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June 13, 2022

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

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

Dear Ms. Countryman,

We are pleased to submit this letter in response to the request from the Securities and Exchange Commission ("Commission") for comments on its Special Purpose Acquisition Companies, Shell Companies, and Projections proposals (collectively, the "Proposals") as contained in Release Nos. 33-11084 and 34-94546 (Mar. 30, 2022), 87 Fed. Reg. 29458 (May 13, 2022) (the "Release").

We agree with the Commission's objective of enhancing investor protection in initial public offerings by special purpose acquisition companies ("SPACs") and in subsequent business combination transactions (a "de-SPAC transaction") between SPACs and operating companies ("Targets"). Further, we appreciate the Commission's effort to craft Proposals in the Release in a way that balances the goal of reform and investor protection with capital formation. Nevertheless, we have serious concerns that certain of the proposals contained in the Release could impose significant costs, burdens and uncertainties on SPACs and de-SPAC transaction participants that will outweigh any benefit to investors and, in certain cases, may result in unintended consequences that could chill capital formation, more generally.

Our comments in response to certain of the specific questions raised in the proposal follow.

Underwriter Status and Liability in de-SPAC Transactions

Background

The Release expresses the Commission's view that the business combination of a SPAC and Target is functionally the equivalent of a traditional IPO of the Target. The Proposals aim to address a perceived asymmetry in the liability protections afforded investors in a de-SPAC transaction and those in a traditional IPO. As a means to do so, the Release would deem (i) a Target in a de-SPAC transaction to be a co-registrant of a registration statement on Form S-4 or

Form F-4 when a SPAC files such a registration statement for a de-SPAC transaction, and (ii) any business combination of a reporting shell company (including SPACs), involving another entity that is not a shell company, to involve a sale of securities to the reporting shell company's stockholders. These changes are intended to expose a broader class of persons to liability under the Securities Act of 1933, as amended ("Securities Act"). Specifically, these changes seek to extend Section 11 liability not only to the Target (in the case of the proposed changes to Form S-4 and Form F-4) and the SPAC (in the case of Proposed Rule 145a), but also to the principal executive officer, principal financial officer, controller/principal accounting officer, and board of directors or persons performing similar functions of each of the Target and SPAC. These persons, particularly those eligible to proffer a due diligence defense, would, in the Commission's view, be incentivized to exercise reasonable care necessary to ensure the accuracy of disclosures in the de-SPAC registration statement.

Proposed Rule 140a

The Release goes even further. With the stated purpose of incentivizing additional transaction parties to perform due diligence in a de-SPAC transaction, the Commission casts a wide net in search of "gatekeepers" to be subject to underwriter liability. Proposed Rule 140a is the mechanism by which this liability could be assigned more broadly. It provides that a person who has acted as an underwriter in a SPAC IPO 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 Securities Act.

Our criticisms of Proposed Rule 140a are several, as detailed below.

Proposed Rule 140a does not represent a "clarification" or "affirmation" of the application of underwriter liability

The Release states that Proposed Rule 140a "would clarify" the underwriter status of SPAC IPO underwriters in connection with a de-SPAC transaction and motivate them to exercise the care purportedly necessary to ensure the accuracy of the public disclosures related to these transactions by "affirming" that the SPAC IPO underwriters are subject to Section 11 liability for registered de-SPAC transactions. We do not believe Proposed Rule 140a represents a "clarification" or "affirmation" of the concept of underwriter liability. Rather, we believe it represents a significant departure from the application of underwriter liability as currently understood by practitioners and transaction participants and as applied by the courts.

Prior to the Proposal, we are not aware of any transaction participants who took the view that a SPAC IPO underwriter would be deemed a statutory underwriter subject to Securities Act liability for purposes of the de-SPAC transaction, whether as a result of merely receiving deferred IPO underwriter compensation payable upon consummation of the de-SPAC transaction or the SPAC IPO underwriter subsequently acting in additional capacities (unrelated to the IPO) in connection with the de-SPAC transaction. The SPAC IPO and de-SPAC transaction are two separate and distinct transactions that should not be conflated. While the de-SPAC transaction bears some relation to a traditional IPO, there is no conventional underwriter who is named "on the first page of the issuer's prospectus," who otherwise prominently "lend[s] their well-known name to the support that issuer's offering" or who "otherwise holds themselves out" as a

"gatekeeper" as the Commission asserts a conventional underwriter does for a traditional IPO.[1] This is because, certain similarities notwithstanding, the de-SPAC transaction fundamentally is a business combination transaction, where no third party, by virtue of their role in the transaction and based upon historical practices and understandings, qualifies as an underwriter under the statute.

Similarly, in the broader context of fundamentally transformative stock merger transactions registered under the Securities Act, which involve a public distribution of the registrant's securities, we are unaware of any transaction participants that view third-party advisors or agents that commonly play a significant role in the business combination as statutory underwriters. For example, if a public operating company acquires a private operating company that is significantly larger than the acquirer in a registered stock merger, the acquirer's business and financial statements post-acquisition may be materially altered relative to the pre-acquisition period, and in certain cases security holders of the public operating company may be viewed as having experienced a fundamental change in the nature of their investment. Yet, we do not believe transaction participants view third-party advisors or agents as potential statutory underwriters. This holds true, for example and without limitation, for persons that serve as financial advisors, M&A advisors, capital markets advisors, and solicitation agents. In sum, we do not believe that transaction participants (and, for that matter, public investors) view the SPAC IPO underwriter, even if it collects a back-end fee or serves in various advisory roles post-IPO, to be endorsing the accuracy of statements in the de-SPAC prospectus or otherwise performing the distributive functions traditionally associated with the role of an IPO underwriter.

We also are unaware of any court that has ruled that a SPAC IPO underwriter is deemed to be a statutory underwriter subject to Securities Act liability for purposes of the de-SPAC transaction. Nor are we aware, at least prior to the Release, of any private plaintiff that has laid a stake to such a claim. Further, and critical here, we are unaware of any court that has found that a third party serving as a financial advisor, M&A advisor, capital markets advisor or solicitation agent that played a significant role in a *registered* stock merger should be deemed a statutory underwriter. In fact, when analyzing the issue of statutory underwriter liability, we note that the Second Circuit declined to find that third parties that played "an essential role" in, or took "steps to facilitate," a registered public offering to be liable as statutory underwriters.[2] In doing so, the court drew a determinative distinction between distributive and non-distributive activities. The Second Circuit found that for purposes of the participation prong of the underwriter definition in Section 2(a)(11), "the participation must be in the statutorily enumerated distributional activities, not in non-distributional activities that may facilitate the eventual distribution by others." The court opined that this approach would avoid improperly transforming every third-party professional whose work was "necessary" to bringing a security to market into an underwriter, which should be reserved for persons who "'participated in the relevant' undertaking: that of purchasing securities from the issuer with a view towards distribution, or selling or offering securities for the issuer in connection with a distribution." Deeming a SPAC IPO underwriter to

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[1] *Special Purpose Acquisition Companies, Shell Companies, and Projections*, Release Nos. 33-11084, 34-94546 (Mar. 30, 2022), 87 Fed. Reg. 29458 (May 13, 2022) (the "Release"), at page 88.

[2] *In re Lehman Bros. Mortgage-Backed Securities Litigation*, 650 F.3d 167 (2d Cir. 2011); *see also In re HealthSouth Corp. Sec. Litig.*, No. CV-03-BE-1500-S, 2009 WL 10708552, at *6 (N.D. Ala. Feb. 26, 2009) ("The court will not stretch the definition of underwriter so far as to impose liability based upon participation – not even by UBS directly but indirectly through its attorney – in the registration process.").

be an underwriter for purposes of the de-SPAC transaction where it "facilitates" the de-SPAC transaction or any related financing transaction is an overly broad application of underwriter liability.

Proposed Rule 140a fails to articulate a workable standard

We believe Proposed Rule 140a fails to articulate a workable standard for purposes of determining whether a SPAC IPO underwriter would be deemed to be "participating" in the de-SPAC distribution for purposes of Section 2(a)(11). We respectfully submit that Proposed Rule 140a fails to add any clarity to this determination.

The proposed text of the rule is devoid entirely of any helpful parameters (indeed, as a gating issue, the Release is not even clear on who would qualify as a SPAC IPO underwriter) and the discussion in the Release does nothing to resolve this uncertainty for transaction participants. As it stands, the Release identifies back-end IPO fees and several advisory roles as common to SPAC IPO underwriters and characterizes certain of these activities as "necessary to the completion of the de-SPAC distribution" but does not answer whether or when such activities would result in the SPAC IPO underwriter "participating" in the distribution for purposes of Section 2(a)(11).

As we noted earlier, playing a "necessary" or "essential" role, by itself, was not sufficient in the Second Circuit's view to cause a person to be deemed a statutory underwriter. A final rule and accompanying commentary similar to Proposed Rule 140a and the related commentary in the Release is likely to have seismic impacts on SPAC and de-SPAC transactions, and create considerable uncertainty and risk potentially significant unintended consequences that could chill capital formation and M&A activity outside of the SPAC and de-SPAC markets. We believe that underwriter liability ought to be limited to those market participants who have traditionally accepted both the risks and benefits of that role, explicitly. The goal of disincentivizing market participants from participating in de-SPAC transactions should not lead to the imposition of rules, the contours of which are unclear and seemingly ad hoc. Accordingly, Proposed Rule 140a and the related commentary ought to be substantially revised to identify clearly, precisely and fairly the type and level of activities that would cause a SPAC IPO underwriter to be considered a distribution participant in the de-SPAC transaction, in alignment with current standards within the Second Circuit. Anything less will render the final rule unworkable. As it is imprecisely drafted, we believe a participant deemed to be an underwriter by Rule 140a would have a defense, among others, that they lacked fair notice that their conduct was a violation of the law in contravention of their due process rights.[3] Under the vagueness doctrine, a statute also could be rendered void for vagueness if a legislature's delegation of authority to an administrator is so extensive that it would lead to arbitrary prosecutions.

We respectfully observe that the Commission's statement that additional parties (beyond the SPAC IPO underwriter) that are involved in a de-SPAC transaction may be deemed statutory underwriters does little beyond flagging certain parties and paraphrasing the statutory definition in the same breath. This casual statement is unhelpful, disruptive and potentially will have a

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[3] *Sec. & Exch. Comm'n v. Ripple Labs, Inc.*, No. 20CIV10832ATSN, 2022 WL 748150, at *5 (S.D.N.Y. Mar. 11, 2022) ("At the very least, these facts, if true, would raise legal questions as to whether Ripple had fair notice that the term 'investment contract' covered its distribution of XRP, and the Court may need to consider these questions more deeply.").

chilling impact on capital formation and transaction execution. Some market participants implicated by this statement have chosen not to participate, or to withdraw from participation, in de-SPAC transactions following the release of the Proposals, with some going so far as to file formal Section 11 withdrawal letters, because of substantial uncertainty as to whether they may be subject to Section 11 liability. Any expansion of Proposed Rule 140a (as posed in Question 88 to the release) may further discourage participants from carrying out their traditional activities, both in SPAC IPOs and in the de-SPAC transactions. For those participants that do choose to participate, the cost of these persons performing due diligence will increase the cost of the de-SPAC transaction (significantly beyond that of a traditional IPO given the multiple advisors and parties who may be deemed statutory underwriters, as well as the multiple transaction constituents) with no assurance that the integrity of the disclosure to investors would be materially improved.

SPAC IPO underwriters may be unwilling to participate in de-SPAC transactions

The impacts of any final rule that extends statutory underwriter liability to SPAC IPO underwriters could be seismic, but certain of its goals may prove elusive. A stated goal of Rule 140a is to incentivize SPAC IPO underwriters to perform due diligence in a de-SPAC transaction. This goal is premised on SPAC IPO underwriters continuing to provide the same services to SPACs and Targets as has been the case in recent years. However, there is no guarantee, and we have seen some SPAC IPO underwriters curtail significantly their activities in de-SPAC transactions following the release of the Proposals, including issuing formal withdrawals, as a means to avoid potential underwriter liability and the attendant costs and burdens necessary to implement detailed due diligence investigations. If SPAC IPO underwriters elect to disassociate from de-SPAC transactions, the stated goal of encouraging enhanced due diligence investigations that is purportedly central to the purpose of Rule 140a may prove elusive at best.

SPAC IPO underwriters may face substantial challenges in establishing a due diligence defense for their role in the de-SPAC transaction, which burdens are not shared by an underwriter in a conventional IPO

The disclosure in the de-SPAC registration statement, for which the SPAC IPO underwriter could be subject to potential Securities Act liability, is prepared in connection with the signing of the business combination agreement. The SPAC IPO underwriter may not have any role in the de-SPAC transaction or may have completed their additional engagements at this point in time. As a result, the SPAC IPO underwriter's ability to participate in the preparation of the de-SPAC registration statement would be limited in ways that differ from a traditional IPO, where an IPO underwriter has the opportunity to actively participate in the preparation of the IPO registration statement. While SPAC IPO underwriters may negotiate (or for pending deals, renegotiate) a right to perform due diligence, we believe the leverage afforded an underwriter in a traditional IPO underwriting agreement would be difficult to duplicate in a de-SPAC transaction, as the SPAC IPO underwriter may have had nothing to do with the de-SPAC transaction.

The existing liability framework already incentivizes participants in a de-SPAC transaction to exercise reasonable care necessary to ensure the accuracy of the disclosures in the de-SPAC registration statement

We do not support the proposed changes to Form S-4 and Form F-4 to deem a Target in a de-SPAC transaction to be a co-registrant when a SPAC files such a registration statement for a de-SPAC transaction. These changes purport to extend Section 11 liability not only to the Target, but also to the principal executive officer, principal financial officer, controller/principal accounting officer, and board of directors or persons performing similar functions of the Target. We do not believe that any extension of liability under Section 11 of the Securities Act to these persons is necessary. The existing liability framework already provides strong incentives for the Target and certain of its affiliates to accurately disclose material information regarding the Target's business in a de-SPAC registration statement. The Target and certain of its affiliates may be subject to liability for disclosures in the de-SPAC registration statement under Rule 10b-5 of the Securities Exchange Act of 1934, as amended ("Exchange Act") and potential enforcement actions by the Commission under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. Particularly illustrative is the enforcement action the Commission brought against Momentus Inc.—a proposed SPAC merger target— and its founder and former CEO under the anti-fraud provisions of the Securities Act and the Exchange Act. The institution of the action preceded the stockholder vote on the de-SPAC.[4]

Moreover, the proposed co-registrant changes may occasion inconsistent treatment of de-SPAC transactions compared to other business combination transactions that are substantively similar and where the Commission's concerns about the adequacy of target company disclosure also could exist. For example, if a public operating company proposes to acquire a target company that is material to the acquirer and transformative of the acquirer's business and prospects in a registered stock-for-stock merger (in which an acquirer stockholder vote is required), the acquirer's business, financial condition and results of operations (and financial statements) post-acquisition will be likely materially altered relative to pre-acquisition periods. Consequently, investors may rely on disclosures about the target in the acquirer's merger registration statement in exercising their voting or investment decisions with respect to the acquisition and/or combined company's common stock. Yet, the Commission has never required the Target or its directors and officers to sign the acquirer's merger registration statement in such circumstances.

[4] *In the matter of Momentus, Inc.,* Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Sec. Act. Rel. No. 10955, Exchange Act Rel. No. 92391, Admin. Proc. File No. 3-20393 (July 13, 2021), https://www.sec.gov/litigation/admin/2021/33-10955.pdf.

Fairness of the de-SPAC Transaction

Background

As discussed, one of the stated purposes of the Proposals is to treat traditional IPOs and SPACs similarly. The Commissioner moreover stated the Proposals would "help ensure that the [IPO regulatory rules] are applied to SPACs."[5] Notwithstanding this stated purpose of treating SPACs and IPOs similarly, the requirements in the proposed rules ignore material differences between the IPO process and de-SPAC transaction. The Commission's position that SPAC sponsors must disclose any fairness determinations obtained from outside parties and the enhanced projection rules are especially inconsistent with the disclosure requirements for traditional IPOs. Further, the enhanced projections disclosure requirements may chill de-SPAC transactions, thus limiting stockholder access to the capital markets.

Proposed Item 1606(a) & (b) of Regulation S-K

The Commission has proposed new Items 1606(a) & (b) of Regulation S-K, which provide, among other things, that at the time of the de-SPAC transaction, the SPAC must make an affirmative statement regarding whether the de-SPAC and any related financing is fair to unaffiliated security holders, as well as a discussion of the bases for this belief. The Commission stated that the purpose of this proposed Item is to "address concerns regarding potential conflicts of interest and misaligned incentives" in connection with the de-SPAC transaction.

Our criticisms of the proposed Items are several, as detailed below.

Proposed Item 1606(a) imports a standard from Rule 13e-3 that is inapplicable to de-SPAC transactions

Item 1606(a)'s requirement to make a statement as to the fairness of the de-SPAC transaction and any related financing transactions to "unaffiliated stockholders" is largely imported from the "going private" rules in Exchange Act Rule 13e-3[6]. The reasons for requiring this type of statement are fairly clear in a 13e-3 transaction. In those deals, a buyer (often a financial sponsor) is partnering with management or other insiders of an issuer to acquire control of the issuer. The buyer group in these transactions typically includes individuals or entities with inside information regarding the issuer, oftentimes at a more granular level than even information provided to the issuer's board of directors on a regular basis. These insiders also may have pre-existing relationships with the issuer board. As such, the buyer group could use this information/relationship advantage to secure a price or terms that are more favorable than would be expected with a true arm's length buyer. Thus, the fairness statement gives some reasonable level of assurance that, despite these advantages, price and terms are fair to the stockholders who are not part of the insiders/buyer group.

No such dynamic exists in the typical de-SPAC transaction. Unlike in a 13e-3 transaction, a de-SPAC transaction is a true arm's length purchase, as is the case in any other

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[5] *SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections*, SEC Press Release, 2022-56 (Mar. 30, 2022).

[6] Release, at n. 96.

M&A transaction. In the typical de-SPAC transaction, no members of target management are also members of the SPAC or Sponsor. Any information that the SPAC sponsor gleans about the target is obtained through standard M&A diligence processes. Price and terms are set through regular arm's length negotiations. Moreover, at closing of the de-SPAC transaction, the SPAC Sponsor's "Class B" shares convert into the same class of shares as owned by the public SPAC holders. So, recognizing that the SPAC Sponsor often pays less for its shares initially, both the SPAC Sponsor and the public SPAC stockholders are incentivized in the same manner post-transaction (i.e., both groups want the stock to trade "up" post transaction). This is especially true in the current environment where many SPAC Sponsors subject their shares to "vesting" or "earn out" structures. Accordingly, the benefits that derive from the fairness statement in a typical 13e-3 transaction are not present in a typical de-SPAC transaction.

Proposed Item 1606(a) is inconsistent with the SEC's stated policy of putting traditional IPOs and de-SPAC transactions on equal footing, and this may result in a chilling effect on SPAC IPOs and capital formation

As noted above, the Release makes clear that the Commission views a de-SPAC transaction as functionally the equivalent of a traditional IPO of the Target and that the two processes should have similar protections for stockholders. However, nothing akin to the fairness statement in proposed Item 1606(a) exists in a traditional IPO. Unlike the IPO disclosure regime, the Proposals, if adopted, would require that a SPAC sponsor or issuer disclose its belief as to the fairness of the transaction and any related financings. The process for the board to evaluate the various sources of financings in a de-SPAC transaction, including debt financing and equity-linked financing instruments, as separate transactions is unclear. The board should instead consider the de-SPAC transaction and all financing holistically and as a single transaction in which all SPAC stockholders who do not redeem will own equity in the new combined company. Furthermore, it is not practicable for the board to assign weight to the material factors underlying the fairness determination. Such a determination would require a high degree of professional subjectivity, which has the potential to expose boards and financial institutions to liability which would ultimately discourage them from pursuing de-SPAC transactions.

In a traditional IPO, the underwriter typically serves a "gatekeeping" function which may address the Commission's concerns behind proposing new Item 1606(a) (e.g., IPO-style diligence by an underwriter helps to confirm the adequacy of the disclosure regarding the issuer). If the Commission's proposed expansion of underwriter liability in Proposed Rule 140a to de-SPAC transactions is adopted ultimately, this gatekeeping function will be imported to de-SPAC transactions, and the Item 1606(a) fairness statement will be another layer of compliance in de-SPAC transactions that is not present in a traditional IPO.

It should be noted that this additional layer of compliance, the benefits of which seem minimal in the context of a de-SPAC (as discussed above), comes at a substantial cost. In 13e-3 transactions, the buyer group frequently retains a third-party financial advisor to provide an opinion that underlies the buyer's group's fairness statement. These opinions are not required by the Commission's rules, although boards may seek to obtain such opinions in support of their obligations under the duty of care. The cost of these opinions can be substantial.

When private operating companies are considering the two alternatives of a traditional IPO versus a de-SPAC, the operating company may consider this layer of additional compliance cost prohibitively expensive as it could reduce the amount of cash available for the operating company to execute its business plan (because transaction costs in a de-SPAC directly reduce the cash that goes to the new public company at closing). This will substantially disadvantage the de-SPAC alternative, which would be detrimental to private companies for which a de-SPAC would otherwise be the best route to becoming a public issuer, all while providing little benefit to public SPAC stockholders.

Proposed Item 1606(a) does not articulate a workable fairness standard

Historically, fairness opinions have not been obtained in de-SPAC transactions, except in certain situations where the SPAC sponsor or management team is affiliated with the target company. While Proposed Item 1606(a) does not, on its face, require a SPAC to obtain a fairness opinion in connection with making the proposed fairness statement, the fairness statement proposed by the Commission in Item 1606(a) is unprecedented in its breadth, purporting to require the SPAC board of directors (and therefore, the financial advisor providing the underlying opinion) to opine as to the fairness of the de-SPAC transaction *and any related financing transactions* to the "unaffiliated stockholders." It is unclear whether it will be possible or feasible to obtain such an atypical and broad opinion from a third-party advisor, and the inability to obtain such an opinion (even for transactions that would otherwise be beneficial to SPAC stockholders) would further chill the market for de-SPAC transactions and reduce access to public market capital for private companies.

Enhanced Projections Disclosure

In further contrast to the IPO disclosure requirements, the Proposals also would mandate disclosure of the material factors upon which its belief of fairness is based (e.g., valuation of the target/financial projections) as well as whether a report or opinion was obtained from an outside party. Projections are not typically disclosed in an IPO prospectus, however, this proposal in conjunction with the fairness proposal appears to suggest disclosure of projections used as part of a fairness analysis and by a SPAC board in considering whether to pursue the transaction. We believe that disclosures should be limited to projections that are actually used by the board in determining whether to pursue a transaction. As proposed, the enhanced disclosure requirement could require boards to disclose projections that were not relied upon in determining the fairness of any particular transaction.

The fairness standard proposed by the SEC is novel across not just IPOs, but any type of transaction, and its ambiguous application makes it difficult for market participants to assess how to comply with the rule. Because of this uncertainty, directors will be faced with difficult decisions as to whether to forgo the use of projections and those decisions may be further influenced by boards whether there is a need to receive and analyze projections from target companies in order to evaluate potential transactions and otherwise to comply with state law.

The increased transaction costs of complying with the Proposals will be dilutive to stockholders

As noted above, the Proposals, if implemented, will have a dilutive effect on stockholders. Compliance with the Proposals will increase significantly the transaction expenses

required to consummate a de-SPAC transaction. In addition to increased legal costs, the fees incurred obtaining a fairness opinion from an investment bank will be borne wholly by stockholders. Given the potential for increased risk of liability to boards, we also expect D&O liability insurance premiums to increase significantly, further diluting the value of the transaction to stockholders.

Moreover, the Proposals may have the indirect effect of limiting avenues to capital markets. To the extent the Proposals increase costs, burdens and potential liability associated with compliance, market participants may be less likely to pursue de-SPAC transactions, even when they otherwise would make financial sense for participants and potential stockholders.

Proposed Safe Harbor Under Investment Company Act

The Commission has proposed new Rule 3a-10 under the Investment Company Act of 1940 ("1940 Act") to provide a non-exclusive safe harbor for SPACs from the definition of "investment company" under Section 3(a)(1)(A) of the 1940 Act if the SPAC satisfies certain requirements with respect to (i) the nature and management of its assets, (ii) certain of its operating activities and (iii) the timeframes in which it enters into an agreement with a Target to engage in a de-SPAC transaction and completes the de-SPAC transaction (the "Timing Requirements").

We support the Commission's goal of facilitating the ability of SPACs to raise capital without the specter of strike lawsuits claiming they are investment companies required to be regulated under the 1940 Act. Consequently, we support the formation of a non-exclusive safe harbor from the definition of "investment company" for SPACs. The Timing Requirements, however, are unnecessarily restrictive and would frustrate the goal of facilitating the formation of capital by SPACs while providing no benefit.

A SPAC is a special purpose company that raises money from investors with the primary purpose of completing a de-SPAC transaction with one or more Targets (i.e., companies that are not "investment companies" as defined in the 1940 Act) within a finite period of time, resulting in a publicly listed company that is not an "investment company" as defined in the 1940 Act. From the time a SPAC completes its initial public offering until it either completes its de-SPAC transaction or it liquidates, its assets consist of "Government securities"[7] or shares of money market funds. SPAC's are not "primarily engaged in the business" of "investing, reinvesting or trading" in securities, as is evidenced by the fact that investors do not acquire SPACs for a return on the securities owned by the SPAC. Rather, investors acquire SPACs for the opportunity to participate in the de-SPAC transaction and to own securities issued by the resulting publicly traded operating business.

Many of the conditions of proposed Rule 3a-10 purport to identify those features of a typical SPAC that indicate the SPAC's primary business is seeking to engage in a de-SPAC transaction, and that its primary business is not to provide a return to its shareholders from its ownership of Government securities and shares of money market funds. The Timing

[7] Defined in Section 2(a)(16) of the 1940 Act to mean any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

Requirements of the proposed rule, however, would require a SPAC seeking to rely on the safe harbor to enter into an agreement for a de-SPAC transaction within 18 months after the effective date of the registration statement relating to its initial public offering and to complete its de-SPAC transaction within 24 months of the effective date of such registration statement. Rule 3a-10 as proposed does not permit a SPAC seeking to rely on the safe harbor to seek an extension of these deadlines from its shareholders.

The Commission acknowledges in the Release that the Timing Requirements are shorter than the initial two-year time period typical SPACs historically have had to complete a de-SPAC transaction and shorter than the three-year time period in which SPACs are required to complete a de-SPAC transaction under applicable listing requirements of the national securities exchanges.[8] The timeframes included in proposed Rule 3a-10:

- will shorten the time periods historically afforded SPACs to find and complete de-SPAC transactions;
- will harm the SPAC market and SPAC investors; and
- are unnecessary to achieve the Commission's expressed goal of ensuring investors do not view SPACs as fund-like investments.

As a result, we recommend the Commission revise the Timing Requirements to conform to the timeframes historically afforded typical SPACs to complete a de-SPAC transaction. Specifically, we recommend the safe harbor provide:

- an initial period of up to two years for a SPAC to complete a de-SPAC transaction; and
- an ability to extend the initial period with the approval of a majority of the SPAC's outstanding shares for an additional period that, when combined with the initial period, will not exceed three years from the SPAC's initial public offering.

Typical SPACs historically have been afforded an initial period of up two years to complete a de-SPAC transaction and were not subject to a shorter deadline by which the SPAC was required to enter an agreement for the de-SPAC transaction.[9] In addition, a significant number of SPACs historically have provided they may seek an extension of their initial period if approved by shareholders and, even if such a provision was not expressly disclosed in a SPAC's registration statement, the SPAC had the ability to seek such an extension from shareholders and they sometimes did so.[10] The outside deadline by which a typical SPAC historically has been required to complete a de-SPAC transaction was limited to three years by stock exchange listing requirements.[11] These timeframes that have evolved from a combination of market forces and

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[8] *See* the Release at pages 155-156, at n. 350 and accompanying text.

[9] *See* the Release at page 206. All 152 SPAC IPOs between January 1, 2016 and December 31, 2019 disclosed in their IPO prospectus that they would be limited to a 24-month lifespan or less.

[10] *See* the Release at page 206. In around 14% of the SPAC IPOs in 2016-2019, there was disclosure in the IPO prospectus about a pre-commitment to hold a vote on an optional extension period ranging from three to 24 months.

[11] *See*, *e.g.,* Nasdaq Rule IM-5101-2.

(cont'd)

the stock exchange listing requirements should be adopted by the Commission for the safe harbor, because they are proven to have permitted SPACs to play an important role in capital formation without creating a concern that investors perceive SPACs as fund-like investments.

Since 2003, over 1,300 SPACs have completed initial public offerings in the United States that, in the aggregate, raised more than $300 billion in proceeds.[12] In 2020 and 2021, SPAC offerings represented 46% and 49%, respectively, of all initial public offerings in the United States.[13] Since 2003, more than 500 SPACs have completed de-SPAC transactions worth more than $126 billion.[14] SPACs clearly have become an important means of capital formation in the United States.

The Commission's staff reviewed and declared effective each initial registration statement and any proxy statement/prospectus used in connection with a de-SPAC transaction by each of the SPACs in the prior paragraph. Further, in response to recent strike suits against SPACs and their sponsors claiming that SPACs are investment companies, more than 60 of the nation's leading law firms signed and published a letter asserting that such claims are without factual or legal basis.[15] In addition, there is no credible evidence that investors acquired typical SPACs for the primary purpose of profiting from the SPAC's securities portfolio instead of seeking to invest in the operating business resulting from a de-SPAC transaction, provided such SPACs were operated in a way that generally would have satisfied the Asset Requirements and the Operating Requirements. Similarly, there is no credible evidence that investors acquired typical SPACs for use as a cash management product the way direct investments in Government securities and government money market funds are used.

Despite the lack of evidence that the Commission, legal practitioners or the investing public had a concern that a typical SPAC resembled an investment company, proposed Rule 3a-10 would require a SPAC seeking to rely on the safe harbor to enter an agreement for a de-SPAC transaction within 18 months and to complete the transaction within 24 months, with no ability to extend such deadlines. The Release itself notes that, of the 152 SPACs offered between January 1, 2016 and December 31, 2019 for which the Commission had data, only 59% of SPACs had announced an agreement to enter into a de-SPAC transaction within the 18-month deadline proposed for the safe harbor, whereas 88% had announced a transaction no later than 24 months after the SPAC's IPO.[16] Similarly, 65% of such SPACs completed a de-SPAC transaction no later than 24 months after their IPO dates.[17] In other words, the Timing Requirements proposed by the Commission for the safe harbor would exclude approximately one-third of the SPACs for which the Commission has data, even though the Commission has presented no evidence indicating that the traditional timeframes used by SPACs caused investors to think they were investing in "investment companies" as defined in the 1940 Act.

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[12] *See* SPAC Analytics at https://www.spacanalytics.com.

[13] *Id.*

[14] *Id.*

[15] https://www.skadden.com/insights/publications/2021/08/the-nations-leading-law-firms-respond

[16] *See* the Release at 206-207.

[17] *See* the Release at 207.

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The proposed Timing Requirements would adversely affect SPACs and their investors. The Commission notes in the Release that SPACs seeking to comply with the timeframes required by the safe harbor would have less time to find and complete de-SPAC transactions, and that the additional time traditionally afforded SPACs can be valuable.[18] The Release also claims that SPACs may compromise on the quality of the targets they pursue to ensure they can enter into and complete transactions within the required timeframes.[19] Similar to this concern, some industries, such as those that require longer regulatory approvals before a de-SPAC transaction could be closed, may be disproportionally impacted by the required timeframes. The Commission also noted that, to the extent value increasing transactions that could have been completed under the timeframes traditionally afforded to SPACs could not be completed under the safe harbor's proposed timeframes, a cost would be imposed on investors and sponsors.

The Commission has failed to explain in the Release why it is necessary to impose these costs on SPACs and their investors when there is no evidence that the timeframes traditionally afforded typical SPACs caused investors to believe they were investing in an "investment company" as defined in the 1940 Act, or even that SPAC investors thought they were investing in a fund-like venture. In order to satisfy the applicable requirements of the Administrative Procedure Act, the Commission would be required to explain why it is departing from its decades long view that the timeframes typical SPACs traditionally enjoyed to complete de-SPAC transactions did not make SPAC investment companies subject to registration and regulation under the 1940 Act.[20]

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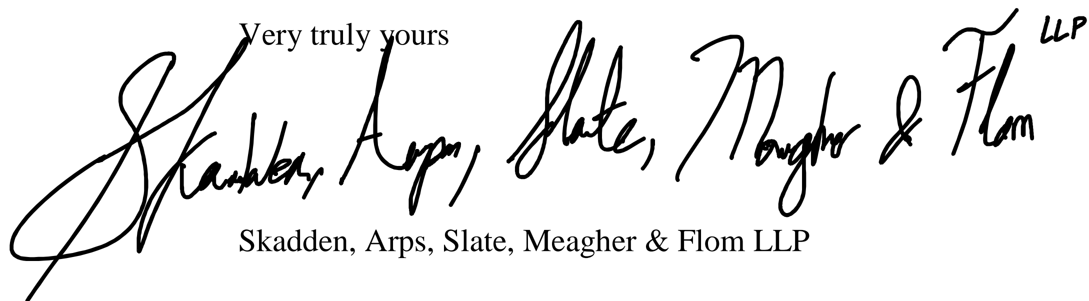
We appreciate the opportunity to submit, and the Commission's consideration of, our comments. We would be happy to provide any additional information you may find useful. We are available to meet and discuss these comments or any questions the Commission and its staff may have. Please do not hesitate to contact Gregg Noel, Howard Ellin, Michael Hoffman, Adrian Deitz and Andrew Brady of this firm.

Very truly yours



Skadden, Arps, Slate, Meagher & Flom LLP

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[18] *See* the Release at page 269.

[19] *See* the Release at page 270.

[20] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal*, 140 S. Ct. 1891, 1913 (2020); and *Goldstein v SEC*, 2006 U.S. App. LEXIS 15760, pages 27 to 31 (D.C. Cir. 2005) (citing *Northpoint Technology, Ltd. v FCC* 366 U.S. App. D.C. 363 (D.C. Cir. 2005)).