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Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via email to rule-comments@sec.gov

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

Dear Ms. Countryman:

This letter is submitted on behalf of the Securities Regulation Committee of the New York City Bar Association (the “**Committee**”). We are responding to the request of the Securities and Exchange Commission (the “**Commission**”) for comment on its proposed rules regarding special purpose acquisition companies (“**SPACs**”), shell companies and projections (the “**Proposal**” and, any individual proposed rule, a “**Proposed**” rule).¹

The Committee includes a wide range of practitioners whose areas of interest and expertise include securities laws and the regulation of the U.S. capital markets and who are employed by or advise public companies, including both domestic and foreign private issuers. The Committee does

¹ See Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29,458 (May 13, 2022) (the “**Proposing Release**”).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

not represent any client and the views expressed by the Committee are those of the Committee and not necessarily the views of any of its individual members or their respective firms or institutions.

The Committee notes the concerns expressed by other commentators regarding the unusually short comment period for the Proposal and the Commission's unwillingness to extend the comment period for significant rule proposals, consistent with the past practice of the Commission to grant such extensions. These periods are particularly important for commenters, such as the Committee, that seek to provide a balanced and thoughtful comment letter that represents the views of a body of experts in the field.

Our comments focus on four areas of the Proposal: (i) the enhanced disclosures under proposed Subpart 1600 of Regulation S-K; (ii) projections disclosures and the treatment of projections in de-SPAC transactions; (iii) the proposed Rule 140a; and (iv) the proposed safe harbor for SPACs under the Investment Company Act of 1940, as amended (the "**Investment Company Act**").

The Committee does not express support for, or opposition to, other provisions of the Proposal not addressed by our comments.

I. SPAC AND DE-SPAC OVERVIEW

The Proposal imposes additional requirements on a series of transactions, including: (i) the initial public offering of common stock and warrants of the SPAC (the "**SPAC IPO**"); and (ii) the acquisition of a private operating company (the "**Target**") by the SPAC (the "**de-SPAC transaction**"), which typically involves: (a) an offering of the SPAC's securities to the Target shareholders (the "**Offering**"); (b) solicitation of votes of the SPAC's shareholders to approve the merger (the "**Solicitation**"); and (c) optional redemption by SPAC's shareholders (the "**Redemption**").²

These transactions are governed by both the Securities Act of 1933, as amended (the "**Act**") and the Securities Exchange Act of 1934 (the "**Exchange Act**"), as set forth below.

² The Committee acknowledges that, in certain cases, de-SPAC transactions involve the acquisition of the SPAC by the Target, or of both by a newly formed company. To streamline our commentary, we are focusing on the most common structure for de-SPACs – the acquisition of the Target by the SPAC in a reverse triangular merger under Delaware law.

Transaction	Required Securities Act/Exchange Act Disclosures	Investors
SPAC IPO	S-1/F-1	Public investors
De-SPAC Transaction		
<i>Offering</i>	S-4/F-4	Target shareholders
<i>Solicitation</i>	Schedule 14A (included in the S-4/F-4 prospectus)	Public investors (SPAC shareholders)
<i>Redemption</i>	Schedule TO	Public investors (SPAC shareholders)

The Committee understands the Commission’s desire to “treat like cases alike”,³ and we acknowledge a de-SPAC transaction and an IPO are both paths for a private company to obtain an exchange listing and involves a floatation of shares to the public. They are, however, fundamentally different transactions, each of which beneficially provides investors with access to different deal structures and risk profiles within the capital markets.

In a traditional IPO, an issuer typically sells a relatively minor portion of its overall capitalization to public investors. Public investors purchase solely on the basis of information contained in the registration statement. All sales to an investor are made through underwriters, with whom IPO investors negotiate the price and quantity of shares to be purchased.

The de-SPAC transaction “offering” typically involves the issuance of a significant portion (often 80% or more) of the SPAC’s shares to the Target shareholders. These Target shareholders made an initial investment decision in the Target either on the basis of extensive due diligence, in the case of accredited investors in prior private placements, or through their inside knowledge of the company as employees. Individual shareholders do not negotiate the price and quantity of SPAC shares to be received. Rather they are asked for an up or down vote on the transaction. Target investors also have protections of state law, including fiduciary duties of the Target Board and appraisal rights. Non-exhaustively, the contrasting facts and circumstances of de-SPACs and traditional IPOs also include: sponsor involvement, deal economics, the types of investors that participate in each transaction, as well as the fundamental investment opportunity.

II. ENHANCED DISCLOSURES UNDER PROPOSED SUBPART 1600 OF REGULATION S-K

The Committee has limited comment on the Commission’s proposal to add new Subpart 1600 to Regulation S-K to enhance disclosure requirements applicable to SPACs and de-SPAC

³ Chair Gary Gensler, Remarks Before the Healthy Markets Association Conference, U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 9, 2021), https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921#_ftnref1 (all links last accessed June 13, 2022).

transactions and address potentially misleading projections used in de-SPAC transactions. Many of the disclosures to be required under proposed Subpart 1600 have already been adopted in practice and through the review and comment process undertaken by the Division of Corporation Finance within the Commission.

The Committee does have significant concerns, however, as to the proposed requirement that SPACs disclose whether they believe that the de-SPAC transaction and related financing transactions are “fair or unfair to unaffiliated security holders.” The Committee is concerned because this disclosure requirement imposes upon the board of directors or other governing body of the SPAC a new substantive obligation to undertake an analysis of the fairness of the transaction, which the Committee firmly believes to be an issue that is the exclusive purview of the law of the jurisdiction under which the SPAC is organized, the legislatures and courts of which have adopted substantive law as to what governing bodies are required to consider and disclose to shareholders in the context of these transactions. Moreover, this substantive disclosure requirement goes beyond putting de-SPAC transactions on a par with registered initial public offerings or other comparable transactions. As such, the Committee would strike this provision of proposed Item 1604(a) and all of proposed Item 1606.

III. TREATMENT OF PROJECTIONS

The Committee believes the Private Securities Litigation Reform Act (“**PSLRA**”) safe harbor for forward-looking statements should continue to apply to projections that are included in Form S-4s and proxy statements relating to de-SPACs. The Commission has stated that “[f]or purposes of the PSLRA, we see no reason to treat forward-looking statements made in connection with de-SPAC transactions differently than forward-looking statements made in traditional initial public offerings.”⁴ This view ignores the fact that traditional IPOs and de-SPAC transactions are fundamentally different transactions. Financial projections are not required to be included, and are rarely included, in IPO registration statements. On the other hand, both Delaware jurisprudence and the Commission’s staff now require inclusion of management projections in proxy statements and registration statements on Form S-4/F-4 where such projections were relied upon by a board of directors in approving a transaction.

The projections included in the de-SPAC transaction registration statement or proxy statement are not included in order to promote capital formation. In fact, such projections are generally only current as of the date a board of directors approved the execution of the acquisition agreement. Such projections are not typically updated because they are being provided to SPAC shareholders to evaluate the board of directors’ recommendation to approve the de-SPAC transaction, rather than to solicit a new investment. As such, projections are often out of date, or “stale”, by the time the SPAC’s shareholders receive them. Issuers generally include disclosure to the effect that investors should not consider projections to be financial guidance, and investors are generally cautioned not to place undue reliance on such projections.

John Coates, former Acting Director of the Division of Corporation Finance of the Commission, has stated that, “projections are woven into the fabric of business combinations” and

⁴ See 87 Fed. Reg. at 29482.

can be a “key component” in understanding the fairness of a transaction.⁵ The elimination of the PSLRA safe harbor, combined with the Commission’s proposed Rule 140a, may have a chilling effect on the use of projections in de-SPAC transactions, which may preclude investors from receiving information that sponsors and boards of directors rely in part on in connection with valuation determination.

Accordingly, we recommend that the Commission continue to permit SPACs to rely on the PSLRA safe harbor for forward-looking statements.

IV. UNDERWRITER STATUS AND LIABILITY FOR DE-SPAC TRANSACTIONS

The Committee respectfully requests that the Commission reconsider proposed Rule 140a. Proposed Rule 140a would deem any person who has acted as an underwriter in a SPAC IPO (“**SPAC IPO underwriter**”) 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 to be an underwriter with respect to the de-SPAC transaction. The stated purpose of proposed Rule 140a is to motivate underwriters to “exercise the care necessary to help ensure the accuracy of the disclosures in these transactions by affirming that they are subject to Section 11 liability for registered de-SPAC transactions.” The Commission implied that other parties who provide services in connection with the de-SPAC transaction may also be deemed to be underwriters.

The Committee acknowledges and supports the views of SIFMA expressed in its letter addressing the Proposal.⁶ The Committee joins these commentators and others in requesting that the Commission abandon the Rule 140a Proposal and rescind the commentary surrounding such rule in the proposing release. The Committee’s rationale includes the following:

- Rule 140a represents a significant shift in Commission policy;
- Rule 140a could impose underwriter liability greatly in excess of a traditional IPO;
- Rule 140a could have negative unintended consequences for Target shareholders; and
- any Underwriter liability should not extend to financial advisors in registered stock merger transactions.

Rather than adopt Rule 140a as drafted, the Committee recommends that the Commission not adopt Rule 140a, or at a minimum consider an alternate approach for investor protection, as set forth in greater detail below.

⁵ See Acting Director, Division of Corporation Finance, John Coates, SPACs, IPOs and Liability Risk under the Securities Laws U.S SECURITIES AND EXCHANGE COMMISSION (April 8, 2021), <https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws>.

⁶ See SIFMA Letter to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission (June 10, 2022), <https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-on-SECs-SPAC-Proposal.pdf>.

A. Commentary on Proposed Rule 140a

Rule 140a Represents a Significant Shift in Commission Policy. While we understand the Commission’s purpose in enhancing disclosures made in connection with de-SPAC transactions, we believe imposing underwriter liability on de-SPAC transactions will be problematic. Stock-for-stock mergers and acquisitions transactions were not subject to registration under the Act, much less underwriter liability, until the Commission changed its “no sale” position in 1972. Since then, neither the Commission nor Congress has imposed underwriter liability on financial advisors in connection with such transactions, even though financial advisors routinely participate in such transactions and they have been considered “distributions” under Regulation M.

Rule 140a Could Impose Underwriter Liability Greatly in Excess of a Traditional IPO. Underwriters in a typical IPO would have liability for the shares sold in the public offering – typically, approximately 10% of an issuer’s market capitalization. In a de-SPAC transaction, the language of Rule 140a implies that the SPAC IPO underwriters would potentially have liability for almost the entire market capitalization of the combined issuer, despite the fact that the SPAC IPO underwriters play no role in underwriting or distributing shares that constitute the majority of the pro forma market capitalization. For the Commission’s reference, we have provided a hypothetical example of such liability below, in each case assuming the IPO issuer/Target has a \$3.0 billion market cap:

<u>Transaction Type</u>	<u>Registration Statement</u>	<u>Percent of Issuer’s Post-Transaction Capitalization Registered</u>	<u>Dollar Value of Shares Registered</u>
Traditional IPO	S-1	15%	\$450,000,000
SPAC			
SPAC IPO	S-1	80%	\$450,000,000
De-SPAC ⁷	S-4	80%	\$2,100,000,000

As indicated by the above hypothetical, under Rule 140a SPAC IPO underwriters would be subject to underwriter liability for potentially up to \$2.55 billion of securities, an amount which has no correlation to any underwriting activity in connection with a SPAC IPO and subsequent de-SPAC transaction. By providing underwriter liability on the entire enterprise value of the combined SPAC and Target, Rule 140a is wholly inconsistent with the Act’s policy of underwriter liability being proportionate to apportioned risk.⁸

In addition, Form S-4 incorporates disclosures required under Section 14 of the Exchange Act, which are far beyond offering-related disclosures, including projections, summaries of merger discussions, voting recommendations, and other corporate matters. The Committee believes there is no policy rationale for why gatekeeper liability is necessary for such disclosures.

⁷ The hypothetical assumes that SPAC shares are registered on a Form S-4 and delivered to Target Shareholders.

⁸ See Securities Act of 1933 § 11(e).

Rule 140a Could Have Negative Unintended Consequences for Target Shareholders.

The bulk of the substantive disclosures in a de-SPAC registration statement or proxy statement are those of the Target. In addition, the potential underwriter liability for the offering of SPAC shares in the de-SPAC transaction would be to both SPAC investors and the Target investors. Target investors largely consist of founders, accredited investors and employees – these are the classes of investors that would not need the protections of registration if the Target were the issuer.⁹ In addition, Rule 140a would provide SPAC investors, Target founders, board members, sophisticated investors and employees with statutory Section 11 claims against the SPAC IPO underwriters.

The Commission has proposed adding the Target as a co-registrant for Form S-4/F-4 on the basis that it is the private operating company that, “in substance, issues or proposes to issue its securities, as securities of the newly combined public company.”¹⁰ Additionally, the Commission has proposed new Rule 145a to deem any business combination of a reporting shell company involving another entity that is not a shell company to involve a sale of securities to the reporting shell company’s shareholders that requires registration. As discussed above, the result of these proposals would be to provide superfluous protections to existing private company stockholders of the Target, some of whom (e.g. officers and directors who are shareholders) are the specific parties the Act seeks to hold accountable for full and fair disclosures regarding their company in an IPO. Furthermore, it is unnecessary to impose additional liability on the Target’s directors and management in connection with the registration statement because those parties, by virtue of inheriting the disclosures of the registration statement and the ongoing disclosure obligations of the combined public company, will have Exchange Act liability going forward and with respect to historical disclosures as a result of the business combination.

To the extent the Commission believes gatekeeper liability is necessary for de-SPAC transactions, the Committee recommends that the SPAC IPO investors, whether such investors purchased in the IPO or on the open market, are the stockholders who need protection. Instead, the proposals, as structured, would provide additional protection to Target stockholders, who are either founders, accredited investors or employees of the target issuer, who do not need additional gatekeeper protection.

Any Underwriter Liability Should Not Extend Beyond SPAC IPO Underwriters. In addition, the Committee strongly urges the SEC to limit any underwriter liability to the SPAC IPO underwriters. Other advisors to either the SPAC or Target in connection with the de-SPAC transaction play discrete roles in connection with the negotiation of the transaction, and are not in a position to be a disclosure gatekeeper. The ambiguity in the Commission’s commentary around Rule 140a leaves open the possibility of underwriter liability for financial advisors in *all* stock mergers, not just de-SPAC transactions. This may reduce the boards of directors’ ability to obtain financial advice for stock merger transactions and, as a result, make the registered stock merger transaction structure prohibitive.

⁹ See *SEC v. Ralston Purina*, 346 U.S. 119 (1953).

¹⁰ See 87 Fed. Reg. at 29479.

B. Alternative Recommendation

The Committee recommends the Commission consider alternatives to Rule 140a. One such alternative would be to require a SPAC to file a Current Report under the Exchange Act upon announcement of a signed agreement to consummate a de-SPAC Transaction.¹¹ Such filing would include Target company disclosures, including:

- historical Target financial statements and pro-forma financial statements (but not projections or other forward-looking financial or operating metrics);
- Target’s management’s discussion and analysis of financial condition and results of operations;
- a description of Target’s business; and
- risk factors applying to the Target.

Such an alternative would harmonize with current rules regarding blank check companies,¹² rather than create a new, and potentially problematic, liability regime that is at odds with the current statutory framework of the Act. This would also have the benefit of harmonizing disclosure processes regarding de-SPAC transactions across numerous potential transaction structures – some of which would not require a registration statement.

V. POTENTIAL SAFE HARBOR UNDER THE INVESTMENT COMPANY ACT

The Committee understands the need and desire to add clarity to the status of SPACs with respect to the Investment Company Act, through proposed Rule 3a-10 safe harbor. The Committee does not believe a safe harbor is necessary. The Committee shares the view of 49 law firms who recently published a letter with the view that SPACs are not investment companies.¹³ In addition, although proposed Rule 3a-10 is presented as a safe harbor, the practical effect of the safe harbor

¹¹ In the alternative, the Commission could require a post-effective amendment to the SPAC IPO registration statement.

¹² Rule 419 under the Act sets forth requirements applicable to initial public offerings by blank check companies. The primary features of Rule 419 are:

- after the blank check company IPO, proceeds and the securities to be issued are placed in escrow pending an acquisition;
- upon execution of an acquisition agreement, the blank check company must file a post-effective amendment to its IPO registration statement to add disclosures of the target; and
- investors have a period of time prior to the consummation of the acquisition during which they may elect to remain an investor in the blank check company.

The Committee notes that the features of Rule 419 are focused solely on the protection of investors in the blank check offering.

¹³ See 49 of the Nation’s Leading Law Firms Respond to Investment Company Act Lawsuits Targeting the SPAC Industry. The letter stated the law firms’ view that “the assertion that SPACs are investment companies as without factual or legal basis and believe that a SPAC is not an investment company under the 1940 Act if it (i) follows its stated business plan of seeking to identify and engage in a business combination with one or more operating companies within a specified period of time and (ii) holds short-term treasuries and qualifying money market funds in its trust account pending completion of its initial business combination.”

may be to create an additional substantive requirement for SPACs. In particular, the Committee believes Rule 3a-10's time limitation for use of the proceeds of the SPAC IPO, if followed by practitioners as rule, would harm investors by impairing the strategic flexibility of SPAC sponsors to identify, negotiate and close value accretive transactions.

* * *

We thank you for the opportunity to comment on this important Commission initiative. Members of our Committee would be happy to discuss any aspect of this letter with the Commission staff.

Respectfully submitted,



Rod Miller
Chair
Securities Regulation Committee
New York City Bar Association