

# Managed Funds Association

The Voice of the Global Alternative Investment Industry

Washington, D.C. | New York | Brussels



December 6, 2022

## Via Electronic Submission:

Internal Revenue Service  
CC:PA:LPD:PR (Notice 2022-21)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

### Re: Excise Tax on Repurchase of Corporate Stock; SPACs

Managed Funds Association<sup>1</sup> (“MFA”) appreciates the opportunity to submit additional recommendations for items to be included on the 2022-2023 Priority Guidance Plan to the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”). We respectfully urge you to issue guidance under Section 4501,<sup>2</sup> clarifying that the excise tax on the repurchase of corporate stock (“Excise Tax”) does not apply to any redemption of stock over the course of the life of a special purpose acquisition company (“SPAC”).

Specifically, we request that Treasury and the IRS issue guidance, as soon as practicable, that announces that Treasury and the IRS intend to issue proposed regulations to clarify that the Excise Tax does not apply to any redemption of stock by a SPAC that is or may become a “covered corporation,” including in connection with its initial business combination, or “de-SPAC” transaction, or the winding up and liquidation of a SPAC if a target is not identified within the term of the SPAC.

We are concerned that, without such clarification, the unintended scope of the Excise Tax may negatively impact shareholders and investors and materially weaken the viability of the SPAC model going forward. On its face, the Excise Tax may apply to repurchases of the stock of redeeming shareholders, including both dissenting shareholders exercising their redemption rights after announcement of a target and all public shareholders in the event a target is not identified within the term of the SPAC.<sup>3</sup> The Excise

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<sup>1</sup> Managed Funds Association (“MFA”) represents the global hedge fund and alternative asset management industry and its investors by advocating for regulatory, tax, and other public policies that foster efficient, transparent, and fair capital markets. MFA’s more than 150 member firms collectively manage nearly \$2.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, Brussels, London, and Asia. [www.managedfunds.org](http://www.managedfunds.org).

<sup>2</sup> Unless otherwise indicated, all “section” or “§” references are to the Internal Revenue Code of 1986, as amended (the “Code”), or the Treasury Regulations promulgated thereunder.

<sup>3</sup> If a de-SPAC transaction is approved and consummated, public shareholders voting against the transaction have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the trust account *net of certain income and franchise taxes* and, if permitted under the SPAC’s constitutive documents, working capital disbursements. See, e.g., NYSE Listed Company Manual Section 102.06(b); Nasdaq Listing Rule IM-5101-2(d); NYSE American Company Guide Section 119(d).

Please note that public shareholders may often vote for a de-SPAC transaction but still elect to redeem their shares—redemption rights are not conditioned on voting against the transaction.

If a shareholder vote on a de-SPAC transaction is not held, the SPAC must provide all shareholders with the opportunity to redeem all their shares for cash equal to their pro rata share of the aggregate amount then in the trust account *net of certain*

Tax may also apply to de-SPAC transactions, paid out of capital necessary to complete a business combination.

Our members are active investors in SPACs, and we believe that SPACs can provide an important option for firms looking to access the public markets and for retail and institutional investors alike to invest in firms that would otherwise be privately held. A key feature of and appeal to investments in SPACs is that investors have the right to redeem their shares and be repaid in an amount equal to their original investment, less a pro rata share of certain income and franchise taxes paid.<sup>4</sup> The Excise Tax may jeopardize this fundamental value proposition—that redeeming shareholders are generally able to recoup their original investment without any real economic gain or loss—and SPACs may experience difficulty finding sources of capital to consummate business combinations as a result.

Congress intended, in enacting the Excise Tax, to discourage publicly traded corporations from engaging in stock buybacks that aim to increase share prices and, instead, encourage these corporations to invest in labor and research and development. The Excise Tax was not intended to apply to SPACs; in distinction, redemptions of SPAC shares take place under the terms of the very instruments under which cash came into the company in the first place and are economically distinct from buybacks that are initiated by a public company itself. In fact, SPAC redemptions are initiated by and inure to the benefit of public shareholders. Such redemptions are not intended to increase share prices or divert capital investment in target businesses. Absent guidance, we fear that the Excise Tax is effectively a blunt transfer tax applicable to certain deal structures. Accordingly, we believe that it is sound public policy to exclude SPAC-related redemptions from the Excise Tax.

## I. Introduction

Investors have benefited from greater choice in investment products and access to innovative venture capital- and private equity-backed companies, along with fast-growing early-stage companies, through SPACs, which otherwise would only be available to institutional and high-net worth individual investors. SPACs have provided an avenue for investors, including retail, to gain access to earlier stage businesses, either through investing in the SPAC itself prior to a business combination or through open-market trades after the business combination has been completed. In short, by providing a pathway for earlier stage businesses to become public sooner, SPACs open the door for investors to gain access through the public markets to innovative and potentially rapidly growing operating companies at a much earlier point in their respective life cycles, allowing investors the opportunity to benefit from the continued growth of such businesses before they reach full maturity.

In many cases, SPACs can provide greater certainty regarding deal completion compared to a traditional initial public offering (“IPO”), while still providing similar access to new capital for target businesses. For example, the shareholder approval process for most proposed business combinations typically requires only a majority vote to approve a proposed business combination and is less susceptible to the impact of market fluctuations when compared to the traditional IPO process. The shareholder approval process tends to discourage the use of cash for purely financial restructurings or “cash-out”

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*income and franchise taxes* and, if permitted under the SPAC’s constitutive documents, working capital disbursements, pursuant to Rule 13e-4 [17 C.F.R. § 240.13e-4] and Regulation 14E [17 C.F.R. §§ 240.14e-1-240.14f-1] under the Securities Exchange Act of 1934, which regulate issuer tender offers. See, e.g., NYSE Listed Company Manual Section 102.06(c); Nasdaq Listing Rule IM-5101-2(e); NYSE American Company Guide Section 119(e).

<sup>4</sup> There is some legal uncertainty as to whether the Excise Tax may be out of scope of a SPAC’s constitutive documents’ and trust agreement’s definition of “taxes,” in which case a SPAC may face a liquidity issue with respect to the liability.

recapitalizations. Rather, the proposed use of such cash is regularly focused on growth and expansion of the proposed target business. SPAC business combinations often involve a concurrent infusion of additional capital from institutional investors, made possible by the publicly traded nature of the company post-business combination. As a result, SPACs provide operating businesses with a clearer path to becoming public than a traditional IPO, while still providing access to growth capital for those businesses.

In part due to the benefits inherent in its structure, SPACs have been used frequently by operating businesses within the environmental, social and governance (“ESG”) space to both become publicly traded and to gain access to additional growth capital. In particular, of the 292 SPAC business combinations announced between January 1, 2020 and August 27, 2021, 65 had ESG-related themes, representing roughly 22% of all SPAC business combinations during that period.<sup>5</sup> The average return on completed ESG-themed SPAC mergers during that period was about 18 times that of non-ESG SPAC mergers.<sup>6</sup> Many of these ESG-related SPAC target businesses were focused on technologies relating to climate change, including renewable energy companies and electric vehicle and battery makers.<sup>7</sup> As a result, ESG-focused SPACs have helped to accelerate business innovation and advance societal sustainability goals by providing growth capital to ESG-related operating companies.<sup>8</sup> Unlike traditional IPOs, SPAC business combinations can presently utilize future projections, making them an attractive option for operating businesses that primarily focus on environmental and social change. Given the greater uncertainty of the traditional IPO process, many of these ESG-focused businesses likely would have foregone going public (but for the alternative path provided by SPACs) and the availability of public capital that encourages faster growth in businesses that provide important long-term benefits to the economy and society.

## II. Excise Tax on Repurchase of Corporate Stock

### a. Overview

On August 16, 2022, the Inflation Reduction Act of 2022 was enacted, which includes the new 1% nondeductible Excise Tax on the fair market value of stock repurchased by certain publicly traded corporations after December 31, 2022.<sup>9</sup> Specifically, the Excise Tax applies to repurchases of stock by publicly traded domestic corporations (including certain publicly traded inverted foreign corporations treated as “covered surrogate foreign corporations”)<sup>10</sup> and domestic subsidiaries of publicly traded foreign corporations. Corporations subject to the Excise Tax are allowed to net certain stock issuances against stock repurchases before applying the Excise Tax (the “Netting Rule”).<sup>11</sup>

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<sup>5</sup> See KPMG SPAC Intel Hub, *SPAC insights: ESG and SPACs*, KPMG LLP (2021), <https://advisory.kpmg.us/content/dam/advisory/en/images/2021/spac-esg.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Based on information sourced from public filings with the Securities and Exchange Commission (“SEC”), SPAC mergers have raised roughly \$31.4 billion for the ESG space since 2019. As of May 2, 2022, there were 11 ESG-related SPAC mergers that were announced and pending close which represent roughly \$6.3 billion of capital.

<sup>9</sup> H.R. 5376, 117th Cong. § 10201 (2d. Sess. 2022) (enacted).

<sup>10</sup> See Sections 4501(d)(2), (d)(3)(B) & 7874(a)(2)(B). Section 4501(d)(3)(B) modifies Section 7874(a)(2)(B) such that the Excise Tax only applies to domestic corporations that have entered into or will enter into an inversion transaction after September 20, 2021, the date on which the Stock Buyback Accountability Act of 2021, S. 2758, 117th Cong. (1st Sess. 2021), was introduced.

<sup>11</sup> Section 4501(c)(3).

The Excise Tax is imposed on the “repurchase” of any stock of a covered corporation by the covered corporation or its “specified affiliates.” A “repurchase” occurs when a corporation (or its specified affiliate) redeems or otherwise acquires the corporation’s stock from a shareholder in exchange for property (other than its own stock or rights to acquire its own stock).<sup>12</sup> Treasury and the IRS may determine that certain transactions are economically similar to redemptions and will be subject to the Excise Tax.<sup>13</sup>

The amount of the Excise Tax is determined based on the fair market value of all of the stock repurchased (or treated as repurchased) by a covered corporation during a taxable year.<sup>14</sup> Under the Netting Rule, such amount is then reduced by the fair market value of any stock issued by the covered corporation during such taxable year, including any stock issued or provided to employees and any stock issued upon the exercise of an option.<sup>15</sup>

The Excise Tax does not apply in the following circumstances:

1. To the extent that the repurchase is part of a “reorganization” within the meaning of Section 368(a) and no gain or loss is recognized on such repurchase by the shareholder;<sup>16</sup>
2. If the repurchased stock (or value of the repurchased stock) is contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan;
3. If the value of the repurchased stock in the taxable year does not exceed \$1 million;<sup>17</sup>
4. If the repurchase is by a dealer in securities in the ordinary course of business;
5. Stock repurchases by registered investment companies or real estate investment trusts; or
6. To the extent that the repurchase is treated as a dividend for tax purposes.<sup>18</sup>

The statute instructs Treasury and the IRS to provide regulations and other guidance as are necessary or appropriate to carry out, and to prevent the abuse or avoidance of, the purpose of the Excise Tax.<sup>19</sup>

*b. Application to SPACs*

The Excise Tax may apply to redemptions of stock over the course of the life of a SPAC that is or may become a covered corporation, including in connection with its de-SPAC transaction. The Excise Tax

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<sup>12</sup> Section 4501(c)(1)(A) (defining “repurchase” as a redemption within the meaning of Section 317(b) with regard to the stock of a covered corporation).

<sup>13</sup> Section 4501(c)(1)(B).

<sup>14</sup> Section 4501(a).

<sup>15</sup> Section 4501(c)(3).

<sup>16</sup> There is some uncertainty as to whether this exception is an all-or-nothing rule under which any amount of taxable gain recognized by a shareholder would prevent the exception from applying to shares acquired from that shareholder. We believe that the better reading of this exception is a more limited rule under which shares that are acquired in a Section 368 reorganization are excepted *to the extent that* gain or loss is not recognized by the shareholder, *i.e.*, except to the extent of taxable “boot.” The use of the phrase “*to the extent that*” (as opposed to the use of the phrase “*in any case*” in other exceptions) supports such reading.

<sup>17</sup> There is some uncertainty as to whether this exception applies with respect to *gross* (*i.e.*, before the other adjustments) or *net* (*i.e.*, after the other adjustments) repurchases. We believe that the better reading of this exception is that it applies after the other adjustments, which would give full effect to the Netting Rule. If, for example, a covered corporation repurchased shares and contributed some of those shares to an employer-sponsored retirement plan, then the Excise Tax should be triggered only if the fair market value of the repurchased shares less the fair market value of the contributed shares was greater than \$1 million, and the full amount would be taxable, not just the fair market value of the *net* repurchased shares in excess of \$1 million.

<sup>18</sup> Section 4501(e)(1)-(6).

<sup>19</sup> Section 4501(f).

may also apply to foreign-incorporated SPACs that will re-domesticate in connection with planned de-SPAC transactions. The Excise Tax on de-SPAC-related redemptions may be reduced by the issuance of SPAC shares in the SPAC IPO or in connection with any private investment in public equity (“PIPE”) investment, warrant exercises, or issuances to target shareholders or sponsors, but only if such issuances occur in the same taxable year as the redemptions. Issuances to PIPE investors, for example, often take place contemporaneously with the de-SPAC transaction and would be expected to reduce the amount of the Excise Tax. However, SPACs may experience high rates of redemptions and difficulty finding PIPE investors in difficult market conditions,<sup>20</sup> which could cause the amount of redemptions subject to the Excise Tax without offset from other issuances to be material.<sup>21</sup>

Although Section 4501(e)(1) provides an exception from the Excise Tax to the extent that the repurchase is both part of a “reorganization” within the meaning of Section 368(a) and no gain or loss is recognized, this exception is not expected to apply to the extent that a party to the reorganization receives cash or other property (*i.e.*, “boot”) in addition to stock of the SPAC (and the receipt of boot is not treated as a dividend). In other words, if the redemption of target shareholders’ stock in a de-SPAC transaction is treated as a sale or exchange, rather than a dividend, target shareholders would recognize capital gain or loss, and the redemption may not qualify in full for the “reorganization” exception.

When a SPAC acquires the stock of a target business in a partially tax-free acquisitive merger pursuant to which the shareholders of the target business exchange their shares in part for shares of the SPAC and in part for cash, the transaction is generally treated as if first, all target shareholders exchanged their target stock solely for stock of the SPAC and then, the SPAC redeemed a portion of the stock received by target shareholders for cash.<sup>22</sup> The second leg of this transaction is expected to be a redemption, treated as a sale or exchange, for tax purposes because the deemed redemption of stock received by target shareholders for cash is “substantially disproportionate” or “not essentially equivalent to a dividend” with respect to target shareholders under rules excepting such redemptions from dividend treatment.<sup>23</sup>

The Excise Tax may also apply in connection with the winding up and liquidation of a SPAC if a target is not identified within the term of the SPAC or pursuant to a SPAC proxy solicitation. Absent guidance, it is unclear whether a distribution of property in whole or partial dissolution or liquidation of a covered corporation may be subject to the Excise Tax.<sup>24</sup> The broad statutory definition of “repurchase,” and the accompanying grant of authority to Treasury and the IRS to subject transactions that are economically similar to a “repurchase” to the Excise Tax, threatens to scope in SPAC liquidations. SPAC liquidations typically occur 18 to 24 months, but up to 36 months,<sup>25</sup> out from a SPAC IPO and likely would not enjoy the benefit of issuances which may reduce the amount of the Excise Tax.

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<sup>20</sup> See Roger E. Barton, *High redemption rates see SPACs relying on alternative financing*, REUTERS (Jan. 14, 2022), <https://www.reuters.com/legal/transactional/high-redemption-rates-see-spacs-relying-alternative-financing-2022-01-14/>.

<sup>21</sup> De-SPAC transactions that utilize an “Up-C” structure or that are structured such that the SPAC is the “target” (including “double-dummy” transactions) may involve limited offsetting issuances as such structures typically do not involve the issuance of material amounts of equity consideration.

<sup>22</sup> Section 356(a); *Comm'r v. Clarke*, 489 U.S. 726 (1989); Rev. Rul. 93-61, 1993-2 C.B. 118.

<sup>23</sup> See Section 302(b).

<sup>24</sup> There is some uncertainty as to whether the Excise Tax applies to SPAC liquidations and may depend on whether the redemptions are structured as liquidating distributions that are not considered repurchases for purposes of the Excise Tax.

<sup>25</sup> Exchanges generally require that within three years, for NYSE, or 36 months, for Nasdaq and NYSE American, of the effectiveness of a SPAC IPO registration statement (or such shorter period specified in the registration statement under Nasdaq and NYSE American rules or its constitutive documents or by contract under NYSE rules), the SPAC complete one or more

### III. Legislative History

#### a. Overview

Prior to inclusion in the Inflation Reduction Act of 2022, the first iteration of the Excise Tax was unveiled in the Stock Buyback Accountability Act of 2021.<sup>26</sup> Although the legislation did not receive serious consideration in the Senate, contemporaneous statements by its co-sponsors—Senators Sherrod Brown and Ron Wyden—indicated that the legislation was intended to “reinvest in the economy, while also preventing abuse and reducing tax avoidance, both of which are significant risks from stock buybacks.”<sup>27</sup> Notably, Senators Brown and Wyden envisioned that the Excise Tax would curb the year-over-year increase in stock buybacks<sup>28</sup> following the enactment of the Tax Cuts and Jobs Act.<sup>29</sup> Thereafter, the current iteration of the Excise Tax was included in a manager’s amendment to the Build Back Better Act.<sup>30</sup> President Biden, Speaker Pelosi, and the Committee on Ways and Means each echoed the sentiments of Senators Brown and Wyden shortly before the legislation passed the House.<sup>31</sup>

Following inclusion in the Inflation Reduction Act of 2022, Senator Wyden reaffirmed the stated purpose of the Excise Tax—to discourage publicly traded corporations from engaging in stock buybacks that aim to increase share prices and, instead, encourage these corporations to invest in labor and research and development.<sup>32</sup> The Excise Tax is intended to increase the cost of engaging in what has become a

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business combinations having an aggregate fair market value of at least 80% of the value of the net assets in its trust account excluding certain costs, or de-list and liquidate. *See, e.g.*, NYSE Listed Company Manual Section 102.06(e); Nasdaq Listing Rule IM-5101-2(b); NYSE American Company Guide Section 119(b).

<sup>26</sup> S. 2758, 117th Cong. (1st Sess. 2021).

<sup>27</sup> Press Release, Senator Sherrod Brown, Brown, Wyden Unveil Major New Legislation to Tax Stock Buybacks (Sep. 10, 2021), <https://www.brown.senate.gov/newsroom/press/release/brown-wyden-tax-stock-buybacks>.

<sup>28</sup> *Id.* (“After the 2017 Republican tax law, instead of higher job growth or a GDP surge, we saw corporations spending hundreds of billions of dollars buying back their own stock...Stock buybacks were once a small share of corporate distributions, but now dominate, and have only exploded following the 2017 Republican tax bill...In 2018, the largest U.S. companies spent a record \$806 billion on stock buybacks, a 55 percent jump from the prior year.”).

<sup>29</sup> Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>30</sup> H.R. 5376, 117th Cong. § 138102 (1st Sess. 2021).

<sup>31</sup> Comm. on Ways & Means, Provisions in the Build Back Better Act, Funding Our Priorities Through A Fairer Tax Code (Nov. 4, 2021) (“Provides a one percent surcharge on corporate stock buybacks, which corporate executives too often use to enrich themselves rather than investing in workers and growing their businesses.”), <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/BBB%20-%20Funding.pdf>; Fact Sheet, Speaker of the House Nancy Pelosi, H.R. 5376, The Build Back Better Act, This Transformational Bill Creates Jobs, Cuts Taxes, and Lowers Costs for American Families (Nov. 4, 2021) (same), [https://www.speaker.gov/sites/speaker.house.gov/files/UpdatedFact%20Sheet\\_TheBuild\\_BetterAct.pdf](https://www.speaker.gov/sites/speaker.house.gov/files/UpdatedFact%20Sheet_TheBuild_BetterAct.pdf); Press Release, The White House Briefing Room, President Biden Announces the Build Back Better Framework (Oct. 29, 2021) (same), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/>.

<sup>32</sup> See Senator Ron Wyden, Chairman, Senate Fin. Comm., Wyden Delivers Floor Speech in Support of the Inflation Reduction Act (Aug. 6, 2022), <https://www.finance.senate.gov/chairmans-news/wyden-delivers-floor-speech-in-support-of-the-inflation-reduction-act>; see also Representative Don Beyer, Chairman, Joint Econ. Comm., Chairman Beyer’s Remarks At Rules Committee Hearing On Inflation Reduction Act (Aug. 10, 2022) (“With this tax [on stock buybacks], we limit tax avoidance that makes large shareholders and corporate executives wealthier, and use the proceeds to fund sensible investments in climate and access to lifesaving prescription drugs.”), <https://beyer.house.gov/news/documentsingle.aspx?DocumentID=5667>.

common means of returning capital to shareholders, and it is expected that this additional cost will reduce the prevalence of stock repurchases as a way corporations return their excess cash to shareholders.

Importantly, Congress gave no indication that it intended the Excise Tax to bluntly apply to any deal structure involving a redemption of stock. Prior to enactment, the Congressional Research Service (“CRS”) described a “stock repurchase” or “buy-back” relevant to the Excise Tax as “made by a tender offer to shareholders...or, more commonly, shares...purchased on the open market.”<sup>33</sup> CRS noted that, apart from the difference in tax treatment applicable to the two means of returning capital to shareholders (*i.e.*, repurchases and dividends),<sup>34</sup> “other concerns have been raised regarding stock repurchases that may be the motivation for discouraging these repurchases through an excise tax...”.<sup>35</sup>

[(1)] For example, some research has suggested that executives use stock repurchases to push the price of the stock up and generate gains for sales of these executives’ stock...[(2)] Others argue that stock buybacks help to concentrate stock among corporate insiders by buying back shares on the open market from the public and that these corporate insiders initiate buybacks knowing that the firm’s shares are undervalued...[(3)] Still others have expressed concerns about leveraged buybacks that may increase debt too much or that buybacks displace investments in capital and research and development that are essential for the firm’s long-term health.<sup>36</sup>

Recently, Members of Congress had occasion to comment on the application of the Excise Tax to SPACs. Senate Finance Committee members, including the authors of the Stock Buyback Accountability Act of 2021, Senators Brown and Wyden, and Senators Toomey and Portman, were unaware that the Excise Tax would apply to SPAC redemptions.<sup>37</sup> The Senators’ comments clearly reflect that Congress did not contemplate that the Excise Tax would apply to SPACs. Indeed, the Chairman of the Committee on Ways and Means, Representative Richard Neal, noted that Treasury *could* provide relief from the Excise Tax to SPACs.<sup>38</sup>

#### *b. Application to SPACs*

It is plainly evident that the Excise Tax was intended to apply to issuers (or affiliated purchasers) that repurchase their shares through open market purchases, tender offers, private negotiated transactions,

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<sup>33</sup> JANE G. GRAVELLE, CONG. RESEARCH SERV., IF11960, AN EXCISE TAX ON STOCK REPURCHASES AND TAX ADVANTAGES OF BUYBACKS OVER DIVIDENDS (Aug. 10, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11960>.

<sup>34</sup> The “difference in tax treatment” applicable to repurchases and dividends referenced in the limited legislative history is seemingly focused on the relative potential revenue collection from either means of returning capital to shareholders, rather than any tax consequences to the public company initiating the repurchase or dividend.

<sup>35</sup> *Id.*; see also Press Release, The White House Briefing Room, The Biden-Harris Economic Blueprint (Sep. 9, 2022) (“The Inflation Reduction Act also addresses the distortion in our tax code that enables corporations to funnel tax-advantaged payouts to wealthy and foreign investors in the form of stock buybacks, instead of paying dividends that shareholders pay taxes on. What’s more, a number of experts have argued that CEOs—who are compensated mostly in stock—use buybacks to enrich themselves to the detriment of the long-term growth of the economy.”), <https://www.whitehouse.gov/wp-content/uploads/2022/09/Biden-Economic-Blueprint-Report-720PM-MASTER-DOC.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> Doug Sword & Chandra Wallace, *Lawmakers Indefinite on SPAC Buyback Tax Relief*, 176 TAX NOTES FED. (TA) 1899 (Sep. 19, 2022); Chandra Wallace, *New Trouble Ahead for SPACs: The Stock Buyback Tax*, 176 TAX NOTES FED. (TA) 1897 (Sep. 19, 2022).

<sup>38</sup> *Id.*

and accelerated share repurchases, pursuant to a share repurchase plan or program authorized by its board of directors. Issuers may engage in repurchases for a variety of reasons—to offset share dilution after new stock is issued, to help signal the issuer’s view that its stock is undervalued, to provide price support by supplying liquidity when selling pressure is high, or because the issuer’s board has otherwise determined that a repurchase program is a prudent use of the issuer’s excess cash. Each of these fact patterns may have a positive or negative impact on the market for an issuer’s securities and may be the subject of criticism identified by CRS, but neither these fact patterns nor their critiques accurately describe de-SPAC transactions or SPAC liquidations.

Importantly, although de-SPAC transactions and SPAC liquidations do resemble traditional repurchases in that cash leaves the issuing company, they differ in that they take place under the terms of the very instruments under which that cash came into the company in the first place and are economically distinct from buybacks that are initiated by a public company itself. As a result, such redemptions should not be treated as a reduction in investable capital of the type that the Excise Tax is meant to discourage, since the redemption provisions were one of the terms on which the capital was originally raised. However, absent guidance, de-SPAC transactions and SPAC liquidations would be subject to the Excise Tax on the same terms as traditional repurchases.

More broadly, corporations (other than SPACs) may raise capital by issuing preferred stock that is puttable by the holder or mandatorily redeemable pursuant to its terms. Puttable preferred stock is similarly economically distinct from buybacks that are initiated by a public company itself. Commenters have likened redemptions upon exercise of a holder put feature to payments upon the early retirement or maturity of debt securities, which would be outside the scope of the Excise Tax. Congress specifically contemplated the need for guidance to address special classes of stock and preferred stock,<sup>39</sup> and we believe such guidance should be issued to except the redemption of stock with a holder put feature or its equivalent as beyond the intended scope of the Excise Tax.

Moreover, such redemptions affect neither a SPAC’s ability to pay wages or make other business investments—by definition, a SPAC does not conduct its own business—nor a target business’s ability to do the same. To the contrary, redemption rights are a key feature of and appeal to investments in SPACs. This “money-back guarantee” is a basic structural component of SPAC transactions, intended to mitigate the effects of certain known conflicts of interests of SPAC sponsors and SPAC boards, which makes the investment effectively riskless. Redeeming shareholders are generally recouping their original investment without any real economic gain, and redemption rights generally do not accrue to the sponsors or management of a SPAC. Redemption rights tied to common shares incentivize investments in SPACs and, therefore, increase available capital to complete a business combination. SPAC sponsors, in turn, are incentivized to complete the business combination; otherwise, the shares and warrants received in the sponsor’s “promote” would be worthless.<sup>40</sup>

Nor do such redemptions raise concerns about price manipulation or tax avoidance. Redemptions occur at the option of shareholders, rather than management, of a SPAC. As discussed above, such redemptions cut against the incentive structure for the sponsors or management of a SPAC by reducing

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<sup>39</sup> Section 4501(f)(2) (“The Secretary shall prescribe such regulations and other guidance as are necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of this section, including regulations and other guidance... to address special classes of stock and preferred stock...”).

<sup>40</sup> Similarly, at the closing of the IPO, the sponsor may purchase warrants, commonly referred to as “sponsor at-risk capital,” to fund the SPAC’s offering expenses, the post-IPO operating expenses, and the payment of the up-front portion of the IPO underwriting fees. If the SPAC liquidates without completing a business combination, the warrants expire worthless.

available capital to complete a business combination and, if significant, put the SPAC in danger of failing to meet its minimum cash condition (*i.e.*, the minimum amount of capital needed to proceed with a business combination). Similarly, the “tax avoidance” criticism of traditional repurchases is seemingly focused on the difference in tax treatment between repurchases, which allow shareholders to recognize capital gain or loss equal to the difference between the proceeds from and the holders’ basis in the redeemed stock, and dividends, which are subject to tax without a basis offset. Again, these are two means that public companies may use to return capital to shareholders, and the choice among the two (and the relative potential revenue collection from either) is irrelevant to de-SPAC transactions and SPAC liquidations.

#### IV. Conclusion

U.S. public markets have experienced a two decade-long period of contraction, which has narrowed an important avenue to raise capital for private operating companies and limited investment opportunity. SPACs provide an important option for firms looking to access the public markets and investment opportunity for retail and institutional investors alike. We are concerned that the imposition of the Excise Tax on SPACs would significantly dampen both retail investment in SPACs and the market for institutional private placements that can occur concurrent with de-SPAC transactions as public shareholders, and not the SPAC itself, may bear the brunt of the Excise Tax. As a result, SPACs may experience difficulty finding sources of capital to consummate business combinations.

Indeed, the Excise Tax has prompted several market responses. At least one SPAC has issued a proxy statement to propose an amendment to its trust agreement allowing interest earned on its trust to be used for payment of the Excise Tax.<sup>41</sup> This proxy statement warned that “[t]he Excise Tax included in the Inflation Reduction Act of 2022 may decrease the value of our securities following our initial business combination, hinder our ability to consummate an initial business combination, and decrease the amount of funds available for distribution in connection with a liquidation.”<sup>42</sup> Several SPACs have issued amendments to registration statements with similar cautionary language.<sup>43</sup> At least fourteen SPACs have issued proxy statements to propose an earlier date by which they must consummate business combinations because their constitutive documents and trust agreements do not permit the return of funds to public shareholders by way of liquidating until after the SPACs’ original termination dates, which, in many cases, fall after the effective date of the Excise Tax.<sup>44</sup> On the whole, SPAC issuances have significantly decreased amid increased economic, regulatory, and now, Excise Tax-related headwinds.

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<sup>41</sup> See, e.g., GigCapital5, Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (Aug. 31, 2022), <https://www.sec.gov/Archives/edgar/data/1844505/00011931252236570/d333335dpre14a.htm#toc>.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Aquaron Acquisition Corp., Amendment No. 5 to Form S-1 Registration Statement Under the Securities Act of 1933 (Sep. 2, 2022), [https://www.sec.gov/Archives/edgar/data/1861063/000121390022053848/f12022a5\\_aquaronacq.htm](https://www.sec.gov/Archives/edgar/data/1861063/000121390022053848/f12022a5_aquaronacq.htm); EF Hutton Acquisition Corp. I, Form S-1 (Amendment No. 4) Registration Statement Under the Securities Act of 1933 (Aug. 18, 2022), <https://www.sec.gov/Archives/edgar/data/1922858/00014931522023455/forms-1a.htm>.

<sup>44</sup> Marlena Haddad, *The Music Acquisition Corp. (TMAC.U) Files to Liquidate Early by Vote*, SPAC INSIDER (Oct. 24, 2022), <https://spacinsider.com/2022/10/24/the-music-acquisition-corp-files-vote-on-liquidation/>; see, e.g., The Music Acquisition Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (Oct. 24, 2022) (“The purpose of the Charter Amendment Proposal and the Trust Amendment Proposal is to change the date by which we must consummate our initial business combination from the Original Termination Date to the Accelerated Termination Date, such that...we will be obligated to redeem all remaining issued and outstanding public shares not redeemed in the voluntary redemption as promptly as reasonably possible...which will enable the redemption of all of the public shares by us before we potentially become subject to the Excise Tax;...dissolve and liquidate as promptly as reasonably possible after completion of the mandatory redemption, which

Treasury Department  
Internal Revenue Service  
December 6, 2022  
Page 10 of 10

Accordingly, we request that Treasury and the IRS issue guidance, as soon as practicable, that announces that Treasury and the IRS intend to issue proposed regulations to clarify that the Excise Tax does not apply to any redemption of stock over the course of the life of a SPAC, including in connection with de-SPAC transactions and SPAC liquidations. We believe that it is sound public policy to exclude such transactions from the Excise Tax on the basis of any of the rationales described above, including, among others, that Congress did not contemplate that the Excise Tax would apply to transactions that neither resemble nor reach the intended result of traditional share repurchase programs initiated by public company management; that redemptions of SPAC shares take place under the terms of the very instruments under which cash came into the company in the first place and are economically distinct from buybacks that are initiated by a public company itself; or that de-SPAC transactions and SPAC liquidations do not affect target businesses' ability to pay wages or make other business investments and do not raise concerns about price manipulation or tax avoidance.

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We appreciate the opportunity to submit additional recommendations for items to be included on the 2022-2023 Priority Guidance Plan to Treasury and the IRS, and we would be pleased to meet with Treasury and the IRS to discuss our comments. If Treasury or the IRS has questions or comments, please do not hesitate to contact Joseph Schwartz, Director and Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han  
Executive Vice President  
Chief Counsel & Head of Global Regulatory Affairs  
Managed Funds Association

cc: Tom West, Deputy Assistant Secretary for Domestic Business Tax, Office of Tax Policy,  
Department of the Treasury  
Krishna Vallabhaneni, Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury  
Brett York, Deputy Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury

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will allow us to return the funds to our public stockholders sooner without any deductions for the Excise Tax..."),  
[https://www.sec.gov/Archives/edgar/data/1835236/000121390022065660/pre14a1022\\_musicaquisition.htm](https://www.sec.gov/Archives/edgar/data/1835236/000121390022065660/pre14a1022_musicaquisition.htm).