June 13, 2022

<u>VIA EMAIL</u>

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

Dear Ms. Countryman:

Ropes & Gray LLP appreciates the opportunity to provide these comments to the Securities and Exchange Commission (the "<u>Commission</u>") on the above-referenced package of proposed new rules and rule amendments (the "<u>Release</u>")[1] regarding special purpose acquisition companies ("<u>SPACs</u>").

Our firm represents the interests of SPACs, SPAC sponsors, SPAC investors, and private operating companies that have combined, or are seeking to combine, with SPACs ("<u>Target Companies</u>"), as well as financial institutions that serve as underwriters on SPAC initial public offerings ("<u>IPOs</u>"), and act in other roles, such as advisors and agents, in connection with SPAC mergers with, or acquisitions of, one or more Target Companies (a "<u>de-SPAC transaction</u>").

In recent years, SPACs have played a significant role in facilitating capital formation in the United States, one of the fundamental pillars of the Commission's "tripartite" mission. SPACs have allowed numerous private companies to effectively access public markets that otherwise might not have. As President Obama explained in 2012 when signing the Jumpstart Our Business Startups Act (the "<u>JOBS Act</u>") into law, "mak[ing] it easier for [companies] to go public . . . [is] a big deal because going public is a major step towards expanding and hiring more workers" and because going public gives companies "access to a big, new pool of potential investors – namely, the American people."[2] Indeed, the Commission itself has previously noted that "[i]ncreased

[1] *See Special Purpose Acquisition Companies, Shell Companies, and Projections*, SEC Release Nos. 33-11048, 34-94546 (Mar. 30, 2022), 87 Fed. Reg. 29458 (May 13, 2022). Page references herein refer to the Release as published on the Commission's website at https://www.sec.gov/rules/proposed/2022/33-11048.pdf.
[2] Off. Press Sec'y, White House, *Remarks by the President at JOBS Act Bill Signing*, OBAMA WHITE HOUSE (Apr. 5, 2012, 2:36 P.M.), https://obamawhitehouse.archives.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing; *see also* Tom Carper, *Sen. Carper Praises Bipartisan Effort as President Signs JOBS Act into Law*, CARPER.SENATE.GOV (Apr. 5, 2012), https://www.carper.senate.gov/public/index.cfm/2012/4/sen-carper-praises-bipartisan-effort-as-president-signs-jobs-act-into-law ("This jobs package encourages companies to keep and grow

participation in our public markets, in turn, promotes more investment opportunities for more investors, including retail investors, as well as transparency and resiliency in the marketplace" and "increases in the number of . . . reporting companies may improve capital formation and efficiency of allocation of investor capital."[3]

While we appreciate that the Commission has not previously established a specific disclosure regime for both SPAC IPOs and de-SPAC transactions, and while we appreciate that clear requirements in certain circumstances can benefit the market by facilitating both investor protection and capital formation, we are concerned that if enacted, the proposed rules would substantially alter the SPAC landscape and impede capital formation without adding meaningful benefits to the investing public. In particular, the proposed rules will likely result in significantly increased costs to companies seeking to go public through a de-SPAC transaction and the exit of gatekeepers from the marketplace by imposing unwarranted incremental liability exposure for market participants that was not contemplated by Congress in enacting the Securities Act of 1933 (the "'33 Act"), or as reflected in the plain statutory language. Indeed, Commissioner Peirce has noted that the proposed rules may completely "stop SPACs in their tracks."[4] If Commissioner Peirce's concern comes to pass—and we fear that it may to a substantial degree if the proposed rules are enacted without substantial changes—private companies will be harmed by losing an avenue for accessing capital in the public markets, and Main Street investors will also lose access to investment opportunities as these companies will remain in the private markets. Put differently, the Commission's proposed rules may unintentionally undermine a long-established policy goal of both political parties and the Commission. The approach taken by the Commission's proposed rules seems particularly unnecessary because the market has taken substantial steps to self-regulate as investor sentiment has already dramatically shifted in the past 12 months away from the unbridled enthusiasm that had been present in the SPAC market (and traditional IPO market).

We agree that it is appropriate to examine the differing ways that a private company can access the public markets and to harmonize the various methods where no principled reasons exist for divergent treatment; however, notwithstanding assertions in the Release to the contrary, the proposed rules go well beyond placing de-SPAC transactions on a more equal footing with traditional IPOs and overlook the fundamental differences between a traditional IPO and a de-SPAC transaction. Because de-SPAC transactions are fundamentally mergers, the proposed rules attempt to equate such merger transactions with traditional IPOs and will potentially lead to unintended consequences not only for transactions involving SPACS, but in merger transactions involving public operating companies. Further still, the proposed rules will also add confusion regarding the Investment Company Act of 1940, as amended (the "Investment Company Act") and long-standing interpretations thereof by introducing an unnecessary "safe harbor" that is

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jobs right here in America by providing better access to capital."); Brian Tumulty, *Bill to aid small business draws some critics*, LEXIS (Mar. 24, 2012), *available only at* https://advance.lexis.com/document/?pdmfid=1000516&crid=c15b4f04-7047-4aa6-9c07-5c503d08185f&pddocfullpath (noting U.S. Senator Charles Schumer's thoughts on the JOBS Act that "[w]hen start-up companies are able to go public, that's the time they create the most jobs.").

[3] *Solicitations of Interest Prior to a Registered Public Offering*, 84 Fed. Reg. 6713, 6714, 6721 (Feb. 28, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-28/pdf/2019-03098.pdf.

[4] Hester M. Peirce, *Damning and Deeming: Dissenting Statement on Shell Companies, Projections, and SPACs Proposal*, SEC.gov (Mar. 30, 2022), https://www.sec.gov/news/statement/peirce-statement-spac-proposal-033022.

inappropriately tied to arbitrary timeframes for SPACs who already would not be deemed investment companies under long-standing settled law.

We agree with the need for guardrails in the public markets—including in connection with investing in SPACs and surviving companies following de-SPAC transactions—but there is a difference between enacting policies that put in place prudent guardrails developed in consultation with industry participants and implementing far-reaching rules developed in a vacuum, which are likely to dramatically curtail capital formation by imposing burdensome requirements, subjecting advisors and market actors to novel theories of liability, and increasing transaction costs on SPACs, target companies and their respective advisors.

We further note that a key challenge of the traditional IPO market is that it ends up depriving retail investors from participating in IPOs through an IPO allocation, and such investors are often unable to purchase at the same price as institutional investors. Retail investors in companies that access the public markets through traditional IPOs also do not have the same access to third-party analysis as larger institutional investors who have ready access to the research analyst community. SPAC transactions have served to democratize the process in enabling prospective investors to have the ability to participate on equal footing with initial investors by way of pricing—by either investing in the SPAC's IPO or purchasing SPAC shares at or near the IPO price prior to the de-SPAC transaction—and access to information.

Accordingly, as detailed further below, we write to provide our view that (1) aspects of Proposed Rule § 230.140a ("Proposed Rule 140a"), which seeks to deem underwriters in a SPAC IPO as underwriters in the subsequent de-SPAC transaction, are inconsistent with the '33 Act, as well as the overall statutory regime established by Congress, and would continue to cause significant market disruption and potentially unintended consequences both within and outside of the SPAC market; (2) while we agree that greater transparency of disclosures in SPAC IPOs and de-SPAC transactions are a necessary and laudable goal, rules governing such disclosures should take a principles-based approach, rather than the prescriptive approach of the proposed rules; and (3) Proposed Rule § 270.3a-10 ("Proposed Rule 3a-10") is unnecessary and will introduce broader confusion regarding what constitutes an "investment company" under the Investment Company Act, as amended. The comments expressed herein reflect the views of the undersigned, as practitioners with many years of experience in providing legal counsel to a wide variety of SPACs, SPAC sponsors, potential target companies, investors and financial institutions. These comments and opinions are not intended to represent the views of our clients.

I. Proposed Rule 140a Is Inconsistent with Federal Securities Laws and Would Cause Significant Market Disruption

Proposed Rule 140a provides that:

> A person who has acted as an underwriter of the securities of a special purpose acquisition company and takes 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 in a de-SPAC transaction within the meaning of section 2(a)(11) of the Act.

Proposed Rule 140a would arguably result in SPAC IPO underwriters with limited or even *no* substantive involvement in the subsequent de-SPAC transaction being deemed underwriters in the de-SPAC transaction, and therefore potentially subject to liability as de-SPAC transaction underwriters. As more fully set forth below, Proposed Rule 140a is (1) inconsistent with the federal securities laws; (2) likely to cause market disruption, which could limit or eliminate the number of underwriters willing to underwrite SPAC IPOs and investment banks willing to assist on de-SPAC transactions; and (3) overly restrictive with respect to de-SPAC transactions when compared to traditional IPOs. We would advocate that the Commission not enact Proposed Rule 140a, but were it to do so, it should modify Proposed Rule 140a and some of the other overly broad and overreaching language used in the Release[5] to more precisely attach such liability only to those SPAC IPO underwriters who actually participate in a meaningful way in a de-SPAC transaction such that their activity is sufficiently akin to underwriting the de-SPAC transaction that it would be appropriate to attach liability for the disclosures associated with such transaction. In connection with our comments regarding Proposed Rule 140a, we would note that we fully support and agree with the analyses and conclusions contained in the June 10, 2022 Comment Letter submitted by the Securities Industry and Financial Markets Association regarding the proposed rules (the "SIFMA Submission").[6]

A. A De-SPAC Transaction Does Not Constitute an Underwritten Distribution Within the Meaning of the Securities Act of 1933

As more fully set forth below, underwriters of a SPAC IPO should not be considered underwriters of a de-SPAC transaction because a de-SPAC transaction is not an underwritten distribution within the meaning of Section 2(a)(11) of the '33 Act.[7] Contrary to the Commission's view, a SPAC IPO is not a "bifurcated," two-step process consisting of both the SPAC IPO and de-SPAC transaction. Rather, it is at the SPAC IPO stage that securities "come to rest in the hands of the investing public," and thus a "distribution" of securities is completed at this stage, with the assistance of the SPAC IPO underwriter.[8] By contrast, a de-SPAC transaction, which often takes the form of an initial business combination ("IBC") or reverse merger, is a wholly separate and distinct process that typically occurs well after the SPAC IPO is completed, and *after* the SPAC's securities have come to "rest in the hand of the investing public."[9]

1. *The SPAC IPO Is Not a "Bifurcated," Two-Step Process*

In the Release, the Commission suggests that a SPAC IPO is a "bifurcated," two-step process that is supposedly analogous to that of a traditional IPO, since the de-SPAC transaction purportedly "marks the introduction of the private operating company to the public capital markets and is effectively how the private company's securities 'come to rest'—in other words, are

[5] For example, in the Release, the Commission suggests that underwriter liability may attach to a wide array of market participants in de-SPAC transactions, including "financial advisors, PIPE investors, or other advisors." Release at 98.
[6] SIFMA, Comment Letter on Proposed Rules Affecting Special Purpose Acquisition Companies, Shell Companies, and Projections (June 10, 2022), https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-on-SECs-SPAC-Proposal.pdf.
[7] 15 U.S.C. 77b(a)(11).
[8] *See Geiger v. SEC*, 363 F.3d 481, 484, 487 (D.C. Cir. 2004).
[9] *Id.* at 487.

distributed—to public investors as shareholders of the combined company."[10] This suggestion is inconsistent with settled law defining a "distribution." A "distribution" has been held to comprise "the entire process by which in the course of a public offer [a] block of securities is dispersed and ultimately comes to rest in the hands of the investing public."[11] Applying this definition, the SPAC completes a distribution, with the assistance of its IPO underwriters, at the time that the SPAC becomes public and first sells securities, typically pursuant to an S-1 registration statement.[12] It is at this point that the SPAC's securities ultimately come to rest in the hands of the investing public and are freely tradeable.[13] At this time, the SPAC IPO underwriter has fulfilled its obligation to the SPAC, and any involvement it may have in connection with the de-SPAC transaction would be separate and apart from its role as IPO underwriter.

Conversely, to the extent that the SPAC shares are exchanged for shares of the post-combination company in connection with a de-SPAC transaction, such an exchange is handled directly between the issuer and the shareholders *without the involvement of the SPAC IPO underwriter*.[14] In connection with a de-SPAC transaction, the SPAC IPO underwriter simply does not (1) "purchase[] from the issuer with a view to distribution"; (2) "offer[] or sell[] for an issuer in connection with a distribution"; or (3) "participate[]," "direct[ly] or indirect[ly]," "in any such undertaking . . . or the underwriting of any such undertaking," as all of the purchases and sales occurred at the time of the SPAC's IPO.[15] There can thus be no underwritten distribution at the time of a de-SPAC transaction under the existing statutory language, given that the securities purchased and sold by the IPO underwriter have *already* come to rest in the hands of the investing public prior to that point. Any other conclusion is a non-sequitur. Indeed, such a conclusion could lead to a claim that any investor who purchases and sells SPAC shares in between the SPAC's IPO and the de-SPAC transaction is an underwriter in the de-SPAC transaction, which would be a completely misconceived result.

While the Release cites three cases to provide a basis for Proposed Rule 140a, none of these cases involve *any* business combination, or even suggest in dicta that a business combination by an existing public company could constitute an underwritten public offering merely by virtue of such a combination.[16] Indeed, the Release ignores more recent, on-point authority that

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[10] Release at 95.

[11] *Geiger*, 363 F.3d at 484; *SEC v. Telegram Grp., Inc.*, 448 F. Supp. 3d 352, 366 (S.D.N.Y. 2020) (a "distribution has been held to mean the equivalent of a public offering" (citing *Neuwirth Inv. Fund Ltd. v. Swanton*, 422 F. Supp. 1187 (S.D.N.Y. 1975))).

[12] *See Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Rsrv. Sys.*, 463 F.3d 239, 250 (2d Cir. 2006) ("[A] Form S–1 is a registration form that a company files with the SEC *when it issues securities in an initial public offering*.") (emphasis added); *see also Jennings v. Gen. Med. Corp.*, 604 F.2d 1300, 1305 (10th Cir. 1979) ("Registration pursuant to S-1 is generally for primary offerings of securities.").

[13] In addition, Section 11 liability under the '33 Act attaches at the SPAC IPO phase. On this basis, Plaintiffs' firms have brought claims against SPACs under Section 11 of the '33 Act in connection with alleged misstatements and omissions in SPACs' Forms S-1. *See* Amended Complaint at 61–63, *Jedrzejczyk v. Skillz Inc.*, No. 3:21-cv-03450-RS (N.D. Cal. filed May 7, 2021); Second Amended Complaint at 87–88, *In re Akazoo S.A. Sec. Litig.*, No. 1:20-cv-01900-BMC (E.D.N.Y. settlement approved Sept. 10, 2021). By contrast, there is no statutory basis under which SPAC IPO underwriters, which are already liable under Section 11 at the time of the Form S-1 filing, may also be liable for a Form S-4 filing during the de-SPAC transaction.

[14] Indeed, in certain de-SPAC transactions, shares may not be exchanged where the transaction is structured such that the existing SPAC stockholders continue to hold shares of the SPAC following closing.

[15] 15 U.S.C. 77b(a)(11).

[16] *See Geiger*, 363 F.3d at 483 (concerning a shell corporation selling unregistered shares of its stock to the investing

demonstrates that Proposed Rule 140a would rework the '33 Act's regulatory regime and decades of practice related thereto.[17]

Notably, the notion that a de-SPAC constitutes the "second step" of an IPO fundamentally contradicts the way the Commission and market participants have historically viewed and understood these transactions. The Commission's Office of Investor Education and Advocacy ("OIEA") has issued an investor bulletin entitled, "What You Need to Know About SPACs," in which it stated, "[i]f you *invest in a SPAC at the IPO stage*, you are relying on the management team that formed the SPAC, often referred to as the sponsor(s), as the SPAC looks to *acquire or combine with* an operating company. That acquisition or combination is known as the initial business combination."[18] The Commission's OIEA further stated that the de-SPAC or IBC is often known as a "reverse merger" in which "the operating company *merges* with and into the SPAC or a subsidiary of the SPAC."[19] Additionally, the Commission's Acting Chief Accountant, Paul Munter, has referred to a de-SPAC transaction as a "de-SPAC merger" and described the transaction as "a *merger* of the SPAC and target company."[20] In other words, the Commission has repeatedly drawn a line between the SPAC IPO — the point at which the investors "invest[s] in a SPAC" — and the de-SPACs or IBCs that occur at a later point in time. Nevertheless, the Commission now attempts to liken the de-SPAC transaction, and not the SPAC's public offering, to a traditional IPO, instead of to a reverse merger, as the Commission has routinely described and as is consistent with the statutory language of the '33 Act.[21]

Accordingly, a SPAC IPO completes the underwritten distribution of securities to the public, while a de-SPAC transaction is akin to a reverse merger wherein the SPAC IPO underwriter does not purchase, sell or offer any securities, or otherwise participate in any such activity. To consider a de-SPAC transaction an underwritten distribution would therefore conflict with the plain language of the '33 Act, undermine settled case law and be inconsistent with established market practice and understanding. Therefore, a de-SPAC transaction should not be considered to be part of an underwritten distribution within the meaning of Section 2(a)(11) of the '33 Act, and the Commission should not adopt Proposed Rule 140a.

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public); *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 448–49 (2d Cir. 1966) (involving a Regulation A offering); *In re Oklahoma-Texas Trust*, 2 S.E.C. 764, 766 (1937), *aff'd*, 100 F.2d 888 (10th Cir. 1939) (involving the registered securities of a business trust).

[17] *See* SIFMA, *supra* note 6, at 8, Appx. A-B.

[18] U.S. Sec. & Exch. Comm'n, *What You Need to Know About SPACs – Updated Investor Bulletin*, SEC.GOV (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin (emphasis added).

[19] *Id.* (emphasis added).

[20] Paul Munter, *Financial Reporting and Auditing Considerations of Companies Merging with SPACs*, SEC.GOV (Mar. 31, 2021), https://www.sec.gov/news/public-statement/munter-spac-20200331 (emphasis added).

[21] We note that portions of the Commission's Release make clear that a de-SPAC is akin to a typical merger transaction. For example, the Commission explicitly modeled certain of the proposed requirements in proposed Item 1606 and Item 1607 on the disclosures required in going-private transactions. *See* Release at 52 n.96. Specifically, proposed Item 1606, which would "require disclosure on whether a SPAC reasonably believes that a de-SPAC transaction and any related financing transactions are fair or unfair to investors" and the "bases for this reasonable belief," Release at 295, is directly modeled on the required disclosures outlined in a section of the Securities Exchange Act of 1934 (the "'34 Act") governing *going-private transactions*. *See* 17 CFR § 229.1014. In addition, the Commission expressly modeled proposed Item 1605, which would "require disclosure on the background, material terms and effects of the de-SPAC transaction," Release at 295, on sections of the '34 Act outlining disclosures for *going-private transactions*. *See* Release at 47–48; 17 CFR §§ 229.1004–16.

B. Proposed Rule 140a Will Continue to Cause Significant Market Disruption and Uncertainty, Including Through Significant Unintended Consequences

As discussed above, Proposed Rule 140a would represent a dramatic shift of what constitutes an underwritten distribution of securities by imposing the '33 Act's liability regime on market participants who do not (1) purchase shares from an issuer with a view to distribution; (2) offer or sell for an issuer in connection with a distribution; or (3) participate, directly or indirectly, in or underwrite any such undertaking in connection with a de-SPAC transaction. We believe this expansion of underwriting liability exceeds the Commission's rulemaking authority and could not only have far-reaching implications in the SPAC market, but also have unintended and unexpected consequences on traditional public M&A transactions as well. By characterizing what is fundamentally an M&A transaction as a distribution underwritten by an underwriter who participated in an earlier offering, the Commission is inviting the plaintiffs' bar to assert an assortment of '33 Act claims in M&A transactions outside of the de-SPAC context, regardless of any guidance the Commission provides in adopting the proposed rules. Simply put, an institution that serves as an underwriter on an initial distribution, such as a SPAC IPO, should not be treated as an underwriter on a subsequent transaction, such as a de-SPAC transaction, absent undertaking traditional underwriting activities in the de-SPAC transaction. Proposed Rule 140a, however, could provide a basis to seek to impose improper Section 11 liability on financial advisors in a myriad of scenarios based on the Commission's theory that these institutions are "gatekeepers" to the public markets and should be deemed underwriters in respect of equity consideration issued as part of a public M&A transaction.

The proposed rule will chill financial institutions' participation in SPAC IPO and de-SPAC transactions. There has been considerable media attention already on the pullback of major investment banks from SPAC transactions. Far from creating an environment with "gatekeepers," the Release is leading to a material retreat by a number of sophisticated and responsible financial institutions who were playing an important role in establishing best practices as to both SPAC IPOs and de-SPAC transactions, including by developing rigorous processes around the due diligence of target companies and by vetting projections and marketing materials that were subsequently made available to the investing public. If the proposed rules are adopted along the lines included in the Release, we would expect additional financial institutions to curtail their participation in the SPAC market, with de-SPAC transactions going forward without the involvement of these responsible market participants, effectively undermining the Commission's goal of creating "gatekeepers."

C. Proposed Rule 140a Would Treat Supposed "Underwriters" on a de-SPAC Transaction Differently than Underwriters on a Traditional IPO

Although the Commission has explained that the Proposed Rules are intended to "[t]reat like cases alike,"[22] if enacted, Proposed Rule 140a would result in so-called "underwriters" on a de-SPAC transaction being treated substantially differently than underwriters in a traditional IPO. Because, as discussed above, de-SPAC transactions are essentially merger transactions, the

[22] Gary Gensler, *Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections*, SEC.GOV (Mar. 30, 2022), https://www.sec.gov/news/statement/gensler-spac-20220330.

information included on Forms S-4 and F-4 filed in connection with de-SPAC transactions differs materially from the information included on a Form S-1 in a traditional IPO. For example, in traditional IPOs, issuers generally do not include financial projections in their registration statements, while SPACs typically are required in the Form S-4 or F-4 filed in connection with a de-SPAC transaction to include financial projections because, as in almost all M&A transactions (where underwriter liability is *not* present), the SPAC's board of directors and fairness opinion providers consider the projections in discharging their fiduciary duties and providing their opinion when evaluating the de-SPAC transaction. A Form S-4 or F-4 filed in connection with a de-SPAC transaction will also include additional information beyond projections that is not present in a traditional IPO S-1, including sections regarding the background of the merger and the board's reasons for the merger. Thus, rather than aligning the liability profile for traditional IPOs and de-SPAC mergers, as the Commission claims is its goal, Proposed Rule 140a would significantly expand the scope of "underwriter" liability beyond that of a traditional IPO. To the extent the Commission adopts Proposed Rule 140a, the Commission should make clear that any "underwriters" of a de-SPAC transaction will not face liability for information that would not be required in a Form S-1 filed in connection with a traditional IPO.

D. At a Minimum, the Commission Should Clarify the Scope of Proposed Rule 140a and the Corresponding Commentary in the Release

Additionally, as set forth below, should the Commission adopt Proposed Rule 140a, the Commission should clarify (1) that mere receipt of deferred underwriting commissions from the SPAC IPO by the SPAC IPO underwriter does not constitute "participat[ion] in" or "facilitat[ion] of" the de-SPAC transaction; (2) that Proposed Rule 140a will not apply retroactively to SPAC IPO underwriters for SPAC IPOs consummated prior to the adoption of the proposed rule; and (3) the circumstances that would result in a financial institution, or other market participant such as a PIPE investor, that did not serve as an underwriter on a SPAC IPO being deemed to be a statutory underwriter in a de-SPAC transaction.

In the Release, the Commission has not specified what actions may constitute "tak[ing] steps to facilitate the de-SPAC transaction" or "participat[ing] (directly or indirectly) in the de-SPAC transaction." Although silent in the text of Proposed Rule 140a, the Release suggests that, without more, mere "receipt of compensation in connection with the de-SPAC transaction could constitute direct or indirect participation in the de-SPAC transaction."[23] If Proposed Rule 140a is adopted, the Commission should, at a minimum, make clear that the receipt of deferred underwriting commissions by the SPAC IPO underwriter will not, without further formal action in support of a de-SPAC transaction, constitute "facilitat[ion]" or "participat[ion]" in the de-SPAC transaction that would deem such SPAC IPO underwriter to be "engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction."

Indeed, such a broad interpretation would run contrary to the Commission's own description in the Release regarding what constitutes facilitation and participation. For example, the Release states that:

[23] Release at 97.

> Both federal courts and the Commission previously have found that [parties] involved in securities offerings can be deemed 'statutory underwriters' under the underwriter definition, [ ] by . . . directly or indirectly 'participating' in a distribution by engaging in activities 'necessary to the distribution' or in 'distribution related activities.'[24]

It cannot be claimed that the receipt of deferred underwriting commissions constitutes activities that are "necessary to the distribution" or constitute "distribution related activities." Indisputably, the consummation of the de-SPAC transaction and the purported "distribution of the securities of the surviving public entity" are in no way dependent on the payment of contractually obligated fees that were agreed to before the SPAC completed its own IPO and had any discussions with any potential target company, let alone the ultimate de-SPAC target.

Indeed, to the extent Proposed Rule 140a is intended to "motivate [SPAC IPO underwriters] to exercise the care necessary to help ensure the accuracy of the disclosures in [de-SPAC] transactions,"[25] this purpose will plainly not be achieved by imposing such liability on SPAC IPO underwriters who have no "involvement" in a de-SPAC transaction beyond their passive receipt of deferred underwriting commissions from the IPO. Such SPAC IPO underwriters likely will not be afforded the opportunity to conduct diligence in connection with the de-SPAC disclosures. And unlike underwriters in traditional IPOs, to the extent a SPAC IPO underwriter is not satisfied with the de-SPAC disclosure documents, it would not have the opportunity to affect meaningful change to the disclosures (or withdraw from participation in the transaction given that it is not involved in the de-SPAC transaction). Underwriters of traditional IPOs retain the option to "walk away" from the transaction before it prices if they find the disclosures to contain material misstatements or omissions, which, in effect, would prevent the underlying shares from being offered to the public; however, a SPAC IPO underwriter would have no such ability to serve as a gatekeeper in the de-SPAC transaction to the extent they are not involved in the de-SPAC. This critical difference is yet another illustration of how de-SPAC transactions substantially differ from traditional IPOs and why rules concerning de-SPAC transactions should not merely attempt to mirror those applicable to issuers and underwriters in traditional IPOs.[26]

Further, should the Commission adopt Proposed Rule 140a, the Commission should make clear that Proposed Rule 140a will not apply retroactively to underwriters of SPAC IPOs consummated prior to the adoption of the proposed rule. While the Commission has positioned Proposed Rule 140a as a "clarification," as set forth above, it is undisputedly a marked departure from existing, settled understandings of the federal securities laws. The Administrative Procedure Act ("APA") generally defines federal agency rules as being prospective in their "future effect."[27] Likewise, courts have generally disfavored retroactive rulemaking by federal agencies.[28] If

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[24] *Id.* at 92–93.
[25] Release at 96.
[26] At a minimum, the Commission should provide clear guidance concerning how a SPAC IPO underwriter who plays no role in a de-SPAC transaction may formally withdraw in advance of the effectiveness of a de-SPAC proxy statement so as to irrefutably fall outside of the scope of Proposed Rule 140a.
[27] 5 U.S.C. § 551(4).
[28] *See Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 745–46 (D.C. Cir. 1986) ("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.").

Proposed Rule 140a is determined to have retroactive effect, not only could underwriters in a SPAC IPO, who have no meaningful connection to a de-SPAC transaction, potentially be held liable for any misstatements or omissions made during the de-SPAC transaction, but they would not even have had advance notice of such potential liability or an opportunity to perform the due diligence that would typically accompany such liability exposure. Should the Commission purport to adopt a rule with retroactive effect, it would therefore be subject to attack in the courts on this and other bases. Accordingly, the Commission should not adopt Proposed Rule 140a, but in the event that it chooses to do so, the Commission should make clear that Proposed Rule 140a will not apply retroactively to SPAC IPO underwriters that have been consummated by SPACs prior to any adoption of Proposed Rule 140a.

Additionally, the Commission should clarify what activities undertaken by financial institutions who were not SPAC IPO underwriters would constitute "'participating' in a distribution" such that the institution may be deemed a statutory underwriter in connection with a de-SPAC transaction. Although Proposed Rule 140a, by its terms, would only apply to underwriters of the SPAC's IPO, the Release suggests that other individuals and institutions such as "financial advisors, PIPE investors, or other advisors" may be deemed statutory underwriters in connection with a de-SPAC transaction.[29] This suggestion marks a dramatic departure from current market practice; we are unaware of *any* situation where *any* investor or advisor has been deemed to be a statutory underwriter in connection with a de-SPAC transaction. Indeed, it would be incredibly unusual for a financial institution to be deemed an underwriter by merely serving as a financial advisor to the SPAC or target company or by acting as a placement agent in connection with a private, un-registered offering without having any involvement in distributing securities to the investing public. To the extent the Commission is of the view that institutions or investors who were not SPAC IPO underwriters may participate in a distribution in connection with the de-SPAC transaction, the Commission should provide clear guidance regarding when this may occur, to remove the uncertainty that has overtaken the market since the proposed rules were announced and to prevent a tidal wave of frivolous litigation by plaintiffs' firms seeking a windfall recovery from any market participant who was in any way involved in a de-SPAC transaction, irrespective of whether such participant "distributed" any securities.

II. The Proposed Rules Regarding Disclosure Are Overly Prescriptive

We commend the Commission for the emphasis that the proposed rules place on ensuring that investors receive fulsome disclosures during both SPAC IPO and de-SPAC transactions. Indeed, market practice has already led SPACs to provide much of the information called for in the proposed rules. We would suggest, however, that the Commission enact rules that take a principles-based approach rather than the prescriptive approach of the current proposed rules.

For example, while acknowledging that Item 501(b) of Regulation S-K already sets forth a number of disclosures that are required to be included on the outside front cover page of an IPO prospectus (including a SPAC IPO prospectus), the proposed rules add a number of additional disclosures to be included on the outside front cover, such as the time frame for the SPAC to consummate a de-SPAC transaction and whether this time frame may be extended;[30] whether

[29] Release at 98.

[30] *Id.* at 329; Proposed Item 1602(a)(1).

security holders will have the opportunity to redeem their securities and whether any such redemptions will be subject to any limitations;[31] "the amount of compensation received or to be received by the SPAC sponsor and its affiliates, and whether this compensation may result in a material dilution for the purchasers' equity interests";[32] and a statement regarding "whether there may be actual or potential conflicts of interest between the SPAC sponsor or affiliates or promoters and purchasers in the offering."[33] These rigid requirements may result in the outside cover page becoming unnecessarily lengthy and confounding to potential investors and may further make it impossible to comply with Item 501(b)'s mandate that the outside cover page be limited to one page.

Further, the proposed rules would require multiple disclosures in the SPAC IPO prospectus regarding potential future dilution at the de-SPAC transaction phase. For example, the proposed rules would require a disclosure in a specified tabular format regarding "the estimated remaining pro forma net tangible book value per share at quartile intervals up to the maximum redemption threshold, consistent with the methodologies and assumptions used in the disclosure provided pursuant to [Item 506 of Regulation S-K]" to be included on the prospectus cover page.[34] Additionally, the proposed rules would require the issuer to "describe material potential sources of dilution following [a SPAC IPO]" as well as tabular disclosure of "the amount of future dilution from the public offering price that will be absorbed by [non-redeeming SPAC stockholders]."[35] We respectfully submit that the information called for by these proposed rules would not provide investors or analysts with meaningful information in valuing SPAC shares at the time of a SPAC IPO.

While the Commission has repeatedly stated that the proposed rules will "help[] ensure that investors in [SPACs] get protections similar to those when investing in traditional IPOs[,]"[36] the proposed rules would require SPACs to include certain information in connection with their regulatory filings related to de-SPAC transactions that are not part of registration statements filed for traditional IPOs and that cannot be accurately described as "disclosures." In particular, proposed Item 1606 would require a SPAC to "[s]tate whether [it] reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders of the [SPAC]"; "[d]iscuss in reasonable detail the material factors upon which the belief [regarding fairness] is based and, to the extent practicable, the weight assigned to each factor" with such factors including "the valuation of the target company, the consideration of any financial projections, any report, opinion or appraisal described in [proposed Item 1607], and the dilutive effects described in [Item 1604]."[37] In addition, proposed Item 1607 would require the SPAC to "[s]tate whether or not [it] or [the] SPAC sponsor has received any report, opinion or appraisal from an outside party relating to the consideration or the fairness of the consideration to be offered

[31] *Id.*; Proposed Item 1602(a)(2).
[32] *Id.*; Proposed Item 1602(a)(3).
[33] *Id.* at 330; Proposed Item 1602(a)(5).
[34] *Id.*; Proposed Item 1602(a)(4).
[35] *Id*; Proposed Item 1603(c).
[36] Gary Gensler, *Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections*, SEC.GOV (Mar. 30, 2022), https://www.sec.gov/news/statement/gensler-spac-20220330.
[37] Release at 338.

to security holders or the fairness of the de-SPAC transaction or any related financing transaction to the [SPAC], SPAC sponsor or security holders who are not affiliates."[38]

Rather than treating de-SPAC transactions similarly to companies going *public* via a traditional IPO, proposed Item 1606 attempts to track requirements of companies going *private* by tracking the language of Item 1014 of Regulation M-A. Proposed Items 1606 and 1607 would represent a dramatic shift to de-SPAC transactions processes and disclosures. Currently, SPAC boards typically make a recommendation to stockholders regarding the vote on the business combination; however, SPAC boards have not historically made recommendations regarding whether or not stockholders should redeem their shares for their pro rata portion of the trust account at the time of the business combination. Further, insofar as Proposed Item 1606, unlike Item 1014 of Regulation M-A, requires the SPAC board to opine separately as to the fairness of any "related financing transactions," this may be unworkable as it is not obvious how a SPAC board could evaluate the fairness of any financing transaction separate and apart from the de-SPAC transaction itself.

Likewise, to the extent SPAC boards obtain fairness opinions in connection with de-SPAC transactions, such opinions are typically limited to whether the transaction is fair *to the SPAC*, not whether the transaction is fair to any particular class of stockholder. By opining on whether the de-SPAC transaction and related financings are fair to unaffiliated stockholders, as opposed to the SPAC itself, the SPAC board and any fairness opinion provider would essentially be making a recommendation regarding whether or not to redeem shares. This practice would differ dramatically from a traditional IPO where company boards do not comment on whether buying stock at a particular price would be "fair" for investors and where boards do not offer opinions concerning any related financing transactions. Additionally, proposed Item 1606 may be unworkable in practice insofar as it directs the SPAC to provide "the weight assigned to each factor" in assessing whether the SPAC "reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to unaffiliated security holders" as various members of the SPAC board will likely assign differing weights to differing factors, and the fairness of financing transactions may be more challenging to opine on at the time the Form S-4 or F-4 goes effective given the uncertainty concerning redemptions in connection with the de-SPAC transaction and the potential impact of such redemptions on assessing fairness of a financing.

This difference between traditional IPOs and de-SPAC transactions would not come without a cost. If, as a result of the proposed rules, SPAC boards were to routinely engage fairness opinion providers in connection with de-SPAC transactions, this would further increase the costs of such transactions. Such costs could rise even more materially should the Commission fail to clarify that institutions that provide fairness opinions on de-SPAC transactions—without being otherwise involved in such transaction—will not be deemed to be statutory underwriters of such transactions.

[38] *Id.* at 339.

III. Proposed Rule 3a-10's Duration Element Undermines Established Practices for Analyzing Investment Company Status

Section 3(a)(1)(A) of the Investment Company Act defines an "investment company" as any issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. There is a long history of established guidance from the Commission, its Staff and the courts regarding the factors to be considered when analyzing an issuer's status as an investment company, which the Commission acknowledges in the Release.[39] In particular, the Commission notes in the Release that an investment company analysis under Section 3(a)(1)(A) typically focuses on five principal factors: the issuer's assets, the sources of its income, its historical development, its public representations of policy, and the activities of its officers and directors (the "Tonopah Factors").

Despite this well-worn path, the Commission in the Release expresses concern that SPACs may not focus on and appreciate when they may be subject to investment company regulation. We find this concern misguided and unsupported by evidence. Over the past two decades, more than 1,000 SPAC IPOs have been reviewed by the staff of the Commission and none have been deemed to be investment companies and therefore subject to the Investment Company Act. Nonetheless, the Commission now proposes Rule 3a-10 as a "safe harbor" to "highlight for SPACs and their sponsors the Investment Company Act concerns that certain SPAC activities may raise."

The safe harbor provided by Proposed Rule 3a-10 limits the makeup of a SPAC's assets and specifies that they must not at any time be acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes. The safe harbor would also require (A) that the SPAC's primary engagement of seeking to complete a single de-SPAC transaction (the result of which would be that the surviving company will be primarily engaged in the business of the target company or companies, which business is not that of an investment company) be evidenced by (i) the activities of its officers, directors and employees; (ii) its public representations of policies; (iii) its historical development; and (iv) an appropriate resolution of its board of directors, which resolution or action has been recorded contemporaneously in its minute books or comparable documents, and (B) that the SPAC must not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities. To some extent, these elements reflect the Tonopah Factors. However, the proposed rule further requires a SPAC seeking to rely on the safe harbor to file a Form 8-K with the Commission within 18 months after the effective date of an issuer's initial registration statement disclosing an agreement to engage in a de-SPAC transaction and to complete a de-SPAC transaction within 24 months of the effective date of its initial registration statement. This requirement is far more restrictive than the Tonopah Factors, creating an arbitrary new "duration" element to the investment company analysis. Imposing this duration requirement runs contrary to other portions of the proposed rules. On the one hand, the Commission has expressed concern that the incentive structure of a SPAC may place a sponsor towards the end of a SPAC's life cycle

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[39] *See id.* at 136–37 n.298 (citing *In the Matter of Tonopah Mining Co.*, 26 S.E.C. 426 (1947), then citing *SEC v. Nat'l Presto Indus., Inc.*, 486 F.3d 305 (7th Cir. 2007), *rev'g, SEC v. Nat'l Presto Indus., Inc.*, Case No. 02 C5057 (N.D. Ill, Oct. 31, 2005), and then citing *Certain Prima Facie Investment Companies*, Release No. IC-10937 (Nov. 13, 1979) [44 FR 66608 (Nov. 20, 1979)] at n.24 ("Proposing Release to Rule 3a-1") ("Although [Tonopah] was decided under [S]ection 3(b)(2) of the Act, the "primary engagement" standard set forth in that case also appears to be applicable to the identical standard of Section 3(a)(1)[A] and [S]ection 3(b)(1).")).

"under pressure to find a target and complete the de-SPAC transaction on less favorable terms or face losing the value of its securities in the SPAC."[40] But on the other hand, by imposing this arbitrary duration requirement in the proposed safe harbor, the Commission will put additional pressure on SPACs to complete deals within this time frame, which may undermine a SPAC's ability to obtain the best outcome for its stockholders.

Although the Commission states that SPACs are not required to rely on the safe harbor, the language of the Release also states that, in not relying on the safe harbor, a SPAC would "choose to bear the legal uncertainty of operating outside of it" and proceeds to enumerate the risks of being deemed an investment company.[41] The Release hints that operating outside the safe harbor (and, in particular, outside the duration element thereof) may result in being treated as an investment company for purposes of compliance with the Investment Company Act. In its discussion of the duration element of Proposed Rule 3a-10, the Commission notes the few other instances in the context of determining investment company status where timing is relevant. The Release states by way of comparison that "the Commission . . . has in the past provided conditional, temporary relief to certain issuers that meet the definition of 'investment company' for only a short period of time."[42] It goes on to discuss Rule 3a-2 under the Investment Company Act, which "provides a one year safe harbor to so-called 'transient investment companies,' which are issuers that, as a result of an unusual business occurrence, may be considered an investment company under the statutory definitions but intend to be engaged in a non-investment company business."[43] The Release also highlights that the Commission has "at times granted short-term, conditional exemptive relief under Section 6(c) of the Investment Company Act to certain issuers that needed additional time to restructure their businesses beyond that afforded by Rule 3a-2."[44] And yet both of these examples refer to circumstances where there is no question that the issuer does in fact meet the definition of "investment company" provided by the Investment Company Act but is able to avail itself of an exemption from investment company status. This leads to the question of whether the proposed rule is intended as a safe harbor or rather is meant to offer an exemption from investment company status based on a view that all SPACs do, in fact, meet the definition of an "investment company"; if the latter is the case, the duration element of Proposed Rule 3a-10 may not only jeopardize the status of many past and future SPACs but may also cause broader confusion regarding what it means to primarily engage in a business.

The Commission expresses concern that "the longer [a] SPAC operates with its assets invested in securities and its income derived from securities, the more likely investors will come to view the SPAC as a fund-like investment and the more likely the SPAC appears to be deviating from its stated business purpose."[45] And yet this overlooks the many safeguards already in place to ensure that investors continue to understand the purpose of the SPAC regardless of how long it takes to complete the de-SPAC transaction. For example, SPAC IPO prospectuses disclose that the SPAC is engaged primarily in identifying and consummating a business combination within a specified period of time. If a de-SPAC transaction has not been completed within that time frame,

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[40] *Id.* at 33.
[41] *Id.* at 273.
[42] *Id.* at 153.
[43] *Id.*
[44] *Id.* at 154.
[45] *Id.* at 156.

the SPAC IPO prospectuses disclose that investors will be entitled to their pro rata share of the amount held in the trust account. These disclosures make clear that the purpose of the SPAC is a de-SPAC transaction and do not provide investors with an interim investment program akin to an investment in a fund. If a SPAC's disclosures shifted to focus on interim investments, the duration element of Proposed Rule 3a-10 would not save the SPAC from the requirements of the Investment Company Act, as the SPAC would fail the Tonopah Factor regarding how the issuer holds itself out.

Finally, apart from our view that the duration element of Proposed Rule 3a-10 is both confusing and unnecessary in the context of determining an issuer's primary engagement, it is also relevant that the ability of an issuer to meet the required 24-month de-SPAC completion date is often out of the hands of the issuer. Indeed, the ability to complete a de-SPAC transaction is often dependent on the ability of a Target Company to satisfy the negotiated conditions to closing as well as the amount of time Commission staff requires to declare the de-SPAC Form S-4 or F-4 effective. Because the safe harbor is inflexible, despite an issuer's efforts to find and consummate a de-SPAC in time to ensure it is within the bounds of the safe harbor, it may find itself failing the requirements of 3a-10 for reasons beyond its control and despite being primarily engaged in an effort to consummate a de-SPAC transaction within 24 months. This eventuality is not unlikely—in fact the Release "acknowledge[s] that the duration limits [the Commission is] proposing are shorter than the actual timeline of some SPACs that recently completed their de-SPAC transactions."[46] Further, current exchange rules permit SPACs to remain listed for 36 months before completing a de-SPAC transaction.

We would advocate that the Commission should not enact Proposed Rule 3a-10, but were it to do so, it should remove the duration aspect of the safe harbor to avoid undermining established practices for analyzing investment company status and further exacerbating potential conflicts associated with this additional pressure to consummate a de-SPAC transaction within the specified time period.

IV. Conclusion

In sum, while providing robust and transparent disclosures to public investors is a necessary and laudable goal, the proposed rules go much further and run the risk of extinguishing or greatly diminishing an effective means for private companies to go public—depriving such companies access to public markets and preventing public access to such investment opportunities. Rather than imposing a new liability regime on de-SPAC transactions inconsistent with clear statutory text, upending long-standing guidance and interpretations concerning Investment Company Act analysis, and adopting prescriptive disclosure requirements, the Commission should

[46] *Id.* at 155.

adopt rules that take a principles-based approach to ensuring that investors are provided with all material information in a clear and transparent manner before making any investment decision.

Very truly yours,

/s/ *Christopher J. Capuzzi*
Christopher J. Capuzzi

/s/ *Daniel L. Forman*
Daniel L. Forman

/s/ *Adam M. Harris*
Adam M. Harris

/s/ *David B. Hennes*
David B. Hennes

/s/ *Carl P. Marcellino*
Carl P. Marcellino

/s/ *Paul D. Tropp*
Paul D. Tropp