June 13, 2022

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: RIN 3235–AM90, Special Purpose Acquisition Companies, Shell Companies, and Projections

Chair Gensler,

Job Creators Network submits this comment on the Securities and Exchange Commission's ("the SEC") Proposed Rule on "Special Purpose Acquisition Companies, Shell Companies, and Projections" (the "SPAC proposal") published in the Federal Register on May 13, 2022, at 87 Fed. Reg. 29,458.

Job Creators Network is a nonpartisan membership organization whose mission is to educate employees of Main Street America and protect the 85 million people who depend on the success of small businesses.

Job Creators Network fights on behalf of its members to defeat government regulations that harm small businesses, including through litigation in the courts if necessary. For example, Job Creators Network was the very first party to seek review at the U.S. Supreme Court when the Department of Labor imposed an illegal COVID-19 vaccine mandate for small businesses across America. *See Job Creators Network v. Dep't of Labor*, No. 21A243 (U.S. Dec. 20, 2021). The Supreme Court agreed with Job Creators Network and held that the vaccine mandate was illegal. *See NFIB v. Dep't of Labor*, 142 S. Ct. 661 (2022).

The SPAC Proposal claims it is "intended to enhance investor protections" in SPACs, 87 Fed. Reg. at 29,458, but in reality it will destroy the domestic market for SPACs, which provide small businesses with meaningful access to capital that otherwise is reserved only for big corporations and IPOs. The SPAC Proposal will drive small-business capital overseas and away from American investors, causing lost jobs, lost production, and lost entrepreneurship—all at a time of rampant inflation and supply shortages.

As demonstrated in detail below, the SEC should immediately withdraw the SPAC Proposal, which is illegal, internally inconsistent, and arbitrary and capricious.

I. SPACs Provide Tremendous Benefits to Capital Formation, Competition, and Efficiency.

Smaller businesses cannot realistically obtain traditional IPO backing from large banks like Goldman Sachs and CitiBank, which do not view the transactions as sufficiently profitable. As a result, big companies can lock out smaller companies—who are not just potential competition but also independent job creators—merely by having access to public markets that the smaller companies cannot access. Smaller businesses would struggle to obtain funding, provide jobs, and compete with the bigger companies. Everyone loses, except the big corporations.

But the recent increase in SPACs has helped level the playing field by revealing those shortcomings with the traditional IPO process. Using SPACs, smaller companies can much more easily obtain access to capital and grow into bigger businesses that provide jobs, increase competition, and improve overall economic efficiencies. SPACs democratize IPOs: going public is not reserved for just the billion-dollar corporations.

Retail investors also benefit from being able to invest in SPACs. These are investments with excellent growth potential that investors otherwise would be unable to access. Without SPACs, if the smaller businesses could obtain backing at all, it would be through private funding, which is not only at a higher cost but also unavailable to retail investors.

There also is no evidence that SPACs have been unable to regulate themselves. SPAC terms have generally become more investor-friendly than they were in 2020 and early 2021.[1]

II. The SPAC Proposal is Designed to Essentially Eliminate SPACs and Is Illegal in Numerous Respects.

The SEC has no statutory power to decide that SPACs are good or bad. Yet, as demonstrated in detail below, the SPAC Proposal is obviously designed to snuff out

[1] *See, e.g., 2022 WilmerHale M&A Report* at 12, https://www.wilmerhale.com/en/insights/publications/2022-manda-report (explaining how SPAC terms "have generally become more investor-friendly than they were in 2020 and early 2021"); Chris Metinko, *As SPACs Slow, Terms Change and the Market Widens for Targets*, Crunchbase News (July 29, 2021), https://news.crunchbase.com/news/as-spacs-slow-terms-change-and-the-market-widens-for-targets/; Preston Brewer, *Analysis: SPAC Deal Terms & IPO Market Are Changing Fast*, Bloomberg Law (Aug. 6, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-spac-deal-terms-ipo-market-are-changing-fast.

the previously flourishing SPAC market. As one group of experts put it: "[T]he SEC is effectively seeking to act as a merit regulator and prohibit certain activity." DavisPolk, *SEC Proposes New SPAC Rules that Are Expected to Significantly Reduce SPAC Activity*, https://www.davispolk.com/insights/client-update/sec-proposes-new-spac-rules-are-expected-significantly-reduce-spac-activity. The SEC has no statutory power to pick winning and losing investments, and it certainly cannot do so through the backdoor of "disclosure" and "regulatory" requirements.

By effectively eliminating SPACs, the SPAC Proposal will lead to capital flight to overseas markets that allow for freer investment in and creation of SPACs. This effect is hardly speculative. After the SPAC Proposal was issued, the domestic SPAC market dried up, as noted below. If the SPAC Proposal is finalized, it will effectively kill the domestic SPAC market, to the great detriment of American investors, entrepreneurs, and employees.

These negative effects themselves warrant rejection of the SPAC Proposal as arbitrary and capricious. They also demonstrate the Proposal's illegality under the SEC's statutory authorities.

A. The SPAC Proposal Does Not "Promote Efficiency, Competition, and Capital Formation."

By essentially shutting down an entire market through the guise of regulation, the SPAC Proposal violates the statutory requirement that SEC regulations "promote efficiency, competition, and capital formation." 15 U.S.C. §§ 77b(b), 78c(f), 78w(a)(2). For example:

The SPAC Proposal would require SPACs to opine on the fairness of the de-SPAC transaction and any related financing transaction. This is a "substantial departure from existing SPAC M&A practice." Weil, Gotshal & Manges, *SEC Proposes Broad Changes for SPACs and De-SPACs* at 2, https://www.weil.com/-/media/files/pdfs/2022/april/sec-proposes-broad-changes-for-spacs-and-despacs.pdf. Although technically not requiring a formal outside fairness opinion, industry experts have already concluded that "the likely, practical outcome of the Proposal" will be to require the preparation of such opinions. Gibson Dunn, *SEC Proposes Rules to Align SPACs More Closely with IPOs* at 3, https://www.gibsondunn.com/wp-content/uploads/2022/04/sec-proposes-rules-to-align-spacs-more-closely-with-ipos.pdf; *see* Weil, Gotshal & Manges, *supra*, at 3 (same). But only 15% of SPACs prepare such statements, compared to 85% of traditional mergers and acquisitions. Gibson Dunn at 3. Even giving the benefit of the doubt that some SPACs may decide to comply with a new opinion-preparation requirement, the end result will undoubtedly be a dramatic reduction in the availability of SPACs.

The SPAC Proposal would eliminate the PSLRA safe harbor for forward-looking statements by SPACs. Industry experts have already demonstrated that this will "effectively eliminate the de-SPAC transaction as an alternative for target companies that do not have a lengthy operating history." Gibson Dunn, *supra*, at 7; *see* Weil, Gotshal & Manges, *supra*, at 2 (noting that this would be an "immediate practical effect" of the SPAC Proposal). This is designed to be a kill shot aimed at SPACs, which of course have been around for decades but traditionally focus precisely on taking public those companies without "a lengthy operating history." Not only does this proposal crush capital formation and competition by preventing more companies from growing, but it is illegal for the additional reason that, as explained below, the mechanism by which the SPAC Proposal seeks to eliminate the safe harbor would be contrary to the relevant statute.

The SPAC Proposal would greatly expand underwriter liability on SPAC IPO underwriters. The SPAC Proposal does this by deeming them to be underwriters at the de-SPAC stage if they "participate (directly or indirectly) in the de-SPAC transaction." This broad and amorphous definition will essentially convert the SPAC underwriters into de-SPAC underwriters. This proposal has already sent "shockwaves through the market," MorrisonFoerster, *SEC Proposes Sweeping Regulations Regarding SPAC and De-SPAC Transactions that Could Have a Chilling Effect on SPACs and Other Market Participants*, https://www.mofo.com/resources/insights/220411-sec-proposes-sweeping-regulations-regarding-spac.html, and will "likely have a chilling effect on [underwriters'] participation in SPAC IPOs," Weil, Gotshal & Manges, *supra*, at 4. For example, if the underwriter assists "in identifying potential target companies" or receives any "compensation in connection with the de-SPAC transaction," the underwriter will be deemed to underwrite the de-SPAC transaction—and thus be liable for the de-SPAC transaction.

SPAC underwriters will do everything possible to avoid being covered by this new rule and thus will change their requirements to the disadvantage of investors. For example, underwriters may "decline to be involved in many de-SPAC transactions" altogether, thereby preventing SPACs from obtaining crucial underwriting. White & Case, *SEC Proposes Rules to Regulate SPACs*, https://www.whitecase.com/publications/alert/sec-proposes-rules-regulate-spacs#. Or underwriters may demand all compensation up front to try and avoid the rule, thereby raising costs for SPACs. In fact, "it was recently reported that one large underwriter of SPAC transactions will stop underwriting SPACs" while the SPAC Proposal remains pending. Weil, Gotshal & Manges, *supra*, at 4. There can be no doubt what will happen if the Proposal is finalized: the SPAC market will dry up.

The SPAC Proposal would require the target company and its officers and directors to be co-registrants on Form S-4 and F-4 filings. This imposes Section 11 liability under the Securities Act on such persons. Again, the purpose of these expansive impositions of liability is clear: eliminate the flexibility and lower costs of SPACs such that they are no longer seen as worthwhile investment vehicles. *See* Gibson Dunn, *supra*, at 8 (noting the obvious "chilling effect" that these requirements will have on "financial institutions' participation in a de-SPAC transaction").

These additional reporting and liability requirements make clear that "SPACs and target companies should expect extensive diligence requests from financial institutions, advisors, and their counsel in connection with a de-SPAC transaction," with the obvious—and intentional—effect of "add[ing] complexity, time, and cost" to the entire process, which of course will lead to a dramatic reduction in SPACs given that their primary investment appeal is their lower cost and flexibility. Gibson Dunn, *supra*, at 8; *see also id.* at 14 (noting the package of changes in the SPAC Proposal will "curtail SPAC flexibility and/or increase the complexity and cost of completing a de-SPAC transaction").

The SPAC Proposal would authorize a faux safe harbor under the Investment Company Act of 1940. To qualify for the proposed safe harbor, the SPAC Proposal would require that SPACs announce a de-SPAC transaction no later than 18 months after the effective date of the SPAC's registration statement and then complete the transaction no later than 24 months after the effective date. But barely half of SPACs meet those deadlines. *See* Hester Peirce dissent n.11, https://www.sec.gov/news/statement/peirce-statement-spac-proposal-033022. And one of the integral benefits of SPACs is that they have flexibility to seek extensions from their shareholders. *See* Gibson Dunn, *supra*, at 3 (noting the proposal would "remove SPACs' flexibility to seek extensions from its shareholders"). There are two likely outcomes: (1) SPACs will "prioritize speed over diligence and quality," to the detriment of investors, White & Case, *supra*; or (2) there will be a dramatic reduction in SPACs that will be able to acquire underwriting and go public. This safe harbor provision is designed to give the appearance of improving SPAC prospects while actually ensuring they either never exist at all, or (if they do exist) they lose their valuable flexibility and investment quality.

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For all of these reasons, the SPAC Proposal is illegal because it does not "promote efficiency, competition, and capital formation." 15 U.S.C. §§ 77b(b), 78c(f), 78w(a)(2).

B. The SPAC Proposal's Elimination of the PSLRA Safe Harbor Violates the Securities Act and the Exchange Act.

As noted above, the SPAC Proposal's proposed elimination of the PSLRA safe harbor will crush competition and stymie capital formation. But it is illegal for another reason: it proposes an unreasonable definition of "blank check company."

The PSLRA generally provides a safe harbor for forward-looking statements, but the safe harbor is not available for "blank check companies." 15 U.S.C. § 78u-5(b)(1). The PSLRA states that the term "blank check company" has "the meaning[] given … by rule or regulation of the Commission," *id.* § 78u-5(i)(5), but of course the SEC does not have carte blanche to define the term however it wants—its proposal must be "reasonable," *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).[2]

The SEC's discretion in defining blank check company is accordingly cabined and informed by other relevant statutory provisions. *See, e.g., Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (for *Chevron* step two, courts look at how Congress "elsewhere defines" the specific term at issue).

In particular, Congress has already defined a blank check company in the Securities Act, and the *only* absolute requirement in that definition is that the company issue "penny stocks." 15 U.S.C. § 77g(b)(3). But the SPAC Proposal would eliminate the penny stock requirement, even though Congress has made clear that that requirement is the core aspect that defines a blank check company. The SPAC Proposal's definition of blank check company is hardly "reasonable" when it eliminates the core of Congress's definition of that term within the same statutory regime, nor is it "consistent with the statute's purpose" to allow the SEC to relabel any entity it chooses as a blank check company by disregarding the core aspect of what makes a blank check company. *Chem. Mfrs. Ass'n v. EPA*, 919 F.2d 158, 163 (D.C. Cir. 1990).

The SPAC Proposal's definition of a blank check company is therefore unlawful, arbitrary, and capricious.

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[2] Indeed, if the SEC had such power, it would violate the nondelegation doctrine by giving the SEC power to make laws without an intelligible limitation announced by Congress. *See, e.g., Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418 (1935); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (Congress, not the agency itself, must be the one to set guardrails to avoid a nondelegation violation).

C. The SPAC Proposal Is Internally Inconsistent.

Further, even on its own terms the SPAC Proposal is internally inconsistent and therefore arbitrary and capricious. The SEC claims that SPACs are like IPOs and thus should be treated the same as IPOs, but—even assuming that is true (and it isn't), the SPAC Proposal would impose "a set of substantive requirements with respect to SPAC business combinations that *go beyond* what would be required in a traditional IPO." DavisPolk, *supra*.

This gives away the game: the SEC is trying to eliminate SPACs, not merely regulate them or provide parity with IPOs. And this internal inconsistency renders the SPAC Proposal arbitrary and capricious. *See Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 879 F.3d 1202, 1214 (D.C. Cir. 2018) ("[I]t would be arbitrary and capricious for the agency's decision making to be 'internally inconsistent.'").

D. There Is (at Best) Mixed Empirical Evidence on the Need for the SPAC Proposal.

The SPAC Proposal also fails to provide a sufficient basis for the SEC to change its tack towards SPACs, which have existed for decades without the need for such oppressive regulation. There is no evidence that SPACs have been unable to regulate themselves. Industry experts have concluded that SPAC terms have generally become more investor-friendly than they were in 2020 and early 2021. *See* fn. 1, *supra*. That is, "the market seemingly has 'self-corrected' and much of the disclosure requirements have already found their way into SPAC SEC filings." White & Case, *supra*.

The SPAC Proposal is therefore a solution (and a bad one, at that) in search of a problem. With (at best) mixed evidence prompting its rulemaking, the SEC's approval of the SPAC Proposal would be arbitrary and capricious under D.C. Circuit precedent, which subjects SEC rulemaking to especially stringent review. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011) ("In view of the admittedly (and at best) 'mixed' empirical evidence, we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.").

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The SPAC Proposal will crush a critical marketplace for small businesses seeking capital. It will drive that capital overseas or onto more expensive private capital markets, making it harder—if not impossible—for smaller businesses to obtain start-up funding, nipping entrepreneurship and job creation in the bud. The

SPAC Proposal is not just terrible policy—it is illegal. The SEC should immediately withdraw the SPAC Proposal.

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