american securities association
America's Voice for Main Street's Investors

May 27, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Special Purpose Acquisition Companies, Shell Companies, and Projections (Release Nos. 33-11045, 34-94546, IC-34549, File No. S7-13-22)

Dear Ms. Countryman:

The American Securities Association (ASA)[1] submits these comments in response to the Securities and Exchange Commission's (SEC) proposed rules regarding special purpose acquisition companies (SPACs) and related issues (Proposal). While the ASA generally welcomes efforts to enhance transparency and investor protections in the SPAC market, we are concerned the Proposal would disincentivize financial institutions from advising on SPAC or "de-SPAC" transactions. This could have the effect of further increasing risks to investors and diminishing due diligence associated with SPAC deals.

I. Introduction.

SPACs are an innovative way for private companies to access the public markets. SPACs allow a company to list on a national stock exchange with the intent of entering into a business combination with a private company within a certain timeframe (typically two years). Once the business combination is complete, the private company retains the SPAC listing on a public market and continues to be publicly traded.

The growth and interest in the SPAC market – driven in part by celebrity endorsements of certain deals and a spike in SPAC offerings in 2020 – has rightfully gained the attention of policymakers. The unique function of SPACs raises several important investor protection questions and warrants a thorough examination by the SEC and Congress.

[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership of almost one hundred members that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

Last year, the ASA released a set of recommendations for how to improve the SPAC market.[2] These recommendations include:

- SPAC sponsors should be required to provide disclosure regarding their economic stake and potential outcomes from a future merger transaction;
- Certain other disclosures may benefit investors in SPAC transactions. For example, SPACs should clearly disclose to investors that a deal may not come to fruition and that shares may only be redeemed at a certain price. Investors should also be provided with merger information and a proxy statement (or a summary document of the merger document), including information for how the valuation was calculated;
- A Form S-4 and proxy statement should be filed at the same time (or shortly thereafter) a deal is announced; a SPAC should also have to publicly file a description of the transaction and how they determined valuation;
- SPAC sponsors should be subject to at least a one-year lockup in their shares from the date that the merger is completed; and
- Any sales within a certain period (e.g. three years) by a SPAC sponsor should be considered a "distribution" under SEC rules.

These recommendations were largely focused on disclosure and ensuring that any potential conflicts of interest do not harm investors during the de-SPAC process. The Proposal, by contrast, seeks to impose traditional initial public offering (IPO) rules on de-SPAC transactions and would, in some instances, unnecessarily expand underwriter liability beyond what currently applies in the traditional IPO process.

The ASA wishes to provide the following recommendations and observations regarding the Proposal:

I. The SEC has not provided sufficient time for the public to submit feedback on the Proposal and has failed to consider the cumulative impact of outstanding rule proposals.

The Proposal is just one, of many, complex and consequential rulemakings the SEC has proposed in recent months. To date this year the SEC has proposed eighteen new rulemakings, in addition to several others that were proposed at the end of 2021. Most of these proposals run to

[2] https://www.americansecurities.org/post/direct-listings-harm-investors-and-undermine-market-confidence

hundreds of pages in length, and often include hundreds of questions that commenters must consider when assessing the impact of potential new rules.

The Proposal itself is 372 pages and includes several specific questions, some of which hint at further mandates that are not fully explored or analyzed in the release. Yet the SEC provided the public only thirty (30) days to comment on the Proposal. This is an inadequate amount of time for the public to properly consider how the Proposal will affect the SPAC market and investors, particularly when many entities are simultaneously considering and developing comments on over a dozen other rulemakings from the SEC.

The ASA reiterates our call for the SEC to immediately extend the comment period for every outstanding rule proposal by a minimum of ninety (90) days. Doing so would allow the SEC to properly consider specific comments on each proposal and to assess the cumulative effect of its current regulatory agenda.[3]

II. The SEC should refrain from adopting proposed Rule 140a as it would disincentivize investment banks from advising on de-SPAC transactions.

Proposed Rule 140a would deem that "a person who has acted as an underwriter in a SPAC IPO and participates in the distribution by taking steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction will be deemed to be engaged in the distribution of the securities of the surviving public entity….within the meaning of Section 2(a)(11) of the Securities Act."[4] Additionally, the Proposal would expand the definition of "underwriter" to potentially include lawyers, accountants, or other parties that may have been involved with the de-SPAC transaction.

As a threshold matter, we do not believe the SEC should equate, for regulatory purposes, a de-SPAC transaction with a registered offering of securities underwritten by a syndicate of investment banks. The role of an investment bank that assists with a de-SPAC transaction is more akin to that of a firm acting as financial advisor to company that is entering into a stock-for-stock merger. In a stock-for-stock merger, an investment bank may run a sale process, assist with due diligence, assist the company with valuation, assist with negotiations, assist the company in crafting its rationale for the transaction, and assist the company in scheduling meetings with institutional investors to discuss the rationale for the merger. These are exactly the same type of functions that an investment bank performs with a de-SPAC transaction.

The Proposal would also expand liability for financial advisors in a de-SPAC transaction beyond what currently applies to underwriters in traditional IPOs. In a traditional IPO, Section 11

[3] https://www.americansecurities.org/post/asa-urges-sec-to-extend-comment-period-for-90-days
[4] Proposal at 96

underwriter liability is typically limited to the amount of securities each underwriter purchased from an issuer. Under the Proposal, almost all shares of a de-SPAC'd company (i.e. the shares being issued to the private company shareholders and shares that continue to be held by non-redeeming SPAC shareholders) will be registered on the S-4. Assuming the "price per share" is approximately $10.00 (which is the price typically used to determine value), if the amount being "distributed" is equivalent to the amount of shares being registered on the S-4, then the Section 11 liability could be in the billions of dollars, which would far exceed the liability assumed by underwriters in the vast majority of IPOs.

Additionally, the Proposal would raise new questions about Section 11(e) of the Securities Act, which states that "in no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit…for damages in excess of the total price at which the securities underwritten by him and distributed to the public or were offered to the public."

In a traditional IPO, investment banks understand the amount of potential liability they are assuming for a transaction and can factor in that liability when deciding what fee to charge an issuer. It is unclear how Section 11(e) would apply to investment banks that are deemed "underwriters" in a de-SPAC transaction. If Section 11(e) doesn't apply, each investment bank involved a de-SPAC transaction (whether as a financial advisor, IPO underwriter, or capital markets advisor), could potentially have liability on the entire amount of the securities being distributed in the de-SPAC transaction. This risk would make it untenable for investment banks to continue advising on de-SPAC transactions and, as a result, the regulation could have the effect of shutting down the market.

In her dissenting statement, Commissioner Peirce also noted that the Proposal "describes at great length court cases and Commission guidance on the determination of underwriter status, it contains only a brief analysis of how those cases apply here."[5] The end result, according to Commissioner Peirce, would be that "SPAC underwriters will do everything possible to avoid being captured by the rule, such as demanding all compensation up front, a result that may not benefit SPAC investors." The ASA echoes these concerns and predictions.

Accordingly, we urge the SEC to refrain from adopting proposed Rule 140a on the basis that investment banks advising companies on a de-SPAC transaction should not be treated as underwriters for the purposes of Section 11 liability.

[5] https://www.sec.gov/news/statement/peirce-statement-spac-proposal-033022

III. **The elimination of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act (PSLRA) is unlawful.**

The Proposal would – without any authorization by Congress – amend the definition of a "blank check" company under the PSLRA to prevent SPACs from utilizing the PSLRA safe harbor for forward-looking statements. Given that de-SPAC transactions necessarily involve making a good deal of projections, there has been an underlying assumption that the PSLRA safe harbor applies to such projections.

The intent of removing the safe harbor for de-SPAC transactions is undeniable – it would open SPACs to a flood of private litigation that, when added to other provisions of the Proposal, would effectively kill the existing SPAC market. Worse, the SEC is seeking to amend the PSLRA on its own without any explicit statutory authority or directive from Congress. This type of legislation-by-rulemaking is unlawful and outside the bounds of the Administrative Procedure Act (APA). The SEC should drop this idea and recognize that it has no legal authority under law to change Congressional statutes on its own.

IV. **Certain rules that would result in negative treatment of companies that list on an exchange via a SPAC transaction should be eliminated.**

Under current rules, a company that elects to go public via a SPAC would be subject to certain restrictions that do not exist for companies that have gone public via a traditional IPO. We believe that as the SEC seeks to modernize rules related to SPACs it should consider easing some of these restrictions, which include:

- Rule 144(i) which makes it difficult for investors to re-sell restricted securities of a de-SPAC'd company;
- Rule 139(a)(ii), which makes broker-dealers unable to rely on the standard Rule 139 safe-harbor for research reports, thereby effectively blacking out broker-dealers from publishing research or subjecting those broker-dealers to Section 5 liability on a Research Report;
- Rule 405, which includes de-SPAC'd companies as "ineligible issuers", thereby prohibiting them from using free-writing prospectuses during a registered securities offering and from being a Well-Known Seasoned Issuer (WKSI); and
- Form S-8, which makes de-SPAC'd companies ineligible to file a Form S-8 for 60 days following a de-SPAC.

Additionally, as currently drafted the Proposal and its expanded liability for underwriters would apply to existing SPACs that were formed with an understanding of how existing rules would apply to their activities. This type of retroactive application of SEC rules to existing SPACs would be inherently unfair and harmful to SPAC investors. To the extent the SEC ultimately decides any new rules for SPACs are warranted, those rules must only be applied prospectively to SPACs formed *after* the effective date of a final rule.

V. **Conclusion.**

The ASA welcomes the opportunity to work with the SEC and Congress on improvements to SPAC market. However, as discussed throughout this letter, we believe several key aspects of the Proposal must be reconsidered.

We look forward to working with commissioners and staff of the SEC on this and other issues critical to the American capital markets.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
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