

June 13, 2022

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

via email: rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Dear Ms. Countryman:

We are submitting this letter in response to the Commission's request for comments on its Special Purpose Acquisition Companies, Shell Companies and Projections rule proposal set forth in the above-captioned proposing release. We appreciate the opportunity to comment on the proposed rules.

The Commission's stated intent with the proposed rules is to enhance investor protections in initial public offerings ("IPOs") by special purpose acquisition companies ("SPACs") and in subsequent business combination transactions between SPACs and private operating companies, which are commonly referred to as "de-SPAC" transactions, particularly as the SPAC marketplace has experienced unprecedented transaction volume over the past few years. In the last two years alone, SPAC IPOs have raised nearly a quarter of a trillion dollars, which in turn has led to a significant increase in the number of companies that have gone public, or are currently seeking to go public, in the U.S. capital markets via a de-SPAC transaction.

We welcome the Commission's efforts to improve public confidence in IPOs by SPACs and de-SPAC transactions by ensuring that registration statements in connection with SPAC IPOs and de-SPAC transactions contain all appropriate information for investors to make informed investment decisions. However, the proposal goes well beyond disclosure requirements and, in so doing, the Commission departs from its historical mission of ensuring the investing public has adequate information on which to make informed investment decisions. Among other things, the proposal purports to expand the statutory definition of "underwriter" found in Section 2(a)(11) of the Securities Act of 1933, as amended (the "Securities Act"), by "deeming" a host of market participants that have never been considered to be underwriters, either in substance or in practice, to be statutory underwriters and therefore potentially subject to traditional underwriter liability under the Securities Act. We certainly understand the Commission's objective to treat traditional IPOs and de-SPAC transactions in a "like for like" manner and in certain cases, such as aligning the disclosure requirements in de-SPAC transactions and traditional IPOs, we welcome the Commission's efforts to create symmetry in these transactions. But as a long-time advisor in traditional IPOs, SPAC IPOs and de-SPAC transactions, we believe the proposed rules go well beyond treating "like cases alike" by ignoring the differences – and, in some cases, the similarities – between a traditional IPO and a de-SPAC transaction, and in the process diverge from existing Commission practice and upend market expectations in these transactions. As described further in our comments below, we believe some of the proposed rules are problematic from a legal perspective, create significant uncertainty in the de-SPAC market and run contrary to the purpose of enhancing investor protections in these transactions.

Further, we have concerns that if the proposed rules go into effect in their current form, uncertainty in the scope and extent of certain of the rules will continue to have a chilling effect on SPAC market activity, without any meaningful benefit for the investing public and counter to one of the SEC's stated goals of facilitating capital formation. For example, as a result of Proposed Rule 140a, we have already observed numerous instances, some well-publicized, of financial institutions resigning from de-SPAC transactions¹ and restructuring SPAC IPOs to remove deferred underwriting compensation (which may have the effect of increasing the upfront cost of SPAC IPOs) rather than serving the gate-keeping function in the de-SPAC transaction that the Commission desires in proposing proposed Rule 140a. This will ultimately result in investors in SPACs being no better protected and will deprive SPACs and target companies in de-SPAC transactions of a broad range of valuable financial and M&A advisory services. We are concerned that the proposed rules are designed to deter offerings based on the merits of the transaction, rather than ensuring adequate disclosure in de-SPAC transactions.²

In this letter, we offer some general observations regarding the proposed rules and respond to certain questions raised by the Commission in the proposing release. We hope the Commission will find our observations and responses useful as it moves forward with these proposed rules, and we would welcome the opportunity to discuss with the Commission our reactions to the proposed rules as set forth in this letter. In addition, attached as Annex A to this letter are our responses to certain of the specific questions raised in the proposing release.

Aligning De-SPAC Transactions with Initial Public Offerings

Proposed Rule 140a is not a clarification of the definition of "underwriter" but rather the unilateral expansion of the term to roles in a de-SPAC transaction that have never been determined to be statutory underwriters in traditional IPOs.

The Commission's proposed Rule 140a would deem a SPAC IPO underwriter that "takes steps to facilitate" or "otherwise participates (directly or indirectly)" in a subsequent de-SPAC transaction or any related financing transaction to be a statutory underwriter for purposes of the de-SPAC transaction within the meaning of Section 2(a)(11) of the Securities Act. As a result, if Rule 140a is adopted as proposed, SPAC IPO underwriters could be subject to liability to a broad set of plaintiffs for any material misstatement or omission of fact in the registration statement filed in connection with the de-SPAC transaction.

In this regard, despite the Commission characterizing the rule as a clarification of the existing definition, proposed Rule 140a is a sweeping departure from the well-understood definition of the term "underwriter" in Section 2(a)(11) of the Securities Act after decades of guidance from the Commission and judicial interpretation. In characterizing advisors involved in the de-SPAC transaction as underwriters when they have a role that has never been understood to be that of an "underwriter" as defined in the Securities Act, we view the proposed rule as effectively rewriting Section 2(a)(11) of the Securities Act to materially expand the definition.³ Lastly, we note that the rule proposal has already resulted in significant implementation issues, so we would urge the Commission to revisit its approach to implementation if it does move forward with the rule.

¹ "Goldman Sachs retreating from SPAC market over regulatory threat," *New York Post* (May 9, 2022) (available at <https://nypost.com/2022/05/09/goldman-sachs-retreating-from-spacs-over-regulatory-threat/>).

² See, e.g., Chairman Gary Gensler, Duke University, Center for Politics Fireside Chat, March 31, 2022, as quoted in "Gensler Says Climate Rule Part Of SEC's Disclosure Mandate," Law360 (available at: <https://www.law360.com/articles/1478271>) ("We're not a merit-based regulator, we're primarily a disclosure-based regulator.").

³ We understand that other commenters, including the Securities Industry and Financial Markets Association, have submitted responses to the Commission's request for comment on the proposed Rule 140a questioning the legality of adopting proposed Rule 140a by agency rulemaking. We share the concerns identified by those commenters that the proposed Rule 140a is an unlawful expansion of the definition of "underwriter" through agency rulemaking.

Financial institutions participating in a de-SPAC transaction have never been considered statutory underwriters within the meaning of Section 2(a)(11) of the Securities Act.

The term “underwriter” is defined in Section 2(a)(11) of the Securities Act to include “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking.” The term has a well-established meaning within the case law and market for traditional IPOs. While the Commission attempts in the proposing release to illustrate the scope of who may be considered an “underwriter” in a distribution of securities, it is not clear how those cases apply to a registration statement on Form S-4 or F-4 filed in connection with a business combination transaction, such as a de-SPAC transaction. It is even less clear how those cases would apply to a definitive proxy statement, where there is no investment decision that requires a registration of securities under the Securities Act. In this regard, we note:

- None of the financial institutions that participate in a de-SPAC transaction “purchase” securities “with a view to distribution,” as they do in a traditional IPO.
- None of these financial institutions “offer or sell [securities] for an issuer in connection with a distribution” – i.e., the investment decision that gives rise to the “offer” of securities that is registered under the Securities Act in a de-SPAC transaction is the decision made by the SPAC’s existing shareholders and/or the target company’s shareholders and these financial institutions do not deliver the shares of the issuer to investors as they do in a traditional IPO.
- None of these financial institutions have “a direct or indirect participation in any such undertaking,” as this concept has been understood for decades – i.e., financial institutions that perform functions “similar in character, in the distribution of a large issue” in furtherance of the principal underwriter or underwriters, such as being a member of an underwriting syndicate as financial institutions are in a traditional IPO.⁴

A de-SPAC transaction is not a continuous distribution from the SPAC IPO.

We also note that a SPAC IPO and a de-SPAC transaction are fundamentally two separate transactions, despite the proposed rule attempting to tie them together. For months, and often a year or more, the securities of the SPAC trade in the public markets without the intervention or support of the SPAC’s IPO underwriters – and, as such, the “distribution” for which the SPAC’s IPO underwriters were responsible was completed by the time of closing of the SPAC IPO. In contrast, the de-SPAC transaction begins once the SPAC identifies a potential target business, at which point the parties negotiate a business combination agreement. This is evidenced by the fact that the “distribution” of securities in a de-SPAC transaction must be registered (absent an exemption from the registration requirements of the Securities Act) on a separate registration statement than the distribution registered at the time of the SPAC IPO.

Public company M&A transactions have never been understood to involve statutory “underwriters”.

Further, we note that the proposed rule is inconsistent with the long-held understanding that traditional “underwriter” liability does not apply in the context of business combination or M&A transactions. Issuers, financial sponsors and other participants have liability in respect of such registration statements under Section 11 and/or Section 12(a)(2) of the Securities Act, and, where a proxy statement has been used in lieu of a registration statement on Form S-4 or F-4, Section 14(a) of the Exchange Act of 1934 (the “Exchange Act”) and Rule 14a-9 under the Exchange Act. However, the numerous financial institutions,

⁴ H.R. Repo. No. 85, 73rd Cong. 1st Sess. 13 (1933).

fairness opinion providers, accountants and other service providers that support a typical M&A transaction have never been determined to be statutory underwriters in respect of such transactions, nor would any of these financial institutions have “a direct or indirect participation in any such undertaking,” as this concept has been understood for decades, sufficient to give rise to underwriter liability even in a traditional IPO.

Requiring that financial institutions accept underwriter liability in de-SPAC transactions is problematic in light of the different disclosure requirements that apply to business combination transactions.

De-SPAC transactions are typically required to be registered on Form S-4 or F-4, rather than on Form S-1 as in a traditional IPO. Importantly, Forms S-4 and F-4 differ from Form S-1 in that they require the inclusion of the disclosures required by Item 1015 of Regulation M-A regarding whether the company has received a report, opinion or appraisal regarding the fairness of the consideration. In addition, regardless of the form requirements, Commission guidance and relevant jurisprudence typically require the disclosure of projections in business combination transactions on the basis that such information is material information that was made available to the SPAC’s board of directors for purposes of evaluating the transaction and/or the SPAC’s financial advisor for purposes of rendering a fairness opinion. As a result, the vast majority of registration statements for de-SPAC transactions include projected financial results of the target company in order to satisfy the parties’ disclosure obligations.⁵ Financial institutions that serve as underwriters in traditional IPOs have historically been uncomfortable assuming liability for projected financial information due to its inherent uncertainty and the potential challenges of establishing a due diligence defense with respect to information that is, by its nature, forward-looking and therefore speculative. As a result, such information is not typically included in registration statements for traditional IPOs and instead information derived from company projections is conveyed to investors by other means – i.e., through research analyst models that are informed by company projections. In other words, substantially similar information is conveyed to many market participants in a traditional IPO as is conveyed in a de-SPAC transaction, without such information being included in the registration statement as is typically required in a de-SPAC transaction.

Accordingly, by requiring that certain financial institutions accept underwriter status for de-SPAC transactions, the Commission is not treating like transactions alike. Rather, it is effectively requiring those financial institutions to assume responsibility for projected financial information regardless of whether that information is being disclosed for marketing purposes or due to non-marketing disclosure requirements. In other contexts, such as the use of non-GAAP financial measures in the context of business combination transactions, the Commission has recognized this important distinction and has granted accommodations⁶ to avoid treating financial information that is being disclosed in business combination transactions as subject to the same disclosure requirements that would apply to that financial information when used in other contexts. We urge the Commission to consider a similar approach here by clarifying that underwriters in a de-SPAC transaction are not assuming liability for projected financial information disclosed in the Form S-4 or F-4 for the reasons described above. If the proposed Rule 140a goes into effect as proposed, we

⁵ See Securities and Exchange Commission Release Nos. 33-11048; 34-94546; IC-34549; File No. S7-13-22, “Special Purpose Acquisition Companies, Shell Companies and Projections” (the “Proposing Release”), at p 194.

⁶ C&DI Non-GAAP Financial Measures, Section 101 “Business Combination Transactions” (“Item 10(e)(5) of Regulation S-K and Rule 101(a)(3) of Regulation G provide that a non-GAAP financial measure does not include financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. Accordingly, financial measures provided to a financial advisor would be excluded from the definition of non-GAAP financial measures, and therefore not subject to Item 10(e) of Regulation S-K and Regulation G, if and to the extent:

- the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and
- the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor’s analyses or substantive work. [Oct. 17, 2017”]

expect that the foregoing will result in the exacerbation of the current trend of the withdrawal of financial institutions from de-SPAC transactions, and at the same time depriving investors of the benefit of such financial institutions advising on de-SPAC transactions with no obvious public benefit.

Proposed Rule 140a has created significant uncertainty in the scope of liability and other implementation issues.

We have also observed in the wake of the Commission's proposal that it has created significant uncertainty in the scope of the proposed underwriter liability in de-SPAC transactions. While the text of Rule 140a is clear that it extends solely to a SPAC IPO underwriter that "takes steps to facilitate" or "otherwise participates (directly or indirectly)" in a subsequent de-SPAC transaction, the Commission has created significant uncertainty by suggesting in the proposing release that this liability "could" even apply to a SPAC underwriter that simply receives its deferred underwriting compensation from the SPAC IPO in connection with the de-SPAC transaction, while undertaking no activities in connection with the de-SPAC transaction.⁷ Given that this deferred underwriting compensation was earned at the time of the SPAC IPO by the terms of the underwriter engagements entered into in connection with the SPAC IPO, such an interpretation would be contrary to the Commission's and the courts' long-standing practice in traditional IPOs of not seeking to impose liability on financial advisors or banks who are simply paid pursuant to the terms of an existing engagement letter. Furthermore, by characterizing this novel and significant expansion of the statutory definition of "underwriter" as merely a "clarification,"⁸ the Commission has created significant uncertainty regarding whether financial institutions may have underwriter liability for ongoing and past de-SPAC transactions and, in turn, has opened the door to a retroactive application of the proposed rule.

In addition, the Commission casts further doubt on the scope of liability by indicating in the proposing release that the new proposed rule is not intended to be an exhaustive assessment of underwriter liability in de-SPAC transactions and that the Commission or federal courts may in the future find that other parties involved in a de-SPAC transaction, including financial advisors, PIPE placement agents, PIPE investors, lenders or other advisors, are "statutory underwriters," regardless of whether they also acted as underwriter in connection with the SPAC's IPO. In addition to creating substantial uncertainty with respect to whether and under what circumstances mere "participants" in a de-SPAC transaction could be deemed to face liability as a purported statutory underwriter in a de-SPAC transaction, this raises questions about whether liability under Section 11 of the Securities Act might also exist in other contexts, such as to financial advisors in stock-for-stock merger transactions outside the de-SPAC context. The proposing release casts doubt on decades of work performed by financial advisors in many different situations, including public company M&A, tender and exchange offers and other liability management transactions, which for decades have been determined to be outside the scope of Securities Act underwriter liability.

The uncertainty generated by the proposing release described in the foregoing paragraphs is contrary to investor protection, which is one of the core mandates of the Commission. As Commissioner Peirce predicted in her comments, it has led to an unprecedented wave of Section 11(b)(1) / (2) withdrawals by investment banks serving as PIPE placement agents, M&A financial advisors and capital markets advisors, among other capacities, to SPACs and target companies, which has deprived these market participants in de-SPAC transactions of a broad range of financial and M&A advisory services. The proposed rule has also called into question the accepted market practice of deferred underwriter compensation in SPAC IPOs, which is likely to lead to increased upfront costs for market participants that

⁷ See, e.g., Commissioner Allison Herren Lee, "Statement on the Proposal to Enhance Investor Protections in SPACs" (available at <https://www.sec.gov/news/speech/lee-statement-spac-proposal-033022>) (noting that the proposed Rule 140a "proposes a new rule to clarify that SPAC IPO underwriters are underwriters in the de-SPAC and therefore subject to underwriter liability" without any nexus to the de-SPAC transaction).

⁸ Despite the fact that the Commission has styled proposed Rule 140a as a clarification of existing law, we are not aware of any cases in which the Commission or any court has found such statutory underwriter liability to exist in the context of a Registration Statement on Form S-4 or F-4.

we believe will ultimately be borne by investors. This will make executing de-SPAC transactions more difficult and have a chilling effect on SPAC activity and capital formation, effects that have already become readily apparent in the SPAC market since the announcement of this proposal, with no obvious public benefit and arguably a significant public detriment given the withdrawal of critical financial institution advisors.

Suggested Modifications to Proposed Rule 140a

If the Commission intends to adopt a proposal to expand underwriter liability to SPAC transactions notwithstanding the concerns identified by us and other commenters, we would recommend that the Commission consider the following in order to mitigate some of the concerns addressed above.

- Clarify that underwriter liability will not attach to financial institutions that have a role in the de-SPAC transaction that has not been traditionally understood to be commensurate with an underwriter in a traditional IPO, such as those that are only participating as M&A financial advisor for the target, capital markets advisor, PIPE placement agent, PIPE investor, lender, fairness opinion provider or other similar roles that have not historically been understood to result in underwriter status in traditional IPO transactions.
- Clarify that the receipt of deferred underwriting compensation, by itself, will not result in the imposition of underwriter liability on a SPAC IPO underwriter without other affirmative actions taken that would rise to the level of a traditional IPO underwriter or in circumstances where the SPAC IPO underwriter has withdrawn from the de-SPAC transaction. SPAC IPO underwriters do not have the same procedural controls and safeguards in connection with de-SPAC transactions as they do in an IPO because their participation and consent are not required for the registration statement for the de-SPAC to occur, and so having a manner for them to be certain that their prior services for the SPAC in its IPO will not result in them having underwriter liability for a future transaction for which they are not providing services or have withdrawn their services is important to clarify the extent of the proposed rule and ensure that SPAC IPO underwriters will be willing to continue to perform that important role.
- Propose a phase-in period for the application of the new proposed rule rather than styling the proposed rule as a clarification, which has led to significant upheaval in the market place and is having a significant impact on transactions. Attaching liability with respect to transactions and registration statements that have already gone effective and closed will only serve the plaintiff's bar and will not provide any benefit in the way of gatekeeping or investor protection, as these transactions have already closed or were executed before the Commission published its rule proposal.
- In light of the distinction already recognized by the Commission⁹ in the reasons for disclosure of projected financial information in business combination transactions as compared to other registered offerings, provide that underwriters in a de-SPAC transaction are not assuming liability for projected financial information required to be disclosed in the Form S-4 or F-4.

PSLRA Safe Harbor

The PSLRA provides a safe harbor for forward-looking statements under the Securities Act and the Exchange Act pursuant to which a company is protected from liability in any private right of action for forward-looking statements when, among other things, the forward-looking statement is identified as such

⁹ See *supra* note 6.

and is accompanied by meaningful cautionary statements. The safe harbor is not available in IPOs and is also not available to “blank check companies.” The proposal would amend the definition of “blank check company” to include SPACs, which would have the effect of making the safe harbor unavailable for disclosure in de-SPAC registration statements, including projections.

While the potential benefits of the safe harbor for projections disclosure in the context of de-SPAC transactions has provided some comfort to parties to such transactions in the abstract, the safe harbor has never provided a meaningful shield from liability. Best practice for participants in de-SPAC transactions has always been to ensure that any prospective financial information is based on the best then available information and that the key assumptions are reasonable and appropriately disclosed. Therefore, we do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices and we do not object to the disapplication of the safe harbor to de-SPAC transactions. However, as noted above, traditional IPO underwriters have historically taken a conservative approach to the use of projections in IPO disclosures because of their potential liability for the projections as “underwriters” and the inherent uncertainty in projected financial information.¹⁰ For this reason, and because the inclusion of projections in registration statements for de-SPAC transactions is effectively required as noted above, if investment banks are deemed to be statutory underwriters in de-SPAC transactions as described above, we expect that the removal of the PSLRA safe harbor will be an additional factor that will cause many investment banks to refuse to participate in de-SPAC transactions to avoid liability.¹¹

Private Operating Company as Co-Registrant to Form S-4 and Form F-4

The proposed amendments to Form S-4 and F-4 for purposes of Section 6(a) of the Securities Act and the signature requirements would update the foregoing forms to require the target company to be a registrant for the registration statement being filed in connection with a de-SPAC transaction, even if the securities of the target company are not being offered to public shareholders of the SPAC. Our view is that these amendments reflect the practical realities of the parties that ultimately already bear responsibility for the registration statement in a de-SPAC transaction. As the Commission notes in the proposing release, the private operating target company and its affiliates are already subject to enforcement actions by the Commission irrespective of these amendments, including under Section 17(a) and the Exchange Act. In addition, the target company’s shareholders will typically own a controlling interest in the SPAC following the closing and as such will bear the economic exposure to any liability that may arise, including Section 11 liability. It is also not uncommon in de-SPAC transactions for the target company to be the registrant due to structural and tax considerations.

However, the proposed rules should clarify that a target company that will ultimately not be the public company parent following the de-SPAC transaction does not become subject to the periodic reporting requirements of Section 13 of the Exchange Act as a result of being a co-registrant in the registration statement for the de-SPAC transaction. Otherwise, upon effectiveness of such registration statement, the target company would, as a result of Section 15(d) of the Exchange Act, automatically be required to begin filing 10-Ks, 10-Qs and other periodic reports required by the Exchange Act, and this would be an Exchange Act reporting obligation that is separate from the public company Exchange Act reporting obligation. These reports would be essentially the same reports as filed by its public parent company and would create significant additional compliance costs while resulting in no substantive

¹⁰ As discussed above, in a traditional IPO, information derived from company projections can be conveyed to investors by other means that do not require inclusion in the Form S-1 registration statement, means which are not available to a SPAC due to the requirements imposed on public companies and by the Commission regulations in respect of disclosure in M&A transactions. As such, there is no incentive or requirement to include financial projections in registration statements for an IPO because they can be made available to key market participants, such as research analysts, in a manner that does not give rise to Section 11 liability.

¹¹ See, e.g., “Goldman Sachs retreating from SPAC market over regulatory threat,” *New York Post* (May 9, 2022) (available at <https://nypost.com/2022/05/09/goldman-sachs-retreating-from-spacs-over-regulatory-threat/>).

additional public disclosure. We do not think this was an intended consequence of the rule proposal and, accordingly, we encourage the Commission to clarify this aspect of its proposal.

Aligning Non-Financial Disclosures in De-SPAC Disclosure Documents

As noted previously, we welcome the Commission's efforts to improve public confidence in de-SPAC transactions by focusing on disclosure requirements and ensuring offering materials in connection with de-SPAC transactions contain all appropriate information for investors to make an informed investment decision. In the case of the Commission's proposals to align the non-financial disclosures in de-SPAC transactions with the analogous requirements for a traditional IPO, we welcome these proposals, consistent with the Commission's historical mission of ensuring investors are informed by good disclosure when making investment decisions.

Minimum Dissemination Period

While we have concerns regarding certain other timing aspects of the Commission's proposed rules, principally the timing parameters proposed in the safe harbor from the Investment Company Act of 1940 (the "Investment Company Act"), which may lead SPACs to seek to hasten all aspects of a proposed transaction in order to stay within the confines of the safe harbor, the minimum dissemination period proposed in the amendments to Exchange Act rules 14a-6 and 14-2 is a welcome modification to improve public confidence by providing a minimum period to review the disclosures provided in connection with a de-SPAC transaction. The period of 20 calendar days proposed in the Commission's rule proposal is also consistent with current market practice for the solicitation period in de-SPAC transactions.

Enhanced Financial Projections Disclosure

As we have discussed above, under existing Commission rules and practice the registration statement in a de-SPAC transaction often must include, and the Commission in fact encourages¹² the inclusion of, any projections provided to the SPAC's board of directors. A SPAC board of directors has incentives to request and review target company projections, which incentives will only be increased by the requirement in the proposed rules that the board of the SPAC make affirmative pronouncements regarding the fairness of the transaction, which will increase the likelihood that SPAC board of directors will request and review target company projections and/or engage the services of a fairness opinion provider, either or both of which will result in the inclusion of forward-looking information in the registration statement with respect to the de-SPAC transaction in a way that is not required in traditional IPOs. Because we view de-SPAC transactions as inherently M&A transactions, we welcome the Commission's efforts to increase public confidence in the disclosures utilized by SPACs and target companies in de-SPAC transactions and we view many of the proposed modifications to Item 10(b) of Regulation S-K to be consistent with current market practice for disclosures in de-SPAC transactions.

Fairness Opinions

As we have noted previously, we welcome the Commission's efforts to improve public confidence in de-SPAC transactions by focusing on disclosure requirements and ensuring offering materials in connection with SPAC IPOs and de-SPAC transactions contain all appropriate information for investors to make informed investment decisions. As the Commission noted in the proposing release, many of the proposals for enhanced disclosures in the proposed Subpart 1600 of Regulation S-K are consistent with current

¹² See § 229.10(b) of Regulation S-K "(b) Commission policy on projections. The Commission encourages the use in documents specified in Rule 175 under the Securities Act (§ 230.175 of this chapter) and Rule 3b-6 under the Exchange Act (§ 240.3b-6 of this chapter) of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines set forth herein represent the Commission's views on important factors to be considered in formulating and disclosing such projections."

market practice for disclosures in SPAC IPOs and de-SPAC transactions based on the Commission's review and comment procedures, and we do not generally believe they will be overly burdensome.

However, we believe that the proposed disclosure requirements with respect to the fairness of the transaction, which require the SPAC to state that the "de-SPAC transaction and any related financing are fair or unfair to the unaffiliated security holders of the special purpose acquisition company," go beyond the principle of ensuring appropriate disclosure by introducing a novel and inherently uncertain disclosure requirement on SPAC boards of directors.

It is customary in a wide range of M&A transactions for the parties to obtain fairness opinions and, where a fairness opinion is referenced in a registration statement or proxy statement for an M&A transaction, Item 1015 of Regulation M-A requires the disclosure of such opinion as well as certain specific disclosures regarding the identity of the party preparing the opinion, its qualifications and relationships with the subject company for whom the opinion was prepared. Moreover, Schedule 13E-3 requires that the registration statement or proxy statement for any transaction subject to Section 13(e) of the Exchange Act and Rule 13e-3 include the items required by Item 1014 of Regulation M-A as to the "Fairness of the Transaction." Item 1014 of Regulation M-A provides that the following must be disclosed in the context of a transaction subject to Section 13(e) of the Exchange Act by the subject company: "**Fairness.** State whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders." In addition, Item 1015 of Regulation M-A goes on to require that the person filing the Schedule 13E-3 disclose if it has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the Rule 13e-3 transaction, including, but not limited to, any report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the transaction to the issuer or affiliate or to security holders who are not affiliates.

While receipt of a fairness opinion is not *per se* a requirement pursuant to Item 1014 of Regulation M-A, in order to support a statement regarding the fairness of the Section 13e-3 transaction, it is customary practice for a fairness opinion to be provided to a special committee of the board of directors that is convened to review such transaction. In addition, for companies organized in Delaware, the *Smith v. Van Gorkom* case has long been read to be a *de facto* requirement for the board of public companies to obtain a fairness opinion to support the exercise of the directors' fiduciary duties in all sell-side and in a significant number of buy-side public M&A transactions. These fairness opinions typically provide an opinion that the consideration to be received by the unaffiliated shareholders, or to be paid by the buyer in a buy-side opinion, in the transaction is, subject to a litany of assumptions and qualifications, fair from a financial point of view. Importantly, a traditional fairness opinion addresses only the fairness of the consideration in the transaction, not the fairness of the transaction as a general matter or the advisability of entering into the transaction.

The proposed rule appears to have been inspired by the requirements of Item 1014 of Regulation M-A. While not specifically requiring a fairness opinion, the proposed rule will clearly push market participants towards obtaining a fairness opinion more typical for public M&A transactions or 13e-3 transactions. However, the proposed Item 1606(a) actually goes further than the requirements imposed on transactions pursuant to Rule 13e-3 and Item 1014 and 1015 of Regulation M-A and requires a substantively different standard than the standard that fairness opinion providers typically will cover in a fairness opinion.

As we have stated previously, in our view a de-SPAC transaction is inherently an M&A transaction. As such, some SPACs have already undertaken to obtain a fairness opinion in a manner customary for a public M&A transaction as a matter of facilitating the SPAC's board of directors review of the transaction and exercise of the directors' fiduciary duties, many of which have been in the context of related party or

conflicted transactions.¹³ However, given the Commission’s desire to treat de-SPAC transactions in a “like for like” manner with traditional IPOs, we note that proposed Item 1606(a) is in stark juxtaposition to other aspects of the Commission’s proposed rules by imposing requirements on SPACs that do not exist in the context of a traditional IPO. While we welcome the Commission’s efforts to improve the disclosure in de-SPAC transaction through creating symmetry with traditional IPOs, we do not see how investors will benefit from such disclosure obligations going further than what is required in a traditional IPO, such as requiring SPACs to make affirmative statements regarding the fairness of the transaction, which the Commission has historically reserved for “take private” merger transactions in accordance with Rule 13e-3. By creating a *de facto* requirement for obtaining a fairness opinion in order to satisfy this disclosure obligation, in a manner consistent with market practice in Rule 13e-3 transactions, this will only lead to increased costs in de-SPAC transactions that are in excess of the costs of a traditional IPO, which does not require anyone to comment on the fairness of any of the terms to investors.

In addition, we note that the proposed Item 1606(a) does not correspond with the analogous requirements of Regulation M-A in the context of a Rule 13e-3 transaction, by requiring the special purpose acquisition company to state that the “de-SPAC transaction **and any related financing** (emphasis added) are fair or unfair to the unaffiliated security holders of the special purpose acquisition company”. It is unclear why a different standard than the standard required in a Rule 13e-3 transaction is necessary for a de-SPAC transaction and we would not expect that a fairness opinion provider, as noted above, would be willing to cover anything other than what would traditionally be provided in an M&A transaction, namely that the consideration paid by the SPAC for the target company in the business combination is fair, from a financial point of view. If the Commission intends to adopt proposed Rule 1606, we would recommend that the Commission rely on the well-developed standards for Rule 13e-3 transactions for this purpose and simply require a statement that the de-SPAC business combination transaction is fair or unfair to the unaffiliated security holders of the SPAC.

Proposed Safe Harbor Under the Investment Company Act

Proposed Rule 3a-10 would provide a non-exclusive safe harbor from the definition of “investment company” under Section 3(a)(1)(A) of the Investment Company Act for SPACs that meet certain conditions set out in the proposal, principally that:

- a SPAC’s assets must consist solely of government securities, government money market funds and cash items, which are not at any time acquired or sold for the primary purpose of making gains or reducing losses due to market value changes;
- a SPAC’s activities must be limited to seeking to complete a single de-SPAC transaction as a result of which the surviving public entity will be primarily engaged in the business of the target company or companies which must not be an investment company business, and will have a class of securities registered on a national securities exchange;
- a SPAC must be primarily engaged in the business of seeking such single de-SPAC transaction, as evidenced by, among other things, the activities of its officers, directors and employees, its public representation of policies, and an appropriate resolution of its board of directors; and
- a SPAC must announce a business combination within 18 months of its IPO and complete a business combination within 24 months of its IPO.

¹³ See Proposing Release at 195.

While we welcome the Commission's efforts to provide clarity regarding the status of SPACs under the Investment Company Act in light of recent purported shareholder derivative lawsuits asserting that SPACs are investment companies, we are concerned that the application of the safe harbor will lead to it becoming a "bright-line" rule (as opposed to a non-exclusive safe harbor) that will result in SPACs that are engaged in the typical business of seeking an initial business combination being characterized as investment companies. This will correspondingly make it more challenging for SPACs to find and enter into an initial business combination that is value-maximizing for their shareholders.¹⁴ The Commission's statement at the open meeting certainly gave credence to the idea that the Division of Investment Management will be scrutinizing any SPAC that falls outside the safe harbor, and we noted Commissioner Peirce's comments regarding the Alberton SPAC, which has created an inference that SPACs falling outside the safe harbor are *de facto* investment companies.¹⁵ We do not believe this is consistent with advancing investor protection, and it will exacerbate the conflicts identified elsewhere in the proposing release.¹⁶

Under Section 3(a)(1) of the Investment Company Act, an entity will be deemed to be an "investment company" if it:

- [Section 3(a)(1)(A)] "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities";
- [Section 3(a)(1)(B)] "is engaged or proposes to engage in the business of issuing face-amount certificates of installment type, or has been engaged in such business and has any such certificate outstanding"; or
- [Section 3(a)(1)(C)] "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40% of the value of [its] total assets (exclusive of [U.S. government] securities and cash items) on an unconsolidated basis" (the "40% Test").

SPACs typically do not issue face-amount certificates of installment type, and therefore are generally not deemed to be investment companies under Section 3(a)(1)(B). With respect to Section 3(a)(1)(C), SPACs that go public generally hold their IPO proceeds in U.S. government securities and U.S. money market fund shares that qualify as "cash items"¹⁷ (i.e., instruments that are not considered "investment securities" under the 40% Test). Such SPACs would typically pass the 40% Test because less than 40% of the value of their total unconsolidated assets (exclusive of U.S. government securities and cash items) consist of investment securities.

The test in Section 3(a)(1)(A) has been the subject of recent litigation regarding the status of SPACs under the Investment Company Act. Proposed Rule 3a-10 is intended to provide a safe harbor from being deemed to be an investment company under Section 3(a)(1)(A) by virtue of being "primarily engaged" in the business of investing, reinvesting or trading in securities. Whether a SPAC is or holds itself out as being "primarily engaged" in the business of investing, reinvesting or trading in securities depends on an analysis of the overall facts and circumstances surrounding the SPAC's business, including the

¹⁴ See Proposing Release, at 205-209.

¹⁵ See Commissioner Hester M. Peirce, "Statement re SPAC Matter," April 15, 2022 (available at <https://www.sec.gov/news/statement/peirce-spac-20220415>).

¹⁶ See Proposing Release, at 204 ("Because of the incentives provided to sponsors by the SPAC structure to complete a de-SPAC transaction, the limited period provided for a SPAC to search for a target and complete a transaction deal may cause some SPACs to pursue comparatively less attractive targets as they get closer to their de-SPAC transaction deadlines.").

¹⁷ *Willkie Farr & Gallagher*, SEC No-Action Letter (Oct. 23, 2000) (allowing an issuer to treat U.S. money market fund shares as "cash items" for purposes of the 40% Test in Section 3(a)(1)(C) and the asset and income test in Rule 3a-1).

considerations set out in *Tonopah Mining Co.* (26 S.E.C. 426 (1947)), i.e.: (1) an issuer's historical development, (2) its public representations of policy, (3) the activities of its officers and directors and, most importantly, (4) the nature of its present assets and (5) the sources of its present income. Any one factor is not determinative, and as interpreted by the courts, the overarching objective of the *Tonopah Mining* analysis is to determine whether reasonable investors would view an issuer "as an operating company rather than a competitor with a closed-end mutual fund."¹⁸

In the proposing release, the Commission acknowledged that "SPACs are generally formed to identify, acquire and operate a target company . . . and not with a stated purpose of being an investment company" and that "SPACs typically view their public representations, historical development and efforts of officers and directors as consistent with those of issuers that are not investment companies."¹⁹ The Commission noted that because most SPACs hold substantially all of their assets in securities for an extended period of time, their asset composition and sources of income may raise questions about their investment company status under Section 3(a)(1)(A). However, because, as noted above, the nature of a typical SPAC's assets and sources of its income consist of assets that are not investment securities for purposes of the 40% Test, it has been standard practice for counsel for such SPACs to provide unqualified opinions that such SPACs are not investment companies. Indeed, over the past two decades, over 1,000 SPAC IPOs have been reviewed by the Commission with no issues raised regarding the status of such SPACs under the Investment Company Act.

The Commission has not identified, despite its statements about the investor protection afforded by the proposed safe harbor²⁰ and concerns that investors may, the longer the SPAC operates, come to view the SPAC as a fund-like investment,²¹ any market data demonstrating that investors are acquiring shares of a SPAC in expectation of a fund-like investment. Existing Commission safeguards and the comment process are sufficient investor protection to police SPACs that may in fact be investment companies by acquiring minority investments in multiple operating companies, holding themselves out as being in the business of investing, reinvesting or trading in securities, or similar facts that are well outside the norm for SPAC activities.

As the Commission has recognized in its economic analysis,²² the prospect of registering as an investment company and compliance with the Investment Company Act requirements would be cost-prohibitive to SPACs; but more than that, the structure and economic terms of a SPAC are incompatible with the Investment Company Act requirements. For example, the typical structure of the sponsor economics received in connection with a SPAC IPO are incompatible with the requirements imposed by the Investment Company Act. The prospect of being deemed an unregistered investment company for any existing SPAC that is outside of the safe harbor may significantly jeopardize the ability of that SPAC to complete its business combination, including as a result of the possibility that any contract entered into by the SPAC, including the business combination agreement, could be unenforceable.²³

Rather than a safe harbor, we would welcome interpretive guidance from the Commission on the activities that a SPAC could undertake that would, in the Commission's view, give rise to such SPAC becoming an investment company. Such actions could include, among other things, acquiring minority

¹⁸ *SEC v. National Presto Industries, Inc.* (486 F.3d 305, 315 (2007)): ". . . the Commission thought in *Tonopah* that what principally matters is the beliefs the company is likely to induce in investors. Will its portfolio and activities lead investors to treat a firm as an investment vehicle or as an operating enterprise?"

¹⁹ See Proposing Release, at 137.

²⁰ See Proposing Release, at 300.

²¹ See Proposing Release, at 139.

²² See Proposing Release, at 266.

²³ § 47 of the Investment Company Act.

investments in multiple operating companies, holding itself out as being in the business of investing, reinvesting or trading in securities, or similar facts that go beyond the typical SPAC's business of seeking to engage in a single business combination transaction.

If the Commission intends to continue with a proposal to put in place a safe harbor, we would recommend that the Commission consider the following in order to alleviate the concerns addressed above:

- Remove the durational component of the safe harbor. Existing safeguards in the Commission review process and the other prongs of the proposed safe harbor are sufficient to advance investor protection and prevent investment companies from masquerading as SPACs without the significant harm of an artificial end date that will only exacerbate the conflicts that the Commission has identified.²⁴ There is no evidence to suggest that the mere passage of time has any bearing on an investor's view of the nature of a SPAC investment as anything more than a SPAC that is seeking to complete an initial business combination with a target in the traditional manner, and there are no economic reasons why an investor would be likely to confuse a SPAC investment with an investment in an investment company. In addition, investors already have existing protections enshrined in market practice and the rules of the listing exchanges that put a maximum limit on the duration of a SPAC without returning to its shareholders for an extension, and the imposition of an arbitrary shot-clock also will eliminate the right of the public shareholders to elect to allow a sponsor to continue to pursue a transaction that they might find value-maximizing.
- If there is a durational component of the safe harbor, it should be aligned with the period of time that existing exchange rules have contemplated as the maximum allowable time for a SPAC to search for a target, with an allowance for that period to be extended by a vote of the SPAC's shareholders.
- The proposed language requiring a SPAC's assets to consist "solely" of government securities, Government money market funds and cash items should be made more flexible to allow SPACs to hold other "good" assets such as prepaid expenses, which would be consistent with a traditional SPAC's primary engagement in a business other than investing, reinvesting or trading in securities, and its compliance with the 40% Test. In addition, a SPAC should be permitted to hold immaterial amounts of "bad" assets up to amounts permitted under the 40% Test in order to enable settlements and other immaterial agreements that might be paid to the SPAC partially in equity securities, if those equity securities are delivered solely after the business combination or the liquidation of the SPAC, as is the case in many of the settlement agreements entered into in connection with terminated de-SPAC transactions.²⁵
- Following the Commission's position that all shares of U.S. money market funds can be treated as "cash items" for purposes of the 40% Test,²⁶ the proposed rules should clarify that SPACs can also hold shares of any U.S. money market fund in addition to "Government money market funds."
- Existing SPACs that otherwise comply with the standards of the safe harbor should be grandfathered into the safe harbor, even if they are not compliant with the durational provisions of

²⁴ See *supra* note 16.

²⁵ See, e.g., "Kredivo, the Leading Digital Consumer Credit Platform in Southeast Asia, and VPC Impact Acquisition Holdings II Mutually Agree to Terminate Business Combination Agreement, March 14, 2022 (available at: <https://www.sec.gov/Archives/edgar/data/1840792/000119312522074165/d313258dex991.htm>); "Atlantic Coastal Acquisition Corp. and Essentium Mutually Agree to Terminate Business Combination Agreement," February 11, 2022 (available at: <https://www.businesswire.com/news/home/20220211005114/en/Atlantic-Coastal-Acquisition-Corp.-and-Essentium-Mutually-Agree-to-Terminate-Business-Combination-Agreement>).

²⁶ See *supra* note 17.

the safe harbor. Sponsors in those SPACs did not expect to have their investment evaporate overnight in the manner demonstrated by the Commission's lack of acceleration of the Alberton SPAC deal, and there is no benefit to investor protection of setting a safe harbor that would be unavailable to a large percentage of active SPACs solely due to the passage of time, particularly given other elements of the Commission proposal that will elongate the process beyond what has been the market norm for similar transactions in the service of other important investor protective measures that the Commission has proposed.

Other Amendments

The Commission is proposing to amend Rule 11-01(d) of Regulation S-X to state that a SPAC is a "business" for purposes of the rule. The Commission proposal is based on the premise that the significant equity transactions generally undertaken by a SPAC cause the financial statements of the SPAC to be material to an investor, particularly when they underpin adjustments to pro forma financial information in a transaction when an operating company is the legal acquirer of a SPAC. As a result of the proposed rule, an issuer that is not a SPAC may be required to file financial statements of the SPAC in a resale registration statement on Form S-1 and in future S-1 registration statements filed by the target business.

It is our view that this will create significant additional compliance costs while resulting in no substantive additional public disclosure. The SPAC historical financial statements are not relevant in any respect to the ongoing business of the target operating company, and there is guidance in the Commission's financial reporting manual²⁷ recognizing as much by providing that issuers do not need to include financial statements of the SPAC in a reverse merger situation once they are reflected in the historical financial statements of the go-forward business. The balance sheet of the combined public company will already reflect the impact of the combination of the SPAC with the target operating business, and the historical income statement component of the SPAC is simply not material following the completion of the de-SPAC transaction.

* * *

We appreciate the opportunity to participate in the Commission's rulemaking process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Pedro J. Bermeo, Brian Burnovski, Derek Dostal, Lee Hochbaum, Michael Kaplan, Sarah Kim, Soren Kreider or Greg Rowland of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP

²⁷ See Securities and Exchange Commission, Financial Reporting Manual § 1170.2(b) ("After the acquisition of a business by SPAC, the financial statements of the registrant for periods prior to the acquisition may not be required to be included in Forms 10-K and 10-Q once the financial statements include the period in which the acquisition or recapitalization was consummated. Generally, these financial statements would not be required in cases in which the registrant had only nominal statement of comprehensive income activity.").

Annex A

Set forth in this Annex A to this letter are our responses to certain of the specific questions raised in these proposed rules:

36. Should we adopt Item 1606 as proposed?

No. As we have noted previously, we welcome the Commission's efforts to improve public confidence in de-SPAC transactions by focusing on disclosure requirements and ensuring offering materials in connection with SPAC IPOs and de-SPAC transactions contain all appropriate information for investors to make informed investment decisions. As the Commission noted in the proposing release, many of the proposals for enhanced disclosures in the proposed Subpart 1600 of Regulation S-K are consistent with current market practice for disclosures in SPAC IPOs and de-SPAC transactions based on the Commission's review and comment procedures, and we do not generally believe they will be overly burdensome. However, we believe that the proposed disclosure requirements with respect to the fairness of the transaction, which require the SPAC to state that the "de-SPAC transaction and any related financing are fair or unfair to the unaffiliated security holders of the special purpose acquisition company," go beyond the principle of ensuring appropriate disclosure by introducing a novel and inherently uncertain disclosure requirement on SPAC boards of directors that is not required in the context of a traditional IPO.

37. Should we require a statement from the SPAC as to whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders, as proposed? Should the scope of the fairness determination include both the de-SPAC transaction and any related financing transaction, as proposed? Should the fairness determination be as to the SPAC's security holders as a whole, rather than to the SPAC's unaffiliated security holders? The factors enumerated in proposed Item 1606(b) in determining fairness include, but are not limited to, the valuation of the target company, the consideration of any financial projections, any report, opinion, or appraisal described in Item 1607 of Regulation S-K, and the dilutive effects described in Item 1604(c) of Regulation S-K. Is there any additional or alternative information that should be disclosed in connection with the SPAC's fairness determination?

Given the Commission's desire to treat de-SPAC transactions in a "like for like" manner with traditional IPOs, we note that proposed Item 1606(a) is in stark juxtaposition to other aspects of the Commission's proposed rules by imposing requirements on SPACs that do not exist in the context of a traditional IPO. We do not see how investors will benefit from such disclosure obligations going further than what is required in a traditional IPO, such as requiring SPACs to make affirmative statements regarding the fairness of the transaction, which the Commission has historically reserved for "take private" merger transactions in accordance with Rule 13e-3.

In addition, the scope of the fairness determination should not include both the de-SPAC transaction and any related financing transaction, as we would not expect that a fairness opinion provider, as noted in our letter, would be willing to cover anything other than what would traditionally be provided in an M&A transaction, namely that the consideration paid by the SPAC for the target company in the business combination is fair, from a financial point of view. If the Commission intends to adopt proposed Rule 1606, we would recommend that the Commission rely on the well-developed standards for Rule 13e-3 transactions for this purpose and simply require a statement that the de-SPAC business combination transaction is fair or unfair to the unaffiliated security holders of the SPAC, rather than requiring that.

39. What are the potential benefits and costs of the statement that would be required by proposed Item 1606(a)? Would the costs of complying with this disclosure requirement discourage SPAC initial public offerings or discourage private operating companies from pursuing business combinations with SPACs?

We do not see how investors will benefit from such disclosure obligations going further than what is required in a traditional IPO, such as requiring SPACs to make affirmative statements regarding the fairness of the transaction, which the Commission has historically reserved for “take private” merger transactions in accordance with Rule 13e-3. And by creating a de facto requirement for obtaining a fairness opinion in order to satisfy this disclosure obligation, in a manner consistent with market practice in Rule 13e-3 transactions, this will only lead to increased costs in de-SPAC transactions that are in excess of the costs of a traditional IPO, which does not require anyone to comment on the fairness of any of the terms to investors. We expect that this will have the effect of discouraging private operating companies from pursuing business combinations with SPACs by treating de-SPAC transactions in a manner that is inconsistent with the disclosure obligations in traditional IPOs.

40. Should we require registrants to disclose whether any director voted against, or abstained from voting on, the approval of a de-SPAC transaction or any related financing transaction, as well as the reasons for such vote or abstention, as proposed? Are there additional or alternative disclosures that we should require in this regard?

Contrary to the remainder of proposed Item 1606, we view the proposed disclosure of whether a director voted against or abstained from voting on the approval of the de-SPAC transaction to be appropriate and is consistent with current market practice in de-SPAC transactions.

61. Should we require a minimum dissemination period for prospectuses and proxy or information statements in de-SPAC transactions as proposed? Is a 20-day period necessary or appropriate to enable shareholders to review and consider these disclosure documents relating to a de-SPAC transaction? Should this 20 calendar day period be longer or shorter? Should the minimum dissemination period be based on business days (e.g., 20 business days) instead of calendar days as proposed?

While we have concerns regarding certain other timing aspects of the Commission’s proposed rules, principally the timing parameters proposed in the safe harbor from the Investment Company Act, which may lead SPACs to seek to hasten all aspects of a proposed transaction in order to stay within the confines of the safe harbor, the minimum dissemination period proposed in the amendments to Exchange Act rules 14a-6 and 14-2 is a welcome modification to improve public confidence by providing a minimum period to review the disclosures provided in connection with a de-SPAC transaction.

62. Would there be timing concerns on the part of SPACs in meeting the proposed minimum 20-day dissemination period? Should we include an exception for the applicable laws of the SPAC’s jurisdiction of incorporation or organization, as proposed? Should we include other exceptions to the proposed minimum 20-day dissemination period?

The period of 20 calendar days proposed in the Commission’s rule proposal is consistent with current market practice for the solicitation period in de-SPAC transactions, but we have concerns regarding certain other timing aspects of the Commission’s proposed rules, principally the timing parameters proposed in the safe harbor from the Investment Company Act, which may lead SPACs to seek to hasten all aspects of a proposed transaction in order to stay within the confines of the safe harbor. If the safe harbor from

the Investment Company Act is adopted as proposed, consider an exception to the minimum dissemination period in the event necessary to stay within the safe harbor.

65. Should we amend Form S-4 and Form F-4, as proposed, to require that the SPAC and the private operating company be treated as co-registrants when the registration statement is filed by the SPAC in connection with a de-SPAC transaction?

We do not find these amendments to be necessary. As the Commission notes in the proposing release, the private operating company and its affiliates are already subject to enforcement actions by the Commission irrespective of these amendments, including under Section 17(a) and the Exchange Act. In addition, the target company's shareholders will typically own a controlling interest in the SPAC following the closing and as such will bear the economic exposure to any liability that may arise, including Section 11 liability. It's also not uncommon in de-SPAC transactions for the target company to be the registrant due to structural and tax considerations.

However, the proposed rules should clarify that a target company that will ultimately not be the public company parent following the de-SPAC transaction does not become subject to the periodic reporting requirements of Section 13 of the Exchange Act as a result of being a co-registrant in the registration statement for the de-SPAC transaction. Otherwise, upon effectiveness of such registration statement, the target company would, as a result of Section 15(d) of the Exchange Act, automatically be required to begin filing 10-Ks, 10-Qs and other periodic reports required by the Exchange Act, and this would be an Exchange Act reporting obligation that is separate from the public company Exchange Act reporting obligation. These reports would be essentially the same reports as filed by its public parent company and would create significant additional compliance costs while resulting in no substantive additional public disclosure. We do not think this was an intended consequence of the rule proposal and, accordingly, we encourage the Commission to clarify this aspect of its proposal.

66. Would amending Form S-4 and Form F-4 in this manner improve the disclosure provided in connection with de-SPAC transactions that are registered on these forms?

No, we do not expect that the disclosure practice will be improved by such amendments. For the reasons described above, the private operating company and its affiliates are already ultimately responsible for the disclosure in the Form S-4 or F-4.

68. Should the sponsor of a SPAC also be required to sign a Form S-4 or Form F-4 filed in connection with a de-SPAC transaction, as well as a Form S-1 or Form F-1 filed for a SPAC's initial public offering, in view of, among other things, the sponsor's control over the SPAC and the sponsor's role in preparing these registration statements? Would such a requirement be consistent with the Commission's approach in requiring a majority of the board of directors of any corporate general partner to sign a registration statement when the registrant is a limited partnership?

No, the sponsor of a SPAC should not be required to sign a Form S-4 or Form F-4. Once a SPAC's IPO is completed, governance of the SPAC is vested in the board of directors of the SPAC, not the sponsor.

75. Should we define "blank check company" in Rule 405, as proposed? Should we include a reference in the definition to "development stage company" or the issuance of "penny stock"? Should we consider other changes to the proposed definition?

As noted in our letter, while the potential benefits of the safe harbor for projections disclosure in the context of de-SPAC transactions has provided some comfort to parties to such transactions in the abstract, the safe harbor has never provided a meaningful shield from liability. Best practice for participants in de-SPAC transactions has always been to ensure that any prospective financial information is based on the best then available information and that the key assumptions are reasonable and appropriately disclosed. Therefore, we do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices and we do not object to the disapplication of the safe harbor to de-SPAC transactions.

76. Would the proposed amendments improve the quality of projections in connection with de-SPAC transactions by clarifying that the safe harbor under the PSLRA is unavailable? Would the proposed amendment discourage some SPACs from disclosing projections in connection with these transactions or affect the ability of SPACs or target companies to comply with their obligations under the laws of their jurisdiction of incorporation or organization to disclose projections used by the board of directors or the companies' fairness opinion advisers?

We do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices. However, as noted above, IPO underwriters have historically taken a conservative approach to the use of projections in IPO disclosures because of their potential liability for the projections as “underwriters” and the inherent uncertainty in projected financial information. For this reason, and because the inclusion of projections in registration statements for de-SPAC transactions is effectively required as noted in our letter, if investment banks are deemed to be statutory underwriters in de-SPAC transactions as described above, we expect that the removal of the PSLRA safe harbor will be an additional factor that will cause many investment banks to refuse to participate in de-SPAC transactions to avoid liability, and this may also result in discouraging SPACs from disclosing projections in order to continue to avail themselves of the M&A services of financial institutions that may be dissuaded from being engaged in de-SPAC transactions otherwise.

82. Should we adopt a definition of distribution in Rule 140a, as proposed?

No. As detailed in our letter, in characterizing advisors involved in the de-SPAC transaction as underwriters when they have a role that was never understood to be that of an “underwriter” as defined in the Securities Act, we view the proposed rule 140a as effectively rewriting Section 2(a)(11) of the Securities Act to materially expand the definition. We also support the view of other commentators, including SIFMA, in questioning the authority of the Commission to do so.

83. Does the current regulatory regime provide sufficient incentives for participants in a de-SPAC transaction to conduct appropriate due diligence on the target private operating company and the disclosures provided to public investors in connection with the de-SPAC transaction? Would proposed Rule 140a likely result in improved diligence of private company targets in de-SPAC transactions and related disclosure? Would the other measures we are proposing in this release mitigate the need for proposed Rule 140a?

Yes, as noted by the Commission, the private operating company, the SPAC and the sponsor all have responsibility for the disclosures provided to public investors in connection with the de-SPAC transaction, as well as significant reputational concerns for sponsors that incentivize extensive due diligence. As an advisor on de-SPAC transactions, in the wake of the Proposed Rule 140a, we have observed numerous diligence exercises performed by financial institutions, which generally have been simply duplicative of prior diligence efforts by other stakeholders with no meaningful benefit to

the disclosure. In addition, the enhanced disclosures proposed by the Commission would enhance investor protection by requiring additional disclosure and mitigate the need for the extreme remedy of extending liability to a host of financial institutions in roles that have never been understood to be that of an “underwriter” as defined in the Securities Act.

84. Does the SPAC IPO underwriter have the means and access necessary (via contract or otherwise) to perform due diligence at the de-SPAC transaction stage, particularly where the SPAC IPO underwriter is not retained as an advisor in the de-SPAC transaction or the target is the registrant for the de-SPAC transaction? Could such access be reasonably obtained in the course of the negotiation of the underwriting agreement for the SPAC initial public offering or otherwise?

No, a SPAC IPO underwriter does not have the means and access solely as a result of its status as an IPO underwriter to perform due diligence at the de-SPAC transaction stage. While access requirements could be negotiated in an underwriting agreement, for all the reasons we describe in our letter, without the ability to have a right to veto the proposed business combination target if their diligence demands it, it is much more likely that financial institutions will decline to participate in the de-SPAC transaction to avoid liability. SPAC IPO underwriters do not have the same procedural controls and safeguards as they do in an IPO because their participation and consent are not required for the registration statement for the de-SPAC to occur. The SPAC IPO and the de-SPAC transaction are in practice and in substance two separate transactions with separate participants.

86. Should we limit the application of proposed Rule 140a to situations in which the SPAC IPO underwriter takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction, as proposed?

If the Commission intends to adopt a proposal to expand underwriter liability to SPAC transactions notwithstanding the concerns addressed by us and other commenters, we would recommend that the Commission consider:

- clarifying that underwriter liability will not attach to financial institutions that have a role in the de-SPAC transaction that has not been traditionally understood to be commensurate with an underwriter in a traditional IPO, excluding those that are only participating as M&A financial advisor for the target, capital markets advisor, PIPE placement agent, PIPE investor, lender, fairness opinion provider or other similar roles that have not historically been understood to result in underwriter status in traditional IPO transactions; and
- clarifying that the receipt of deferred underwriting compensation, by itself, will not result in the imposition of underwriter liability to a SPAC IPO underwriter without other affirmative actions taken that would rise to the level of a traditional IPO underwriter or in circumstances where the SPAC IPO underwriter has withdrawn from the de-SPAC transaction.

87. Would a determination that SPAC IPO underwriters are engaged in a distribution of the private operating company's securities, as proposed, raise additional issues we should address? For example, does it raise questions about when the SPAC IPO underwriters' participation in the SPAC initial public offering distribution is completed for purposes of calculating the restricted period under Regulation M?

A SPAC IPO and a de-SPAC transaction are fundamentally two separate transactions, despite the proposed rule attempting to tie them together. For months, and often a year or more, the securities of the SPAC trade in the public markets without the intervention or support of the SPAC's IPO underwriters – and, as such, the “distribution” for which the SPAC's IPO underwriters were responsible was completed at the time of closing of the SPAC IPO. In contrast, the de-SPAC transaction begins once the SPAC identifies a potential target business, at which point the parties negotiate a business combination agreement. This is evidenced by the fact that the “distribution” of securities in a de-SPAC transaction must be registered (absent an exemption from the registration requirements of the Securities Act) on a separate registration statement than the distribution registered at the time of the IPO.

88. As noted above, there may be additional parties that are involved in a de-SPAC transaction that may fall within the statutory definition of underwriter because they are “participating in the distribution” of the target private operating company’s securities to the public. Should proposed Rule 140a be expanded to expressly include such other parties? If so, which parties? Should the rule instead deem any party playing a significant role at the de-SPAC transaction stage to be an underwriter? Should the Commission provide additional guidance as to which additional parties may be underwriters and what activities or other considerations would be relevant to determining whether a party falls within the statutory definition of underwriter in a de-SPAC transaction?

Please see the sections of our letter entitled “*Financial institutions participating in a de-SPAC transaction have never been considered statutory underwriters within the meaning of Section 2(a)(11) of the Securities Act*” and “*Public company M&A transactions have never been understood to involve statutory ‘underwriters’.*” The Commission should clarify that underwriter liability will not attach to financial institutions that have a role in the de-SPAC transaction that has not been traditionally understood to be commensurate with an underwriter in a traditional IPO, such as those that are only participating as M&A financial advisor for the target, capital markets advisor, PIPE placement agent, PIPE investor, lender, fairness opinion provider or other similar roles that have not historically been understood to result in underwriter status in traditional IPO transactions.

89. Is it clear what parties would be considered a SPAC IPO underwriter for purposes of proposed Rule 140a? Should we limit underwriter status as clarified by Rule 140a to the entities acting as traditional underwriter in a SPAC IPO? Are there other parties that should be specifically excluded from the application of the rule?

Please see the section of our letter entitled “*Proposed Rule 140a has created significant uncertainty in the scope of liability and other implementation issues.*”

119. Instead of a safe harbor, should we provide an interpretation concerning when SPACs would meet the definition of “investment company”? Alternatively, should we exempt SPACs that meet the definition of “investment company” from any provisions of the Investment Company Act, and if so, which provisions? Are there any changes we should make to the proposed approach that would better achieve the objectives of the proposed rule? Are there conditions we should include in addition to those set forth below?

While we welcome the Commission's efforts to provide clarity regarding the status of SPACs under the Investment Company Act in light of recent purported shareholder derivative lawsuits asserting that SPACs are investment companies, we are concerned that the application of the safe harbor will lead to it becoming a “bright-line” rule (as opposed to a non-exclusive safe harbor) that will result in SPACs that are engaged in the typical business of seeking an initial business combination being characterized as investment companies. This will correspondingly make it more challenging for SPACs to

find and enter into an initial business combination that is value maximizing for their shareholders. Rather than a safe harbor, we would welcome interpretive guidance from the Commission on the activities that a SPAC could undertake that would, in the Commission's view, give rise to such SPAC becoming an investment company. Such actions could include, among other things, acquiring minority investments in multiple operating companies, holding itself out as being in the business of investing, reinvesting or trading in securities, or similar facts that go beyond the typical SPAC's business of seeking to engage in a single business combination transaction.

123. As proposed, an existing SPAC that has not completed a de-SPAC transaction prior to the effective date of the rule would not be prohibited from relying on the safe harbor if it satisfies the conditions. Should we permit an existing SPAC to rely on the safe harbor if it does not have a board resolution but has other contemporary evidence of its intent and otherwise meets the conditions of the safe harbor? Alternatively, should we limit reliance on the safe harbor to SPACs formed after the effective date of the rule? If proposed Rule 3a-10 is adopted, should the rule's effective date reflect the possibility that some SPACs may need to alter their operations or more quickly complete a de-SPAC transaction in order to meet the conditions of the rule? If so, should we provide an extended or delayed effective date? Should we provide a compliance or transition period, and if so, why?

Yes, existing SPACs that have not completed a de-SPAC transaction prior to the effective date of the rules should not be prohibited from relying on the safe harbor. Indeed, any existing SPAC that otherwise complies with the standards of the safe harbor should be grandfathered into the safe harbor, even if they are not compliant with the durational provisions of the safe harbor. Sponsors in those SPACs did not expect to have their investment evaporate overnight in the manner demonstrated by the Commission's lack of acceleration of the Alberton SPAC deal, and there is no benefit to investor protection of setting a safe harbor that would be unavailable to a large percentage of active SPACs solely due to the passage of time, in particular given other elements of the Commission proposal that will elongate the process beyond what has been the market norm for similar transactions in the service of other important investor protective measures that the Commission has proposed.

125. Should we allow SPACs to invest in government money market funds, as defined in Rule 2a-7? Should we instead limit the type of money market funds that a SPAC may invest in to money market funds that only hold U.S. Treasury securities? Conversely, should the provision be expanded to permit SPACs to invest in all types of money market funds provided that they rely on Rule 2a-7?

Following the Commission's position that all shares of U.S. money market funds can be treated as "cash items" for purposes of the 40% Test, the proposed rules should clarify that SPACs can also hold shares of any U.S. money market fund in addition to "Government money market funds."

126. In addition to the questions raised above, as a general matter, is paragraph (a)(1) too narrow? For example, should the safe harbor be expanded to include SPACs that acquire investment securities or other assets (e.g., assets that are not for investment purposes relevant to the operation of the SPAC)? If yes, please explain which investment securities and/or assets and why such an expansion of the safe harbor would be appropriate.

Yes, the proposed rule should allow SPACs to hold other "good" assets such as prepaid expenses, which would be consistent with a traditional SPAC's primary engagement in a business other than investing, reinvesting or trading in securities, and its compliance with the 40% Test.

In addition, a SPAC should be permitted to hold immaterial amounts of “bad” assets up to amounts permitted under the 40% Test in order to enable settlements and other immaterial agreements that might be paid to the SPAC partially in equity securities, if those equity securities are delivered solely after the business combination or the liquidation of the SPAC, as is the case in many of the settlement agreements entered into in connection with terminated de-SPAC transactions.

129. Do SPACs engage in other activities that should be expressly permitted or prohibited by the safe harbor? If yes, please explain these business activities and why they should be permitted or prohibited.

SPACs engage in activities related to the business combination agreement that may not be permitted by the safe harbor as proposed. In particular, SPACs may need to engage in a settlement in relation to the termination of the business combination and as such should be able to hold an immaterial amount of “bad” assets as referred to in our response to Question 126 above.

138. Should we require, as proposed, that the SPAC reach an agreement with at least one target company within 18 months? Should we require that the SPAC reach an agreement with at least one target company within 12 months, which would be more consistent with the time period in Rule 3a-2? Should the time period be even shorter than 12 months (e.g., 6 months)? Should the time period be longer (e.g., 20 months, 24 months, 36 months)? If the time period should be longer, please explain why such a longer period is necessary and how any such longer period would be consistent with the framework of the Investment Company Act, the rules thereunder, and prior Commission positions.

If the Commission intends to continue with a proposal to put in place a safe harbor, we would recommend that the Commission remove the durational component of the safe harbor. Existing safeguards in the Commission review process and the other prongs of the proposed safe harbor are sufficient to advance investor protection and prevent investment companies from masquerading as SPACs without the significant harm of an artificial end date that will only exacerbate the conflicts that the Commission has identified. There is no evidence to suggest that the mere passage of time has any bearing on an investor’s view of the nature of a SPAC investment as anything more than a SPAC that is seeking to complete an initial business combination with a target in the traditional manner, and there are no economic reasons why an investor would be likely to confuse a SPAC investment with an investment in an investment company. In addition, investors already have existing protections enshrined in market practice and the rules of the listing exchanges that put a maximum limit on the duration of a SPAC without returning to its shareholders for an extension, and the imposition of an arbitrary shot-clock also will eliminate the right of the public shareholders to elect to allow a sponsor to continue to pursue a transaction that they might find value-maximizing.

If there is a durational component of the safe harbor, it should be aligned with the period of time that existing exchange rules have contemplated as the maximum allowable time for a SPAC to search for a target, with an allowance for that period to be extended by a vote of the SPAC’s shareholders.

140. Should we include an option for SPACs that have not identified a target within 18 months, or completed the de-SPAC transaction within 24 months to extend these deadlines? If so, what would that be and what conditions should be included? For example, should we provide that a SPAC can obtain an extra 2, 4 or 6 months and stay within the safe harbor if it obtains approval from its shareholders? Please explain how any extensions of these deadlines would be consistent

with the framework of the Investment Company Act, the rules thereunder, and prior Commission positions.

If there is a durational component of the safe harbor, it should have the option to be extended through a shareholder vote in accordance with the current market practice and stock exchange listing rules. The imposition of an arbitrary shot-clock also will eliminate the right of the public shareholders to elect to allow a sponsor to continue to pursue a transaction that they might find value-maximizing.

141. Should we require, as proposed, that the SPAC complete the de-SPAC transaction within a 24-month period? Should the time period be 18 months, as in Rule 419 or 12 months, as in Rule 3a-2? Should the period be longer (e.g., 30 months)? If so, how would that longer period be consistent with the framework of the Investment Company Act, the rules thereunder, and past Commission positions?

Please see our response to Question 138.

142. The rule proposal requires that any assets of the SPAC that are not used in connection with the de-SPAC transaction, or in the event of the SPAC's failure to meet the timelines required for identification or completion of a de-SPAC transaction, be distributed in cash to investors as soon as reasonably practicable. Should we allow distributions "in-kind"? Are there any other distributions made by the SPAC that should be covered by the rule? Should the rule text define the term "reasonably practicable"? If yes, how should the term be defined? If the term "reasonably practicable" is not defined, could that potentially result in unnecessarily extended periods of time before investor assets are returned? Instead of defining the term "reasonably practicable," should we specifically require that such assets be distributed within a defined time period such as 30 days? 15 days? 7 days? Should we require the SPAC to provide notification to the Commission, its investors and/or the SPAC's board of directors if the distribution of cash takes longer than a certain period of time, e.g., 30 days?

As described in our prior response, a SPAC should be permitted to hold immaterial amounts of "bad" assets up to amounts permitted under the 40% Test in order to enable settlements and other immaterial agreements that might be paid to the SPAC partially in equity securities, if those equity securities are delivered solely after the business combination or the liquidation of the SPAC, as is the case in many of the settlement agreements entered into in connection with terminated de-SPAC transactions. To the extent this results in the SPAC holding equity securities, the safe harbor should contemplate the possibility for distributions "in-kind".