwriters would not have liability for projections and other information in the de-SPAC Registration Statement that would not be included in an IPO Registration Statement, we expect that, as a practical matter, the investment banks deemed underwriters would still review the projections and the assumptions underlying the projections in order to safeguard their reputational interests of being associated with the transaction. In addition, registrants and target companies will continue to have liability for projections, and will be constrained, from a practical perspective, by the fact that investors can and do hold the combined company accountable on its ability to achieve the projections, whether by "voting with their feet" (i.e., selling the combined company's stock) or through litigation.

B. Who is a "Statutory Underwriter" Should be Limited

While the Commission stated in the Proposing Release that proposed Rule 140a addresses the underwriter status of only the SPAC IPO underwriter in the context of a de-SPAC transaction, the Commission also warned that "Federal courts and the Commission may find that other parties involved in securities distributions, including other parties that perform activities necessary to the successful completion of de-SPAC transactions, are 'statutory underwriters' within the definition of underwriter in Section 2(a)(11). For example, financial advisors, PIPE investors, or other advisors, depending on the circumstances, may be deemed statutory underwriters in connection with a de-SPAC transaction if they are purchasing from an issuer 'with a view to' distribution, are selling 'for an issuer,' and/or are 'participating' in a distribution."[10] While it always is the case that courts and the Commission may deem certain participants in a distribution to be statutory underwriters, the inclusion of this explicit statement in the Proposing Release has left many SPAC market participants concerned that the Commission may be implying that it has reached this conclusion in the de-SPAC context. To our knowledge, no court has deemed an advisor (financial, capital markets or otherwise) in a registered M&A transaction to be a statutory underwriter even if they played a significant role in such capacity. Accordingly, the implication of such an expanded definition of "underwriter" would result in disparate treatment for participants and advisors in de-SPAC transactions compared to participants and advisors in traditional IPOs and direct listings, and also would create uncertainty for participants and advisors in other similar transactions such as transformative mergers or acquisitions by public companies.

As noted above, the uncertainty caused by the Commission's commentary on who might constitute a "statutory underwriter" has already curtailed activity in the SPAC IPO and de-SPAC markets causing significant market disruption, ultimately undermining one of the Commission's core missions of facilitating capital formation. We recommend that the Commission clarify that this commentary does not represent a formal legal conclusion by the Commission. We also urge the Commission to clarify that it would view this expansive interpretation of "statutory underwriter" to be applicable in only the most extreme of circumstances on a fact-specific basis. If the Commission takes the proposed expansive view on the definition of "statutory underwriter," all parties contemplating association with a de-SPAC transaction – no matter how limited their potential involvement might be – would be forced to examine their potential Securities Act liability and act accordingly given the ambiguous nature of the proposed rule with respect to

---

[10] Proposing Release at 29483.

WHITE & CASE

what constitutes "participation" in a distribution. Further, the Commission offered little guidance about how the precedents cited in the release with respect to the definition of "statutory underwriter" would apply in the de-SPAC context, and, in the words of Commissioner Peirce from her dissent on the proposed rules, the "more likely result is that SPAC underwriters will do everything possible to avoid being captured by the rule, such as demanding all compensation up front, a result that may not benefit SPAC investors."[11]

C. It Should be Clarified that There is No Underwriter Liability with Respect to the Sale of Securities to Target Company Shareholders

Should the Commission decide to expand the scope of underwriter liability in de-SPAC transactions, we urge the Commission to clarify that such underwriter liability would not extend to the sale of securities to shareholders of a target company in a de-SPAC transaction.

If enacted, proposed Rule 145a would result in any business combination of a reporting shell company involving another entity that is not a shell company to be deemed to have involved a "sale of securities" to the reporting shell company's shareholders. Certain references in the Proposing Release have left some concerned that the proposed rules would subject anyone deemed a statutory underwriter under the final rules to the attendant liability with respect to the sale of securities to a target company's shareholders. This interpretation would be inconsistent with both the text of proposed Rule 145a, as well as the Commission's explicit statement in the release that the "sale of securities" in a de-SPAC transaction would be to the reporting shell company's shareholders (as opposed to the target company's shareholders). Further, in many instances, the structure of the de-SPAC transaction would make such an interpretation illogical. In "target on top" structures, where the target private operating company acquires the SPAC, the shares of the legacy target company's shareholders are not registered at all, and, in a traditional de-SPAC transaction, the same often is true when only cash consideration is payable or when stock consideration is issuable pursuant to a private placement exemption. Accordingly, the Commission should make it clear that any underwriter status that is imposed in a de-SPAC transaction should extend only to the distribution to the SPAC's public shareholders, not the target shareholders.

II. Proposed Item 1606 and Fairness Determinations

The Commission's stated goal in proposing Subpart 1600 of Regulation S-K is to enable investors to "better understand and evaluate the merits of a prospective de-SPAC transaction."[12] We generally agree that the proposed rules and amendments regarding disclosure relating to sponsors, conflicts of interest, dilution (that is included in de-SPAC Registration Statements) and compensation, to the extent not already part of common disclosure practice, will ensure that investors are provided with material information in de-SPAC transactions. Proposed Item 1606(a), however, will not serve to protect or assist investors, but will increase transaction costs for de-SPAC transactions, negatively impacting such transactions and investors, and provide fodder for plaintiffs' firms to extract fees for meritless litigation against SPACs, sponsors and target companies.

A. Item 1606(a) Impermissibly Requires SPACs to Make Fairness Determinations

Proposed Item 1606(a) would require a SPAC to state whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair to the SPAC's unaffiliated security holders.

---

[11] SEC Commissioner Hester M. Peirce, *Damning and Deeming; Dissenting Statement on Shell Companies, Projections, and SPAC Proposals* (Mar. 30, 2022), https://www.sec.gov/news/statement/peirce-statement-spac-proposal-033022.

[12] Proposing Release at 29471.

Proposed Item 1606(b) would require a discussion of the material factors upon which such belief is based and, to the extent practicable, the weight assigned to each factor. According to the proposed rule, the discussion of such factors "shall include," but not be limited to, the valuation of the target company, the consideration of any financial projections, any report, opinion or appraisal described in Item 1607 of Regulation S-K and the dilutive effects described in Item 1604(c) of Regulation S-K.

Item 1606(a) extends beyond eliciting helpful disclosure of the material factors considered by a SPAC's board of directors in connection with a de-SPAC transaction by requiring SPACs to make a substantive fairness determination of the de-SPAC transaction and related financing, specifically to unaffiliated shareholders. Clearly no SPAC would be able to complete a de-SPAC transaction if it disclosed that it *did not* believe that the de-SPAC transaction and any related financing were fair to unaffiliated shareholders. In practice, therefore, only one outcome is practicable for SPACs: a fairness analysis together with a conclusion that the de-SPAC transaction and related financing is fair to unaffiliated shareholders.

Mandating a substantive fairness determination traditionally has been guided by applicable corporate law and case law, and is not within the standard purview of the federal securities laws or the Commission's rulemaking authority.[13] Although the Commission references Section 13(e) of the Exchange Act and the going private rules in the Proposing Release, a de-SPAC transaction is not a going private transaction. The Commission has not cited to any other statutory provision that confers the authority upon the Commission to require fairness determinations in de-SPAC transactions, which suggests that the Commission would be exceeding its authority in adopting Item 1606 as proposed.

As a general matter, we note that the federal securities laws and regulations governing the transactions by which companies enter the public markets are, by design, disclosure-based, and do not mandate fairness determinations in transactions or among transaction participants, as those matters are the purview of state and foreign corporate laws governing the relationship among a corporation, its board or similar governing body, and various other stakeholders. As proposed, Item 1606 would essentially collapse these two distinct legal regimes through the Commission's imposition of its own requirement regarding (i) the substantive matters a board must determine in connection with a de-SPAC transaction and (ii) the particular factors a board must consider in reaching that determination.

Proposed Item 1606(b) expands standard disclosure requirements by dictating certain factors that a SPAC *must* discuss (*i.e.*, consider) in relation to its fairness determination. We believe it is not within the Commission's authority to require SPAC boards of directors to conform their deliberative processes to the Commission's rules and that Item 1606(b) impermissibly encroaches upon the discretion of a board to evaluate whatever information it deems appropriate in deciding to proceed with a transaction. While the factors listed in Item 1606(b) may, depending upon the particular circumstances of a transaction, be deemed material to investors and warrant disclosure in de-SPAC Registration Statements, the Commission's objective of enabling investors to evaluate transactions would be better served by a reformulated rule that focuses on the disclosure of these factors within the context of a board's decision to approve, and to recommend that shareholders approve, a de-SPAC transaction rather than in the context of a fairness determination.

B. The Commission's Concerns are Addressed Elsewhere in the Proposed Rules

[13] 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 (1980).

In citing the going private rules, the Commission states that Item 1606(a) is designed to "address concerns regarding potential conflicts of interests and misaligned incentives."[14] However, Item 1606(a) does not elicit the information that would address conflicts of interests and misaligned incentives. Potential conflicts and misaligned incentives currently are appropriately addressed through the disclosures required under other proposed rules, such as Items 1603 and 1605, which will be more effective than Item 1606 in providing investors with the information needed in order to understand the merits and risks of a transaction.

If the Commission's concern is that investors will not have the benefit of the disclosure regarding the factors underlying a fairness belief specified in Item 1606(b), we believe that concern is unfounded. The factors listed in Item 1606(b) are customarily included in de-SPAC Registration Statements and proxy statements, including in the section(s) setting forth a SPAC board's reasons for approving the de-SPAC transaction. If the Commission believes that the current disclosure practice is insufficient, a better, more effective formulation of Item 1606 would require SPACs to specifically discuss the material factors that the board considered in approving the transaction, including, if relevant, the factors listed in 1606(b), rather than as part of a fairness determination. The result would achieve the enhanced disclosure the Commission is seeking without encroaching on state and foreign corporate law, case law and the discretion of SPAC boards by requiring SPACs to make a substantive fairness statement.

C. Fairness Determinations are Not Required in Traditional IPOs

Proposed Item 1606(a) also is counter to the Commission's stated position that de-SPAC transactions should be regulated in a similar manner as traditional IPOs. Companies conducting traditional IPOs are not required to provide assurances to investors that the IPO is fair to such investors, or that the IPO price is fair to unaffiliated shareholders, even though significant benefits may accrue to founders, management or other transaction participants if the IPO is consummated. A similar fairness requirement in traditional IPOs would be clearly contrary to the disclosure-based paradigm of the federal securities laws and regulations. Instead, IPO investors are provided material information in order to make their own assessment of the potential risks and merits of investing in a company. If the Commission is truly in favor of leveling the playing field, then de-SPAC transactions should be subject to the same disclosure requirements as traditional IPOs.

D. If Item 1606(a) is Adopted, the Commission Should Not Mandate a Separate Determination as to Any Related Financing

If the Commission chooses to adopt proposed Item 1606(a) in its current form, then the fairness determination should be with respect to the de-SPAC transaction and related financing as a whole. The de-SPAC and any related financing are integral and mutually conditional events; there is no value to investors in segregating these transactions. By including "any related financing" in the rule, the Commission seems to be signaling a concern that certain de-SPAC financings may not be fair to public investors given the dilutive impact on the SPAC's shareholders or the benefits that may accrue to financing providers. If this is the Commission's concern, then the rules should be designed to provide investors with sufficient information to make their own evaluation of whether the terms of any related financing render the de-SPAC transaction unattractive. As noted above, we believe these concerns are addressed through Items 1603 and 1605 of Regulation S-K.

E. Item 1606(a) Will Lead to Increased Frivolous Litigation

[14] Proposing Release at 29473.

Proposed Item 1606(a) will expose SPAC boards to more frivolous lawsuits and associated costs, ultimately to the detriment of investors. We believe Item 1606(a) potentially opens a "Pandora's box" of shareholder claims regarding the board's "reasonable belief" as to fairness, which will not protect investors but will simply be another tool for the plaintiffs' bar to extract fees and drain resources from newly public companies.

Stock prices rise and fall based on myriad factors that are often beyond a company's control. We believe that if Item 1606(a) is adopted, then any post-closing share price decline will give rise to plaintiffs seeking damages from the combined company by claiming, through hindsight, that the SPAC's fairness belief was unreasonable or misleading. In this way, Item 1606(a) will operate as an implicit guarantee of stock price performance and rather than enhancing disclosures, would significantly increase litigation risk and the attendant costs (*e.g.*, D&O insurance, litigation expenses, etc.) for SPACs, targets and combined companies. This consequence could unnecessarily chill the market for de-SPAC transactions and is inconsistent with the Commission's core mandates to protect investors and foster efficient capital formation.

III. Proposed 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 of 1940 (the "***Investment Company Act***") for SPACs that meet the conditions of the safe harbor.

A. SPACs are Primarily Engaged in a Non-Investment Business

We believe that SPACs simply are not investment companies under Section 3(a)(1)(A) of the Investment Company Act because they are not, and do not hold themselves out as being engaged primarily, or propose to engage primarily, in the business of investing, reinvesting or trading in securities. 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.[15]

As the Commission acknowledges in the Proposing Release, SPACs are formed for the purpose of identifying and effecting a business combination with one or more businesses, and not for the purpose of being an investment company, and 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.[16] 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

15 The *Tonopah* factors were set forth by the Commission in *In the Matter of the Tonopah Mining Co. of Nevada*, 26 S.E.C. 426 (Jul. 21, 1947).

16 Proposing Release at 29497.

> Investment Company Act and, in assessing this status, these factors would need to be weighed together with the other *Tonopah* factors.[17]

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."[18] "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."[19]

In the Proposing Release, the Commission states that it is concerned 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 a duration limitation, which requires that a SPAC (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's IPO registration statement and (ii) consummate the business combination no later than 24 months after such effective date (the "***Duration Limitation***"). The Commission does not provide any evidence of such investor sentiment to substantiate its concerns. Moreover, an investor seeking exposure to the treasury securities in which a SPAC is limited to investing would be unlikely to invest in a SPAC rather than directly in such securities or a fund that invests in such securities, given the inherently different characteristics of SPACs as compared to typical investment funds. 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 after announcement of progress toward a de-SPAC transaction based on market perception of that particular proposed transaction. This is starkly different from a fund that invests in treasury securities whose share price is closely tied to the value of its underlying securities.

B. The Duration Limitation is Detrimental to the Interests of Investors

Most of the conditions of the proposed safe harbor would codify existing SPAC practices that already are included in SPAC organizational documents or trust agreements. However, the Duration Limitation would put an arbitrary deadline on SPACs and, contrary to the stated intent of many of the other proposed rules, would put pressure on SPACs to prioritize speed over diligence and quality, to the detriment of investors and contrary to the fiduciary obligations of a SPAC's board of directors.

Moreover, the Duration Limitation would make potential target companies reluctant to engage in discussions and commit resources to a potential de-SPAC transaction even before the actual expiration dates of the Duration Limitation. First, the 18-month deadline to sign a deal, in practice, would operate as

---

17 *Id*.

18 *Tonopah Mining Co.*, 26 S.E.C. at 430.

19 *S.E.C. v. Nat'l Presto Indus., Inc.*, 486 F.3d 305, 315 (7th Cir. 2007).

a much shorter deadline, because as that deadline approaches, potential target companies would be concerned that discussions may not be concluded by the 18-month mark. The 24-month deadline to consummate the de-SPAC transaction would be even more concerning, as the target company would worry that it could take longer than six months to close the transaction, and all of the time and resources committed to the transaction would be completely lost. Many of the factors that could delay the signing or closing of a de-SPAC transaction are outside the control of the parties, such as regulatory approvals, the SEC staff review process and the financial statement audit and review process. Inhibiting the ability of a SPAC to consummate a business combination runs completely contrary to the interests of shareholders who invested with that very expectation.

In justifying the 18- and 24-month timeframes, the Commission in the Proposing Release cites historical statistics for SPACs with effective IPO dates between January 1, 2016 and December 31, 2019 about the average length of time it took those SPACs to sign and close de-SPAC transactions.[20] Those statistics show that 41% of those SPACs did not announce an agreement to enter into a de-SPAC transaction within 18 months, and 35% did not complete a de-SPAC transaction within 24 months. Rather than justifying the proposed Duration Limitations, these statistics demonstrate that the Duration Limitations would very often operate to force SPACs to liquidate without closing a de-SPAC transaction, validating our concern expressed above that potential target companies will be reluctant to expose themselves to this risk. Moreover, in our experience, it is now taking longer for SPACs to sign and close de-SPAC transactions than it did prior to this year, due to market conditions and significantly longer review times by the Commission's staff.

As support for the Duration Limitations, the Commission also refers to the 18-month timeframe in Rule 419. That rule was adopted 30 years ago, and has seldom been used in practice. We submit that the vast experience with SPACs in the years following the adoption of Rule 419 is much more relevant than the timeframe the Commission considered adequate at that time for the purposes of Rule 419. Rather, the same rationale that the Commission expressed in the adopting release for Rule 419 applies equally to SPACs. That is, even if a SPAC were an investment company, in light of the purposes served by the establishment of a SPAC's trust account, the limited nature of the investments permitted to be held in the trust account and the limited duration of a SPAC, a SPAC should not be required to register as an investment company.[21] All SPACs have a duration limitation in their organizational documents which generally require the SPAC to consummate a de-SPAC transaction within 18 to 24 months (but, crucially, with the possibility of extension), and virtually all SPACs publicly traded in the United States are listed either on The Nasdaq Stock Market or the New York Stock Exchange, which each require a listed SPAC to consummate its initial business combination within 36 months from its IPO. These duration limitations, under which the SPAC market has comfortably operated for 20 years, should be adequate to obviate the need for regulation under the Investment Company Act.

C. <u>In Light of the Other Proposed Rules, Regulation under the Investment Company Act is Unnecessary</u>

In light of the other rules being proposed by the Commission specifically to regulate SPACs, layering onto SPACs an entirely different regulatory regime designed to address the same principal concerns is unnecessary. The Investment Company Act was principally designed to: (i) prevent insiders from taking advantage of funds they manage; (ii) require effective disclosure; and (iii) ensure the equitable

[20] Proposing Release at 29520 – 29522.

[21] *See Blank Check Offerings*, 57 Fed. Reg. 18037 at 18043 (Apr. 28, 1992).

treatment of shareholders.[22] These are the very concerns that the Commission seeks to address with the other proposed rules, which were designed to address the specific issues the Commission believes are raised by SPACs. In effect, the Commission is creating a bespoke regulatory regime for SPACs. As the principal areas of concern that the Investment Company Act was designed to address are more than adequately addressed by the other rules being proposed by the Commission, the threat of having to comply with the Investment Company Act should not operate as a "gotcha" to compel SPACs to take refuge in the safe harbor or, as William Birdthistle, the Director of the Division of Investment Management, suggested in an interview last year with Joanna Makris, the Head of Equity Research at Boardroom Alpha, hold all of their assets in cash.[23]

D. <u>Holding Assets in Cash</u>

Proposed Rule 3a-10 requires a SPAC to distribute its assets in cash to investors as soon as reasonably practicable after missing either of the deadlines in the Duration Limitation. However, SPACs also should be permitted to continue their operations if they convert their assets to cash. A company whose assets consist only of cash is indisputably not an investment company under the Investment Company Act. Indeed, Mr. Birdthistle suggested in his interview with Ms. Makris that moving assets to cash could avoid the need to register as an investment company:

> Ms. Makris: "If I'm a pre-merger SPAC right now, what's your advice to me? And what, should these companies do operationally, if anything, right now?"
>
> Mr. Birdthistle: "You know, if I were to advise a SPAC, I'd be certainly tempted to move my proceeds into cash. And then I could make a claim that under the definition of an investment company, I'm not engaged in the business of investing in securities … to be quite clear."[24]

Accordingly, if Rule 3a-10 is adopted, it should make clear that a SPAC that reaches the Duration Limitation need not distribute its assets in cash to investors if it converts its assets to cash at that time.

E. <u>The Importance of Getting a Safe Harbor Right</u>

We note that proposed Rule 3a-10 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."[25] In addition, Mr. Birdthistle 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."[26] 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.

---

[22] *See* Michael B. Weiner, *A Historical Analysis of the Investment Company Act of 1940,* 10 Mich. Bus. & Entrepreneurial L. Rev. 67 (Fall 2020).

[23] Joanna Makris, *Fireside Chat: Does the Latest Bill Ackman Lawsuit Spell Doom for SPACs?*, InvestorPlace (Sept. 29, 2021), https://investorplace.com/2021/09/fireside-chat-does-the-latest-bill-ackman-lawsuit-spell-doom-for-spacs/.

[24] *Id*.

[25] Proposing Release at 29502.

[26] Commission Meeting, YouTube (Mar. 31, 2022), https://www.youtube.com/watch?v=t6qX8FGiI_8.

IV. Dilution Disclosure in SPAC Registered Offerings Other Than for de-SPAC Transactions

Proposed Items 1602(a)(4) and 1602(c) of Regulation S-K would require, in any registration statement filed by a SPAC, other than for de-SPAC transactions,[27] (i) the disclosure of the remaining pro forma net tangible book value per share at quartile intervals up to a maximum redemption threshold in tabular format on the cover page and within body of the prospectus, (ii) a description of material potential sources of dilution following the registered offering and (iii) the disclosure of the amount of future dilution from the public offering price that will be absorbed by purchasers of the securities being offered, to the extent known and quantifiable.

We submit that proposed Items 1602(a)(4) and 1602(c) of Regulation S-K should not be adopted. As described below, such proposed disclosure would not provide any useful information to investors and would produce inherently misleading disclosure.

Dilution disclosure has become customary in connection with de-SPAC transactions as it can provide meaningful information to existing or prospective SPAC investors in evaluating the specifics of a proposed de-SPAC transaction. In addition, SPACs customarily provide qualitative narrative disclosure in their IPO registration statements describing the potential sources of future dilution for investors, such as in connection with the de-SPAC transaction and any related financing. However, the specifics of a de-SPAC transaction are never known or quantifiable at the time that a SPAC files its registration statement for its IPO because a SPAC is prohibited from selecting a specific de-SPAC target and from engaging in substantive discussions with a potential de-SPAC target prior to the closing of its IPO.

As a result, proposed Items 1602(a)(4) and 1602(c) would require dilution disclosure informed by purely hypothetical assumptions that would be inherently devoid of nearly all of the actual material details that typically comprise dilution disclosure in a de-SPAC transaction, including the nature, size and composition of the de-SPAC transaction and any related financing. After all, de-SPAC transactions can be structured in innumerable and diverse ways, making it impossible to base in fact any assumptions regarding such a transaction with unidentifiable terms. If hypothetical terms of a de-SPAC transaction are assumed, such assumptions would need to be presented with lengthy and detailed caveats regarding the forward-looking nature of such disclosure explaining that such assumptions are not based on any actual negotiated terms and that it would be inappropriate to rely on any such assumptions which will almost certainly not come to pass once the SPAC structures its actual proposed de-SPAC transaction. As one common example highlighting the impossibility in reasonably selecting any hypothetical assumptions for such disclosure, many de-SPAC transactions are structured such that the de-SPAC transaction is accounted for as a reverse recapitalization in which the de-SPAC target is determined to be the accounting acquirer, a structure in which the SPAC's book value per share will cease to be a relevant figure for securityholders in the resulting combined company.

Without an identified de-SPAC target or structured de-SPAC transaction, the only known information at the time of the SPAC's IPO that could be utilized to calculate the proposed tabular information required by proposed Item 1602(a)(4) would be the size of the SPAC's trust account, the number of outstanding shares and the offering price per share, in addition to other liabilities incurred by the SPAC. Such limited information produces an absurd result when net tangible book value per share is calculated in accordance with accounting principles generally accepted in the United States of America ("***U.S. GAAP***"). All of a SPAC's shares sold to public investors in the SPAC's IPO (the "***public shares***")

[27] Other than in IPOs and in a few rare circumstances to register the resale of affiliate-held securities purchased in the IPO, SPACs do not file registration statements that are otherwise unrelated to a de-SPAC transaction.

are required to be classified as temporary equity upon the completion of the IPO in accordance with Accounting Standards Codification ("***ASC***") Topic 480, "*Distinguishing Liabilities from Equity*." As a result, the calculation of pro forma net tangible book value per share in accordance with U.S. GAAP inevitably produces a deficit and remains the same constant figure across any assumed redemption thresholds because the metric solely takes into account the non-redeemable shares issued to the SPAC's founders prior to the IPO (the "***founder shares***"), which are classified as permanent equity, and none of the public shares, which are classified as temporary equity. As a result, the proposed sensitivity analysis conveys no additional information. In other words, the calculation of pro forma net tangible book value per share produces a result that is not practically relevant to prospective investors in the public shares whatsoever. Further, if the SPAC issues warrants in its IPO that do not meet the criteria for equity treatment in accordance with ASC Topic 815-40, "*Accounting for Convertible Instruments and Contracts in an Entity's Own Equity*," and must be recorded as liabilities, the calculation of pro forma net tangible book value per share produces an even larger deficit which remains constant across redemption thresholds.

In addition, it is unclear whether a maximum redemption threshold for purposes of proposed Item 1602(a)(4) should require or call for anything other than the redemption of 100% of the SPAC's public shares. A maximum redemption threshold in an actual de-SPAC transaction could be tied to a negotiated condition in the business combination agreement, the SPAC's governing documents or other factors such as stock exchange listing requirements, each of which widely varies based on the terms of the de-SPAC transaction. This means that a maximum redemption scenario for a SPAC would vary across different de-SPAC transactions even if one assumes the SPAC's governing documents are identical. As a result, any purported maximum redemption scenario disclosed at the time of IPO cannot be based on reasonable assumptions given the inherent lack of specifics available at the time of the IPO for a prospective de-SPAC transaction. In any particular de-SPAC transaction a SPAC may or may not be able to sustain the redemption of 100% of its public shares and comply with the SPAC's governing documents or other requirements. Alternatively, a SPAC may actually become subject to a maximum redemption scenario that is lower than the quartile intervals required to be presented by proposed Item 1602(a)(4). Further, some de-SPAC transactions are structured such that certain funding mechanisms, such as backstop, forward purchase or PIPE arrangements, apply only in the event of certain redemption thresholds, further complicating the ability to make the assumptions required by proposed Item 1602(a)(4).

We therefore submit that the disclosure required by proposed Item 1602(a)(4) would be meaningless and misleading to an investor in the SPAC's IPO.

Because no details of a de-SPAC transaction are known or quantifiable at the time of the IPO, it would appear that the tabular information required by proposed Item 1602(c) could only be provided when there is an agreement entered into at the time of the IPO relating to the future issuance of securities by the SPAC, such as pursuant to a committed forward purchase agreement. However, providing dilution disclosure relating to such a circumstance, i.e., a forward purchase agreement on its own without the broader context of a specific de-SPAC transaction, would be misleading rather than useful for investors for all of the same reasons described above in our discussion of Item 1602(a)(4).

The Proposing Release states that "we expect that the tabular format of this disclosure will help investors (especially those that are less financially sophisticated) more easily process the financial implications of dilution and potentially improve their investment decisions" which "might more accurately represent the dilution that they might experience if they choose to invest in the SPAC."[28] However,

[28] Proposing Release at 29524.

proposed Items 1602(a)(4) and 1602(c) of Regulation S-K would only confuse and mislead investors by requiring the presentation of hypothetical data that would by its nature lack nearly all of the key information underlying useful de-SPAC dilution disclosure and would in practice produce absurd results. Rather than "allowing investors to more easily analyze [dilution information] and compare it across SPACs,"[29] such calculated information would be irrelevant and misleading to an investment in the public shares.

V. <u>Regulation of Post-de-SPAC Combined Companies</u>

In the Proposing Release, the Commission stated "In our view, a private operating company's method of becoming a public company should not negatively impact investor protection." We agree and further submit that the method by which a private operating company chooses to go public should not negatively impact its regulatory treatment under the Commission's rules. Companies that go public through a de-SPAC transaction provide commensurate historical legal and financial information to investors as part of the de-SPAC process, including through filing a de-SPAC Registration Statement, the contents of which is similar to a Form S-1 for a traditional IPO. Accordingly, consistent with the Commission's approach to treating like cases alike, the Commission should align not only the disclosure and liability protections between de-SPAC transactions and traditional IPOs, but also the regulatory requirements applicable to the resulting public companies. We therefore propose that the Commission make the following revisions to its rules:

- *Streamline the information required to be included in a "Super 8-K"*. The information required by Item 2.01(f) of Form 8-K is duplicative of the disclosure in a de-SPAC Registration Statement. Typically investors only look to the Super 8-K for disclosure regarding the number of redemptions and post-closing capitalization of the combined company. Item 2.01(f) of Form 8-K should be streamlined to require only these items and any other material developments that occurred in connection with the closing of a de-SPAC transaction and not a repetition of the information that is already included in the de-SPAC Registration Statement.
- *Exclude combined companies following de-SPAC transactions*. Securities Act Rule 144(i) unnecessarily impedes resales of privately placed securities for combined companies following de-SPAC transactions. The inability to remove restricted securities legends from privately placed shares raises costs for such combined companies and frustrates investors who are unable to deposit their securities into a brokerage account without a legend, thereby depriving them of the full benefit of owning such shares.
- *Exclude combined companies following de-SPAC transactions from the definition of "ineligible issuers" in Securities Act Rule 405*. The de-SPAC registration process results in the same information being provided to investors as compared to a traditional IPO, such that the Staff's concerns regarding the lack of operations of shell companies do not apply to combined companies following de-SPAC transactions.
- *Eliminate the prohibition on combined companies following de-SPAC transactions filing a Form S-8 for 60 days after the closing of the de-SPAC transaction.*
- *Permit broker dealers to rely on Rule 139 safe-harbor to publish research reports following the closing of a de-SPAC transaction.*

* * *

29 *Id.*

We hope the Commission and its staff find our comments useful in considering whether and how to adopt and formulate any final rules. If there are any questions about any of our comments, we would welcome an opportunity for further discussion. Please do not hesitate to contact Joel L. Rubinstein at 212.819.7642, Jonathan P. Rochwarger at 212.819.7643, Elliott M. Smith at 212.819.7644 or Daniel E. Nussen at 213.620.7796.

Sincerely,

/s/ White & Case LLP

White & Case LLP