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SMALL BUSINESS
CAPITAL FORMATION ADVISORY COMMITTEE

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100 F Street, N.E.
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1 P R O C E E D I N G S

2 MS. GARRETT: Good morning, and welcome to
3 today's meeting of the SEC's Small Business Capital
4 Formation Advisory Committee. It's good to see all of
5 you. I hereby call the meeting to order. Julie, do we
6 have a quorum for the meeting?

7 MS. DAVIS: Yes, we do have a quorum, and I'll
8 take this opportunity to give a disclaimer for any staff
9 speaking today. We're speaking on our own behalf and
10 not necessarily on the behalf of the Commission or any
11 of the commissioners. Thanks.

12 MS. GARRETT: Thank you Julie, and before we
13 get started with our agenda items, I would like to
14 extend a special thank you to the Chair and Commissioner
15 Peirce for attending today's meeting. We also extend a
16 big thank you to Martha Miller, who has left her
17 position as the Director of the Office of the Advocate
18 for Small Business Capital Formation. Martha has gone
19 on to pursue new opportunities. We thank Martha for
20 building the office from the ground up and being a great
21 leader and committee member.

22 Her successor will have some big shoes to
23 fill. We are happy to be working with Sebastian Gomez,
24 the Deputy Director of the Office, and the rest of the
25 team at the Office of the Advocate for Small Business

1 and Capital Formation, especially Julie Davis and Jenny
2 Choi who help us immensely.

3 We also want to thank our guest speakers for
4 taking the time to come talk to us today, and finally we
5 appreciate the members of the public who have tuned in
6 to watch the meeting via webcast on sec.gov. As a first
7 matter, I would like to discuss some changes to the
8 committee membership. Unfortunately, Porvi (phonetic)
9 has resigned from the committee. As you know, Porvi is
10 a business owner and founder of a company, and we
11 understand that she has limited time. We thank Porvi
12 for all of the work and time on the Committee.

13 And today, we will welcome a new member to the
14 committee and the Commission has appointed Donnel Baird
15 to the Committee. Donnel is the Founder and CEO of
16 BlocPower, a Brooklyn based climate technology company
17 that uses machine learning and structured finance to
18 partner with utilities and governments that upgrade
19 building's utility energy systems.

20 BlocPower has raised capital using multiple
21 regulatory pathways, including pre-seed financing from
22 venture capital funds, regulation crowdfunding, and
23 institutional investors. We look forward to working
24 with Donnel and believe his climate experience will be
25 put to good use today if he's able to join the meeting

1 because the first item on our agenda today will be
2 discussing the Commission's recently proposed rules on
3 climate related disclosures.

4 In our second agenda item, the Committee will
5 be discussing the Commission's recently proposed rules
6 on SPACs. We have lined up great speaker to present on
7 each of those topics, and I look forward to the
8 committee engaging in discussions with them and
9 potentially coming up with recommendations with respect
10 to each of the proposals.

11 Before we turn to our agenda items, we are
12 pleased to recognize the Chair and Commissioner Pierce
13 for opening remarks. Chair Gensler?

14 CHAIR GENSLER: Thank you so much Carla and
15 thanks for all the members of the Small Business Capital
16 Formation Advisory Committee. I also want to welcome
17 Donnel to the committee and extend my gratitude to
18 Porvi, as you mention, and also Martha Miller who ran
19 the office so well over these last number of years and
20 was our first Head of the Small Business Office.

21 As is customary and as Julie said, I'd like to
22 note that I'm speaking not on behalf of the Commission
23 or the SEC staff. I've often spoken to this committee
24 about my dad, Sam Gensler, with nothing more than a high
25 school education and his mustering out pay from World

1 War II. He started a small business repairing vending
2 machines and then putting pin machines, and candy
3 machines, and vending machines in the streets of
4 Baltimore.

5 Well, tomorrow would've been his hundredth
6 birthday, so I'm thinking about my dad right now. I've
7 been thinking recently about a world that my dad grew up
8 in in the Roaring 20s investing boom. New industries
9 rose, yet investor protections at best were piecemeal.
10 And over time as my dad matured, our markets matured as
11 well thanks to the work of this agency that was stood up
12 when he was just in middle school, the SEC, in those
13 formative 30s and early 40s.

14 Really to maintain fair, orderly, and
15 efficient markets, of course, to protect investors, and
16 importantly facilitate capital formation for business,
17 including small businesses like the one he ran. Now, he
18 never tapped the public markets. He never went to
19 venture capital. He did the traditional sort of friends
20 and family rounds because it was just that small a
21 business.

22 But as our technologies and markets continue
23 to evolve, it's through our time-tested securities laws
24 that we can offer a steadying hand to investors and
25 businesses of all size, and it is in this context that I

1 want to thank you all using today's agenda addressing
2 two recently proposed rules of the Commission, some
3 climate related disclosures, special purpose acquisition
4 companies. I look forward to the comments, and we'll
5 put the transcript of this meeting into those respective
6 files because it's important parts of the administrative
7 record and the Commission's and staff's consideration of
8 what steps to take next.

9 Let me just briefly on a high, very high
10 level, give you thoughts on each of the proposals. With
11 related to climate related disclosures, I think it
12 builds upon the Commission's long tradition of
13 disclosures. That core bargain back to when my dad was
14 just in middle school, and the agency was stood up in
15 the 30s. The core bargain from the 30s is that
16 investors get to decide which risks to take as long as
17 the public companies provide full, fair disclosure of
18 relevant material information.

19 And over the decades, disclosure needs
20 evolved. Many types of risk factors which were added in
21 the 1960s, 1964 I think, environmental in the 1970s and
22 so forth, have been added over time. Today, one of
23 those risk factors that investors are actually
24 considering today when they're buying and selling and
25 making investment decisions is climate related risk.

1 And so, this is a conversation already taking
2 place between issuers on the one side and investors on
3 the other side right now. Today, hundreds of issuers
4 are disclosing climate related information. Investors
5 representing tens of trillions of dollars are making
6 decisions based on that climate related information.

7 However, without clear rules of the road,
8 different companies are disclosing different amounts of
9 information and different places at different times, and
10 also with different methodologies and approaches and so
11 forth. So, that's why I believe that this proposal is
12 in line with our disclosure based, not merit based
13 regime, but disclosure-based regime and would help
14 ensure that investors receive consistent comparable and
15 useful information.

16 One could think of it almost like about
17 standardization of data and whether when somebody wants
18 go long green and short what's called brown assets, or
19 maybe they disagree with that and what to go short green
20 assets and long brown assets. The data, the
21 comparability of the data, is helpful for capital
22 markets for issuers and investors.

23 The proposal would include certain exemptions
24 and phase ins for small filers, particularly around
25 which types of emissions related information those small

1 filers would need to disclose, and we welcome the
2 feedback from, of course, the broad public but from this
3 committee and your discussion today.

4 You've also decided to take up a look at the
5 SEC's proposals in special purpose acquisition
6 companies. SPACs as you know go public in two stages.
7 The first stage, which I would call the blank check IPO
8 stage, and then later the target company has an IPO, but
9 they call it a de-SPAC transaction to go public.

10 Each stage offers alternative paths for
11 traditional IPOs for companies to raise capital from the
12 public, and that competition of ideas and forms, while
13 good, also raises a number of issues because these paths
14 don't offer the same protections and obligations
15 associated with traditional initial public offerings.
16 That's why the SEC's recent proposal, I believe, and why
17 I support it - it would strengthen disclosures,
18 marketing practices, gatekeeper and issuer obligations.

19 This consistency can advance our three-part
20 mission no matter how the issuer, big or small, raises
21 capital from the public and no matter how an investor,
22 big or small, makes decisions about that investment
23 opportunity. It's best for everyone to follow similar
24 rules and guiding principles around disclosure and
25 marketing practices and gatekeepers.

1 We've already gotten a lot of feedback on both
2 these rules, some comments for, some against. And
3 either way, we need to hear your thoughts, including in
4 response to what you hear shortly from -- the Division
5 of Corporate Finance is going to walk you through some
6 of this, and this dialogue you have with each other.
7 Please weigh in and I thank you. I look forward to the
8 readouts from today's discussion.

9 MS. GARRETT: Thank you, Chair Gensler, and
10 thank you for coming to the meeting. Commissioner
11 Peirce?

12 COMMISSIONER PEIRCE: Thank you, Carla, and
13 thank you to the rest of the committee and to today's
14 guest speakers for sharing your thoughts on the
15 potential effects of the commission's proposed rules
16 relating to climate change disclosures and SPACs on
17 small businesses. Welcome to the committee, Donnel, and
18 I echo Carla's thanks to Martha Miller and gratitude
19 also to Sebastian and the team for taking up the mantle
20 without missing a beat.

21 Today's dialogue represents an important part
22 of the rule making process given the consequential
23 nature of these proposals for small businesses. The
24 climate change proposal would vastly expand the
25 disclosure requirements and compliance burdens for all

1 public companies, large and small.

2 When we proposed the rules, I laid out my
3 general concerns. I'm not going to go through those
4 again today, but I think small companies are likely to
5 face unique challenges in complying with the proposal,
6 and I hope to hear today what some of those challenges
7 might be.

8 Smaller reporting companies would be except
9 from scope 3 disclosure requirements and would have a
10 longer transition period for compliance in other public
11 companies. But is this limited relief sufficient?

12 To justify not exempting small public
13 companies from the rules, the Commission explains that
14 climate related risks may pose a significant risk to the
15 operations and financial condition of domestic and
16 foreign issuers, both large and small. Do you agree
17 that climate related risks pose a significant risk to
18 all small public companies?

19 If those risks exist, do the proposed benefits
20 of the rule justify the costs associated with
21 compliance? Should the Commission exempt smaller
22 reporting companies from some or all of the proposed
23 climate related disclosure requirements? Should the
24 Commission exempt emerging growth companies from some or
25 all of the proposed requirements?

1 The release was dismissive of the notion that
2 the costs associated with the proposed rules could deter
3 a private company from going public. Was the Commission
4 correct or might these new requirements be a material
5 consideration for companies considering going public?

6 The proposal's effects will extend to small
7 private companies as well. To calculate their scope 3
8 emissions, public companies inevitably will demand that
9 private company suppliers supply them with climate data.

10 Public companies may do more than demand data.
11 The Commission, in fact, bluntly stated that although a
12 registrant may not own or control the operational
13 activities in its value chain that produce scope 3
14 emissions, it nevertheless may influence those
15 activities, for example, by working with its suppliers
16 and downstream distributors to take steps to reduce
17 those entities' scope 1 and 2 emissions, and thus help
18 reduce the registrant scope 3 emissions and any intended
19 risks.

20 What will the costs be for small private
21 companies to reduce their emissions to improve the
22 public image of their public company counter parties at
23 the vast of the Commission?

24 The SPAC proposal would require significant
25 changes to the operations, economics, and timeline of

1 SPACs. Does the proposal diminish the desirability of
2 SPACs as a vehicle by which small businesses can become
3 public companies? What is attractive about SPACs and
4 small businesses seeking to enter the public markets,
5 and what about the traditional initial public offering
6 process is uninviting to these companies?

7 As you consider the proposal, be mindful of
8 the fact that it addresses more than just SPACs. For
9 example, it would deem many business combination
10 transactions involving a reporting shell company and
11 another entity that is not a shell company to constitute
12 a sale of securities. How will this change effect the
13 ability of reporting shell companies to enter into
14 business combinations with operating companies?

15 Are there unintended consequences for shell
16 companies are their investors? Insights from the
17 committee members, guest speakers, and any subsequent
18 recommendations offered by the Committee will be
19 valuable inputs for the Commission. As Chair Gensler
20 mentioned, we'll be considering them as part of the
21 rulemaking process.

22 Thank you to this committee and to the guest
23 panelists for engaging in a thoughtful dialogue on these
24 issues. I'm looking forward to hearing your views on
25 these subjects. Thank you.

1 MS. GARRETT: Thank you, Commissioner Peirce.
2 We are happy now that our new member, Donnel Baird, has
3 been able to join the meeting. Welcome, Donnel. We're
4 excited to have you on our committee, and would you like
5 to take a moment to introduce yourself, please?

6 MR. BAIRD: Yes. Hi, apologies for not being
7 able to figure out how to log into WebEx quickly, but
8 I'm super excited to be here. I have followed the great
9 work of the SEC since 2010 when I enrolled in business
10 school and learned what a stock actually was. Before
11 that, I was a community organizer and a political
12 organizer.

13 I attended Columbia. I had the good fortune.
14 Chairman Gensler came and did a small panel with
15 Professor Alyssa Glenn and then Congressman Barney Frank
16 at Columbia where he was scintillating in his comments
17 about the need for a great regulatory environment to
18 spur growth, and I just couldn't be more thrilled.

19 I run a clean tech startup based in Brooklyn
20 called BlocPower. We decarbonize urban buildings
21 meaning we turn buildings into Teslas. We rip out
22 fossil fuel equipment and replace it with all electric
23 heating, cooling, hot water cooking equipment in
24 buildings, so all electric buildings powered by solar
25 wind, hydroelectric power.

1 We've worked with over 5,000 families in New
2 York City and have products across America. We have
3 done 2 or 3 filings with the SEC for crowdfunding.
4 We've raised about \$100 million in private capital from
5 Wall Street and Silicon Valley for our firm over the
6 last 8 years. And we get calls from SPACs all the time
7 and are looking to learn more about how that all works,
8 but more broadly, really interested in what is happening
9 with cryptocurrencies and the need for regulation there,
10 and just deeply interested in transparency and fairness,
11 particularly for financially underserved communities,
12 which is where I'm from.

13 So, I'm delighted to join all of you all and
14 super excited to be with you.

15 MS. GARRETT: Great. Thank you so much
16 Donnel and welcome to the committee. We're excited to
17 have you on and look forward to your expertise today as
18 we discuss climate related disclosures as I mentioned
19 earlier. We will now turn to our first agenda item, and
20 it is the Commission's proposed rules on climate related
21 disclosures.

22 On March 21, 2022, the Commission proposed
23 rules to enhance and standardize climate related
24 disclosures for investors. The proposed rules would
25 among other things require registrants to include

1 certain climate related disclosures in their
2 registration statements and periodic reports. The
3 Commission has set May 20 as the last day to receive
4 comments on the proposed rule, thus feedback on the
5 proposed rule is ongoing, and we as a committee have the
6 opportunity to provide our thoughts to the Commission on
7 the proposed rule during this meeting.

8 We have with us Erik Gerding, who is the
9 Deputy Director of Legal and Regulatory Policy of the
10 SEC's Division of Corporate Finance. Erik will first
11 provide an overview of these proposed rules. Erik, we
12 are grateful for all of the hard work that you and your
13 staff do at the Commission, and we appreciate you for
14 taking the time to be with us today. Erik?

15 MR. GERDING: Thank you Carla. Thank you to
16 all of the Advisory Committee. It's great to be here
17 with you today. Again, I'll briefly note that my
18 remarks today represent my views and not those of the
19 Commission or its staff. As was noted, I'm here to
20 summarize the proposal that the commission voted to make
21 in March 2022 to require certain new climate related
22 disclosures of public companies. Before I get started,
23 I want to underscore the last part of that sentence

24 This proposal applies only to public
25 companies. That is those that are required to make

1 reports under the Securities Exchange Act of 1934, for
2 example, 10-Ks, 10-Qs, etcetera. This important nuance
3 may sometimes get lost. Some communicators recommended
4 that the Commission apply disclosure requirements to
5 transaction or resale exemptions, but those are not part
6 of the proposal currently out.

7 So, first I'll give an overview of why the
8 Commission proposed the climate disclosure rules.
9 You've heard a little bit about that from the Chair
10 already. Second, I'll talk about what's in the proposed
11 disclosures, and then third, I'll take questions. So,
12 the reason for the rule, proposed rules seek to provide
13 investors with information about climate related risks
14 and opportunities, and I want to focus a little bit on
15 the idea of risk, and there's five points I want to
16 underscore there.

17 First, the rule focuses on investor needs for
18 information, so we are working within our statutory
19 mandate to provide investors with information about
20 issuers. Second, the rule focuses on risks, which are
21 adverse events that may occur in the future. Third,
22 investors care about risks because they care about
23 future performance and a company's long-term prospects.

24 Fourth, the Commission has for decades
25 required disclosures to inform investors about risks and

1 future events. In a company's risk factors, for
2 example, management discussion and analysis, and MDNA
3 Sections number 10-K among other areas of public company
4 disclosure. And fifth, the company also requires -- has
5 also long required disclosures about environmental risks
6 dated back several decades.

7 The climate related disclosures are thus
8 consistent with the SEC's disclosure rules with its
9 statutory mandate and with long-standing disclosure
10 practice. For example, all the way back in 2010, 12
11 years ago, the Commission published guidance for
12 registrants on how the Commission's existing rules may
13 require disclosure of the impacts of climate change on a
14 registrant's business or financial condition.

15 Since that time, climate related impacts have
16 been increasingly well documented, and awareness of
17 climate related risks to businesses and the economy has
18 grown. Investors have also increased their demand for
19 more detailed information about the effects of climate
20 on a registrant's business, and for more information
21 about how a registrant is addressing climate related
22 risks when conducting its operations and developing its
23 business strategy and financial plans.

24 So, today investors realize that climate
25 related risks can have an impact on public company's

1 financial performance or position. They'll be material
2 to investors in making their investment or voting
3 decisions. While many companies have begun to provide
4 some of the climate related information voluntarily,
5 much of this disclosure occurs outside of Commission
6 filings under different third-party frameworks and at
7 various levels of completeness.

8 The Commission is concerned that the existing
9 disclosures of climate related risk do not provide
10 investors with the detailed and reliable climate related
11 information that investors seek to make informed
12 investment and voting decisions. The proposed rules are
13 therefore intended to fill this gap.

14 So, now I'd like to turn to the main
15 components of the proposal. Again, I do want to
16 underscore the proposed rule would only apply to '34 Act
17 reporting or public companies. The first main component
18 of the proposal is to bring consistency and
19 comparability to how a management team of an issuer
20 discloses a company's strategy, governance, and risk
21 management with respect to climate related risks.

22 The proposal builds upon the TCFD framework.
23 TCFD, which stands for Taskforce for Climate Related
24 Financial Disclosures, is a non-governmental body drawn
25 from the private sector that is developing frameworks

1 for companies to use in making climate disclosures. The
2 disclosures in the Commission's proposal include
3 disclosures about physical risk such as relocating
4 facilities due to rising sea levels.

5 The proposal also discusses transition risks,
6 which may relate to new regulatory standards, evolving
7 technologies, and technological standards, and changing
8 consumer business counter party and investor
9 preferences. The proposed rule would require companies
10 to disclose the actual and potential impact of climate
11 risks on an issuer's strategy, business model, and
12 outlook.

13 A second component of the rule is disclosure
14 for companies that set targets or use internally
15 developed target plans, transition plans, scenario
16 analysis for carbon pricing as part of the risk
17 management processes. Companies that have climate
18 targets would be required under the proposal to disclose
19 their plans to get to that target. The same is true of
20 transition plans. Companies that have transition plans
21 about transitioning to a lower carbon economy would also
22 have to provide disclosure about that plan.

23 Companies that use a particular tool called
24 scenario analysis or that use internal carbon pricing as
25 part of their risk management would disclose those too.

1 But here's a very, very important point: companies that
2 do not have targets, transition plans, scenario
3 analysis, or internal carbon pricing are not required to
4 provide these disclosures.

5 A third component of the proposal, the
6 proposal would require a company to disclose certain
7 information in notes to their financial statement.
8 These financial statement disclosures would include the
9 impact, whether positive or negative, of climate related
10 risks such as severe weather events and transition
11 activities on certain financial statement line items on
12 a line-by-line basis.

13 Second, companies would have to discuss or
14 disclose expenditures related to mitigating the risk of
15 severe weather events and transition activities. The
16 fourth component of our proposal, the proposal addresses
17 disclosure of certain greenhouse gas emissions.
18 Greenhouse gas emissions' data are increasingly being
19 used by investors and issuers as a quantitative metric
20 to assess a company's exposure to and the potential
21 financial effects of climate related transition risks.

22 All filers would disclose their scope 1 and 2
23 greenhouse emissions; that is emissions that result
24 directly or indirectly from facilities owned or
25 activities controlled by a registrant. These data would

1 be available -- because this is from those activities or
2 facilities, this data should be available to all
3 issuers.

4 Under the proposed rule, some registrants, not
5 all registrants, would be required to disclose scope 3
6 emissions, the emissions from upstream and downstream
7 activities in a company's value chain if such emissions
8 were material or if the registrant made a commitment
9 that referred to scope 3 emissions. So, for scope 3
10 emissions, not all registrants would be required to
11 disclose them first of all, only certain registrants.

12 And then only if the emissions are material or
13 if the company had a commitment that referred to scope 3
14 emissions. The Commission proposed different
15 requirements for scopes 1 and 2 as opposed to scope 3 as
16 methodologies for determining scope 3 emissions aren't
17 as well developed as for scopes 1 and 2 right now.

18 There's another part of the proposal that we
19 hope you all consider regarding attestation. We
20 recognize that disclosures in this rule need to be
21 reliable for investors. To that end, larger companies,
22 larger public companies, would need to include in
23 relevant SEC filings an Attestation Report that covers
24 the disclosure of its scope 1 and 2 emissions. This
25 Attestation Report would not necessarily need to be

1 provided by an auditor regulated by the Public Company
2 Accounting Oversight Board.

3 Other kinds of firms could provide this
4 attestation report provided that conditions specified in
5 the rule proposal are satisfied. What I think might be
6 of particular interest to this Advisory Committee, the
7 Commission is aware that smaller public companies can
8 face additional costs in complying with these disclosure
9 rules. So, the rule proposal includes a number of
10 important accommodations for smaller public companies,
11 including the following.

12 Smaller reporting companies, which is a term
13 in our regulations, would be exempt from scope 3
14 disclosures. We recognize that scope 3 emissions
15 provide particular challenges for issuers because of the
16 need to track the emissions' upstream and downstream in
17 the value chain. We believe larger issuers would be
18 more able to spread the costs and have more influence in
19 order to obtain this particular information.

20 In addition, smaller companies will have more
21 time, one to two years depending on size, to begin
22 providing required disclosures under the proposal.
23 Furthermore, smaller companies, a certain kind of
24 smaller companies and non-accelerated filers, will not
25 be subject to the attestation requirements that I just

1 described.

2 In terms of legal liability, we are also
3 sensitive to the benefits and costs of subjecting new
4 disclosures to legal liability. Proposal has an
5 extensive discussion for how existing safe harbors and
6 securities rules for legal liability would apply to the
7 new disclosures. First, to the extent that the proposed
8 disclosures include forward looking statement, such as
9 projection of future risks or plans related to targets
10 or transitions.

11 The forward-looking statement safe harbors,
12 pursuant to the Private Securities Litigation Reform
13 Act, would apply assuming that certain other conditions
14 specified in that previous statute were met. The
15 proposal also discusses how existing Rule 409 and Rule
16 12b-21 apply to information that isn't reasonable
17 available without unreasonable effort or expense, so a
18 registrant may be able to rely on those rules as well
19 provided that the conditions of those rules apply.

20 In addition, the proposal includes a new
21 liability safe harbor that would be available for scope
22 3 emissions disclosures if those disclosures are made
23 with a reasonable basis and in good faith. So, here's
24 the steps going forward. As was noted, our comment
25 period is still open, so the ball is now in the public's

1 court, and we hope that members of the committee will
2 consider commenting on some or all aspects of the rule.
3 We are looking for comments not just for high profile
4 issues but also important but less publicly mentioned
5 questions.

6 We hope all questions in release receive
7 comment from a diverse group of stakeholders, so thank
8 you again for allowing me to join you, and I look
9 forward to answering your questions.

10 MS. GARRETT: Thank you very much, Erik, for
11 that detailed overview of the proposed rules. I want to
12 open the floor now to committee members. If you have
13 any questions for Erik, can you please let me know?
14 I'll start with a question while others might be
15 generating some. Erik, one of the items that
16 Commissioner Peirce I believe mentioned was that private
17 companies could be affected by this rule as a result of
18 public companies needing information from private
19 companies in order for the public companies to fulfill
20 their obligations. Can you speak to that, please?

21 MR. GERDING: Yes. So, I think what
22 Commissioner Peirce was mentioning was the scope 3
23 emissions disclosures, so as I mentioned briefly, scope
24 3 emissions are about emissions that a company under
25 certain circumstances may have to disclose, both

1 upstream and downstream in their value chain. It's
2 important to note here that issuers who are subject to
3 that particular disclosure requirement have a number of
4 ways of satisfying that disclosure requirement.

5 One is to get information from suppliers and
6 customers about their particular emissions, but the
7 proposal also includes extensive discussion of how that
8 may be difficult for issuers to get that kind of
9 information, and there may be gaps that a public company
10 has. So, there are other methodologies that a public
11 company could use in order to fill those gaps. It's not
12 necessarily going to get -- be able to get all of that
13 information from other companies in its value chain, and
14 there's developed methodologies that are already out
15 there, including ones that are discussed by that TCFD
16 organization that I mentioned for companies to use in
17 terms of other ways of calculating scope 3 emissions
18 other than getting the information directly from
19 suppliers and customers.

20 MR. SOLOMON: Carla, I have two questions if I
21 can. Carla, I think you might be on mute.

22 MS. GARRETT: Yes, Jeff, I was on mute. Thank
23 you. So, Jeff, yes if you can go ahead and ask your
24 questions, and then after you, I see Brian has some
25 questions.

1 MR. SOLOMON: So, two questions, first, has
2 the commission really undertaken a cost benefit analysis
3 that it can provide in terms of the impact, particularly
4 on smaller issuers and actually small companies that are
5 down the supply chain, small private companies that may
6 be forced to, you know, increase their costs associated
7 with this if they want to sell into larger public
8 companies thinking, for example, if Walmart has to ask
9 each of its suppliers down chain to provide that
10 information, the impact on those smaller companies, even
11 if they're private companies. I'd be curious to know if
12 there's a cost benefit analysis on that.

13 And then the second is for smaller public
14 companies, has the commission considered scaling in
15 disclosure similar to the way that, for example, the
16 Jobs Act has Sarbanes-Oxley scaled, meaning there's a
17 period of time in which you're a public company if you
18 qualify as an emerging growth company that you have a
19 period of time in which you don't have to actually
20 provide Sarbanes-Oxley attestations because that cost
21 associated with those are reasonable expensive.

22 And has the commission considered doing that
23 similarly with small emerging growth companies if they
24 qualify for that status under the Jobs Act, you know,
25 looking for a period of time in which they're released

1 from these requirements? So, two questions.

2 MR. GERDING: Yes, so thanks for that, Jeff.

3 With respect to the first question, there is an
4 extensive economic analysis as part of all of our rule
5 proposals, so I would urge committee members to look at
6 the economic analysis in the proposal. And if you feel
7 that there's other considerations in response to the
8 request for comment there, I would urge you all to
9 provide comments, including on the issue that you
10 raised, Jeff, in terms of effects on companies in the
11 value chain.

12 In terms of scaling disclosures, I mentioned a
13 number of the ways in which the proposal has carve outs
14 for certain disclosures depending on the size of the
15 issuer, as well as phase ins for smaller issuers. And
16 as you know, Jeff, there's a number of different
17 regulatory categories, so one regulatory category that
18 you mentioned is emerging growth companies. There's
19 other ways of slicing and dicing in the securities rules
20 other categories of smaller public companies.

21 So, the proposal doesn't use the emerging
22 growth company category. It uses other categories for
23 smaller filers or smaller public companies, but there
24 are phase ins and carve outs, including on the
25 attestation requirement that I mentioned for smaller

1 public companies. So, that is something that is already
2 considered in the proposal, but that is another area
3 that we would welcome public feedback in terms of are we
4 using the right regulatory categories. Are the phase
5 ins too long, too short, just right? Are the carve outs
6 from the types of disclosure that we're talking about
7 appropriate for investors and for issuers?

8 MS. GARRETT: Thank you, Erik. Brian?

9 MR. LEVEY: Hello. Erik, I read an article by
10 Professor Joe Grundfest of Stanford Law School, former
11 SEC Commissioner recently, who talked about is there a
12 way for sort of a more coordinated approach with the SEC
13 and the Environmental Protection Agency, which does have
14 clear, you know, statutory permission to deal with
15 greenhouse gas emissions. That would be sort of a whole
16 sort of government approach as opposed to the SEC in one
17 corner, the EPA in another.

18 And perhaps some framework where the EPA
19 expands its current, you know, requirements, and then
20 there's some sort of way for companies to tack that on
21 into sort of an integrated SEC reporting framework. I
22 just wanted to get your sense on that.

23 MR. GERDING: Yes, thank you for that, Brian.
24 So, a couple of points, we do believe that the current
25 proposal is well within the commission's statutory

1 mandate. Second, it is really important to note that
2 EPA and the SEC have different statutory mandates, and
3 the purposes for which the EPA requires disclosure are
4 different from the purposes that the Commission has
5 under its statutes.

6 So, our focus is, as you know, on investor
7 protection, capital formation, and fair and orderly
8 markets. So, I think it's important for people reading
9 Professor Grundfest's article to understand that there's
10 different mandates that we need to be sensitive to, but
11 like we're not an environmental regulator. That being
12 said, Brian, I do think that some of the existing
13 emissions disclosure requirements that companies are
14 subject to from the EPA would lower compliance costs
15 with our particular rules.

16 If those disclosure -- emissions disclosures
17 are already being made, that would help companies be
18 able to gather the types of information that are
19 required under this particular proposal. If there are
20 ways that our proposal could better leverage existing
21 compliance and lower compliance costs for companies,
22 we'd welcome comments on those, but we have to be very
23 cognizant of the fact that we are an investor protection
24 and capital market regulator and not here for sort of
25 environmental purposes.

1 MR. LEVEY: Thank you.

2 MS. GARRETT: Thank you, Erik. Do any other
3 committee members have questions for Erik? Donnel?

4 MR. BAIRD: Hi, I just had a quick question.
5 If scope 3 emissions did require small business
6 suppliers to participate, which totally makes sense,
7 does the SEC's purview include guidance or
8 recommendations to reflect low-cost software based
9 almost like a Turbo Tax like a free Turbo Tax for
10 reporting that could be developed? Or is that kind --
11 is a recommended low-cost open-source accessible tool to
12 help small businesses report, is that outside the
13 purview of the SEC?

14 MR. GERDING: Yes, Donnel, thanks for that. I
15 think we again have to be very cognizant of our
16 statutory mandate and what we're doing in the proposal.
17 So, we are not requiring or governing small businesses
18 that are not public companies in this proposal. I
19 understand that concern would sort of flow through in
20 terms of what public companies provide or require from
21 their suppliers or might ask their suppliers on
22 customers to provide.

23 I think the Commission would welcome guidance
24 from the public on are there ways out there for public
25 companies to gather that, and as you have your own

1 startup business and are an entrepreneur, I would note
2 that there's quite a bit of startup businesses out there
3 that have a business model of helping companies figure
4 out their climate related impact and their emissions
5 disclosure.

6 So, we would certainly welcome disclosure --
7 I'm sorry -- comments on what sort of private sector
8 initiatives are out there to help public companies
9 gather that data in a quick low cost but still reliable
10 framework. So, I think the good news is that a lot of
11 entrepreneurs out there I think have already given quite
12 a bit of thought to that, as well as other companies in
13 that space.

14 MR. BAIRD: Thank you, Erik.

15 MS. MEHTA: Hi, this is -- sorry, Carla, if I
16 may? Just on that point of the, you know, the fact that
17 there are companies out there who will -- firms out
18 there to do the research and provide the disclosure and
19 help companies identify what their impact is, it is not
20 cheap. I know someone who just went through this
21 process to see what it would cost; I believe they're an
22 accelerated filer. And it's about \$150,000 is the quote
23 they were given, and so I do think there is -- and a lot
24 of their impact is just going to be, you know, having
25 data servers.

1 And so, I'm just -- I do think it is and maybe
2 it's just initially, maybe until there is -- you know --
3 maybe it's the initial reporting that will be the heavy
4 lift, but I think it would be beneficial to have
5 something a little more affordable for some of these
6 companies where \$150,000 is quite a substantial - even
7 if they are a reporting company, it is a substantial
8 cost investment. And you also want to be -- you know --
9 I worry about flooding the investors with too much
10 information and too much so that it's not then
11 meaningful.

12 You know I'm sure you are looking into this,
13 but how do you sift through all of this information and
14 find out what is actually going to impact an investor's
15 decision to invest in this company or not? And so, you
16 know, I understand it's like a lot of risk factors, but
17 you know, it's just one thing that I would be concerned
18 about is that we're making all of these companies focus
19 on this, you know, turn their attention away from
20 certain things to focus on this, which is incredibly
21 important and I do believe there should be climate
22 related disclosures, and it should be harmonized in some
23 way so that everyone is reporting on the same metrics.

24 But just also keep in mind that we want good
25 data, data that is helpful to investors, and you know,

1 data that we can get, and companies can get in a way
2 that is not incredibly burdensome to running their
3 business.

4 MR. GERDING: Yes, so thank you for that. The
5 two parts of your comments really focus on the supply
6 and demand for disclosure. On the supply, I would urge
7 you to take a look at the economic analysis as I
8 responded to Jeff and provide feedback on whether you
9 think the assumptions and analysis there are
10 appropriate.

11 I don't know the details of the particular
12 company that you're talking about, but there is a big
13 difference between the scope 2 emissions and scope 3, so
14 many companies for scope 2 emissions colloquially
15 speaking it's sort of their mission is associated with
16 your electricity bill. And there are fairly well-
17 developed methodologies for figuring out the scope 2
18 emissions, so that might be something that a company
19 like a data -- that has a lot of data servers might
20 particularly focus on.

21 In terms of the demand for information, I do
22 want to underscore that the focus of the proposal is all
23 about investor needs, and one of the things that we
24 focused on in this particular proposal were the comments
25 that were received, including from institutional

1 investors and retail investors in response to acting
2 (audio interference) request for information early in
3 2021.

4 So, we were very much focused on what
5 information our investors demand, what kind of format
6 investors wanted, and balancing that against the costs
7 for issuers of providing that particular information.
8 One thing I'll note is in terms of the format for
9 information, a lot of these are metrics because we're
10 told that investors are increasingly demanding, not just
11 narrative disclosure, but actual metrics to make apples
12 to apples comparisons among issuers.

13 The second thing is that the proposal proposes
14 putting a lot of these climate disclosures in a separate
15 section of the periodic reporting to allow for more
16 apples-to-apples comparisons among the different
17 companies of climate related risks. But we would
18 welcome feedback on that as well if that's the right
19 call or if another format would be more helpful for
20 investors in helping them understand, analyze, and
21 process information.

22 MS. MEHTA: Thank you, Erik.

23 MS. GARRET: Okay. Thank you very much, Erik.
24 If there's no more questions, we will now turn to our
25 invited speakers to share their perspectives on how

1 these proposed rules on climate related disclosures
2 might impact smaller public companies and small
3 businesses that are considering going public as the
4 rules are finalized.

5 First, we have Betty Huber, who is a Partner
6 and Global Co-Chair of the Environmental Social &
7 Governance Practice at Latham & Watkins in New York.
8 Betty advises public and private companies, funds, and
9 their boards on ESG related corporate governance
10 matters. Betty is a former member of the Sustainability
11 Accounting Standards Board Advisory Counsel.

12 We also have Thomas Sonderman who is the CEO
13 of SkyWater Technology. SkyWater is a semiconductor
14 technology manufacturing company based in Bloomington,
15 Indiana. SkyWater recently went public in 2021. Tom
16 joined SkyWater in 2017 as the Lead Executive. Prior to
17 that, he worked at various high-tech companies,
18 including Rudolph Technologies, GlobalFoundries, and
19 AMD. He is also the author of 50 Patents.

20 And also from SkyWater, we are fortunate to
21 have Steve Manko, who is the CFO of SkyWater Technology.
22 Prior to joining SkyWater, Steve was a Managing Director
23 at Riveron Consulting in Minneapolis and was at Ernst &
24 Young where he specialized in the banking and capital
25 markets industry. Betty, Tom, and Steve, we appreciate

1 your willingness to share your expertise and
2 perspectives with us, and I will now turn it over to
3 Betty to speak.

4 MS. HUBER: Great. Good morning. Thank you,
5 Carla, and thank you to the entire SEC Committee. Carla
6 had mentioned that most of my clients are public
7 companies, and private companies, and in private equity
8 from small to large companies, so I wanted to share my
9 comments and they coalesce around six points, which kind
10 of tail off of Erik's great summary of the rule.

11 The first is on the financial statement's
12 requirements. The second is on emissions and
13 attestation. The third is some cost information that I
14 have which some of the members had asked about. The
15 fourth is relating to the targets and goals for climate
16 change and scenario analysis. The fifth is on the safe
17 harbors that in the proposal, and the sixth relates to
18 the timing of initial reporting and ongoing reporting
19 under the proposal.

20 So, I'll start with the financial statements,
21 and this is really just a collection of what I've been
22 hearing from my clients and kind of the registrant
23 community. Kind of the overwhelming first issue that
24 we're hearing is just kind of like sort of audit
25 challenges, particularly relating to the internal

1 control over financial reporting given that that needs
2 to be audited under reasonable assurance standard.

3 And now that registrants are looking at the
4 proposal and kind of doing a GAP analysis as to what the
5 proposal would require versus what is being done today,
6 I'm hearing that the implementation will require a high
7 degree of subjectivity and some non-GAP measurements.
8 And so, a couple of examples that I have been hearing is
9 just with respect to the proposal it's really unclear to
10 registrants what is a severe weather event. You know an
11 example would be if, you know, there's global warming
12 and companies need to run their air conditioners in the
13 wintertime, which maybe they don't have to do today. Is
14 that a cost relating to a weather-related event, and
15 does that need to be calculated and factored into the
16 line items in the notes to the financials?

17 Another question would be like would all
18 wildfires be categorially climate related if, you know,
19 sometimes I think I've heard from climate scientists
20 that wildfires could be reduced if they're periodic
21 burns in a state. So, maybe it's not due to climate
22 change, but you know, they're these sort of judgements
23 that need to be made, and they may not be made uniformly
24 by all registrants. You know they could come out in
25 different ways.

1 Another example would be like what If there
2 were a severe weather event that you would say, okay
3 fine, it's climate related to a retailer. What would
4 those costs look like in kind of like doing that math
5 and saying, oh well, I suppose that would result in
6 expedited shipping fees or excess inventory for Q1. But
7 it would kind of smooth out over the course of the year.
8 How does one calculate that? So, I know those sound
9 alike details, but it gives some, you know, like
10 tangible examples of how registrants are looking at the
11 proposal.

12 The one percent materiality threshold for
13 calculating the line items is particularly challenging I
14 think for some registrants, and I suppose they would
15 probably prefer maybe materiality standard. I think
16 overall registrants are wondering if maybe transitional
17 or other guidance would be helpful here, and some
18 registrants are looking at the Revenue Recognition
19 Standard ASC 606 was issued. I think it was issued in
20 2014 and didn't really become effective until the 2018
21 10-K which would be issued in 2019, you know, so
22 significantly longer implementation timeline that here.

23 And I think for the Revenue Recognition
24 Standard, the FASB set up a transition resource group
25 and held public meetings and published memos on their

1 website to kind of help with these types of practical
2 questions. And I guess just with respect to small
3 companies, you know, so small companies would be subject
4 to that. That's size agnostic, but maybe the cost of
5 the audit is probably going to go up, and I wonder if
6 that will have a disproportionate impact on small
7 companies.

8 The next section, and please interrupt me if
9 anyone wants to ask me any questions or say something
10 else is just with respect to emissions disclosure. And
11 you know scope 1 and 2 I know are very difficult for
12 small businesses to calculate and costly, and probably
13 not many of them are doing that today. Scope 3 is
14 pretty challenging as well. The one thing that I was
15 thinking about that may not be obvious from the proposal
16 reading it alone is just possibly what could the impact
17 on small non-public companies in public company's chains
18 would be.

19 So, an example would be, you know, if a bank
20 is financing a small private company, and then the small
21 private company's data is considered scope 3 data for
22 the bank that's publicly traded, the bank would have to
23 try to gather that data to disclose it pursuant to the
24 proposal. And what if the small private is not able to
25 provide that data, could it be possible that then the

1 publicly traded bank would be kind disincentivized to
2 provide capital to these small business who just simply
3 can't provide the greenhouse gas data?

4 And then you can kind of extrapolate that
5 example to any kind of service provider in the value
6 chain of any, you know, public company. So, you know,
7 it's possible that the proposal could have the
8 unintended consequence of stopping the use of smaller
9 suppliers who simply can't afford to comply with the
10 rule. The other thing too is maybe just like given that
11 they'll be a real need for service providers to help.
12 Kind of as one of the committees asked about like
13 opensource, is there data? Could it be easier from a
14 cost perspective? And I wonder if, you know, currently
15 - I'm sure that the industry is growing now, but if
16 there's a small subset or finite subset of service
17 providers who can provide this, you know, the larger
18 companies can possibly have the wherewithal to incur
19 those costs. To the smaller ones, it's just supply and
20 demand. You know the costs may be increased, and again,
21 that's quite tough on smaller public companies.

22 Another thing that we've been hearing is just
23 about the timing of data and availability of data which
24 I'm sure you've heard before, so this is not just for
25 small companies but all companies, you know. I do this

1 in actually my own company. We collect our greenhouse
2 gas emissions data and report it, and often times you
3 don't get a lot of that data from like utility for the
4 scope 2 emissions until maybe January. So, there might
5 be just kind of like a timing issue to think about and
6 work through and talk to registrants about what is
7 actually possible and if it can actually be in time for
8 the 10-K to provide reliable data and decision useful
9 data.

10 In terms of cost estimates, someone had asked
11 about how much this would cost, and I think companies
12 are still right now collecting data and trying to figure
13 out what it might actually cost to comply with an
14 eventual final rule. But some things that I've been
15 hearing is that, you know, some of the cost data that's
16 included in the proposing release is probably based off
17 of like voluntary reports against TCFD. And I've worked
18 on many of those, and a lot of them are, you know, not
19 done to possible like sort of 1934 Act Standard
20 involving disclosure committees. And also, TCFD
21 voluntarily reports don't have to comply and disclose
22 against all of the recommended items, but maybe just a
23 few of them. So, you know just something to think about
24 in terms of costs.

25 I have heard from one large cap company, so of

1 course large cap and not small, but maybe we can take a
2 note from this. They're calculating it. They're
3 already voluntarily reporting and assuring their scope
4 1, 2, and 3 emissions data, but they're estimating that
5 their one-time cost to bring themselves into compliance
6 with the proposed rule would be in the multi-million-
7 dollar range. So, I can't disclose the company, but
8 maybe if you do a proportionate, you know, kind of bring
9 it down for smaller companies; it's a significant cost.

10 Another thing that we've been hearing with
11 respect to the fourth item I wanted to talk about like
12 the greenhouse gas targets, and goals, and scenario
13 analysis, and internal carbon pricing. The way that one
14 could read the proposal is to say that you don't have to
15 disclose them unless you have them, you know, which is
16 really helpful. But at the same time, it may discourage
17 some public companies and also pre-IPO companies from
18 setting these targets or disclosing scenario analysis to
19 simply kind of avoid the costs and burdens of having to
20 do that in their 10-Ks, so just something to think
21 about.

22 And there was a specific question in the
23 proposing release whether the rule should be required
24 the disclosure of climate adjacent goals like energy or
25 water use, conversation, or ecosystem restoration, and I

1 think all the same sort of concerns would apply to that,
2 but even greater because, you know, these are sort of
3 climate adjacent as opposed to actually the greenhouse
4 gas emissions. I'm just going to keep going unless
5 people want to interrupt with any questions.

6 But one thought too about like the safe
7 harbors, which is kind the fifth comment I wanted to
8 talk about, was just with -- you know -- I have a lot of
9 pre-IPO companies which they're private, and it would be
10 wonderful for them to be able to access the capital
11 markets. But the PSLRA, the safe harbors there, don't
12 apply unfortunately in the IPO context, so it's just
13 something to think about whether that would kind of
14 discourage companies from going public because of fear
15 of securities litigation with respect to office climate
16 related disclosures that would have to show up in their
17 S-1 or their F-1.

18 The other thing about the scope 3 safe harbor
19 that was so well summarized earlier on this WebEx is
20 just, you know, I think everyone recognizes that right
21 now, maybe not in 10 years, but right now there's a lot
22 of missing scope 3 data. And companies are using
23 estimates to try to disclose their scope 3. Companies
24 are not often or always disclosing all 15 categories of
25 the greenhouse gas protocol, and so there are some

1 questions, and maybe the safe harbor could be a little
2 clearer as to what is a reasonable basis and what is
3 good faith just to give companies, you know, the
4 certainty they need that they can then go ahead and
5 disclose their scope 3 emissions if they need to under
6 the proposed rule, you know, with some safety and
7 clarity.

8 Finally, I wanted to talk about just like the
9 timing of any kind of final rule, and they're kind of
10 two-timing concepts. One would be like the initial
11 filing when this all starts and then ongoing reporting.
12 So, as we read it, the proposal would have like large,
13 accelerated filers. If the proposal became final at the
14 end of this year, it would have to start collecting data
15 and making disclosures for calendar year 2023 to show up
16 in a 10-K filed in 2024. That's extremely fast, and you
17 know, given the kind of interpretive questions that I
18 raised earlier in my comments, and all of the other
19 challenges with gathering data with service provided,
20 you know, this is totally a laudable goal to have
21 greenhouse gas emissions data out there and information
22 that investors -- some investors are asking for.

23 In maybe giving a little more time to
24 regularize the market to ensure that the data would be
25 consistent and reliable, and then just, you know, being

1 a lawyer at an international law firm, a lot of my
2 partners are looking at the climate related disclosure
3 frameworks in the EU, or the UK, and I'm following
4 closely what the ISSB is doing. And I know the SEC is
5 also, so it might make some sense to take a look. I
6 think the ISSB exposure draft on climate related
7 disclosures won't be finalized until the end of this
8 year, and so it may make sense to kind of take a look at
9 that and see what that looks like to make sure that
10 they're kind of coordinated and uniform.

11 And if I got it right with respect to the
12 European Union's CSRD, I don't think that the data needs
13 to start being disclosed -- or it would be not off 2023
14 data, but 2024 data, so that strikes me as like an
15 additional year of kind of a time for companies to get
16 their data and ducks in a row. The final thing that I
17 would say is just like an explicit example that just
18 came up for one of my newly public company clients.
19 They're right now a non-accelerate filer, so kind of on
20 the smaller end of things. And as some of you know on
21 the phone, companies need to kind of recalculate what
22 their filer status is at the end of the year.

23 So, come December 31 of 2022, they'll be
24 recalculating, and you know, there may be several of
25 these kind of non-accelerated filers or small reporting

1 companies who are right now today as we speak, but come
2 December 31, 2022, may suddenly become large,
3 accelerated filers because they did a good job, and
4 their share price went up. And so then suddenly now,
5 you know, if we're reading the proposed rule correctly,
6 would have to start gathering the data starting January
7 1, 2023, and I don't think they're in a position to do
8 that yet, and so who knows if that would result in kind
9 of like unreliable data or just a real crunch for
10 companies like that.

11 So, I'll stop there. Thank you very much for
12 allowing me to speak with you today.

13 MS. GARRETT: Thank you, Betty, very much. I
14 think what we'll do is we'll move onto our other
15 speakers, and then we'll open the floor up for
16 questions. So, Tom, would you like to present please?

17 MR. SONDERMAN: Yes, thank you. A fascinating
18 discussion, I appreciate you giving SkyWater the
19 opportunity to give our perspective and, you know, kind
20 of chime in as you and the rest of the committee work
21 through this particular rule adoption.

22 As far as SkyWater as pointed out in our
23 intro, we are the only 100 percent U.S. investor-owned
24 pure play semiconductor manufacturer. We were spun out
25 of a larger company called Cypress Semiconductor 5 years

1 ago back in 2017. We are headquartered in Bloomington,
2 Minnesota, not Indiana. That happens frequently. We
3 have a fab in Minnesota as well one in Kissimmee,
4 Florida.

5 One of the things that's unique about SkyWater
6 is we are a trusted what we call foundry for the U.S.
7 governments. We do about a third of our business with
8 the U.S. government working on some very sensitive
9 proprietary technologies, and we also do a lot of
10 developments and manufacturing work for commercial
11 companies as well. Obviously, right now, the
12 semiconductor industry is getting a lot of attention.
13 We're in a situation where demand clearly exceeds
14 supply. There's a lot of effort in our industry to
15 bring manufacturing of semiconductors back to the United
16 States, and clearly this is an important backdrop for
17 the committee.

18 The other thing I want to point out is that
19 our industry has a history of doing environmentally
20 sound monitoring. We have what's called ISO 14001
21 Accreditation. We periodically get audited against
22 that. This is a fairly stringent protocol that not only
23 assesses our current capabilities but allows us to get
24 recommendations on an annual basis in terms of what we
25 can do to improve not only our monitoring but ensure

1 that we're not having any negative effects on the
2 environment. We also as an industry are very committed
3 to, you know, not only not making the environment less
4 safe to the work that we're doing but actually taking a
5 lot of, you know, I would call it preemptive action to
6 ensure that the very complicated manufacturing we do is
7 done in the most environmentally friendly and
8 economically beneficial manner as possible.

9 We have a long history of monitoring
10 pollutants such as phosphorus and fluoride, and we have
11 voluntarily reported that for many years as part of
12 what's called the World Semiconductor Counsel. One of
13 the things that I think is important to understand, and
14 this has been discussed during other calls, and it again
15 it very refreshing is that a one size fits all policy is
16 not going to work in my opinion. I think we're a small
17 company. We went public last April. There are a host
18 of expenses and new reporting requirements that, you
19 know, become apparent when you go public, and we had to
20 incur new costs when we did that last year. By
21 expanding reporting capabilities, now we end up having
22 to spend more money, not only on the monetary, which is
23 something we're already doing but we'd have to do more
24 of, but also in terms of new staff, software, auditing
25 fees to again ensure that we are adhering to the

1 regulations in alignment with the SEC.

2 So, we do have to be very careful of the
3 unintended consequences of a broad mandate. One example
4 I want to give is related to COVID. When the mandate
5 came out for, you know, vaccinations and that all
6 government contractors had to adhere, we of course fell
7 into that. And given our size, you know, 500, 600
8 employees, it had a relatively dramatic effect. We lost
9 about 5 percent of our population, our employee
10 population, because they strictly did not want to get
11 vaccinated. And of course, this happened at a time
12 where we're seeing low unemployment levels. There's
13 high demand for the work that we do, and when you lose 5
14 percent of your employee base at a time where you're
15 trying to make as much product as possible, it's really
16 a challenge, and it definitely affected us as we exited
17 last year and went into this year.

18 So again, as an industry, I think we are very
19 committed to doing whatever it takes to adhere to new
20 regulations. I think it's something that we do on an
21 ongoing basis any way, but you know, some of the
22 comments about the downstream effects, we do have many
23 of our suppliers are private companies. The effects on
24 them as we would then require similar types of
25 reporting, so we could be in adherence, I think needs to

1 be considered. And we also, you know, need to recognize
2 that when a company like SkyWater who is doing very
3 critical work for our country as well as for our
4 customers, other customers, when we're investing in
5 this, we're not investing in building more capacity.
6 We're not invested in doing more R&D.

7 We have a limited amount of dollars, and none
8 of this reporting is going to add to the growth and
9 scale of our company. It's essentially going to be
10 overhead, so we recognize the importance. We appreciate
11 the fact that you're soliciting our input, but again,
12 it's really important to think through how this will
13 affect companies of all sizes. Larger companies can
14 absorb this relatively easily, but small companies it
15 will become -- you know -- I don't to use the word a
16 distraction, but when you're in a mode of high growth
17 entrepreneurial mode and you have to begin to start
18 worrying about reporting additional regulatory
19 requirements, it can have an effect on the business.

20 So, thank you for your time, and I look
21 forward to answering your questions.

22 MS. GARRETT: Thank you very much, Tom. We
23 appreciate your perspective, and I will now move onto
24 Steve who's the CFO of SkyWater. Thank you, Steve.

25 MR. MANKO: Thank you very much, Carla, and

1 I'll be quick with my comments. I think that Tom and
2 Betty both gave enough content to keep us busy for
3 discussion for more than the next 40 minutes, but I
4 would like to do is just touch on a couple of points to
5 highlight what the impact would be, a little bit more
6 detail from Tom and Betty talked about.

7 First off, I can say that I really appreciate
8 the opportunity to speak here and to reinforce that with
9 some of the rules and exceptions out there for small
10 reporting companies and emerging growth companies, that
11 is really pivotal to what allowed SkyWater to become a
12 public company when we did. Without that, we very
13 likely would not have been able to capitalize on the
14 opportunity to go to market and become a public company
15 in 2021. So, I'm a big proponent of some of these
16 exceptions and slower adoption for some of the smaller
17 reporting companies that had a direct impact to us, so
18 we do appreciate that.

19 Number two, I always like to think about are
20 we properly using the rules that are out there before we
21 make another rule. Can we modify or change the rules
22 that were already put in place, one of them being the
23 risk factors? That was something that I think is often
24 overlooked for our mature company but became very
25 important to us as we were going out and talking to

1 investors. As a new company, our risk factors were
2 something that were evaluated and discussed, not only
3 internally but with a lot of our internal and external
4 stakeholders as well.

5 So, I think there's some opportunity to really
6 go back and look at the requirements for risk factors to
7 see what can be done within that frame already before we
8 start doing something new or adding something new as
9 well. Obviously, as a public company CFO, a big cost
10 for us is our audit expense. That's one expense that
11 has continued to grow up as we've been a public company,
12 and we think that's going to continue to go up over time
13 as we do quarterly reporting and adopt 4A and 4B
14 formerly as we get into that.

15 So, when I hear about something being in the
16 Form 10-K, I think that's one document that we should
17 use wisely. There's been discussions on the Form 10-Ks
18 getting so long. It's great to have everything in one
19 document, but sometimes the document gets too long, and
20 it doesn't have its usefulness. So, I'd like to think
21 about that for consideration. Also when I think about
22 something going into the financial statements that are
23 included on Form 10-K and having those be suspect to
24 audit then, you know that becomes something concerning
25 since it's a whole different level of putting something

1 in the Form 10-K, where you put it, whether it's in a
2 section of the Form 10-K or in the financial statements
3 themselves.

4 Betty mentioned a couple of things that went
5 back more on the accounting side referring to SACS and
6 ASC 606, so I'd like to talk about those just very
7 quickly. I remember when SACS was implemented, there
8 was a big absorption cost that companies had to take on
9 for several years when SACS was put in place. First
10 off, I can remember I was part of the teams that was
11 putting that in place, you know, nearly two decades ago,
12 and it had several years of impact away from the core
13 business and the core audits that were taking place.
14 That really revolutionized everything and took the focus
15 away from the auditors that were doing the other
16 financial statement work, as well as the companies to
17 respond to the audit requests.

18 So, there's a big push whenever something like
19 this is significant and new. It takes a lot of
20 concentration, and there's only so much resource
21 available within the company and externally from the
22 audit firms as well, and it will take away from other
23 things that we're already working on. So, it will be a
24 distraction for everybody. I would also say that those
25 costs, while there's one-time implementation costs,

1 unfortunately those costs don't go away, and I think if
2 you would look back, those costs have continued to
3 increase over time, not only stay, but continue to
4 increase for various reasons.

5 For an item like ASC 606, that was a standard
6 that impacted companies differently, so for instance,
7 you could have a very small company that was generating
8 revenue from selling software or a product that maybe
9 only had \$100 million in revenue but had a very
10 significant expense to adopt ASC 606 whereas you go to
11 some of the large banks out there that are multibillion
12 dollar bank assets, it had a very small impact because
13 that rule did not apply to them significantly with the
14 way that they were recognizing their revenue in the
15 banking industry.

16 So, sometimes looking at size is not a proper
17 way to look at what an impact of something will be. On
18 the contrary, there was an item called incurred expected
19 credit losses that was another accounting standard that
20 had very little to do with a smaller company that was
21 probably more so impacted by the revenue recognition but
22 was a significant cost to the banks that it was being
23 applied to. So, sometimes looking at size and
24 implementation isn't always fair on who's being impacted
25 and what the proportional cost of that will be.

1 I'll also say going back to the current
2 expected credit losses, that was a change from looking
3 to the past on what your losses would be and taking more
4 of a forward-looking approach. I was a fan of that
5 because I think forward looking can be more meaningful,
6 but what I will also say is with forward looking
7 estimates, there is much more judgement, much more
8 subjectivity to them. And if you're looking for
9 consistency, any time you're looking at forward looking
10 information or scenario analysis, that inherently will
11 bring more susceptibility, more judgement, and I think
12 lack of consistency whenever you're doing something
13 that's forward looking.

14 So, just a couple of points that I wanted to
15 highlight with a little more detail from what Betty and
16 Tom already talked about today, thank you for inviting
17 us and thank you for letting us talk about SkyWater and
18 how we believe this will impact us.

19 MR. SOLOMON: That's -- sorry.

20 MS. GARRETT: I was just going to say thank
21 to Steve, ~~and~~ then I was going to ask people if they had
22 questions, but Jeff, go ahead.

23 MR. SOLOMON: Yes. I was just going to chime
24 in, so first of all, I want to make sure that other
25 people are asking questions if they have them. But just

1 to frame some of the conversation, but this is super
2 helpful. I know it takes a lot to prepare, you know. I
3 know it takes a lot to prepare, so super, super
4 thankful. Just out of curiosity, when you look at - and
5 I guess this would be more for -- well, any of the three
6 of you, when you look at the proposals themselves,
7 they're well intended. I think there's no question that
8 investors have a deeper challenge at understanding the
9 standardization.

10 So, when there's a potential for companies to
11 potentially be green washing or putting pronouncements
12 out there, if there's no standards around how they
13 report, then it becomes much more difficult for
14 investors to determine the veracity of the statement.
15 So, if the intent of the Commission is to let's say
16 standardize or create a framework where there is
17 consistent disclosure among companies, then let me ask
18 you this. When you look at the elements of what I would
19 consider, you know, compliance for small companies in
20 particular, scaled disclosure, is it something that we
21 can really consider around a deeper cost benefit
22 analysis? Is that something that you would like to see,
23 you know, specifically again understanding the efforts,
24 the amount of effort that you'd be putting in and the
25 relative benefit from that? Or is this sort of just a

1 matter of, hey, this is so burdensome for us as small
2 companies that we'd rather not be in a position where we
3 have to comply?

4 MR. SONDERMAN: Yes, I can start, and Steve
5 and Betty, you can amplify, but I would say that we do
6 cost benefit analysis for everything. And so, whether
7 it was a requirement to do it or not, we're going to do
8 one internally. We're going to assess what the cost of
9 compliance is going to be. There will be a cost clearly
10 understanding that costs will help us integrate it into
11 our normal operations, but I do think the idea of having
12 a framework and a pathway to aligning with what is
13 envisioned is very important because as Steve pointed
14 out when SACS came out, you ended up having a lot of
15 effort that, you know, worked to get towards adherence,
16 and it became a distraction for companies as that was
17 going on.

18 So, I think the cost benefit analysis is a
19 must, and we will do it. Having a methodology may be
20 that came from the Commission that would allow us to do
21 it in a similar way would be important, but I also think
22 there needs to be a roadmap to getting to the end state
23 versus flipping a switch and saying this is what it's
24 going to be on this day going forward. So, I'll stop
25 there. Steve or Betty can amplify as needed.

1 MR. MANKO: Yes, I'll go onto that real quick,
2 Tom. I would say a couple of things. Again, going back
3 to the risk factors, that was something that we were
4 taking a fresh look as a new public company, so when we
5 were writing those, we wrote those with intent. Those
6 were current things that we really wanted our investors
7 to understand about us. If there needs to be more
8 information, you know, we'd be happy to start disclosing
9 more information there. We also know that when we're
10 looked at from an insurance perspective on the cost of
11 insurance for property and casualty every year, there's
12 a lot of analysis that we've talked about today saying
13 one location, two location. What is (audio
14 interference) the business in that location? What is
15 the loss?

16 So, I think that there is some other
17 information that's already out there that we could be
18 implementing and not creating from scratch but trying to
19 bring everything together and not starting over again
20 but giving better disclosure about that as well. So,
21 we're happy to be part of something that -- we want to
22 be responsive to our investors. I think as a one-year
23 public company, Tom and I have been getting feedback
24 from our investors over the course of the last year, and
25 we have been implementing more information so they can

1 understand the business model that we're taking.

2 So, we want to appease the investors and be
3 responsive to what the investors are asking. You know I
4 would say being in the first year of a public company
5 when Tom and I were going through tests of waters and
6 the roadshow before we became public, we probably had 60
7 different meetings with investors. The topic that we're
8 talking about here a year ago did not come up at all
9 during any of those 60 meetings that we've had.
10 However, post that, we do have investors that follow up
11 with us on this topic from time to time.

12 So, there is a need for it. There is a demand
13 for more information, but this wasn't anywhere close to
14 what the investors that were looking at SkyWater a year
15 ago were first interested in when they were making a
16 decision whether or not to invest in the company. So,
17 we definitely want to be responsive to our investors.
18 We know our investor appetite, and demands will change
19 over time. We want to adhere to that, but we also want
20 to be attacking the most relevant factors for our
21 investors and for our company today.

22 MR. SOLOMON: So, Betty, just to focus in
23 maybe on some of your comments around that, when you're
24 talking to some of your smaller filers, and again, I
25 want to make sure that we focus this discussion more on

1 small businesses because the purview of this committee
2 is really to advise the Small Business Advocate on
3 Capital Formation, so you know. I want to try to focus
4 in there, so when you look at your clients who are small
5 issuers, are they saying similar things about investors
6 don't really look at these kinds of disclosures when
7 making an initial investment decision?

8 And so, is there a feeling that they may
9 choose not to go public as a result of this or are you
10 hearing anything from your smaller clients on that
11 front?

12 MS. HUBER: Yes, Jefferey, thank you for that
13 question. Well, I guess they are probably certain other
14 reasons why companies are delaying going public right
15 now, but putting that aside, a lot of the small
16 companies, you know, they might have the same investors
17 that a large cap company would. Or some of them are
18 controlled companies, and they don't have those demands
19 from the kind of typical investors that perhaps this
20 role was written for. So, I would kind of say that it's
21 hard to answer that question because they're no uniform
22 either.

23 And I think Tom made that point too, you know.
24 Some small companies are -- or Steve -- you know it's
25 hard to say, and what I can say though is that maybe

1 small companies should get involved in trade groups who
2 are looking at pulling together cost estimates now so
3 that their smaller voices can be heard, and it's not
4 just -- you know -- the only data I had was that one
5 large cap company with the experience in doing the
6 reporting and was able to come up with that data.

7 And so, maybe to your point, it would be great
8 for smaller companies to just get in the mix and see if
9 they can figure out what the impact would be on them.

10 MR. SOLOMON: Kesha, you had a question?

11 MS. CASH: I did. Thank you. Fascinating
12 discussion, and Betty, you mentioned something about the
13 sort of the European market. I'm just curious as we
14 talk about a roadmap, right, I think this is obviously
15 very important about the roadmap to getting there. What
16 have we seen from other countries that we're following
17 as a best practice or we're throwing out because we're
18 America and want to do it a different way? Just curious
19 about that roadmap?

20 MS. HUBER: Yes, Kesha. So, I think just
21 starting from the top, and I'm sure that the SEC can say
22 it better. Having been on SASB Advisory Counsel and
23 advising companies on this, it's really important,
24 especially, multinational companies, to have some sort
25 of global harmonized uniform disclosure standards, so

1 that companies don't have to disclose against three
2 different frameworks. So, that was why I was looking at
3 the international and the European models.

4 The difference though, Kesha, is just in those
5 jurisdictions, and I mean others correct me if I'm
6 wrong, but as a general matter if there's I guess a
7 litigation with respect to what's being filed in those
8 jurisdictions versus in the United States, there's a
9 heightened sensitivity to any disclosures. For
10 instance, in a 10-K, information could get incorporated
11 by reference into a registration statement. There's
12 strict liability on those statements, and there's
13 definitely, you know, sort of a bar that takes a look at
14 that and has a business off of that, and that doesn't
15 necessarily happen in the EU or in the UK.

16 In terms of a roadmap, I'm not sure, Kesha, if
17 you mean a roadmap actually for companies to comply or
18 just a roadmap to getting some kind of regulation
19 because right now, I think everyone is still just --
20 everybody is moving in the same direction, and
21 everything is still being proposed. There's no one
22 country right now that has it in the books, and they've
23 said, "Yep, we've done it right, and then you can use
24 this as a model.", so unfortunately the book is still
25 being written.

1 MR. SOLOMON: So, let me sort of follow up on
2 that too because is there -- you know -- I think Kesha
3 embedded into your question, which is the right
4 question, is whether or not it makes America
5 uncompetitive from the statement of capital formation.
6 And I think what we've talked a lot about in this
7 committee is making sure that small companies are the
8 lifeblood of American growth and employment, and access
9 to capital is part of what fuels that growth.

10 And so, are you thinking that if we have
11 overly restrictive compliance requirements in this, is
12 it another log on the fire of reasons not to think about
13 accessing public markets here? Or is it, you know,
14 something that you think is enough to shift people to
15 think about doing financings or listing in other
16 jurisdictions? We're trying to figure out sort of the -
17 - is this just another set of regulations people are
18 going to have to comply with, and they'll figure it out
19 even though it's going to increase costs? Or is it
20 something that's meaningful enough and broad enough that
21 people say, "You know what? Actually, I'm not even
22 going to think about going public."?

23 MS. HUBER: Yes, Jeffrey, I guess I would just
24 kind of like reiterate the comments that I made. This
25 is the proposed rule. We haven't seen the final one, so

1 it may be better to ask the question once the final rule
2 is in place. If the final rule is different and
3 addresses some of the items that people have raised on
4 the phone today, it could be a different story. And it
5 could just be, you're right, it's a rule; we need to
6 comply with it.

7 I was at a board meeting last week of a public
8 company, fairly new, and the chair of the board
9 concluded exactly what you said, "Okay. This is a new
10 regulation. We comply with laws. We'll do it.", and
11 that was the end.

12 MR. SOLOMON: So, Tom and Steve, and again,
13 I'm looking to see if there's any other people who have
14 their hands up. If I can't see it, just chime in. But
15 Tom and Steve, we got through this process together
16 where I talk about -- by the way, I talk about you guys
17 all the time because you're the first semiconductor
18 company to go public in the United States in over two
19 decades, and here we are having a chip shortage, right.
20 And we've got a lot of supply chain issues, and there's
21 some really good fundamental reasons why, you know,
22 venture capitalists haven't invested in fixed costs
23 businesses like the runs you run for the last two
24 decades.

25 So, you know, unless anybody either watching

1 or on the committee thinks this isn't a serious issue,
2 you can pretty much tie the lack of capital for small
3 companies back to things like Sarbanes-Oxley, which
4 frankly wasn't even intended for small companies, right.
5 You know Sarbanes-Oxley was in response to very
6 significant bad behavior by large companies, and yet
7 small companies ended up bearing most of the brunt as a
8 percentage to their revenues.

9 I'm a public company. Our compliance before
10 we actually reverse merged into Cowen 8-12 years ago was
11 intense and very expensive, and it remains expensive
12 today. So, I'm sensitive to this. Can you talk about
13 that from your standpoint? If we were to go through a
14 process here where a big advice, we might give to the
15 commission is to look at the emerging growth company
16 status, as well as maybe the small filer status, where
17 companies might have a 5-year hiatus before they had to
18 comply, or maybe they may never get there.

19 Can you walk through if that would be helpful
20 to you or would've been helpful to you in terms of your
21 thought process? Is that maybe a way to go here in
22 terms of providing advice? Either one, Tom or Steve or
23 both of you.

24 MR. SONDERMAN: Yes, I'll start, Steve, and
25 then you can jump in. I mean it kind of goes back to

1 the roadmap that I talked about. I think we are always
2 on a pathway of continuous improvement in our
3 semiconductor world that we live in, and you kind of
4 alluded to it. We have a high fixed cost business. You
5 have to absorb that to drive to profitability, and the
6 more we understand about what that end state is, we can
7 begin to move the business in that direction. But it
8 has to be done over time, and it has to be done through
9 strategic investment.

10 As I alluded to, we are ISO 14001 certified,
11 so we would integrate this new rule and any new kind of
12 regulation into our business model, but having it evolve
13 over time becomes very important to us just to avoid
14 creating some kind of instability in the overall
15 operation, especially as we're a small company trying to
16 grow and our resources are very valuable. So, that's
17 what I was referring to as a roadmap which is, you know,
18 here you need to be at this state in 5 years. You put a
19 plan in place, and I think if we execute against the
20 plan versus trying to do it in a very short time frame
21 where you flip the switch and then immediately, you'd
22 have to start it here. And then it does become a
23 distraction. Steve, anything to add?

24 MR. MANKO: Yes, I would say a couple of
25 things. I mean really going back to when we're talking

1 about the size of a company and what a smaller reporting
2 company looks like, again, we were \$163 million in
3 revenue last year, but again, given the structure of our
4 company as mentioned, we're a very high fixed cost
5 company that we have to absorb those costs. And that's
6 why it was great to be able to go to the market to help
7 us have some financing to bridge that gap before we can
8 scale and really start absorbing those costs.

9 I'd also say on our SGNA costs are about 20
10 percent of our revenue today, which really for our
11 industry needs to be something more between 7 and 9
12 percent, so there were just some scaling costs that are
13 in SGNA. But there was also a significant increase to
14 SGNA because of the public company requirements to have
15 different processes and governance in place, which are
16 all fine, but they're just is a cost to doing that.

17 So, I would say if this was in place, would it
18 really have made us not go if it was another, 500 to a
19 million-dollar charge to do this? It probably wouldn't
20 have prevented us from going, but again, as we're
21 already bearing those costs to becoming a public
22 company, it would've been another drain on the capital
23 that is so precious to us right now given a high fixed
24 cost business. Every dollar we spend right now is so
25 pivotable on generating revenue, so we can grow and be

1 here for the stakeholders of the future.

2 I'd also say that if I think about just going
3 through not only the IPO process, which we'll say took a
4 year, and really getting the company up and running one
5 year post-IPO, it's been a two-year process. And just
6 the intensity on the team and the personnel for the past
7 two years has just been daunting, and so it just could
8 be for us and the timing, but then to throw something so
9 significant on like this would just be another daunting
10 task to the mindset and personnel of our team given our
11 current state of what we've been dealing with from a
12 teaming and processing perspective over the past two
13 years.

14 You know going back to the ASC 606 and
15 (phonetic), those items had been talked about for
16 probably 8 years before they were implemented, had a lot
17 of convergence; trying to converge internationally
18 didn't work out for some of them. But there was a lot
19 of discussion taking place to make sure it was
20 implemented appropriately. Like I said, you never fully
21 know how something is going to work until there is a
22 final rule that's being implemented, and you truly get
23 the feedback at that point in time.

24 So, to be more specific and answer the
25 question more directly, what I'd ask to see is let it be

1 figured out. Let it be potentially finalized whenever
2 it might be at the right time. Let it be implemented by
3 those that can and should be implementing this to find
4 out how it is working before it is pushed down, and
5 there are inefficiencies that a small company would have
6 to learn by before it's been figured out by some of the
7 larger companies that are out there that this probably
8 more has an impact on and applies to from the very
9 beginning.

10 MR. SOLOMON: Brian?

11 MR. LEVEY: Yes, thanks Jeff, and thanks
12 Thomas, Steve, and Betty. A question I have is like is
13 there a way -- and maybe this is for Betty and
14 certainly, you know, there's no right or wrong answer
15 here. But just inquiring, could the rules be tailored a
16 little bit more based on industry? It just seems like,
17 you know, everything is applying to every single
18 company, and there's so many prescriptive disclosure
19 requirements, you know, subjective, objective
20 determinations. It just seems like a lot of these
21 companies' climate risks are not necessarily material,
22 but everyone is being bunched together. I just don't
23 know how practical it would be to be able to tailor
24 based on industry. Thanks.

25 MS. HUBER: I'll start, Brian. Thank you.

1 Yes, that's a really tough question, and I do know some
2 of my colleagues when the rule first came out on March
3 21 said, wow, that's interesting that there aren't
4 industry specific standards here. And having been on
5 the Advisory Counsel for SASB, which was created to have
6 like these types of disclosures in 10-Ks, SASB purposely
7 created 77 different industry frameworks. A

8 And so, there's certainly some people and
9 organizations that think that would be the way to go, so
10 you're right that there isn't one right answer. To use
11 Steve's word "daunting", I think that this was a
12 daunting task for the SEC to even write this rule, and
13 so I don't know if any -- it would be even a larger rule
14 if there were industry specific requirements in there,
15 and then trying to handle some industries. Some would
16 definitely get left out, so I'm not sure. I think that
17 the SEC did as good as they could do, I suppose.

18 MR. SOLOMON: Let me sort of give a 5-minute
19 warning year because I think we're going to want our
20 speakers to step off at 11:45, so we can discuss it as a
21 committee. But this is for any of the three of you. If
22 the SEC were to consider a safe harbor for scope 1 and
23 scope 2 for smaller companies, as well as scope 3, would
24 that be helpful? Would it change things? Or is it at
25 the end of the day if you've got to do it, you've got to

1 do it?

2 Like in other words, I guess what I'm trying
3 to say is how much of this is just the effort and costs
4 associated with this versus the liability, you know.
5 And if there was maybe a stepdown in liability on scope
6 1 and scope 2 or maybe the attestation cost would be
7 less expensive, I mean think about my expenses
8 associated with Sarbanes compliance. Frankly, my
9 biggest cost is getting our audit to -- the amount of
10 money we have to pay to external auditors to validate
11 what we already do every year by the way. And that's a
12 -- you know -- we don't change that much year over year.
13 It's a small company. Honestly, if we did it every 3
14 years, that'd be plenty.

15 But because the rule says we have to do it
16 every year, we got to do it every year, and it probably
17 costs us half a million to \$750,000 a year. I'd like to
18 say we're \$650 million, \$700 million market cap company.
19 What we spend to comply as a percentage of our market
20 capitalization is expensive, right. And I think those
21 are the kinds of things that I think about. Maybe
22 there's a way to step down scope 1 or scope 2 for
23 smaller companies and maybe give a safe harbor. Maybe
24 the cost of external compliance goes down. Is that
25 something or am I just, you know, hopeful here on that?

1 MS. HUBER: I'll try that one, Jeffrey. I
2 think the one thing that could make it cheaper is just
3 get rid of the attestation requirement for everybody. I
4 was thinking about what if there were materiality
5 standards on scope 1 and scope 2 like there is for scope
6 3, but I guess that doesn't work because somebody's
7 scope 1 and 2s are somebody's scope 3. So, I guess
8 that's why that's being required to be disclosed, but if
9 it's going to be in the 10-K, why do you need the
10 additional attestation requirement?

11 I think companies feel strongly enough that
12 they're going to get it right. If it's going to be in
13 their 10-K, why do they have to -- and that slows things
14 down, and it also makes it much more costly. So, that
15 seems like a pretty decent fix, and then also maybe the
16 other idea is to have the scope 1 and scope 2 and scope
17 3, given where they stand right now, that they be
18 furnished and not filed. Kind of like conflict
19 minerals, that makes it a little bit easier for
20 companies to disclose. Conflict minerals are permitted
21 to be disclosed at the end of May. That timing and
22 cadence is probably a little bit better, and I'm sure
23 Tom and Steve know better than I do when if they are
24 disclosing their scope 1 and 2 emissions when they're
25 getting that data.

1 But I know from my clients they're not getting
2 all of that, and they're not ready to disclose it with
3 accuracy come first week in February or sometime in
4 February.

5 MR. SONDERMAN: Yes, I would just echo that
6 Betty and Jeff. The whole idea of not -- you know --
7 forcing us to do things that are too different than what
8 we're already doing I think is very important. And
9 Jeff, I liked your idea about does it have to be every
10 year, or could it be every 3 years, and being able to
11 provide a report that may be shows what we're doing but
12 is outside some of the other regulatory filings that we
13 have to do. And then Steve made a really good point
14 that let's let the big companies go figure some of this
15 out, and then let it trickle down to the smaller
16 companies when there is a kind of business model that is
17 understood and as Betty just said that a reporting is
18 there.

19 We know where to go get the data. We know how
20 to adhere to the regulations that are coming, but it's
21 going to take time to flush this out, and big companies
22 can go figure that out. Small companies will have to
23 figure it out because we will adhere to the rules if
24 that becomes a rule, but there is a cost, and it does
25 become a distraction at a time when you're really wanted

1 to drive and grow the business as a small company.

2 MR. SOLOMON: So, I want to bring part of this
3 section to a close. I'll say, first of all, thank you
4 all for doing this. It's really helpful for us in terms
5 of trying, you know. We're also like you trying to read
6 this, digest it, and then come up with recommendations
7 that we think are salient recommendations for the
8 Commission even though we all have day jobs. It's
9 voluminous, so you know, I appreciate your willingness
10 to spend the time. We all do appreciate that.

11 For Thomas and Steve, I just think, again,
12 I'll be curious to hear in closing how much -- for
13 example, we're at the 10-year anniversary of the Jobs
14 Act right now. Like how much of that enabled you to
15 raise private capital to get this done? Like I think we
16 talk about public capital all the time, but a lot of
17 people don't think about the fact that before you get
18 public, you've got to raise private capital. And
19 private capital looks at the likelihood that you'll be
20 able to access public capital as a way to especially in
21 capital intensive businesses like yours.

22 So, if there had been no Jobs Act, would you
23 have been able to actually garner enough capital
24 privately without -- in order to execute on your
25 business plan?

25 MR. SOLOMON: Right. And it's fair to say

1 that the public markets, obviously, they're deeper
2 enough and provide you with enough capital to execute in
3 your business plan where maybe the private markets if
4 you had gone that route may not had been as cost
5 effective or maybe not even there for you if you hadn't
6 been able to access it, correct?

7 MR. MANKO: Correct.

8 MR. SONDERMAN: Oh, yes. That's for sure.
9 Absolutely.

10 MR. SOLOMON: Well, that's helpful because in
11 the context of using, you know, the Jobs Act as a rubric
12 for how to take some of these regulations and put them
13 in a framework that are acceptable so that you can meet
14 the needs of both the standardization and disclosure
15 which I think we all think is important in making sure
16 that investors get the information that they need in
17 order to make decisions is very important. And weighing
18 that against the burden on public companies I think is -
19 - you know -- using the Jobs Act may be a helpful
20 framework, and I just was curious to know how much of
21 that was helpful to you in terms of your access to
22 capital, and that's been a helpful thing.

23 So, if nobody else has any additional
24 questions, I want to again -- we want to thank you for
25 taking the time to do this. This has been very helpful,

1 and then if the committee members can stay for a few
2 minutes, and we can discuss before breaking, that would
3 be helpful. Thank you.

4 Well, thanks everybody. Again, I know this
5 has been - it's been hard to actually read and digest
6 the size and the scope of the rules, and you know, just
7 I know it's always -- whenever something like this comes
8 out and the Commissions asks us to look at it, most of
9 us don't spend a lot of our days thinking about it. And
10 it's hard to get up to speed. We have actually spend a
11 lot of time on this account, and I've been, you know,
12 relying on a lot of our team here because we have ESG
13 scores for every company we cover and research mostly
14 because we needed to have a standardization, and we've
15 found that there were so many different rules and
16 regulations to the way that people disclosed that we had
17 to create an algorithm and a rubric on our own because
18 we couldn't make determinations as to who was actually
19 doing things well and who wasn't doing things well
20 across different industries.

21 And so, we built an algorithm, and we crunched
22 a lot of data, and we look at a lot of big data sets to
23 make sure companies aren't greenwashing to come up with
24 a net promoter score framework for every company we
25 cover. Is it right? Is it wrong? I don't know.

1 Directionally, it's helpful to investors, but we had to
2 come up with a private market solution to address what
3 the SEC I think is trying to get accomplished here which
4 is a standardization. So, I'm sympathetic to the
5 Commission's desire to have standardization because what
6 we've found is companies are all over the map in what
7 they do. Again, I'm not saying ours is better or worse
8 than anybody else. We just needed to do it because we
9 felt it was an important thing for investors to have,
10 some toolset to make investment decisions around this.

11 When we think about advising the Commission, I
12 laid out 3 different things that I think maybe, you
13 know, Carla and I were chatting maybe it makes some
14 sense for us to try and get our heads around. I would
15 encourage you all to think about it. The framework of
16 recommending a more detailed cost benefit analysis, you
17 get to the -- I think it's like -- literally I think
18 it's page 434 where there is an attempt there, but I'm
19 not sure that it's all fulsome as it could be, and maybe
20 one of the recommendations is doing a deeper dive,
21 particularly as it relates to smaller companies on the
22 way the rule is laid out.

23 It just didn't seem as if there was a lot of
24 focus on the impact of smaller companies and the costs
25 associated with that relative. The second I would

1 think, you know, we may want to look at using EGCs and
2 smaller filers as a way to create holidays or frameworks
3 using the Jobs Act framework similar to what they do
4 with Sarbanes-Oxley here. And we can refresh everybody
5 on what that looks like, but the Sarbanes-Oxley
6 reporting requirements, there's a period of time in
7 which you're not required to do that if you qualify as
8 an emerging growth company.

9 I know they had small company filer status in
10 here too and maybe that might be a way to look at this
11 as well. The EGC statuses came about, just so everyone
12 knows, as a -- in the legislation itself was actually a
13 highly negotiated point because it was a line of
14 demarcation for companies that weren't yet public
15 meaning everybody -- like Cowen was public before the
16 Jobs Act, so we have all the same Sarbanes-Oxley
17 requirements that everybody else does. But anybody in
18 our business who had qualified as an EGC going forward
19 is not required to do Sarbanes-Oxley, so I think one of
20 the things we may want to consider is do we use EGC or
21 some EGC like definition or small company filing status
22 as a way to create a holiday?

23 That would be a proposal, and then I actually
24 think the safe harbor thing is very important or the
25 attestation is very important. That's really where the

1 bulk of the costs lay, and the bulk of the costs that
2 are not in the company's control because you basically
3 get handed a rate sheet and, you know, there's no
4 negotiating around it; this is what it's going to cost.
5 Because you need it, it becomes a layer of cost that
6 never goes away. Those are the 3 areas that I would
7 think we should consider, but I'm open to other
8 suggestions from the other committee members as we try
9 to frame a response. Anybody?

10 MS. CASH: Yes, I had a comment around -- I
11 think Betty and someone else on the committee talked
12 about sort of the alignment of incentives that if
13 companies are moving in the direction of doing things
14 that are more climate friendly, that they have to
15 disclose it versus companies that don't. So, I don't
16 know how we address that. This is happening, so the
17 rules -- certainly the regulation needs to be put in
18 place.

19 From my purview, I know a number of emerging
20 investment firms that are responding to the demand of
21 younger generations that do want this disclosure, and
22 the goal isn't necessarily punishment but to reward
23 those small cap companies. In the case of (audio
24 interference), I'm thinking about with capital for
25 "having a positive impact on the environment", and

1 social issues, etcetera. So, you know, I'm all for if
2 it moves the ball forward, but what I heard from this
3 discussion is that small cap companies that are sort of
4 further removed from doing what we're proposing, you
5 know, is it fair to sort of tax them for not already
6 being there?

7 And I'm a little torn because in order for --
8 you know -- these are urgent issues we're speaking of, so
9 it's, you know, how do you incentivize companies to do
10 the "right thing" but also being conscious that it takes
11 time to get there if you didn't start from that place if
12 that makes sense?

13 MR. SOLOMON: Sara and then Donell?

14 MS. GARRETT: Let me just real quick, Jeff,
15 follow up on Kesha's point which is, you know, rewarding
16 companies that are doing the right thing, and I think one
17 of the things that was mentioned maybe by Betty was that,
18 you know, if you are putting together some of this
19 analysis which we want companies to be doing, you're
20 subject to disclosure of them and more analysis, and
21 therefore that might be a deterrent to actually putting
22 together the analysis that people want done. So, that's
23 just another thought on following up on Kesha's point in
24 terms of we want to be rewarding companies and not
25 discouraging them from doing this disclosure or this

1 analysis.

2 MS. CASH: In particularly -- and thank you,
3 Carla, that clarified my own thought. In particularly,
4 small cap companies who need to attract those public
5 dollars, and that's what I'm seeing with some of the
6 innovative sort of more progressive investment firms
7 that are keyed into that. But also, you know, my heart
8 bleeds for companies that we just heard today that are
9 doing great work and providing important products and
10 them being taxed to sort of get up to speed.

11 MR. SOLOMON: Well, to that point before we
12 turn on that, I'll just say our experience here and the
13 incentives of people being proactive, when we put EGC
14 scores on -- sorry -- when we put ESG scores on every
15 one of our research reports, and we didn't really tell
16 any of the companies we cover that we were doing it. We
17 just announced we were doing it and did it. We got a
18 lot of calls from a lot of people from a lot of
19 companies of a lot of sizes, right, small companies and
20 large companies. Like the first question they ask is,
21 well, what is this and how can I make it better, right?

22 If you were getting a low score, everyone
23 wanted to understand what the algorithm was so they
24 could figure it out and make it better. Our algorithm
25 relies on company reporting but then also validates

1 company reporting externally, so there's a bunch of data
2 sets we look at to see if they're actually doing what
3 they say they're doing. So, there's a validation aspect
4 of it, but it definitely elicited a response from small
5 companies, as well as large companies, that they would
6 like to be better whether it's from an appearance
7 standpoint, or a marketing standpoint, or they're
8 worried that investors aren't going to invest in them,
9 no question that with a modicum of effort we got the
10 positive response. And then it went away. No one -- a
11 few people complained, but then they just got with the
12 program, and they've all been working for the last 6
13 months trying to increase their scores.

14 That's what happened at Cowen when we did it
15 too, so I think, you know, there's no question that
16 there's an incentive structure here that could work as
17 opposed to a penalty structure. And that might be
18 something worth considering. Sara?

19 MS. HANKS: Yes, thanks. I had a couple of
20 points. One of the is building on what Commissioner
21 Peirce had mentioned earlier with respect to she
22 characterized the analysis as being dismissive of
23 concerns that this would discourage smaller companies
24 from becoming public companies. And I certainly don't
25 want to dismiss the importance of this. This is an

1 amazingly important issue, but I think she has a point
2 there. And I think this is just another element where
3 we're seeing, you know, the SEC being treated as the
4 whole (audio interference) because there are so many
5 important societal things that are being piled onto the
6 companies.

7 And all of this becomes incremental. With
8 respect to the companies that we work with, and this is
9 important to my second point, they have a choice in many
10 cases as to whether they do become public. And this is
11 just one more thing that they look at in saying my
12 goodness, you know, this would be an enormous amount of
13 work. We want companies to be public. We want them to
14 be completely transparent. We want them to report to
15 the SEC, but this is another thing that's kind of going
16 to discourage them.

17 And that leads to my second point which is I
18 think we keep missing the point as to how small some of
19 the small companies are. With all due respect to Betty,
20 the companies that I work with can't afford Latham's
21 fees, and so the companies that we are seeing are tiny.
22 We're dealing with a number of companies who have just
23 moved into the public reporting sphere, which we are
24 happy to encourage, and a couple of our clients have
25 become newly registered public companies. But they've

1 got revenues of like \$1 to \$4 million, and the
2 difference between them and emerging growth companies
3 with billion-dollar revenues is huge.

4 So, not that I want there to be another
5 category of, you know, emerging growth, smaller
6 reporting, smaller accelerated, smaller and accelerated,
7 but there's got to be space there for the tiny companies
8 to become registered public companies without having to
9 spend what we estimate might be 30 percent of their
10 revenues, their gross revenues, on consulting fees to
11 comply with this sort of thing. So, thanks.

12 MR. SOLOMON: Thanks, Sara. Donnel?

13 MR. BAIRD: Yes. I'm so glad to be here. I'm
14 just going to not stand on ceremony and just jump here
15 in my first meeting. I do think in a future state there
16 will be a TurboTax for climate reporting for small
17 businesses. Like that will happen.

18 MR. SOLOMON: That was dually noted. I wrote
19 that down by the way as something.

20 MR. BAIRD: I think hopefully there will be
21 multiple versions of TurboTax for climate reporting and
22 will bring the efficiencies of technology and software
23 to these processes so that small firms can do a TurboTax
24 like form. If Intuit was smart, they'd actually just
25 add this as one of their applications that they offer to

1 folks since they have such great market share already.
2 But I don't think that small businesses are going to
3 have to hire expensive consultants. If they do, that
4 certainly will not work, so I certainly agree with
5 Sara's comments there.

6 So, this does all have to be built in a way
7 that is not dependent on consultants. If you look at
8 the carbon offset market, which is dependent on
9 consultants in like carbon offset reporting across the
10 world, it's like a failed, flawed, fraudulent, hyper
11 expensive, hyper inefficient market, so we want to take
12 lessons from there and not do that. I was really
13 interested in Jeffrey's comments on ESG ratings for
14 firms that they cover, and it reminded me here in New
15 York we did pass a law that provides almost an ESG
16 rating for every building over 25,000 square feet in New
17 York now has a letter grade on the front of the
18 building.

19 And so, it used to be like if you wanted to go
20 into a restaurant and have A, or B, or C letter grade
21 and you could say, hey, this is an unhealthy restaurant;
22 it's not clean because it has a C letter grade or it has
23 an A letter grade, so I want to eat there. So, we now
24 have that rating for climate for all of the real estate
25 asset class above 25,000 square feet in New York and had

1 similar reactions to what Jeffrey heard in his sector,
2 hey, what's the score.

3 But then it starts to impact your asset
4 valuation. If you want to sell your skyscraper, and you
5 got a D rating from the climate change rating, like
6 that's a problem at resale, right. And so, it starts to
7 get incorporated into the transaction cost of doing
8 business. Third, I just want to point out the success
9 of the green bond market globally that green bond
10 offerings and green corporate bonds have outperformed,
11 right. I mean I don't know what kind of returns to
12 investors, but they certainly sell, and there's a
13 premium that capital markets place on green bond
14 offerings.

15 And so having these kinds of ratings for even
16 midcap companies may in effect allow them to access
17 additional pools of capital, public capital, that they
18 were not otherwise able to access. And I think when you
19 look at the green corporate bond market, that's what
20 you're seeing that there's tremendous demand among
21 institutional investors for green offerings of any kind.
22 And so, I don't see why that would be the case for debt
23 but not for equity. Like it just seems like it would
24 translate, and then last, just a quick question.

25 I know the like Department of Defense and

1 Department of Energy spend a ton of money investing in
2 small businesses who innovate to solve these kinds of
3 problems that are part of their administrative mandate.
4 And so, I mean like Palantir, this giant Peter Thiel
5 company that's IPO'd and serves Department of Defense,
6 and CIA, and everybody else, like they were started with
7 the CIA's like venture capital arms. Does the SEC have
8 a Small Business Innovation Research Fund that could
9 fund low-cost compliance software for small businesses
10 and midcap companies in America to help them reduce the
11 burden of reporting?

12 MR. SOLOMON: Kind of like a DARPA for the
13 SEC. That's a great idea.

14 MR. BAIRD: DARPA for the SEC, SARPA.

15 MR. SOLOMON: That is a phenomenal idea, a
16 totally phonemical idea, and I think if those of us who
17 end up in front of Congress actually asking sometimes
18 for the SEC to make sure that Congress still funds the
19 SEC - I've been asked several times to make sure that
20 Congress still funds the SEC which is amazing to me.
21 But I think that would be a great thing, and I think,
22 you know, certainly this office was created by
23 Congressional mandate in 2016, so if they're any
24 legislatures or legislatures that are looking or anybody
25 else for that matter who thinks that it would be great

1 for the SEC to create an incubator or invest in
2 companies to do compliance, that would be phenomenal.

3 Because I think there's nobody that doesn't
4 want to do it. I think it's just in a way the costs
5 associated with it, and if we could do things like
6 create software programs that make it easy to comply,
7 that would be a great idea. So, value added on day one,
8 Donnel.

9 MR. BAIRD: Yes. I hereby resign. I'll leave
10 on a high note.

11 MR. SOLOMON: I see an officership if your
12 future. Well, so, I think -- you know -- I want to make
13 sure that we're mindful of people's time, and I think
14 maybe Carla, I'll turn it back to you. And you can help
15 us to get back on track timewise, but there's a lot that
16 we need to try to get accomplished, and we have a full
17 afternoon as well. So, Carla?

18 MS. GARRETT: Yes. We do have a full
19 afternoon. These are each topics that could have their
20 own meeting. So, I've roughly -- and I'm just going to
21 say roughly try to write down what some of the different
22 recommendations I've heard are, and these are going to
23 need to be, you know, refined. But I want to kind of go
24 through and see where the committee is and whether or
25 not they agree or, you know, don't agree with it. I

1 mean I think first of all we've heard that we do think
2 climate related disclosures are, you know, important,
3 and we also believe that there should a consistent set
4 of disclosures by companies.

5 And I've heard it looks like it might be nice
6 to have the consistency between, you know, agencies and
7 internationally also. But some of the recommendations
8 that I've heard from Jeff recommending a more detailed
9 cost benefit analysis and the impact this will have on
10 small private companies using the emerging growth
11 companies and small reporting companies both as a way to
12 scale disclosure requirements and the time to comply
13 with the requirements, make the disclosures subject to
14 the safe harbors, have an incentive structure instead of
15 a penalty structure, consider how these disclosures are
16 going to deter companies from going public possibly,
17 consider how these disclosures are going to effect the
18 very small companies such as the ones that Sara
19 mentioned, and the cost to comply.

20 One concern I have, and it wasn't brought up
21 in this last discussion, but it's just a concern on the
22 private companies and whether this could inadvertently
23 affect private companies and whether, you know, as Betty
24 mentioned, companies such as Walmart might not use a
25 small company because they don't have the disclosures in

1 place.

2 Brian mentioned could this be applied to
3 certain industries. We also heard the recommendation of
4 possible getting rid of the attestation report because
5 those are very costly, burdensome, and they slow down
6 everything. And is this necessary if companies are
7 already disclosing their information? We heard
8 possible having information furnished, not filed, and
9 having it disclosed later than when a 10-K would be
10 needed to be filed because information is not available.

11 And then we also heard about the timing and
12 implementation of these rules and whether we need a
13 little bit more time for companies to be able to comply
14 with these rules. And so, I guess I will turn that --
15 those are just a lot of different thoughts. I can now
16 let the committee weigh in on anything I said and
17 whether you agree or don't agree with some of them.

18 MR. SOLOMON: Well, maybe from an efficiency
19 standpoint because, again, we have a lot to cover, and I
20 know we need to get to an executive session here before
21 we break. Why don't we take a stab and circulate some
22 thoughts to the committee and then have people weigh in
23 with those thoughts? Unless I don't want to cut off the
24 conversation, but that was a very exhaustive list. You
25 do a great job at that. You always do. You know I

1 thought that was encompassing of everybody's commentary.

2 If there's anything you all think is missing,
3 you know, I'm happy to take it up. We can do it
4 offline, and then we're circulate it so that we can help
5 to formulate a recommendation off the back of those. I
6 love the incentive structure thing. I really do. My
7 mind is already thinking about, you know, if you want
8 people to comply at smaller companies, you know, reduce
9 their registration fees, that's well within the SEC's
10 purviews to do that. Like you can shift it, right.
11 They're so expensive to file sometimes registration
12 fees, but if this is really an important thing for the
13 SEC and you want small company compliance, it's like
14 waive some of the other fees. I think that's certainly
15 something that's well within their purview.

16 And there's a bunch of stuff like that that,
17 you know, we can help to bridge the gap on maybe. Great
18 ideas.

19 MS. GARRETT: I would like to see -- you know --
20 - get on the record, you know, if there are additional
21 things that I missed, and I might not have because I
22 discussed a lot, or if there's concerns about some of
23 the things I said, and if people don't agree with those.
24 Because I think those should probably be on the record.
25 Then do we want to just take a vote whether or not

1 people agree with the different items that I mentioned
2 so that we can formulate a recommendation based on
3 those?

4 MR. SOLOMON: Well, if we could just do this
5 formally. Maybe I'll just make a motion that I think
6 that the recommendations that you laid out are good ones
7 and that maybe we should authorize you to pull them
8 together in a document that gets recirculated. I think
9 that we can make a motion that we all agree that those
10 are the recommendations. That's the framework of the
11 recommendations we'd like to make to the Commission, and
12 that way I think we can be on the record that we've
13 tried to - we've heard everybody's input and we can try
14 to frame that and make some recommendations on that
15 basis. Does that work if I make a motion here? Julie,
16 I'll look at you and ask.

17 MS. DAVIS: I think so. Yes.

18 MR. SOLOMON: So, then I'll make a motion that
19 what you laid out, Carla, is the path we should go down
20 in terms of our recommendations. If anybody wants to
21 second it?

22 MR. LEVEY: I'll second.

23 MR. SOLOMON: All in favor?

24 GROUP: I.

25 MR. SOLOMON: Anybody opposed? Great.

1 Thanks, everybody.

2 MS. GARRETT: Thank you.

3 MR. SOLOMON: Carla, were we supposed to go to
4 executive session now for a few minutes?

5 MS. GARRETT: Yes. So, we are going to break
6 for lunch, and the webcast will be stopped, and it will
7 be restarted again at 1:30 p.m. However, if the members
8 of the committee could please stay on, we're going to
9 have a short executive session at this time.

10 (Whereupon a luncheon recess was taken from
11 12:13 to 1:30 p.m.)

12 MS. GARRETT: Welcome back. I hope everybody
13 had a nice lunch. We appreciate the discussion this
14 morning, and we will now turn to our second agenda item
15 which is the Commission's proposed rules on SPACs, shell
16 companies, and projections, which were proposed by the
17 Commission on March 30, 2022.

18 As you guys may recall in September 2021, this
19 committee discussed different pathways for businesses to
20 go public, including mergers with special purpose
21 acquisition companies, often referred to as SPACs. We
22 heard from Phyllis Newhouse and Isabelle Freidheim of
23 Athena, all women-led SPAC, who shared some of the
24 reasons companies and investors choose SPACs to go
25 public.

1 We also heard from Stanford Law Professor
2 Michael Klausner, who had suggestions for SPACs and
3 projection reforms. And we heard from David Ni, a
4 partner at Sidley & Austin who represents parties in
5 connection with SPACs. Now that the commission has
6 proposed rules on SPACs and with the background context
7 that the speakers provided in our prior meetings, and
8 the information we learned today, we hope that this
9 committee will be able to engage in a meaningful
10 discussion on how the proposed rules may impact small
11 businesses and deliberate on potential recommendations
12 on the proposal.

13 The Commission is still receiving comments on
14 the proposed rule, and so we once again have the
15 opportunity to provide our thoughts to the Commission.
16 We will first hear from Charles Kwon, Special Counsel of
17 the Office of Rulemaking in the SEC's Division of
18 Corporate Finance, to provide an overview of proposed
19 rules on SPACs, shell companies, and projections.

20 Charles, we appreciate you taking the time to
21 be with us today. We are aware of the Commission's
22 ambitious rulemaking agenda and appreciate how much hard
23 work that means for you and the rest of your staff.
24 I'll turn it over to you now, Charles.

25 MR. KWON: Great. Thank you, Carla and

1 committee members. I will start by stating that the
2 views I express today are my own, and I am not speaking
3 on behalf of the Commission or the SEC staff. As
4 stated, the Commission proposed the rules on March 30 of
5 this year to address investor protection concerns with
6 respect to SPAC, shell companies, and projections.

7 By way of background, a SPAC is in general a
8 shell company organized by a sponsor that conducts a
9 firm commitment IPO of redeemable shares at once that is
10 organized for the purpose of combining with one or more
11 unidentified private companies within a certain
12 timeframe. These transactions are often referred to as
13 de-SPAC transactions.

14 As noted in the proposing release, the public
15 securities markets in the U.S. have experienced an
16 unprecedented surge in the number of SPAC IPOs over the
17 past two years with SPACs raising more than \$83 billion
18 in IPOs in 2020, and more than \$160 billion in IPOs in
19 2021. This surge in SPAC IPOs has heightened concerns
20 about various aspects of the SPAC structure. These
21 concerns would include potential conflicts of interest
22 between sponsors and a SPAC's public shareholders, the
23 amount of sponsor compensation, the amount of dilution
24 experience by non-redeeming shareholders, the adequacy
25 of the disclosures provided in these transactions, and

1 the lack of a named underwriter in de-SPAC transactions
2 that perform traditional gatekeeping functions,
3 including due diligence.

4 Market observers have also raised concerns
5 about the increasing use of shell companies generally as
6 a mechanism for private operating companies to go
7 public, and whether investors have sufficient
8 protections in these transactions. A surge in SPAC IPOs
9 has also renewed concerns about the use of projections
10 in Commission filings, whether by SPACs or other
11 issuers, that may be unreasonable, unfounded, or
12 potentially misleading.

13 And as the SPAC market has grown, concerns
14 have also arisen as to whether some SPACs may be
15 investment companies that are subject to the
16 requirements of the Investment Company Act. As stated
17 in the proposing release, the proposed rules are
18 designed to provide important investor protections and
19 to strengthen investor confidence in the SPAC market as
20 well as to improve the completeness, clarity, and
21 comparability of the disclosures provided by SPACs at
22 the IPO stage and of de-SPAC transactions.

23 As noted by Chair Gensler at the Open
24 Commission Meeting on March 30, a theme of the rule
25 proposals is treating like cases alike by helping to

1 ensure that SPAC investors get protections similar to
2 those afforded to investors in traditional IPOs. The
3 proposing release was posted to the SEC's website on
4 March 30. We are currently in the public comment period
5 for this rule making, and the public comment period will
6 remain open for 60 days following posting to the SEC's
7 website or 30 days after publication of the Federal
8 Register, whichever is later.

9 Given that as of today, May 6, the proposing
10 release has not yet been published in the Federal
11 Register, the comment period will run through a period
12 of 30 days after Federal Register Publication. We
13 welcome public feedback on the rule proposals and look
14 forward to the comments and discussion today by this
15 committee. In general, the rule proposals fall under 5
16 categories, the first category consists of proposals to
17 set forth specialized disclosure requirements in SPAC
18 IPOs and in de-SPAC transactions.

19 The Commission proposed specialized disclosure
20 requirements, a new Subpart 1600 of Regulation S-K,
21 which would require among other things enhanced
22 disclosures about SPACs, sponsors, conflicts of
23 interest, and dilution. And additional disclosures on
24 de-SPAC transactions, including a requirement that a
25 SPAC state whether it reasonably believes that a de-SPAC

1 transaction and any related financing transaction are
2 fair or unfair to investors and would also require
3 disclosure as to whether a SPAC has received any outside
4 report opinion or appraisal relating to the fairness of
5 the transaction.

6 Proposed Subpart 1600 would also require
7 disclosures -- certain disclosures on the prospectus
8 cover page and in the prospectus summary of registration
9 statements filed in connection with SPAC IPOs and in de-
10 SPAC transactions, and it would also require the tagging
11 of information disclosed pursuant to Subpart 1600 in
12 line (audio interference.)

13 The second category of rule proposals relates
14 to proposals to align more closely the disclosures and
15 legal obligations in de-SPAC transactions with those in
16 traditional IPOs. The Commission proposed these new
17 rules and amendments in view of the increasing number of
18 private companies using de-SPAC transactions to go
19 public. Specifically, the Commission proposed to
20 mandate that additional information about the private
21 operating company be provided to the shareholders before
22 they make voting investment or redemption decisions in
23 connection with the proposed de-SPAC transaction.

24 The proposed amendments would also require or
25 deem a private operating company to be a co-registrant

1 when a SPAC files a Form S-4 F-4 for a de-SPAC
2 transaction such that the private company and its
3 signing persons would also be required to sign the Form
4 S-4 and would also clarify by rule that the underwriters
5 in SPAC IPOs participate in a distribution by taking
6 steps to facilitate a de-SPAC transaction or any related
7 financing transaction or otherwise participates directly
8 or indirectly in the de-SPAC transaction that they would
9 be deemed to be engaged in a distribution of securities
10 in the de-SPAC transaction and to therefore be
11 underwriters in that transaction.

12 In addition, the proposed rules will require a
13 minimum dissemination period for disclosure documents
14 and de-SPAC transactions of at least 20 calendar days in
15 advance of a shareholder meeting or the earlier date of
16 action by consent, absent a shorter maximum
17 dissemination period under the laws of the SPAC's
18 jurisdiction of incorporation. The proposed rules would
19 also require a redetermination of smaller reporting
20 company status following the consummation of a de-SPAC
21 transaction. It would also amend the definition of
22 blank check company for purposes of the Private
23 Securities Litigation Reform Act of 1995 or the PSLRA to
24 encompass facts and certain other blank check companies
25 to clarify that the safe harbor under the PSLRA for

1 forward looking statements would not be available.

2 The forward-looking statements in this would
3 include projections in connection with de-SPAC
4 transactions. The third category of rule proposals
5 consists of proposals to address business combinations
6 involving shell companies. Generally, these rule
7 proposals are in response to concerns regarding the use
8 of shell companies generally as a means of accessing
9 into capital markets and are intended to ensure that
10 shareholders receive the protections of the Securities
11 Act in business combinations involving reporting shell
12 companies, and this would include de-SPAC transactions.

13 Specifically, the Commission proposed to deem
14 by rule, and it's this proposal 145(A) that these
15 transactions with a non-shell company entity constitute
16 the sale of securities to the reporting shell company's
17 shareholders. And the Commission also proposed to align
18 more closely the financial statement requirements
19 applicable to business combination transactions
20 involving shell companies and private operating
21 companies for those and traditional IPOs. And these
22 proposed requirements are set forth in proposed Article
23 15 of Regulation SX.

24 The fourth category of rule proposals consists
25 of proposals to address projections in Commission

1 filings generally and in de-SPAC transactions
2 specifically. The Commission proposed to amend Item
3 10(B) of Regulation S-K, which currently sets forth
4 Commission's views regarding projections of Commission's
5 filings to update and expand this guidance to allow
6 investors to better assess the reliability of these
7 projections and whether they have a reasonable basis.

8 Among other things, the proposed amendments to
9 Item 10(B) would address the presentation of projections
10 by companies with no history of operations and provide
11 that the guidance in Item 10(B) applies to projections
12 by persons other than the (audio interference.) In
13 addition to that, the Commission also proposed Item 1609
14 of Regulation S-K to require additional disclosures to
15 assist investors in assessing the basis of projections
16 when they're used in de-SPAC transactions.

17 And finally, the Commission proposed Item
18 3(a)(10) under the Investment Company Act of 1940 that
19 would provide a safe harbor from the definition of
20 investment company under Section 3(a)(1)(A) of the
21 investment company for SPACs that meet certain
22 conditions. The proposed conditions include among other
23 things that the SPAC must maintain assets consisting
24 only of cash items, government securities, and certain
25 money market funds, and also under the safe harbor,

1 would be required to enter into an agreement with the
2 target company to engage in a de-SPAC transaction within
3 18 months of the IPO and to complete the de-SPAC
4 transaction within 24 months of its IPO.

5 While a SPAC wouldn't be required to rely on
6 the proposed safe harbor, the proposed conditions are
7 intended to align with the structures and practices that
8 the Commission preliminarily believes will distinguish a
9 SPAC that is likely to raise serious questions as to
10 whether it may be an investment company from one that
11 does not. If the proposed safe harbor is adopted, a
12 SPAC that fully complies with the rule's conditions
13 wouldn't be required to register as an investment
14 company under the Investment Company Act.

15 So, that's a general overview of the rule
16 proposals and the SPAC rulemaking. We very much look
17 forward to the input and discussion by this committee on
18 these rule proposals.

19 MS. GARRETT: Thank you very much, Charles.
20 And I would like to open up the floor to any committee
21 members that have questions for Charles. If you do, just
22 raise your hand or go ahead and speak.

23 MR. SOLOMON: Yes, I have a question. Yes. I
24 have a question. On the last rule as it relates to the
25 '40 Act, what was the purpose behind sort of an 18-month

1 timeframe and did the Commission debate that being a
2 longer period of time or where did the Commission sort
3 of come up with that timeline?

4 MR. KWON: So, as you know, I mean this is a
5 rule proposal that sets forth the Commission's
6 preliminary views on the parameters of a safe harbor
7 from not being deemed an investment company under the
8 Investment Company Act. The timeframes that are
9 proposed, and the proposing release are based on the
10 Commission and the staff's analysis of transitory
11 investment company status. And I think that's laid out
12 in the proposing release that it's not something that
13 the Commission just came up with on its own for this
14 rulemaking, but it's based on existing analysis of
15 transitory investment company status under the '40 Act.

16 MR. SOLOMON: Got it. Does anybody have any
17 other questions for Charles?

18 MS. GARRETT: Thank you, Jeff. I was on mute.
19 Okay. It does not look like it, so I'm going to go
20 ahead and introduce our external speaker. We are
21 pleased to have with us today another expert on these
22 proposed rules, Anna Pinedo, and Anna is a partner in
23 Mayer Brown's New York office and is Co-Leader of the
24 firm's Global Capital Market Practice. Her practice
25 focuses on securities and derivatives, and she

1 represents her clients in financing transactions,
2 including public offerings and private placements.

3 Anna has agreed to share her perspectives on
4 how the proposed rules, if adopted, might impact smaller
5 businesses. Welcome, Anna. Thank you for being here
6 today, and we look forward to your presentation.

7 MS. PINEDO: Thank you very much, Carla, and
8 thanks to the committee. I'm very pleased to join you
9 all this afternoon, and I'm going to share my slides
10 with you. I'm not going to go through all of them.
11 These are my own views, not necessarily the views of the
12 firm. And so, with that I'll just take a moment, and
13 we'll get the slides up.

14 Since Charles went through the details of the
15 proposal, I'm going to skip over a number of the slides.
16 So, I want to begin with something that I know is very
17 much a focus and has always been a focus for this
18 committee, and that is the broader context of capital
19 raising and how much the landscape for capital raising
20 has changed in recent years, and the fact that we should
21 view the SEC's proposed rules on SPAC, shell companies,
22 and projection, which Charles went through, within and
23 situate it within this broader context of capital
24 raising.

25 And in that regard, I note the very

1 interesting speeches that several of the commissioners
2 have made of late. Taking to heart a number of the
3 trends that I'm outlining here on this slide, and that
4 is of course that we are indeed facing a situation where
5 many, many companies are choosing to stay private
6 longer, where there is increased reliance, and there has
7 been for over a decade now on raising capital in the
8 private markets and exempt transactions, and where there
9 is the pace of capital raising in exempt transactions
10 has vastly outpaced the capital raising in SEC
11 registered transactions, and of course, the decline
12 which this committee knows well in the number of U.S.
13 public companies. And that's not necessarily a trend
14 that's unique to the United States. We see it in the
15 other jurisdictions where we, Mayer Brown, do business,
16 and it's well documented that it's not a U.S. phenomenon
17 alone.

18 And in fact, the unicorn phenomenon is one
19 that's global. The rise of unicorns also is well
20 documented, and I know the committee has spent a fair
21 bit of time discussing it, but what is very important is
22 that private companies are approaching the public
23 markets with some degree of trepidation and skepticism.
24 And prior to this SEC -- to these proposed amendments,
25 the conversations that we had been having in the last

1 couple of years with companies that were considering a
2 liquidity transaction had changed from the usual -- from
3 what we thought of as the dual track, and IPO, and an
4 M&A transaction, to a much more fluid conversation of an
5 IPO, potentially a direct listing, potentially an M&A
6 transaction, and a combination with a SPAC.

7 And I think it's important that we continue
8 obviously to focus on disclosure, and we continue to
9 prioritize investor protection in good disclosure which,
10 of course, the SEC's proposal does and puts a premium on
11 as well it should, but that we not eliminate the
12 possibility of choice. And each of these alternatives
13 certainly have its place for a particular company and
14 for a particular market cycle.

15 And we also have to recognize, of course, that
16 the private markets remain very, very appealing.
17 There's plentiful private capital, private capital even
18 in the volatile markets that we're experiencing at
19 present. Valuations remain high, potentially more
20 attractive than those that are available in the public
21 markets, and it's no longer the case that an IPO is the
22 only available choice or the best available choice for
23 raising significant capital.

24 So, now when we have conversations with
25 companies about approaching the public market, it's

1 usually to gain liquidity for existing stockholders and
2 not really so much about access to capital. And I think
3 the other important realization, and I know this
4 committee is intimately aware of this, is that
5 institutional investors are incredibly focused on larger
6 IPOs, and there's been a lot of discussion of late,
7 again, in some of these same speeches about direct
8 listings, how well direct listings have fared, direct
9 listings as an alternative to IPOs, as an alternative to
10 combinations with SPACs.

11 But the reality there is complex as well,
12 right, and the reality is that not all direct listings
13 have been as been equally successful, and that direct
14 listings are not available to all companies, and that
15 the direct listings that have fared best are those where
16 there's been a lot of institutional investor interest
17 before the company has approached a direct listing in
18 where there's been an active liquid secondary market
19 precisely because there's been institutional -- there
20 have been large institutional investors within the cap
21 table.

22 None of this really has anything to do with
23 necessarily with the approach to going public so much as
24 some fairly complex market structure issues, size
25 issues, the secondary market, the inability to raise

1 capital effectively in follow-on offerings that makes it
2 very difficult for a lot of these companies to thrive as
3 public companies following their IPO. And to that end,
4 a lot of attention has been paid to the role of
5 projections in SPAC transactions and de-SPAC
6 transactions, and a lot of attention has been paid to --
7 and you've been the beneficiaries in some of your prior
8 meetings of academic research on de-SPAC performance and
9 so on.

10 So, if you look at the slide here, it shows
11 that the de-SPAC index is not all that different from
12 the IPO index or the Russel Index, right. These are
13 highly correlated and if you think about the de-SPAC
14 transactions or the post de-SPAC companies and how
15 they've performed and you really look at them based on
16 market size, market cap, and the fact that a lot of
17 these companies lack -- institutional stockholders lack
18 the institutional stockholder base, and you look at them
19 from a size perspective. A lot of their issues that
20 have been unfortunately attributed to projections --
21 they're more in common with market structure issues and
22 they're more in common with issues that are very
23 familiar to this committee's core areas of focus, issues
24 that are common to all small or public companies to
25 midcap public companies these days, lack of sufficient

1 institutional holdings, lack of a liquid secondary
2 market, lack of research support.

3 And very little has to do with how they came
4 to be whether it was through a business combination or
5 otherwise. So, I'm going to skip my little overview of
6 SPACs, and SPAC IPOs, and de-SPAC features. I'm also
7 going to skip over a number of the points regarding the
8 elements of the SEC's proposed rules on SPACs and shell
9 companies, and projections since Charles went through
10 those in detail. I will just note that I would say that
11 market participants generally readily would acknowledge
12 that a lot of the disclosure enhancements, those related
13 to potential conflicts of interests, those related to
14 dilution, those related to bringing disclosures, adding
15 additional Reg S-K items into the S-4 that might now
16 only be required in connection with the Super 8-K.

17 I don't think that anybody would quibble that
18 those are useful, and that the market would benefit
19 generally from those, and that those are helpful, and on
20 the whole would make this process infinitely better. I
21 think that there would be great support among market
22 participants for all of those changes that are in the
23 proposed amendments. I think that if alignment is an
24 objective and that if Chair Gensler is sincere in his
25 words about treating like as like, then perhaps the SEC

1 staff should consider removing a lot of the impediments
2 that historically have held back shell companies, those
3 in Rule 144, those that limit the availability of Form
4 S-8 for a time, some of the inability to rely on
5 communication safe harbors because if we're making all
6 of these enhancements to disclosures and we are
7 addressing a lot of the disparities relating to
8 disclosures and we're truly treating like as like, then
9 let's address them.

10 I would like to spend the majority of my time
11 with you focused on those proposed amendments that I
12 think have - where the calibration I think is slightly
13 off and where I think we're veering from focusing on
14 disclosure and investor protection and really sort of
15 putting the thumb on the scale and kind of dangerously
16 moving to a merit-based system which is not the core of
17 the SEC's mission. It never has been. It isn't what
18 the SEC is focused on, and where the calibration
19 between, you know, investor protection and having just a
20 chilling effect on the market, and just creating a
21 dangerous slippery slope, is really concerning.

22 So, I'll go through the first topic here
23 relatively quickly, and this relates to the proposed
24 amendments regarding the background of the de-SPAC
25 transaction. And Charles mentioned these changes

1 briefly in his overview. So, new Item 1605 would
2 require a disclosure of the de-SPAC background. It's
3 certainly not problematic for market participants to
4 provide additional disclosure relating to the background
5 of the de-SPAC, any associated or concurrent financing,
6 any material interest, and so on.

7 Where things get tricky and I think maybe
8 require some re-assessments are the provisions, the
9 proposed amendments, relating to a discussion of the
10 fairness of the de-SPAC transaction. So, here there's
11 an acknowledgement in the proposing release that these
12 requirements are similar to what is currently required
13 in going private transactions. There's no real sort of
14 explanation or justification for why what is required in
15 a going private transaction is appropriate in the
16 context of a de-SPAC transaction. And it is very clear,
17 I think, or at least what market participants are taking
18 from this is that the expectation certainly is that a
19 SPAC board ought to be obtaining a fairness opinion in
20 connection with a de-SPAC transaction.

21 Well, currently there are very few financial
22 advisors that are in the business of providing fairness
23 opinions in the context of these transactions. It is
24 difficult to provide a fairness opinion in these
25 transactions. It's a difficult analysis. It is costly

1 for a SPAC board to obtain a fairness opinion. There is
2 liability associated with rendering a fairness opinion,
3 and this ties into something that I'm going to go
4 through later which is 140(a) and the very problematic
5 wording in the proposing release regarding who may be
6 seen as constituting an underwriter for Section 2(a)(11)
7 purposes, and whether a provider of a fairness opinion
8 would be seen as having additional liability.

9 So, while certainly the Delaware Chancery
10 Court has raised issues in its multi-plan decision, and
11 market participants have that to consider, it still is
12 not clear why it should be the SEC's -- within the SEC's
13 rulemaking authority to essentially require that market
14 participants obtain a fairness opinion in the context of
15 a de-SPAC transaction. Another issue that is extremely
16 worrisome to market participants, and that is a
17 departure from traditional Securities Law principals is
18 the approach of treating the target company as a co-
19 registrant.

20 So, from a public policy perspective, I at
21 least understand the basis for wanting to treat the
22 target company as a co-registrant. However, this is one
23 instance, one of several, where I think that this is
24 really a -- is problematic, you know, from just a
25 theoretical securities law perspective, and just a

1 practical perspective. And also, that -- you know --
2 can't veer too far from my University of Chicago Law
3 School and Economics thinking a quintessential slippery
4 slope issue.

5 So, here the target company is not selling
6 securities. The target company -- in most de-SPAC
7 transactions, the target company is not a promoter. It
8 is not a control person at this point in your typical
9 de-SPAC transaction. The target company is providing
10 information about itself to be included in a S-4. There
11 are officers and directors of the target company that
12 are not continuing on that would essentially in this
13 construct be asked to sign on to a registration
14 statement when they would not be continuing on, and that
15 would be taking on Securities Act liability.

16 There is already a rubric of Securities Act
17 liability for the signatories of the S-4/F-4 in a de-
18 SPAC scenario, so it seems like we're trying to address
19 a problem that already has been addressed. And in other
20 context in the '33 Act where we have co-registrants,
21 it's where there's a common identity with the issuer
22 where it's the issuer, a control person of the issuer, a
23 promoter. If you look at a securitization scenario,
24 it's a depositor or a sponsor that is treated as a co-
25 registrant.

1 If you look at a repackaging scenario where
2 the Securities & Exchange Commission has analyzed co-
3 registrants, you still wouldn't come to this conclusion,
4 and if you look at a public to public merger or public
5 to private merger and compare it or try to analyze to
6 this scenario, it's very difficult to see how you would
7 separate this co-registrant conclusion and how one would
8 draw a distinction from co-registrant analysis to a
9 public-to-public transaction or a public to private
10 transaction and distinguish it from a Securities Law
11 purpose other than pointing to the public policy
12 justification which is a very bad justification, again,
13 for an agency and for a body of law that's supposed to
14 be guided by disclosure principals.

15 So, underwriting liability, again, Charles
16 outlined the purpose of 140(a). I think that this is
17 certainly having the most chilling effect right now even
18 given the status of this action, the fact that we're
19 still dealing with these rules as proposed. The
20 language in the proposing release goes much, much
21 farther than the text of proposed Rule 140(a), and the
22 language in the proposing release is very expansive and
23 suggests that it is an expression of the SEC's current
24 view regarding statutory underwriting liability.

25 And that is very, very worrisome in the sense

1 that it is a very broad reading or very broad
2 interpretation of who might be viewed as a statutory
3 underwriter in a transaction because it goes beyond
4 certainly the SPAC IPO underwriter. It suggests that an
5 investment bank that maybe simply receives IPO
6 compensation in a deferred compensation but has no
7 participation whatsoever in the de-SPAC -- we've lost
8 the slides a little bit for which I hope you'll forgive
9 me -- that has no participation at all in the de-SPAC
10 process is still nonetheless an underwriter in respect
11 of the de-SPAC, the S-4 process.

12 It's unclear if an investment bank has no
13 participation whatsoever in the context of the de-SPAC
14 what relationship that investment bank has to the
15 distribution or the introduction of securities into the
16 market of the target company. And what underwriting
17 liability they bear? Is it in respect of the SPAC
18 shares that are being delivered in connection to the
19 target stockholders? It's really just difficult to
20 quantify. It is very difficult to draw the connection
21 to, again, historic principals of underwriting
22 liability.

23 And then you take some of the other language
24 that's in the proposing release that suggests that
25 acting a financial advisor to a SPAC or assisting in the

1 identification of potential target companies, or
2 potentially identifying acting as a placement agent in a
3 SPAC pipe might render you an underwriter in respect of
4 the process itself is potentially problematic. All
5 quite inconsistent with historic principals of who has
6 been viewed as an underwriter.

7 So, then we go to the next and last point that
8 I want to spend a little bit of time on, and that is
9 projections. Again, Charles explained that the proposed
10 amendments would amend the Private Securities Litigation
11 Reform Act a statute. Obviously, the market understands
12 that there were on both the House side and the Senate
13 side proposed bills. I think those bills are still
14 pending that would propert to do much of what the SEC
15 seems to have taken upon itself to do, and now make it -
16 - not make the safe harbor available for projections.

17 So, here, I'm focusing only on the safe
18 harbor, not the disclosure aspects, the Reg G disclosure
19 aspects of the proposed amendments. So, a couple of
20 things in this regard setting aside whether, you know,
21 this is within the SEC's authority and whether it makes
22 sense to address this part of the safe harbor, and
23 whether it's logically consistent to address only this
24 part of the safe harbor and not address the safe harbor
25 as it would apply to direct listings or any other way of

1 becoming a public company, but focusing solely on
2 projections and the utility of projects.

3 If indeed the SEC thinks that a fairness
4 opinion is important in the de-SPAC process, any good
5 worthwhile fairness opinion would be based on assessment
6 of projections, and a SPAC board would evaluate and
7 consider projections. So, if a fairness opinion needs
8 to be included and a fairness opinion is going to rely
9 on projections, then -- and those projections are not
10 going to benefit from a safe harbor, then again, market
11 participants are left wondering how all of this would be
12 handled and how all of this is intended to work out, and
13 if there would be underwriting liability in respect to
14 the projections, and how that squares with treating like
15 as like when that is not the case in IPOs.

16 So, that doesn't really jive with the like is
17 like. It also doesn't seem consistent with providing a
18 good substantive basis for a fairness opinion if people
19 would then be motivated to exclude projections and not
20 have a meaningful fairness opinion analysis. So,
21 finally, let's just tally all of this up.

22 So, someone has to pay for all of these many
23 things that are going to be required, and that is the
24 discussion that has been going on since the day that the
25 SEC released these proposed amendments. So, if indeed

1 we are all left to wonder who might be a potential
2 statutory underwriter and if the SEC in fact already
3 believes that all of these various advisors may be
4 statutory underwriters, and we have no idea what they
5 might have underwriting for because that's unclear, and
6 we don't know what securities they might be
7 distributing, then we're going to have to take, you
8 know, additional measures.

9 And so, it would stem to reason that we're
10 going to want to suggest that they obtain additional
11 legal opinions. 10b-5 Letters might be in order.
12 Comfort Letters from accountants might be in order.
13 Certainly, higher financial advisory fees would be a
14 reasonable thing to expect. Anybody who's prepared to
15 deliver a fairness opinion would certainly expect a
16 hefty fee. D&A insurers are certainly going to be
17 charging significantly more. And if you're a target
18 company, you would want to think very seriously about
19 getting additional D&O insurance and D&O insurance for
20 your directors and officers, even those that are
21 departing, that now suddenly have to sign a registration
22 statement.

23 So, it's really easy to see how all of this
24 becomes really quite unsustainable in the context of a
25 transaction, and why it would have a chilling effect on

1 the market, and why it would leave a lot of market
2 participants perplexed about whether this is even a
3 viable strategy going forward, particularly for a
4 segment of the market that may not -- you know -- may be
5 queasy about being public to begin with. So, I'm happy
6 to take questions.

7 MR. SOLOMON: Carla, do you want me to take
8 this?

9 MS. GARRETT: That'd be great, Jeff.

10 MR. SOLOMON: Great. If we could take down
11 the slides, that'd be helpful. And Charles, I just want
12 to make sure you're still there because I think it would
13 be helpful actually to, you know, hear some of your
14 thoughts, as well as Anna's thoughts, as we try to parse
15 through this. So, I'm going to make a couple of
16 statements. I've been around the SPAC market for a long
17 time, and I just want everybody on the committee to know
18 that was about as in depth from both Charles and from
19 Anna as I've ever been in terms of the innerrancy
20 workings of the SPAC market. So, lest you think that
21 those of us who have been around the SPAC market for
22 almost 3 decades have that all memorized, we do not.

23 And so, you shouldn't feel that -- you
24 shouldn't feel like you needed to get a PhD in SPACs to
25 make some high quality recommendations, so I'm going to

1 try to see if I can boil this down to a couple of
2 salient points, and then see if we can actually create a
3 framework where we might actually be able to get some
4 agreement on a path forward. So, let's start with --
5 and Charles, again, I'm not sure if you're there or not.
6 Oh, good to see you.

7 So, when the Chair has said like for like --
8 by the way, kudos. I think when you look at just
9 different pathways for companies to access public
10 markets, small companies to access public market
11 capital, just the Commission is looking for a way to
12 balance its 3 missions, which is access to capital, fair
13 safety and soundness, and investor protection. And I
14 just want to make sure that when the Chair says like for
15 like, it's creating a pathway where small companies can
16 continue to use SPACs as a viable alternative to direct
17 listings or IPOs, and trying to create a framework where
18 SPACs - where the process of going public through a SPAC
19 balances both the need for capital formation, as well as
20 investor protection and fairness. Is that -- I just
21 think that's important to state, right? That's really
22 what we're trying to get accomplished here, yes?

23 MR. KWON: Yes. You know I would say in
24 general that obviously de-SPAC transactions are
25 different than regular IPOs because it involves a

1 merger, and you know, a SPAC with shareholders that have
2 certain interest along with the target company and the
3 target company's shareholders. And so, I think, you
4 know, again, these are just my views, but I think the
5 rule proposals reflect, you know, the general principal
6 of treating like alike, but then also taking into
7 account that de-SPAC transactions are different in
8 certain ways than regular IPOs. And it's trying to
9 balance all of those different factors together into a
10 set of rule proposals that would strengthen investor
11 protection, as well as the SPAC market by improving
12 investor confidence in the market.

13 MR. SOLOMON: That's fair. So, SPACs are
14 actually -- when you think about for those of you on the
15 committee that maybe aren't as familiar with it, but
16 SPACs have two parts, right. There's the initial public
17 offering of a blank check company. In that particular
18 case if a company -- the investors in that company at
19 that point in time are simply buying a financial return.
20 Up until the time that the SPAC either completes a
21 transaction or actually expires, the investors get their
22 money back. Every investor gets their money back.
23 Actually, that's the way that SPACs have been set up, so
24 up until the moment in time that a transaction is
25 announced and is closed, SPAC investors who are invested

1 in the IPO of the SPAC before the de-SPAC transaction
2 actually have a guaranteed return in there because
3 either they can say -- they can ask for their money back
4 at the moment of a merger, or if the SPAC expires
5 without completing in a merger, they get their money
6 back. And I think that's an important distinction.

7 I'm not sure many people know that that SPACs
8 are really the only equity instrument in which there's a
9 guaranteed return of capital to an investor up until the
10 moment that a transaction is consummated or the SPAC
11 expires. I'm looking at both Anna and Charles. I think
12 you'd want to make it very simple that what we're
13 talking about here is what happens at the moment that a
14 SPAC completes a transaction, right. And that's
15 relevant particularly because at that point, the company
16 becomes more of a regular way company in the sense that
17 it has an operating business in it, and there's a whole
18 series of disclosures that have to occur.

19 So, everything we've been talking about here
20 is what happens at that moment in time in which a SPAC
21 consummates a transaction and how would that be the same
22 or different than actually the moment a private company
23 goes public.

24 MS. PINEDO: Jeff, I think that's absolutely
25 right, and it's great that you brought that up. The

1 first couple of slides that I didn't go over provide the
2 -- and folks can refer to them -- provide the SPAC IPO
3 overview and then the de-SPAC process. And it is in
4 fact two distinct processes as you just outlined, and
5 participants in the SPAC IPO just as you said, right,
6 have this opportunity to be redeemed if they so choose.
7 And they purchase knowing that they're purchasing with
8 the opportunity to be redeemed and that they're
9 purchasing into an opportunity also to vote on this
10 initial business combination.

11 I think that the SEC's proposed amendments do
12 in part in particular on this issue of underwriter
13 status sort of conflate the two distinct processes that
14 you described, the SPAC IPO and the de-SPAC, in ways
15 that are problematic.

16 MR. SOLOMON: Right. So, for purposes of the
17 committee discussion, we should talk about advising the
18 Commission to clarify that really what we're talking
19 about here is post transaction just a case in point. I
20 also want to make a few statements about the risks for
21 investors. So, most SPACs have a redemption value at
22 \$10 a share, not all of them, but the vast majority of
23 them do, meaning either at the moment of expiration or
24 at the moment that a transaction is consummated it's
25 consummated with a value that prices it at \$10 a share.

1 What's been happening in some instances, not
2 recently, but certainly in 2020 and 2021 we saw this a
3 lot. Prior to the commencement of a transaction, many
4 SPACs traded higher than \$10 a share on the expectation
5 that the company that was being acquired was -- you know
6 -- had some intrinsic value that was going to be higher
7 than at \$10 a share. Even if the transaction was priced
8 at \$10 a share, many of these traded through \$10 a share
9 at a moment in time in which we could argue in the first
10 quarter of last year there was rampant speculation
11 everywhere, not just in SPACs.

12 What's interesting to note about that is even
13 if you buy SPAC shares at \$12, or \$13, or \$14, or \$15 a
14 share, if you -- you still up until the moment the
15 transaction is completed you can ask for your money back
16 at \$10 a share. Again, SPACs are one of those very few
17 instruments where they put a floor on value prior to the
18 merger, and so there's limited downside in SPACs unlike
19 in any other equity where almost every other equity can
20 go to zero. Prior to SPACs commencing the transaction,
21 they get stopped at \$10 a share for the most part, and I
22 think that's important because what we're really talking
23 about is getting information in investors' hands.

24 From the moment a SPAC deal is announced until
25 the time it closes, there has been a real dearth of

1 information and not consistent amount of information in
2 the hands of investors where private investors or
3 institutions might have more information because maybe
4 there were doing a private investment as a result as
5 part of financing the SPAC when it merges. And other
6 investors who are not part of that discussion would not
7 have had the same amount of information until such time
8 as the prospectus, the full prospectus, was published.

9 And in that interim period, lots of people are
10 trading the stock, so on fairness and disclosure, the
11 SEC is making the case that there needs to be improved
12 disclosures at the moment in time that a SPAC
13 transaction is announced putting everybody on the same
14 information level at that point. And Charles, I know
15 there was a lot of information about a lot of rules, but
16 the jist of it as I understand it, stepping back as to
17 create a level playing field where once a SPAC announces
18 a transaction that there is an adequate disclosure
19 regime that goes in place disclosing all potential
20 conflicts of interest, all the economics associated with
21 that that flow to the various parties, so that the
22 investors from that moment forward until the transaction
23 is consummated or terminated, they all have the same
24 information.

25 I think that's important as we consider this.

1 They're a lot of rules in here, but that's the goal.
2 One of the main goals is to level the playing field on
3 disclosure, and Charles and Anna, I want to see if I can
4 get agreement on that because I think it's an important
5 concept that we should 100 percent be behind in this
6 committee. But I just want to make sure I'm not
7 misstating that, you know, taking it back out to maybe
8 20,000 feet.

9 MS. PINEDO: Additional disclosure on
10 conflicts, additional disclosure on dilution, additional
11 disclosure regarding as I suggested a lot of the parody
12 disclosure that Charles outlined, bringing forward
13 disclosure that is currently -- could be deferred to the
14 Super 8-K.

15 MR. SOLOMON: Really important right there.
16 That's a really important thing, so --

17 MS. PINEDO: Bringing it forward is a positive
18 development and should be welcomed my market
19 participants, absolutely.

20 MR. SOLOMON: So, this is closing the
21 information gap in time. Bringing it forward means when
22 a SPAC transaction is announced, there needs to be --
23 right now, there's a delay in when all that information
24 is disclosed to the public because there's not a
25 requirement that they disclose everything at the time

1 that a SPAC transaction is announced, leaving people and
2 investors the chance -- you know -- maybe with less than
3 perfect information about what's likely to happen and
4 where the economics lay.

5 So, a big part of what's happening here and
6 all those regulations that Charles laid out in his
7 discussion with all the letters and everything is really
8 just about making sure that upfront when a transaction
9 is announced there's a new disclosure regime that
10 requires both the SPAC's sponsor or the acquirer in this
11 particular case, and the acquiree to disclose a lot more
12 information today than -- or a lot more information
13 going forward than they have to disclose today in time.

14 Like ultimately, all of the information gets
15 out there, otherwise they would be a public registrant,
16 but there's so much between the time of announcement and
17 the time of closing where there's an information gap.
18 Here, we're really talking about in many instances is
19 simply bringing forward that information disclosure and
20 improving it meaningfully so that investors have
21 adequate information on which to make investments in
22 that intervening period before the transaction is
23 consummated but after it has been announced, right. I
24 just want to make sure that that's a big part of what
25 we're trying to get accomplished here, correct?

1 MR. KWON: Yes. And I would add that in
2 addition to the rule proposals in the proposing release
3 that there are a number of requests for comments on this
4 topic. And to the extent that commenters have views
5 about whether the Commission goes far enough or maybe
6 too far in the rule proposals to try to provide -- have
7 SPACs or target companies provide more information
8 earlier in the process to investors, that I think those
9 comments would very much be welcomed on the proposing
10 release.

11 MR. SOLOMON: I appreciate that. Sometimes
12 though it's not obvious that we're really talking about
13 a gap in time, you know, and I think that's an important
14 part of it, right. Eventually, everything gets to the
15 public domain. The SEC is right in my opinion to be
16 concerned about the information gap between announcement
17 and the consummation of the transaction. That's
18 actually when a lot of people can get hurt because
19 they're playing with less than perfect information, and
20 during 2020, 2021, many of them were -- many individuals
21 actually were buying stocks in anticipation of something
22 with less than perfect information.

23 And so, point one, we should continue to make
24 SPACs a viable alternative to the public market. I
25 think we all are in agreement on that and try to make it

1 more like for like if we can. Two, definitely
2 increasing disclosures to protect investors and in
3 particular bringing forward when those disclosures need
4 to be made so that when an announcement occurs, there's
5 as much information as can be humanly possible in the
6 hands of every investor so that it's a level playing
7 field.

8 Let's go to this question though if I can of
9 clear identification or underwriter's liability and the
10 scope of that liability. And I think I've been public
11 about the fact that I've said the greatest thing to ever
12 happen in America actually was the '33 Act followed by
13 the '34 Act, so not to waive the flag but if there
14 hadn't been a '33 Act and a '34 Act, investors from all
15 over the world would never have viewed the United States
16 Capital Markets as the preemptive place to go, and that
17 basically fueled the entire growth of capital formation
18 that gave us the GDP that we have.

19 So, I just want to be on the record of saying
20 the '33 Act and the '34 Act probably two of the most
21 powerful things to come out of Congress in the last
22 century, and so to the extent that we can play within
23 that framework and utilize the framework of disclosure
24 around the '33 Act and '34 Act, even with all the
25 improvements that have happened, that is a better

1 outcome. And so part of that is who's underwriters
2 liability which is holding financial intermediaries
3 responsible for disclosure of information and doing due
4 diligence on targets or on companies when we're bringing
5 them public so that the public investors, both
6 institutional and individual, know that there is a
7 financial intermediary who is ultimately going to be
8 held responsible for the disclosure of that information
9 and the veracity of that information in the public
10 domain.

11 And SPACs have historically fallen underneath
12 that category though not explicitly because there's not
13 named underwriters in SPAC transactions, and part of
14 what's happening here is the SEC is saying we would like
15 to be able to designate in certain instances liability,
16 underwriters' liability. For financial intermediaries
17 and potentially others who are around this transaction
18 so that there's a higher bar for the work that they have
19 to do before the transactions happens. And I think it's
20 really important to understand they're certain
21 institutions that are equipped to do underwriter
22 liability, and there's ones that aren't.

23 And Charles, I'll just ask you this question.
24 You know I think certainly investment banks are capable
25 of producing -- doing that, but maybe sponsors and other

1 members of this -- is it the SEC is open to the idea
2 that maybe narrowing in on specifics around
3 underwriter's liability, for example when a merger
4 happens between two companies, today, there are
5 financial advisors there to public companies. There are
6 advisors there. They don't necessarily take
7 underwriters' liability because that is deemed to be a
8 merger and there's no underwriting of securities that
9 comes along with that. When two public companies merge,
10 that's part of what happens here in SPAC.

11 When a company goes public, the underwriters
12 in the syndicate actually have to stand up and attest or
13 take responsibility for liability for the issuance of
14 that stock to the public, that is deemed to be a merger.
15 And that -- there's no underwriting of securities that
16 comes along with that when two public companies merge.
17 That's part of what happens here in a SPAC. When a
18 company goes public, the underwriters in the syndicate
19 actually have to stand up and attest or take
20 responsibility -- liability for the issuance of that
21 stock to the public.

22 So here in SPACS you've got both things, and
23 there are different roles that advisors play in these.
24 So some advisors are actually advising the company and
25 the target on the merger. Some advisors are actually

1 raising money, maybe incrementally to do this merger.

2 And some are advising the new combined entity
3 afterwards on how to finance itself and potentially
4 distributing securities on the back end after this is --
5 and so as we think about the nuance of providing advice
6 here, is it reasonable to think that we can bifurcate
7 that advice into underwriters who are raising money and
8 selling capital to the public as a part of a SPAC
9 merger, and other financial advisors who are simply
10 providing advice to a target and an acquirer.

11 And is that something that SEC has thought
12 about as it thinks about, you know, where the liability
13 falls, because it's an important distinction as we think
14 about potentially making a recommendation here because,
15 as Anna highlighted, has broad implications and actually
16 how advisors will behave and whether or not we'll be
17 able to get, you know, opinion letters and fairness
18 opinions. There's a regime for this, it's just, I
19 think, looking for a little more clarity around that.

20 Is the SEC, in your opinion -- I know it's not
21 -- you can't speak for the commission -- open to the
22 idea of a more nuanced approach to focused liability
23 rather than blanket liability.

24 MR. KWON: Well, I would say, as you pointed
25 out, underwriter status is an issue that runs throughout

1 the Securities Act. It's, you know, it's been an issue
2 from day one in terms of whether a party qualifies as a
3 statutory underwriter pursuant to the definition of
4 underwriter in Section 2(a)(11) of the Securities Act,
5 which, you know, is -- I'm sure many of you know has
6 three different prongs.

7 If you purchase with a view to distribution,
8 if you're acting as an agent for the issuer and
9 distributing securities or a participant in a
10 distribution, then you would meet the statutory
11 definition of being an underwriter and you would have
12 underwriter liability in a Securities Act transaction.

13 And so, you know, that was the case, you know,
14 since day one. I mean, you know, obviously before the
15 rule proposal and this proposing release, and, you know,
16 I think the commission in the proposing release pointed
17 out that parties, whether they're involved at the SPAC
18 IPO stage or the De spac transaction stage could be the
19 underwriters, the, you know, under this long-standing
20 statutory definition of underwriter.

21 And so what the commission did in -- in
22 proposing Rule 140 under the Securities Act is to -- to
23 clarify, under this proposed rule, if it's adopted, that
24 statutory underwriters that meet certain -- underwriters
25 at the IPO stage that meet certain conditions under the

1 rule would be the underwriters at the De spac stage.

2 And then the commission also included language
3 in their proposing release pointing out -- and, again,
4 this is nothing new -- that other parties involved in
5 these transactions, depending on the facts and
6 circumstances, could be deemed underwriters pursuant to
7 the statutory definition.

8 And so I, you know, I think the proposed rule,
9 the idea behind it, is to provide a clarification of
10 underwriter status at the De spac stage for certain
11 parties that are involved as underwriters at the IPO
12 stage.

13 And there are a number of other requests for
14 comment in the proposing release. This is, I think,
15 certainly an area where the commission would welcome
16 commenters views on whether the proposed rule takes the
17 right approach, or whether, you know, there may be other
18 approaches to addressing underwriter status at the De
19 spac transaction stage.

20 But, you know, as you you point out,
21 underwriter status is really nothing now under the
22 Securities Act, and it's been an issue with SPAC
23 transactions, you know, even before this proposing
24 release.

25 MR. SOLOMON: That's super helpful. And,

1 Anna, my -- I -- and I want to make sure we have
2 other -- time for others to ask questions too. But I
3 really appreciate that candor. And thank you for that.

4 Anna, is -- do you -- I mean, what I said
5 earlier, does that make any sense? Is that something we
6 should be considering as a committee?

7 MS. GARRETT: Hey, and -- Jeff, I think also
8 just, we should probably let some of the other committee
9 members, you know, ask questions, too. So --

10 MR. SOLOMON: Yeah.

11 MS. GARRETT: -- (Audio disruption) said --

12 MR. SOLOMON: Anybody --

13 MS. GARRETT: -- we should probably --

14 MR. SOLOMON: -- raise -- we're looking for --

15 MS. GARRETT: -- and --

16 MR. SOLOMON: -- we're looking for raised
17 hands. So if anybody has them, I'm -- there we go.

18 MS. PINEDO: I'll wait then, Jeff

19 MS. GARRETT: Okay.

20 MS. PINEDO: I'll wait.

21 MS. GARRETT: I think we have --

22 MS. PINEDO: (Audio disruption.)

23 MR. SOLOMON: Greg --

24 MS. GARRETT: I --

25 MR. SOLOMON: -- Greg --

1 MS. GARRETT: -- I see Greg's hand raised.

2 MR. DEAN: Yeah, hi, Jeff. And thanks. And
3 this is great because I think this discussion is really
4 kind of getting at the heart of the situation, which is
5 the disclosure to the investor itself.

6 From a FINRA perspective, I know we've been
7 looking at SPACs over the past few years. We have rules
8 on the books regarding SPACs.

9 If the underwriter is a registered broker-
10 dealer our 5100 corporate financing rules do kick into
11 play. We review advertising. There are fairness letter
12 rules, 5150, that looks in that. What we have seen --
13 and we just released this week -- are a snapshot of the
14 industry, and we can send that out to everybody.

15 But with regard to SPACs, traditionally they
16 have been, in older years, beyond, in the OTC
17 marketplace. And I think we've seen them grow up a
18 little bit through the years. And now they're getting
19 more on the registered exchanges where there are SR
20 rules that do apply in that instance.

21 But I think the average and median size of the
22 SPACs have grown up. And in our snapshot this year --
23 and I'm just stating a fact -- is that it's over \$200
24 million is the median size.

25 So I think if we're talking about for small

1 business capital formation, we just have to keep that in
2 mind that a lot of the SPACs are larger than that, and
3 is there a duty to owe to the investors if it's a larger
4 size SPAC as compared to a smaller business that's
5 trying to get access to the capital markets.

6 MS. PINEDO: Well, so those -- just to be
7 clear, right, those are the -- a lot of the companies
8 that are combining into SPACs are still relatively
9 early-stage or smaller companies that are combining into
10 SPACs, and then ultimately, through the business
11 combination, as well as concurrent capital raises, yes,
12 at the end of the day, they will be, as you said, 200
13 million and so on.

14 But the SPACs and combinations with SPACs do
15 provide unapproached for smaller and medium-sized
16 companies to get to the public market. So we shouldn't,
17 sort of, neglect that as a theme.

18 MR. DEAN: Yeah, and I'm not taking a position
19 on that --

20 MS. PINEDO: Yeah.

21 MR. DEAN: -- aspect of it. I'm just pointing
22 out the growth and how it has originally started on the
23 OTC markets. It has grown over the past few years.

24 MS. PINEDO: It has grown and matured. It has
25 grown and matured, but I would say that since the

1 release of this proposed -- of these proposed
2 amendments, there has been a distinct chill.

3 MR. SOLOMON: So I want to make sure, if
4 there's other questions, please raise your hand or throw
5 it into the chat box.

6 Can we just spend two seconds on the SLRA that
7 the -- safe harbor on projections?

8 And, Anna, I would love to hear your specific
9 recommendation, if you have any, on how to handle
10 projections because that's obviously a big distinction
11 between IPOs where there are no projections and SPACs
12 where there are projections.

13 And I've held out that, you know, having
14 management's point of view in projections is actually a
15 helpful thing for investors. It's something that's
16 different about SPACs. It's one of the places where
17 you're actually not like for like, right? Companies
18 choose to go public because they'd like to have their
19 projections in the hands of the public, you know, as
20 opposed to an IPO when they don't do that.

21 And how would you propose to handle, like,
22 safe harbor around projections for underwriters and
23 underwriters' liability?

24 MS. PINEDO: Well, a couple of things, Jeff.
25 Just, you know, for everyone's benefit, so just to make

1 sure that folks who are listening to us understand, in
2 IPOs, it is not that projections are not used. Right?
3 I mean, we should all be very transparent and understand
4 that projections are produced. Projections are -- we
5 all spend a ton of time discussing and diligencing [sic]
6 projections. Projections are used by IPO management
7 teams or discussed with the research -- the equity
8 research teams and institutional investors benefit from
9 information on those projections and discussions about
10 those projections. And those projections inform the IPO
11 valuations.

12 So to say that IPO, you know, that every IPO
13 valuation is absolutely shaped by and informed by
14 projections, those projections don't make their way into
15 the public domain or into a disclosure document. That
16 much is true. Indirect listings, projections are used
17 in investor days, and projections are often furnished
18 and not filed. So we have a variety of ways in which
19 projections are used, but right now they all differ.

20 So to be specific to your question, I don't
21 think -- so SPAC market participants, the financial
22 intermediaries diligence the projections that are used
23 by target companies currently, even before these
24 proposed amendments. We were all spending inordinate
25 amounts of time diligencing the projections that were

1 used.

2 Should there be underwriting liability for the
3 projections? No. Can a law firm give a, you know, kind
4 of negative assurance letter include or address the
5 projections? No. Should there be a, you know, but do
6 fairness opinions and a discussion of the background of
7 the transaction and the terms of the transaction require
8 a discussion of the projections? Yes, almost absolutely
9 it does. Yeah.

10 So I think it's a very difficult situation to
11 try and, you know, purport to do away with the safe
12 harbor in this particular instance when, you know, as a
13 group we know that projections figure into the other
14 ways to raise capital. They play a part in direct
15 listings. They play a part in IPOs just like they play
16 a part in De spac transactions.

17 MR. SOLOMON: That's helpful.

18 Carla, I know we're --

19 MS. GARRETT: Hey, Jeff --

20 MR. SOLOMON: -- going to (Audio disruption)
21 time soon.

22 MS. GARRETT: Yeah. Let me just say real
23 quick, we're going to need to thank Anna and Charles for
24 their time, and then we're going to need to deliberate
25 as a committee. Before we do thank them for their time,

1 are -- do any committee members have questions -- other
2 questions for them? I want to make sure we've given
3 everybody a chance.

4 Okay. Anna, Charles, thank you very much for
5 joining us today. And we really appreciate all the
6 information that you've provided. It's been quite
7 useful and quite knowledgeable for all of us. And, have
8 a great day.

9 MS. PINEDO: Thank you so much, Carla.

10 UNIDENTIFIED MALE: Thank you.

11 MS. PINEDO: Thanks to the committee.

12 MR. KWON: Thank you.

13 MS. GARRETT: Thank you.

14 DELIBERATIONS

15 MS. GARRETT: And now I guess I would ask if
16 committee members want to express their opinions with
17 respect to what you've heard today or with respect to
18 just the -- this proposal in general.

19 MS. CASH: Yeah. I thought Anna's chart where
20 she laid out the graphs and the performance of SPACs --
21 and I don't know enough about it to compare this
22 conversation to the conversation we heard from the
23 professor, but I do think her take is interesting in
24 that it's not the actual SPAC itself. It's the
25 underlying, "asset" -- the company that's being SPAC'd

1 and and when you compare it against the company that's
2 being SPAC'd against other companies and sizes, you
3 know, that downward trend. It's similar, right, and so
4 it does beg the question of, is it the SPAC or is it the
5 underlying asset that the SPAC is bringing public.

6 MR. SOLOMON: I mean, there's no question that
7 IPO class of 2021 has had similar performances as
8 SPACs. There's also no question that the SPAC market
9 needs some improved regulation. I think there's room
10 for both narratives there. And, you know, somebody
11 who's been around this back market for 25 years, you can
12 look at that and I can't tell you how much of it is a
13 function of the SPAC structure and the lack of
14 disclosure or how much of it is just a function of
15 rampant speculation that was going on by investors at
16 the beginning of -- at the end of '20 and '21, beginning
17 of '21. It's probably a little bit of both.

18 But the SEC has put forth some very thoughtful
19 rules here, and we should just be in a position where
20 we're advising them because there's -- some of them are
21 really constructive. Some of them are a little
22 overreaching, and as Anna mentioned, have definitely put
23 a chill in the market, and we need some clarification
24 around them in order to make sure the SPACs continue to
25 be a viable alternative should companies and investors

1 want to do it.

2 They may choose not to for reasons having
3 nothing to do with that, but I think it's important for
4 us to be able to weight in on that. I do think that was
5 a helpful slide, Kesha. I agree with you.

6 Anybody else?

7 MS. MOTT: Jeff, I don't -- I'm not steeped in
8 the mechanics of this, but I was -- there's a couple of
9 things that I associate this SPAC with some of the
10 venture capital and search funds. You know? You know,
11 search funds go down the road of aggregating capital and
12 finding a company in which to invest and hopefully --
13 and again, it's based on -- as we were talking about
14 projections, that's what we deal with all the time in my
15 -- you know, in venture capital are projections. But
16 they're merely projections.

17 And one of the things I know that we ran into
18 before is, you -- I heard this fairness opinion having
19 to come into play. I don't see how that can be done
20 simply because they are projections. I mean, and
21 they're based on a set of assumptions that have yet to
22 be proven.

23 So, you know, we always discount them here in
24 my -- in our business. We always discount them 30, 50,
25 and 70 percent to understand the volatility, the risk --

1 the volatility risk. So I look at this and I'm thinking
2 how a fairness opinion could work, and I don't see how
3 it could. I mean, I just -- because these are
4 projections.

5 So that's the only thing I have with this. I
6 mean, I -- that's all I could get, I guess, carve out
7 from what would be my concern. That's all I can say.
8 Because I've never invested in them. I've invested in
9 search funds, but I've never done that.

10 MR. SOLOMON: It's hard to do.

11 MS. MOTT: Yeah.

12 MR. SOLOMON: But financial intermediaries can
13 do it, and they'll get paid for it. And they also have
14 the liability associated with that. So there is a
15 liability regime today on providing a fairness
16 opinion. And there's also a liability regime today on
17 underwriting. And the challenge with the rules as
18 they're written is a teams -- as if the underwriter's
19 liability could extend to people beyond financial
20 intermediaries. And it's not clear if the functions
21 that financial intermediaries are playing.

22 For example, when two public companies merge,
23 they're two advisors -- they may be providing a fairness
24 opinion or not, and they'll get paid in a price
25 associated with that is different if you're providing

1 one or you're not providing one. But there's not
2 underwriters' liability in those because there's no
3 distribution of securities.

4 SPACs are complicated because they are both a
5 merger of two public company -- or a merger of a private
6 company into a public company which requires a fairness
7 opinion and projections in order to base that fairness
8 opinion adequately. And there's a distribution of
9 securities, arguably, on the back end. The SEC is right
10 about that. It is a back door IPO. That's what it was
11 intended to be.

12 And so we need to tighten up the rules on
13 disclosure, and we certainly need to tighten up the
14 rules on who has liability if they aren't doing the
15 work. And those are two very important parts of this
16 that shouldn't get lost. You know? And so I would --
17 you know, I don't want to pre-prescribe it, but there
18 are elements of this that make a lot of sense,
19 particularly in light of what's gone on. And so those
20 are two, I think, that make sense.

21 Other questions, guys?

22 MS. MOTT: One other thought, though. I know
23 that in a -- we have this committee -- one of the
24 previous committees in which I served, we discussed the
25 fact that it is very challenging for small companies to

1 go public. And we even tested tick marks and a pilot on
2 tick marks to see if that would bring back the
3 opportunity to encourage small companies to list on the
4 public exchange.

5 But so my thoughts are just this, and they've
6 general, is, we still need to find a way for small
7 companies to find a viable approach to go public. That
8 still doesn't exist. So that's just, you know, like
9 when I balance this with protections you were talking
10 about that need to happen because these are companies
11 going public, right? But also with, how do we make it
12 easier for small companies to go public, or not easier,
13 but viable, okay, is what I should say.

14 Anyways, that's all. Thank you.

15 MS. GARRETT: And, Jeff, I guess I'd like to
16 point out that I think that was one of the questions we
17 wanted, you know, just to get a sense from the committee
18 is how does the committee feel about facts in general as
19 a way for companies to go public. Do we continue to
20 support SPACs, or not continue, but do we support SPACs
21 now that we have a lot more information about them in
22 the -- that we've gotten in the last 12 months from
23 different speakers to our committee.

24 Would anybody like to discuss that or give
25 their thoughts on that?

1 MS. CASH: Yeah, I think what would help me if
2 anyone has -- sorry, I didn't raise my hand -- but if
3 anyone has as examples, because it's -- I'm still trying
4 to reconcile what "makes for a good SPAC." Right?
5 It's not if all SPACs follow the same process, are there
6 examples of companies that have been SPAC'd that were
7 above that zero percent line. And is there a difference
8 in criteria where there needs to be rulemaking around
9 what type of company is SPAC'd.

10 So I'm still kind of hung up on the asset
11 versus the actual process, and where is the room, as
12 we've seen in the last couple years, like, where is the
13 gap information, but where is there a gap in the
14 structural process that allows speculation to drive an
15 asset to market that people get their money -- lose
16 their money on, essentially.

17 MR. SOLOMON: Sorry, Greg. Did you have a
18 question or a comment?

19 MR. YADLEY: I unfortunately wasn't able to
20 be here for the entire discussion. So I'll just say,
21 in answer to Carla's question, I think there definitely
22 is place for SPACs for smaller companies. Catherine is
23 right. We're struggling with alternatives in theory,
24 anyway. With a good advisor to a target company finding
25 the right SPAC has advantages to simply saying, okay,

1 we're going to go public and we hope we'll do it at a
2 time when the window's going to be open 90, 120 days
3 down the road, and the SPACs have the money today. So
4 it's a different world.

5 The other thing is, I think we want to be
6 cognizant of what we're trying to do in investor
7 protection -- and I totally agree with you, Jeff, that
8 we have a tried and true regime for disclosure, and
9 let's use it. A lot of the interest initially from the
10 regulators, I think was because there was a perception
11 true in many, many cases that the public investors at
12 the De spac stage weren't getting anywhere near the
13 returns that the people earlier in the process got. And
14 that's, by the way, true, as companies have gone through
15 successive equity rounds of financing and larger and
16 larger PE deals. And those returns are going to be a
17 lot greater than the investor who bought Uber when it
18 went public, right?

19 Now the risks are different because, with
20 SPACs, as we know, the transaction is contemplated from
21 day one by the initial SPAC and the IPO, and the time
22 frame is pretty short as the private equity round time
23 frame gets extended.

24 And I guess another thing I would just say is,
25 definitely true that SPACs are getting larger and, as a

1 result, moving away from smaller companies and therefore
2 the SEC properly has to worry about more investors. And
3 as they get larger, there's also more money to spend on
4 doing things the right way.

5 So I think this is an area that we should be
6 interested in. One of our companies that we hoped would
7 be public by now isn't. And it's because of the
8 proposed rules and what led up to the SEC deciding to
9 issue them.

10 MR. SOLOMON: I would just say, your question
11 is the right question. Is it a structural problem or is
12 it the assets that tend to choose SPACs. That is the
13 right question. I think it's probably a combination of
14 both.

15 But what Anna did say is correct. There's a
16 chill in the market today because there needs -- there's
17 this regulatory uncertainty. And it's like our job here
18 is not to pass judgment on whether or not there's enough
19 good assets to go into SPACs, but whether or not it
20 remains a viable alternative for small companies. They
21 may or may not go that route for a whole host of
22 reasons. Some will; some won't. Some will work out;
23 some won't work out. Some of that will be because
24 they're good companies; some will be because they're bad
25 companies. Some will be market conditions.

1 But I think our job here is to provide advice
2 to the commission on -- when they've asked us for advice
3 on this rulemaking, if the committee's view is that
4 SPACs are still -- want to be a viable path for small
5 companies to access public capital, then we should focus
6 in on making some recommendations that balance the need
7 for increased disclosure and investor protection, and
8 give -- focus in on giving advice to the commission.
9 I'm sure everybody will in the comment period.

10 But from our point of view, as a committee, if
11 we think SPACs are bad, then we can leave it alone. If
12 we think SPACs are good, then we should do so. But if
13 we're not in a position to judge, then we can let market
14 participants decide what they want to do with it, and
15 make it as safe as possible for investors. I think
16 that's sort of the way I would think about this, Kesha,
17 if that answers your question.

18 MS. CASH: It does, but for me it also --
19 depending what the underlying asset is in my head -- and
20 maybe I'm thinking about it the wrong way -- does impact
21 disclosure, right? The conversation around early stage
22 venture capital companies, pre-revenue, I'm not -- the
23 point made earlier about -- Catherine's point about
24 discounting.

25 If you're a venture investor, nobody tells you

1 you have to discount the company 30, 60, 70 percent.
2 You know that a projection on a (Audio disruption)
3 revenue company is likely going to be wrong half the
4 time. Right? And so if we're saying, now the --
5 there's a discussion about SPACs being bigger, but if
6 you're SPACing an early-stage company where the
7 likelihood of that projection being off is 50 percent or
8 60 percent because of the stage of the company, that for
9 me would impact the disclosure to those potential public
10 investors. It would look a little different if a
11 company's been around for 20 years.

12 MR. SOLOMON: Yeah. They're generally more on
13 the earlier stage. No question. But not always. But
14 they look a lot like -- some of them look a lot like
15 biotech companies where the revenue is years away. I
16 mean, that's just -- that's the nature of, I think, the
17 investor base and the nature of the companies that may
18 choose to go public.

19 So we should acknowledge that they, generally
20 speaking -- not always, but generally speaking -- are
21 earlier stage companies. Though sometimes they could be
22 very significant companies with lots of revenues,
23 companies like Draft Kings and -- that have had
24 significant revenue ramps, who have chosen to go down
25 this path.

1 So, again, I guess my point is if there -- we
2 have a rulemaking set in front of us. If we think, as a
3 committee, that it's important to maintain this as a
4 path, right now we've heard from a market participant,
5 Anna in particular, that things are a little frozen. So
6 we need to help give some guidance on these if we think
7 it's important for the SEC to continue to have SPACs be
8 a viable path for small companies to access capital.

9 MS. GARRETT: So, Jeff, I think that in and of
10 itself is something that we could discuss -- I mean, not
11 discuss, but vote on like we as the committee feel that
12 SPACs are -- continue to have a place for smaller
13 companies to go public and raise capital.

14 You know, I personally also, like Greg and
15 others, agree that there is a place for SPACs.

16 MS. HANKS: I just wanted to try and get --
17 I've mentioned this before, but I think the existence of
18 SPACs is an indictment on the overly complex nature of
19 securities or in general.

20 And to build on what Catherine had said, if --
21 in an ideal world, I would throw out SPACs entirely, and
22 I would make it much easier for smaller companies to go
23 public by having a nano layer of security. So something
24 like Reg A, which I am a huge fan of, you could go
25 public on the basis of Reg A disclosure. So that would

1 be my alternative to SPACs.

2 MR. SOLOMON: I agree with you, the securities
3 laws are very complicated. I think you can do both. I
4 mean, I think one doesn't preclude the other. I'm not
5 sure there'd be a rush to Reg A if there weren't SPACs,
6 and just Reg A is there, and I share -- I think I've
7 shared this with you, Sara. I continue to be
8 frustrated, lack of interest on the part of issuers or
9 investors to participate in Reg A.

10 You know, I advocated for it in a white paper
11 when I presented to the Treasury seven years ago. I
12 thought it was a great solution. And I'm in the
13 market. We can't get anybody to pay attention to it,
14 not an issuer or not an investor. It's super
15 frustrating. I don't know why. I don't think that has
16 anything to do with SPACs, by the way. I don't think --
17 if you shut down SPACs, I don't think there's going to
18 be a rush to Reg A.

19 Those are available to people. When we talked
20 to people about Reg A, they're like, why would I do
21 that? And it's hard to make the case. That's a
22 different issue, but that's more of a -- but I hear you,
23 it's super complicated.

24 MS. HANKS: And we'll take that one offline.
25 We've just recovered from the annual filing season where

1 I think we've got a whole load of Reg A companies.

2 MR. SOLOMON: Good. We should talk about
3 that.

4 MS. HANKS: We'll discuss that.

5 MR. SOLOMON: Yeah. Carla -- sorry, go ahead.
6 Did somebody have a comment?

7 MR. BAIRD: This is Donnel. I just wanted to
8 add quickly that for a climate tag, which has a
9 different profile than small businesses or traditional
10 venture-backed software companies or even hardware
11 companies because of the regulatory energy industry
12 highly regulated. I just think for climate tech
13 companies, SPACs can be really important, as well as for
14 retail investors who want to participate in, you know,
15 saving the planet.

16 So I think that that's important. I've been
17 disappointed with what I've seen from climate tech SPACs
18 personally. I know lots of folks are, as well. Other
19 folks are excited. But I just wanted to note that they
20 can play an important role, in particular in the climate
21 technology industry.

22 MR. SOLOMON: We agree. I mean, I wish SPACs
23 had been performing better. I really do. But when we
24 think about, you know, again, you have all have heard me
25 mention AppHarvest, and I've talked about it. Our

1 ability to raise them a half a billion dollars to build
2 agricultural facilities in Appalachia is purely a
3 function of the fact that they could do that in a SPAC
4 environment at a moment in time. That was not going to
5 happen in an IPO.

6 There were bunch of institutional investors
7 around that who believe. And I still think the company,
8 even though the stock hasn't worked, I still think it
9 has a lot of viable alternatives. I was in Kentucky
10 last month. And they're hiring a lot of people. And
11 they're going to grow the world's greatest tomatoes in
12 their minds.

13 And there's a lot of happy folks in that part
14 of the world because they got access to capital in
15 Kentucky, and that was purely a function of the fact
16 that there was a functioning SPAC market. Again, it's
17 one example. There are many of them.

18 I take your point, Donnel. There's a lot of
19 EVs companies that got access, a lot of clean tech
20 companies that got access to the market using SPACs.
21 Again, they haven't worked as stocks, and -- but they've
22 gotten access to capital and (Audio disruption). I
23 think part of what's happening here is, you know, the
24 SEC is doing the right thing by making sure they level
25 the playing field.

1 So if I could -- because I know we're running
2 short on time, let me take a stab at putting out some
3 thoughts for agreement and -- or disagreement, by the
4 way. And it's fine if we don't all agree on these
5 things.

6 One, I think it -- you know, should we -- can
7 we -- I think we just did get agreement that we should
8 encourage the SEC to make -- continue to make SPACs a
9 viable alternative to raising capital in the public
10 market. I think that's what I heard from everybody and
11 -- or that's what we think everybody just said.

12 I think increasing the disclosure to protect
13 investors, particularly in that period of time between
14 the announcement of a SPAC and the closing of a SPAC,
15 you know, bringing forward all that disclosure which
16 this rulemaking says, I think we should all be on board
17 for that. That's a good solve to make sure there's not
18 this period where there's an unequal information flow.
19 So that would be my second proposal.

20 I think we need to make clear who has
21 underwriters' liability and who doesn't. We don't need
22 to tell the SEC who we think that -- we should encourage
23 them to be more nuanced in that, so that the '33 Act can
24 take hold and, again, I just say, if you tell us exactly
25 where our liability is and what our roles are as

1 financial advisors, we will do that. We just need to
2 know.

3 And I think it's going to be important to
4 clarify who has underwriters' liability and who doesn't.

5 And then, as Anna pointed out, in the last
6 statement, IPOs do use projections all the time. They
7 just don't publish them. And those projections do fall
8 under the safe harbor. And we should probably afford
9 SPACs the same opportunity.

10 Again, it doesn't mean you don't do due
11 diligence, you do. It's just what the safe harbor does
12 is it allows for their not to be frivolous lawsuits. So
13 people have a higher bar in order to bring a claim
14 against an underwriter. And I think if the SEC can see
15 its way clear to including, you know, the projections in
16 the safe harbor but hold financial intermediaries
17 responsible for underwriting, that actually feels more
18 like for like the way that they do in underwritings.
19 And I'm not a securities attorney. I'll defer to Greg
20 and Carla and everybody else who is, but it seems to me
21 that would be the recommendations.

22 The '40 Act thing, I'll just -- I'm not sure
23 we're in a position to comment on. And it's just -- I
24 don't even get it, so it's hard to comment on it.

25 Do those four things make sense to everybody

1 or debate or if they don't, I'm happy to hear otherwise.

2 MR. YADLEY: I think they do. I think
3 that's a succinct, good approach. And I would be in
4 favor of those. And the same thing on the '40 Act. I'm
5 not really sure I understand what --

6 MR. SOLOMON: On the '40 Act thing, I worry --
7 what I worry about on the '40 Act thing, which is to
8 shorten up the period of time that a SPAC has to get a
9 deal done, that is a dangerous proposition because that
10 incentivizes people to do bad deals. If they think
11 they've got a '40 Act liability, then they're just going
12 to go do whatever deal they want to.

13 They should rule -- they should eliminate the
14 '40 Act thing because they never looked at them as '40
15 Act. I'm not sure where that came from, but I'm really
16 worried that if they shorten up the time frame to 18
17 months, I mean, for sake, you know, one of the things
18 with a SPAC is that you can't actually identify a target
19 before you file. So literally the clock starts ticking
20 the moment your IPO happens.

21 To get an IPO identified -- to get a company
22 identified and closed in an 18th month period or run the
23 risk of being an investment company, they're just a
24 bunch of folks that will just do bad deals. And I think
25 that's just -- that's not in the public's interest.

1 But, again, we didn't talk about the '40 Act
2 thing. I'm happy to leave it in or leave it out or let
3 the public comment on it. But it's just a bad idea.

4 MR. YADLEY: And that's what I was trying to
5 say.

6 I think there will also be pressure on the
7 front end, too, of people that will have conversations
8 and mislead smaller companies, particularly that
9 something's coming down the pike and they're waiting.
10 And they'll
11 be very careful about what they tell these targets, and
12 the target may miss a more legitimate opportunity. So
13 you said it better than I did.

14 MS. MOTT: I think we should, Jeff, make a
15 comment about that because I know how long due diligence
16 takes. It takes a long time before you can at least --
17 I shouldn't say I know for this asset class, but for our
18 asset class, due diligence can take a long time. I
19 agree. You can end up with a lot of junk.

20 MR. SOLOMON: Well, I'll also say this, we've
21 had companies in front of the SEC for longer than 18
22 months after the announcement, waiting for them to --
23 you review. The SEC's been crushed, so I want to be
24 really clear, even with the slowdown, the SEC has been
25 crushed. Just the staff, there's just been -- just the
 amount of time it takes them to review all the

1 documents.

2 And so, again, I don't know why we would put a
3 shorter time frame on SPACs. If anything, it should be
4 a longer time frame, or no time frame at all because
5 there's an economic incentive and a market clearing
6 mechanism. If a SPAC doesn't get a deal done in a time
7 frame, then the sponsor loses all of their capital.

8 So they've already got a pressure to get a
9 deal done. There's no reason for there to be a
10 regulatory accelerant on that because I just think it'll
11 illicit bad behavior. That's my own view of having been
12 around this market for a long time. Nobody likes the
13 pressure of the cold metal of (Audio disruption). I can
14 say the -- nobody likes the pressure of having to get
15 something done in an artificial time frame. It just
16 doesn't get good results.

17 So I would love for somebody to make a
18 motion. If you'd like me to repeat it or if there's
19 debate or a discussion or we're not there yet, we can
20 come back at it, but I know I'm mindful of the fact that
21 we're already 10 minutes over and this is complicated
22 stuff.

23 But does anybody have any questions or
24 comments?

25 MS. GARRETT: I would make a motion to approve

1 what you proposed as our recommendation.

2 MR. YADLEY: I'll second it.

3 MR. SOLOMON: All in favor?

4 GROUP: Aye.

5 MR. SOLOMON: Anybody opposed?

6 MS. HANKS: I'm abstaining.

7 MR. SOLOMON: Fair.

8 MS. HANKS: On the basic, you know, the
9 existence of SPACs.

10 MR. SOLOMON: Fair.

11 MS. GARRETT: Julie, where does that leave us
12 just so we know, or should we talk about this another
13 time?

14 MS. DAVIS: No, we have a quorum, so I think
15 the vote carries. Is that what you're asking?

16 MS. GARRETT: Okay. Yeah.

17 MS. DAVIS: (Audio disruption.)

18 MS. GARRETT: Okay. Thank you.

19 Well, it's now time for me to say thank you
20 very much for joining, and it was nice to see everybody
21 today. I appreciate all of your time, and the great
22 discussion.

23 Just as a reminder, the remainder of our
24 meetings for 2022 are Tuesday, August 2nd and Thursday,
25 October 13th.

1 And I hereby move to adjourn the meeting. And
2 I hope everybody has a nice weekend.

3 Thanks very much.

4 (Whereupon, at 3:11 p.m., the meeting was
5 adjourned.)

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PROOFREADER'S CERTIFICATE

In the Matter of: SMALL BUSINESS ADVISORY COMMITTEE
File Number: OS-0001
Date: Friday, May 6, 2022
Location: Washington, D.C.

This is to certify that I, Christine Boyce,
(the undersigned), do hereby certify that the foregoing
transcript is a complete, true and accurate
transcription of all matters contained on the recorded
proceedings of the meeting.

(Proofreader's Name)

5-13-2022

REPORTER'S CERTIFICATE

I, Tristan Freeman, reporter, hereby certify that the foregoing transcript is a complete, true, and accurate transcript of the meeting indicated, held on 5/6/22, at Washington, D.C. in the matter of:
SMALL BUSINESS ADVISORY COMMITTEE.

I further certify that this proceeding was recorded by me, and that the foregoing transcript has been prepared under my direction.

5-13-2022

