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June 7, 2022

VIA E-MAIL

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-13-22 - Special Purpose Acquisition Companies, Shell Companies, and Projections

Dear Ms. Countryman:

Fenwick & West LLP is pleased to submit to the Securities and Exchange Commission (the "*Commission*") comments on the proposed rules (the "*Proposed Rules*") under the Securities Act of 1933, as amended (the "*Securities Act*"), the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"), and the Investment Company Act of 1940, as amended (the "*Investment Company Act*"), relating to Special Purpose Acquisition Companies per Release Nos. 33-11048; 34-94546; IC-34549 (the "*Proposing Release*"). Capitalized terms used in this letter without definition have the meanings ascribed to such terms in the Proposing Release.

Consistent with the trends discussed in the Proposing Release, in recent years, we have represented a growing number of private operating companies in the technology and life sciences sectors that have engaged in de-SPAC transactions as an alternative means of going public. The comments we provide in this letter are derived from our experience with this practice.

Because we anticipate the Commission will receive a substantial amount of comments from issuers, targets, sponsors, law firms, investment banks and other interested parties on all facets of what is contained within the Proposed Rules, we have opted to limit our commentary to issues faced by former private operating companies after the closing of the de-SPAC transaction that were not addressed by the Proposed Rules.

As described in more detail in the Proposing Release, certain of the new rules and amendments to existing rules are designed to align more closely the treatment of private operating companies going public via a de-SPAC transaction with that of companies undertaking a traditional initial public offering (an "*IPO*"). As contemplated by the Proposed Rules, investors in a de-SPAC transaction will receive disclosure and liability protections that are comparable to an IPO, and one or more investment banks

will likely perform due diligence and other traditional gatekeeping functions that correspond to the role they would play as an underwriter in an IPO (a “*Gatekeeper*”).¹ Assuming these aspects of the Proposed Release are adopted, it is our view that a private operating company that has completed a de-SPAC transaction involving a Gatekeeper should generally be treated the same as a company that has completed an IPO (an “*IPO Issuer*”), with the closing date of the de-SPAC transaction (the “*Closing Date*”) being the equivalent of the effective date of an IPO registration statement (the “*Effective Date*”).

More specifically, we believe, if a private operating company completes a de-SPAC transaction involving a Gatekeeper under the framework contemplated by the Proposed Rules (a “*de-SPAC Issuer*”), then:

- The de-SPAC Issuer should not need to file a “Super 8-K” containing Form 10 information following the Closing Date because the registration statement for the de-SPAC transaction will include disclosures equivalent to those provided in an IPO;²
- The de-SPAC Issuer should not be treated as an “ineligible issuer” under Rule 164 and Rule 433 of the Securities Act following the Closing Date, and should be permitted to use free-writing prospectuses and conduct electronic roadshows in subsequent public offerings;
- Rule 144 should be available following the Closing Date in the same way it would otherwise be available following an IPO, with the de-SPAC Issuer being deemed to have become subject to the reporting requirements of the Exchange Act as of the Closing Date, and the requirement for current public information should not apply in perpetuity as it currently does under Rule 144(i);
- Form S-8 should be available immediately following the Closing Date;
- The de-SPAC Issuer that has filed an Annual Report on Form 10-K and remained timely in its Exchange Act reporting following the Closing Date should be permitted to incorporate its Exchange Act reports by reference into Form S-1 registration statements in the same manner an IPO Issuer that filed an Annual Report on Form 10-K and remained timely in its reporting following the Effective Date can do so (including, in the case of de-SPAC Issuers that qualify as smaller reporting companies, through forward incorporation by reference pursuant to Item 12(b) of Form S-1);
- Form S-3 should be available 12 months following the Closing Date, assuming the de-SPAC Issuer satisfies the other applicable form requirements (such as timely Exchange Act reporting);

¹ We further note that de-SPAC investors might actually wind up being in a better position in terms of disclosure and protections than traditional IPO investors under the Proposed Rules. IPO prospectuses traditionally do not include statements as to fairness or financial projections. Further, de-SPAC investors may benefit from multiple Gatekeepers involved in a de-SPAC transaction concerned about potential Section 11 liability from the differing perspectives of their participation, whereas a traditional IPO typically only has one syndicate of underwriters.

² In our experience, substantially all the disclosure from the Form S-4 or proxy statement for the de-SPAC transaction currently is incorporated by reference into the Super 8-K filing already. However, if it remains important for all de-SPAC Issuers to file Super 8-Ks, we suggest that a timely filed Super 8-K by a de-SPAC Issuer that has completed a de-SPAC transaction involving a Gatekeeper be deemed to have been filed as of the Closing Date.

- The de-SPAC Issuer should be able to qualify as a Well-Known Seasoned Issuer (“WKSI”) 12 months following the Closing Date, assuming the de-SPAC Issuer satisfies the other applicable requirements (such as public float) and therefore have the ability to utilize automatically effective shelf registration statements;
- The research report and communication safe harbors contained within Rules 137, 138, 139 and 163A under the Securities Act should be available following the Closing Date consistent with their availability to IPO Issuers; and
- The de-SPAC Issuer should benefit from the transition, grace periods and other accommodations following the Closing Date that IPO Issuers benefit from following the Effective Date (for example, the de-SPAC Issuer should benefit from the same exemption from Sarbanes-Oxley Act Section 404(a) compliance under Item 308 of Regulation S-K in respect of its first Annual Report on Form 10-K filed after the Closing Date, and a de-SPAC Issuer that qualifies as an emerging growth company should benefit from an up to five year transition period following the Closing Date).³

In our experience, the historical disclosures, reporting history and disclosure and internal control framework of the SPAC are immaterial to the de-SPAC Issuer following the Closing. Accordingly, we believe the SPAC’s prior shell company status should not impact a private operating company that goes public through a transaction that offers equivalent disclosures, protections and gatekeeping to a traditional IPO.

We acknowledge that the Commission has historically viewed shell companies as unsuited for the exemptions, accommodations and other benefits described above because both Congress and the Commission have found that transactions involving shell companies have posed substantial risks for abuse.⁴ We want to emphasize that we only believe that a de-SPAC Issuer should be treated in the manner we suggest when the de-SPAC transaction has involved a Gatekeeper as we believe the involvement of a Gatekeeper will sufficiently address those potential risks.⁵ The proposed Rule 140a would establish a specific category of advisor that will be incentivized to act as a Gatekeeper – the SPAC IPO underwriter that participates in the distribution involved in the de-SPAC transaction; however, the Proposing Release leaves the door open for both the federal courts and the Commission to determine that other advisors involved with de-SPAC transactions may also be deemed to be “statutory underwriters” under Section 2(a)(11) of the Securities Act. Accordingly, we believe a de-SPAC transaction involving any third-party advisor unrelated to the SPAC, the SPAC sponsor and the target company that performs a Gatekeeper function equivalent to an IPO should result in the de-SPAC Issuer

³ We believe de-SPAC Issuers that qualify as foreign private issuers should similarly benefit under Forms F-1, F-3 and 20-F.

⁴ See, for example, *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Release No. 33-8587 (July 15, 2005); and *Securities Offering Reform*, Release Nos. 33-8591; 34-52056; IC-26993 (December 1, 2005).

⁵ For example, paragraph (iii) of the definition of ineligible issuer under Rule 405 excludes offerings by limited partnerships that are done on a firm commitment underwriting basis, presumably because these offerings do not pose the same issues as other limited partnership offerings due to the gatekeeper function performed by the underwriter. We believe de-SPAC transactions involving a Gatekeeper can similarly be excluded.

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being eligible for the treatment we describe above, but that at a minimum a Rule 140a underwriter that acts as a Gatekeeper should result in such treatment for the de-SPAC Issuer as of the Closing Date.

If the Commission's Staff would care to discuss any of the comments contained in this letter, please contact Per Chilstrom at pchilstrom@fenwick.com, Michael Pilo at mpilo@fenwick.com and James Evans at jevans@fenwick.com.

Very truly yours,

FENWICK & WEST LLP

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