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June 13, 2022

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

BY EMAIL TO rule-comments@sec.gov

Re: Special Purpose Acquisition Companies, Shell Companies, and Projections
File Number S7-13-22

Dear Ms. Countryman:

We welcome the opportunity to comment on the proposed rule amendments (the "Proposal") set forth in the Commission's Release 33-11048; 34-94546; IC-34549; File No. S7-13-22 (March 30, 2022) (the "Release"). Our law firm advises a wide range of market participants on initial public offerings by special purpose acquisition companies ("SPACs") and subsequent business combination transactions between SPACs and private companies ("de-SPAC transactions"), and this Proposal is of particular interest to our clients.

Introduction

Financial institutions perform important and valuable services for the public markets, including facilitating investors' access to a broad range of investments, and enabling companies to raise capital and fund critical operation initiatives. In our experience, these financial institutions overwhelmingly seek to have their clients comply with disclosure obligations under applicable statutory guidelines, including in the context of initial public offerings by SPACs and later de-SPAC transactions. Moreover, securities offerings by SPACs involving such market participants can offer specific advantages over other types of investment structures, including in certain situations greater efficiency and certainty in capital raising.

We therefore believe the Commission should act cautiously with respect to any proposed rule that may unfairly expand the scope of liability faced by such financial institutions for activities that they undertook in connection with SPACs. One such rule is the Commission's proposal to change what constitutes an "underwriter" in an initial public offering by a SPAC or a de-SPAC transaction. That change would be inconsistent with the statutory definition of the term "underwriter" in the Securities Act of 1933, and with decades of case law interpreting and applying that statutory provision. We believe adopting that change could meaningfully deter financial institutions from providing services in connection with SPAC IPOs or later de-SPAC transactions, and we are aware that the proposal itself has already resulted in certain market participants, such as financial institutions, exiting this market.

Proposed Rule 140a

Proposed Rule 140a states 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." Release at 343.

The Release itself makes plain the broad scope of the Commission's intentions in proposing the rule. Specifically, the Release states that "parties can attain underwriter status even if they do not receive compensation for their services, do not sell securities directly to the public, and do not have privity of contact with the issuer," *id.* at 93 (internal citations omitted), and can include those "who have arranged for public trading of an unregistered security or have stimulated investor interest in such security through advertisements, research reports, or other promotional efforts." *Id.* Connecting this to de-SPAC transactions, the Release concedes that "SPAC IPO underwriters typically are not retained to act as firm commitment underwriters in the de-SPAC transaction," but nonetheless asserts they can be considered underwriters with respect to that transaction because they "typically participate in activities that are necessary to that distribution," such as "identifying potential target companies, negotiating merger terms, or finding investors for and negotiating PIPE investments" and receiving "compensation" related to the de-SPAC transaction. *Id.* at 97.

Although the Proposal reflects a thoughtful effort to ensure full disclosure to potential investors, Rule 140a exceeds the scope of 15 U.S.C. § 77(b)(a)(11) and therefore exceeds the bounds of the SEC's rule-making authority. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (holding Rule 10b-5 could not adopt more lenient standard of liability than required by the statutory text of § 10(b)); *see also Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 701-02 (1980) (same). In adopting Rule 140a or any other proposed rule that aims to address what constitutes an underwriter, the Commission may not exceed the statutory boundaries set forth by Congress: playing an essential role in the actual distribution of securities, rather than engaging in mere facilitation (even if necessary to the completion of the distribution). *See In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 177-78 (2d Cir. 2011). Adopting a broader rule would expose market participants to the threat of liability for indirect, non-essential participation in securities offerings—beyond the scope of what Congress authorized and what decades of federal court decisions have determined to be the statutory scope of underwriter liability—and would improperly conflate the separate distributions made in initial public offerings by SPACs with subsequent de-SPAC transactions.

Boundaries Under 15 U.S.C. § 77(b)(a)(11)

It is well established that liability for underwriting a securities offering is limited to those "playing roles essential in the actual distribution of securities." *Lehman*, 650 F.3d at 178. 15 U.S.C. § 77(b)(a)(11) defines an underwriter as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission." Thus, on its face, the statute limits the definition of an underwriter to those who participate directly or indirectly in the distribution of a security.

Following the requirements of this statutory definition, federal courts have limited "underwriters" to parties that participated in the "actual distribution" of the securities at issue, rather than those with roles that did not involve interactions with purchasers in the distribution. *See, e.g.*, *Lehman*, 650 F.3d at 176. Among other examples, courts have found that:

- A party is not an underwriter if it merely reviews and performs due diligence of disclosure, even if that participation was "essential to the distribution" of the securities, where those activities "are not part of the purchase, offer, or sale of the [securities]." *Fed. Deposit Ins. Corp. v. First Horizon Asset Sec. Inv*., 443 F. Supp. 3d 505, 510 (S.D.N.Y. 2020). Therefore, a financial institution's mere participation in a securities offering, such as by performing due diligence, verifying the accuracy of statements in the disclosure documents, asking accountants to perform procedures on those documents, obtaining counsel's opinions on those documents, and approving their final content, do not make that financial institution an underwriter. *See id*. at 509-10; *Employees' Ret. Sys. of the Gov't of the Virgin Islands v. J.P. Morgan Chase & Co*., 804 F. Supp. 2d 141, 156-57 (S.D.N.Y. 2011) (finding that financial institutions were not underwriters where they participated in the drafting and dissemination of prospectus documents).

- A party is also not an underwriter simply because it "tak[es] steps that facilitate the eventual sale of a registered security[.]" *Lehman*, 650 F.3d at 177. Specifically, taking part in "non-distributional activities"—such as evaluating loan data, assisting in the creation of securities, and reviewing and commenting on draft disclosures—do not render a party an underwriter. *Id.* at 178, 182-84.

- A party is not an underwriter if it merely participates "behind the scenes" (*i.e.* is not identified to the public) in the drafting of disclosure documents. *See, e.g.*, *In re REFCO, Inc. Sec. Litig*., 2008 WL 3843343, at *2-5 (S.D.N.Y. Aug. 14, 2008); *see also In re HealthSouth Corp. Sec. Litig*., 2009 WL 10708552, at *6 (N.D. Ala. Feb. 26, 2009) (stating that financial institution was not an underwriter where it, through its attorneys, reviewed and commented on draft registration statements and placed the name of its counsel on the front of the registration statements).

Faced with this hurdle to finding underwriter status, the Release conflates the SPAC IPO distribution with the subsequent de-SPAC transaction distribution. But those are plainly separate distributions, not only in time but also in terms of the securities being offered and the offerees of those securities. There is no basis to integrate those separate and distinct offerings.

Accordingly, any proposed changes to Commission rules as to what constitutes an underwriter in the context of initial public offerings by SPACs and de-SPAC transactions should remain limited to parties "playing roles essential in the actual distribution of securities." *Lehman*, 650 F.3d at 178 (discussing *SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005)). That includes ensuring that only a party who had an "essential" role in the "actual distribution" of securities in a de-SPAC transaction be considered an underwriter for that transaction, regardless of any role that party played in a previous initial public offering by that SPAC.

* * *

We appreciate the Commission's attention to these comments. Please direct any questions or comments to Jared Gerber at [redacted]

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP