Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

June 9, 2022

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

Re: File No. S7-13-22

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to the Securities and Exchange Commission's (SEC or Commission) request for comment on the proposal (Proposed Rule) to strengthen investor protections in initial public offerings by special purpose acquisition companies (SPACs) and in business combinations between SPACs and private operating companies (de-SPACs).[1]

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $40 trillion in assets under management.[2]

In evaluating proposals to expand company disclosure, CII considers materiality to investment and voting decisions; depth, consistency and reliability of empirical evidence supporting the connection between disclosure and long-term shareowner value; anticipated benefit to investors, net of the cost of collection and reporting; and the prospect of substantially improving transparency, comparability, reliability and accuracy.[3]

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[1] *Special Purpose Acquisition Companies, Shell Companies, and Projections*, 87 Fed. Reg. 29458 (May 13, 2022), https://www.federalregister.gov/documents/2022/05/13/2022-07189/special-purpose-acquisition-companies-shell-companies-and-projections.
[2] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.
[3] Council of Institutional Investors, CII Policies, Policies on Other Issues, *Statement on Company Disclosure* (Mar. 10, 2020), https://www.cii.org/policies_other_issues#Company_disclosure.

<u>General views on the Proposal and support for multiple paths to the public markets</u>

We agree with the Commission that "greater transparency and more robust investor protections could assist investors in evaluating and making investment, voting, and redemption decisions with respect to these transactions, [4]" and we welcome the Proposal as meaningful reform to address current gaps in transparency and investor protections between the SPAC route to the public equity markets and other routes.[5]

We believe that addressing these gaps would benefit not just SPAC investors, but also millions of public equity index investors, whose success relies in significant part on reasonable safeguards ensuring quality entrants to the public company universe. To that point, the 2020-21 SPAC boom raised the urgency of a final rule. As of the writing of this comment letter there are 592 SPACs actively searching for private companies to usher into the public markets.[6]

We generally agree with the Commission on the need to: clarify the obligation of SPAC sponsors and their affiliates to disclose all material conflicts of interest; bring greater clarity to dilution under various SPAC share redemption scenarios; ensure that underwriter status and liability under Section 11 of the Securities Act of 1933 apply to SPAC underwriters who participated in the distribution of shares by taking steps to facilitate the de-SPAC (however we do not believe that underwriter status and Section 11 liability applies to Private Investment in Public Equity investors in SPACs); establish private operating companies merging with SPACs as co-registrants; and clarify that the Private Securities Litigation Act (PSLRA) safe harbor with respect to forward-looking statements does not apply to the de-SPAC merger proxy.

CII does not believe there is anything inherently problematic with capital markets offering more than one avenue for private companies to go public. Indeed, we believe the ongoing availability of different paths to the public markets promotes capital formation. At the same time, we believe it is critical that each path—whether traditional IPO, de-SPAC merger or direct listing—offers consistently robust investor protections. This is the underlying motivation for why since 2017 CII has raised concerns with the Commission about efforts by national exchanges to reduce SPAC listing standards.[7] It is also why the CII Research and Education Fund in 2021 published

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[4] 87 Fed. Reg. at 29,463
[5] We acknowledge that the "investor perspective" represented in this letter focuses on outcomes for long-term investors and the quality of the public company universe, and we respect that those who invest in SPACs for short-term income, or who have limited exposure to public equity indexing strategies, may bring a different investor perspective.
[6] SPAC Insider, SPAC Status by Year of IPO at https://spacinsider.com/stats/.
[7] Examples of these efforts to accelerate accommodations for SPAC listings included halving the baseline number of round-lot holders, reducing minimal equity requirements, and authorizing listings by virtue of a competing exchange's lower listing requirements. For a recent example, see Jeffrey P. Mahoney, CII Letter to SEC on Nasdaq SPAC Proposal at https://www.cii.org/files/job_listings/December%209%202021%20SPAC%20letter-(final).pdf.

a guide for investors that highlights some of the novel risks of the SPAC process, [8] and why CII has engaged with regulators in other markets regarding reforms related to SPAC listings.[9]

CII Responses to Specific Requests for Comment

Conflicted interests and priorities

SEC Request for Comment 15. Should we require disclosure with respect to material conflicts of interest that may arise in connection with de-SPAC transactions, as proposed? Should we include a materiality threshold, as proposed? Is it clear what would constitute an actual or potential material conflict of interest, or is further guidance or specification needed? For example, are there other specific conflicts of interest that we should identify in the rule?[10]

CII Response. CII supports improving and codifying disclosure to clarify the misalignment of interests between 1) the sponsor or its affiliates or the SPAC's officers, directors or promoters, and 2) unaffiliated security holders, as required by proposed Item 1603(b). We generally agree with the conflicts described in the Proposal. Conflicts we highlight include those stemming from the contingent nature of the SPAC process; differences in risk/reward economics among participants; business and financial relationships among SPAC participants, including transfers of sponsor equity; and the involvement of sponsors in multiple SPACs and private operating companies. We believe there should be mandatory disclosures of conflicts of interest among SPAC directors, SPAC officers, target company directors and target company officers.

We support disclosure illuminating how compensation arrangements and other financial incentives create fundamental differences in *outcome priorities* among participants. For example, a SPAC sponsor's investment terms and conversion rights, as well as its expense reimbursement arrangements, may mean that the sponsor's overriding priority is to complete a transaction before the business combination deadline.[11] Similarly, for SPAC investors who are oriented toward securing stable short-term income and redeeming their shares prior to the business combination, the highest priority may be deal consummation in order to realize any value from warrants that become exercisable after completion of the transaction.

In contrast, for public SPAC investors who anticipate holding their shares for the long term beyond the business combination, the efficient use of capital to acquire the target and the ability of the target to thrive as a public company are paramount concerns. The de-SPAC proxy should describe such differences in priorities and how they may impact voting decisions on the business combination.

We believe disclosure of SPAC directors' and officers' fiduciary duties, as required by proposed Item 1603(c), could help investors understand the conflicts often presented by SPACs, and could

[8] Glenn Davis and Ernie Barkett, *Considerations Before Investing in SPACs* (April 2021) at https://www.ciiref.org/_files/ugd/72d47f_a37046935b9342f89a91dd943498116b.pdf
[9] Amy Borrus, Response to public consultation on European Commission listing act, (Feb. 15, 2022) at https://www.cii.org/files/EU%20Dual%20Class%20SPAC%20Consultation%20final%20posted.pdf.
[10] 87 Fed. Reg. at 29,468 (emphasis added).
[11] We recognize that if sponsors have non-redemption agreements and/or forward purchase agreements in place, they may mitigate pressure to close *any* deal.

decrease the likelihood of SPAC directors and officers taking actions that call into question whether they have breached their duties to SPAC shareholders.

Dilution and dissipation of cash

SEC Request for Comment 20. Should we require disclosure of material potential sources of future dilution in registration statements filed by SPACs for initial public offerings and in disclosure documents for de-SPAC transactions, as proposed? How would investors benefit from this additional disclosure? Should we require other information either in addition to, or in lieu of, the proposed dilution disclosure, such as disclosure of the cumulative amount of dilution that non-redeeming shareholders may experience or the amount of net cash underlying each share at the time of a de-SPAC transaction? If so, should we require that this disclosure be presented in a tabular format? Should we provide additional explanation on how to calculate the amount of dilution for purposes of these disclosure requirements? Should we provide further guidance about disclosures that SPACs should consider making to help non-affiliated shareholders understand the potential for dilution and the consequences of dilution for non-affiliated shareholders?[12]

CII Response. As highlighted in a recent CII amicus brief, "Because a SPAC cannot predict in advance how many shares will be redeemed, it is difficult for a non-redeeming investor … to assess the extent of dilution of an investment."[13] We support clear disclosure of net cash per share after taking into account all sources of dilution and dissipation of cash, under various redemption scenarios. Reductions in net cash may be attributable to a variety of sources, including: sponsor compensation and investment terms; share redemption; exercise of warrants, fractional warrants and convertible securities; PIPE financing; and underwriting fees. Given the complexity and contingencies involved in the de-SPAC process, investors (and particularly SPAC investors who are contemplating declining the redemption opportunity) need clear information about potential consequences to inform their understanding of the true cost of the business combination.

SEC Request for Comment 23. Should we require, in disclosure documents for de-SPAC transactions, a sensitivity analysis in a tabular format, as proposed? Should we consider additional or alternative approaches to this disclosure requirement?[14]

CII Response. We support requiring tabular disclosure in the de-SPAC proxy illustrating net cash per share after taking into account all sources of dilution and dissipated cash under 25%, 50%, 75%, 90% and 100% redemption scenarios. We note that the table recommended in a recent paper by a three securities law experts includes a 90% redemption scenario.[15] The additional disclosure at the 90% threshold could be particularly useful to investors if recent

[12] 87 Fed. Reg. at 29,470 (emphasis added).
[13] Amicus Brief for *Assad v. E.Merge Technology Acquisition Corp*., SDNY, at 7, available at https://www.cii.org/files/issues_and_advocacy/legal_issues/CII%20Amicus%20-%20Assad%20v_%20E_Merge%20Technology%20Acquisition%20Corp_%20et%20al.pdf.
[14] 87 Fed. Reg. at 29,470 (emphasis added).
[15] Klausner, M., Ohlrogge, M. and Halbhuber, H. "SPAC Disclosure of Net Cash Per Share," (Mar. 1, 2022) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047180.

redemption activity is indicative of future activity.[16] As to the specific methodology required for the dilution calculation, we would not object to modifications to the Proposal that would increase consistency with the approach outlined in the aforementioned paper.

Accountability

SEC Request for Comment 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?[17]

CII Response. We support requiring that the SPAC and the target company act as co-registrants upon filing of the registration statement in connection with the de-SPAC. We believe that treating both the SPAC and the target as an issuer under Section 6(a) of the Securities Act would help to align investor protections with those of a traditional IPO. We believe that a narrow interpretation exempting the target company as a registrant is inappropriate, considering that the de-SPAC serves the same practical purpose as a private company entering the public markets traditional IPO and the extent to which private companies have embraced the de-SPAC option.

We further support the proposed amendments to the signature instructions of Form S-4 to require that officers and a majority of the board of the target company are liable for any material misstatements or omissions in the S-4, such that they are accountable for the accuracy of the registration statement under Section 11 of the Securities Act.

SEC Request for Comment 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?[18]

CII Response. We believe historical uncertainty surrounding the availability of the safe harbor may have contributed to the proliferation of unreasonably optimistic forward projections that would not have been made if liability had more clearly paralleled the traditional IPO regime. We support the proposal's revision to the definition of "blank check company" to ensure that the safe harbor against a private right of action for forward-looking statements under the PSLRA is not available. We believe this clarification may reduce the inclusion of unreasonably optimistic forward projections in SEC filings, which may in turn help SPAC investors avoid overestimating future revenues and other measures of future company performance.

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[16] See Makris, Joanna SPAC Market Review 2022, finding February 2022 redemption rate of 89%, at https://www.boardroomalpha.com/spac-market-review-march-2022/.
[17] 87 Fed. Reg. at 29,480 (emphasis added).
[18] 87 Fed. Reg. at 29,482 (emphasis added).

SEC Request for Comment 82. Should we adopt a definition of distribution in Rule 140a, as proposed?[19]

CII Response. We support the de-SPAC transaction as a "distribution" under the Securities Act of the combined company's securities, synonymous with "public offering." We consider the SPAC/de-SPAC process to be one public offer of a block of securities ultimately dispersed to public investors.

SEC Request for Comment 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?[20]

CII Response. We support the enhanced investor protection that would result from assigning underwriter status for the de-SPAC transaction to 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. We support limiting the application of Rule 140a so that PIPE investors in the SPAC are excluded. We believe PIPE investors do not fit the traditional function of an underwriter and including PIPE investors in Rule 140a presents the risk of significantly reducing investor appetite to backstop this route to entering the public markets. [21]

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Thank you for consideration of CII's views. If we can answer any questions or provide additional information, please do not hesitate to contact me.

Sincerely,

Glenn Davis
Deputy Director

[19] 87 Fed. Reg. at 29,486 (emphasis added).
[20] 87 Fed. Reg. at 29,487 (emphasis added).
[21] For a discussion drawing distinctions between PIPE investors and underwriters, see p. 43 of *The New Age of Special Purpose Acquisition Companies: What Investors Should Know* (May 2022), CFA Institute, https://www.cfainstitute.org/-/media/documents/article/position-paper/cfa-spac-investors.pdf.