

Statement

Statement Regarding SPAC Matter



Commissioner Hester M. Peirce

April 15, 2022

Alberton Acquisition Corporation (the “SPAC”) filed a Form 8-K yesterday^[1] announcing that SolarMax Technology, Inc. (“SolarMax”) intends to terminate its merger agreement with the SPAC.^[2] The press release explains that SolarMax reasonably believed that the proposed merger would not be completed by April 26, 2022, the date by which the merger must be completed for the SPAC’s securities to remain listed on Nasdaq.^[3] The press release does not say why meeting Nasdaq’s deadline would be problematic. It states only “[a]s of April 13, 2022, the registration statement on Form S-4 . . . with a proxy statement containing information about the Merger **was not declared effective** by the U.S. Securities and Exchange Commission”^[4] (emphasis added). Therein lies the question that troubles me: Why exactly did the SEC not take the routine step—one typically taken on delegated authority by the staff without input from the Commission—to declare the registration statement effective?

Commission inaction on a request for acceleration of the effective date of a registration statement is highly unusual. Rule 461(b) of the Securities Act of 1933 explains the statutory considerations for the Commission when determining to accelerate the effective date of a registration statement, lists specific situations in which the Commission “may refuse to accelerate the effective date,” and states that “it is the general policy of the Commission, upon request, . . . to permit acceleration of the effective date of the registration statement as soon as possible after the filing of appropriate amendments, if any.”^[5] Here, no Commission action has been taken, so there is no obligation to explain why the registration statement was not declared effective.

The failure to take an otherwise routine step makes sense only in the larger context of the Commission’s newfound hostility to SPAC capital formation. The SPAC completed its IPO in October 2018 with the intent to complete a business combination within 18 months.^[6] SPAC shareholders approved two extensions of that timeline prior to a merger agreement being entered into in October 2020 with SolarMax, a solar energy company with operations in China.^[7] SPAC shareholders subsequently approved two further extensions of the timeline within which to complete the business combination, resulting in the current deadline of April 26, 2022.^[8] Meanwhile, the SPAC filed eight amendments to its registration statement relating to the business combination since October 2020, including the most recent April 4, 2022 amendment.^[9]

During that period, a lot of other things were happening too. Subsequent to the SPAC’s merger agreement being announced, Commission staff issued a statement addressing the proper accounting for warrants that led many SPACs to restate their financial statements.^[10] Additionally, in July 2021, Chair Gensler issued a Statement on Investor Protection Related to Recent Developments in China, which was followed by a detailed Sample Letter to China-Based Companies published by the Division of Corporation Finance in December 2021.^[11] Most significantly, the Commission voted last month to propose sweeping rules pertaining to SPACs, including a proposed non-exclusive safe harbor under the Investment Company Act of 1940.^[12] At the open meeting, Division of Investment Management Director William Birdthistle, when asked what the proposal would mean for SPACs, warned:

For SPACs that are able to satisfy the conditions of the safe harbor with respect to their activities, the holdings of their portfolio, and the duration of their project, then they would enjoy a certain amount of certainty with respect to their situations. For those SPACs that aren't, that do not satisfy those conditions, we would expect that those SPACs should be consulting closely with their advisors and considering carefully their compliance obligations. And finally, I would just say, certainly for those SPACs that also fall outside the safe harbor, I would expect that the staff would also be taking a look at them.^[13]

As Director Birdthistle stated, "This proposal is the first time that the Commission has specifically addressed the question of whether SPACs are investment companies."^[14] After all, SPACs have been around for a long time, and the Commission has not suggested that it thinks that any of them, let alone many of them, are investment companies. Without affording some notice, the Commission cannot turn on a dime and start treating SPACs that do not meet an arbitrarily determined timeline as investment companies. Because of the timing—less than a month after the release of the SPAC proposal, one cannot help wondering, however, whether this SPAC might be a victim of the parameters of a non-exclusive safe harbor that have not yet been adopted. After all, the SPAC has been going back and forth with staff in our Division of Corporation Finance for months. With the end of the road finally in sight, when the SPAC sought to have its registration statement go effective, it did not get the response that virtually everyone gets at this stage of the process. That appears to be the death knell of the SPAC, which robs the investors of the opportunity to decide whether they approve the merger agreement.

Will other SPACs seeking to consummate their business combination face existential questions from the Commission at the eleventh hour? If so, why not let them know earlier in the process that there is a problem? It is not a good look for the Commission to run a SPAC through the gauntlet of addressing disclosure comments only to say, "Oh, and by the way, now you are too old to be anything other than an investment company."^[15] We must always engage registrants in the same good faith that we expect of them. A failure to do so would undermine the credibility of this agency.

[1] Alberton Acquisition Corp., Current Report (Form 8-K) (Apr. 14, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390022019701/ea158435-8k_alberton.htm.

[2] Alberton Acquisition Corp., Exhibit 99.1 to Current Report (Form 8-K) (Apr. 14, 2022), https://www.sec.gov/Archives/edgar/data/0001748621/000121390022019701/ea158435ex99-1_alberton.htm.

[3] *See id.*

[4] *See id.*

[5] *See* 17 CFR § 230.461(b). The statutory considerations referenced in the rule are found in Section 8(a) of the Securities Act of 1933. *See* 15 U.S.C. § 77h(a) (" . . . having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors.").

[6] *See* Alberton Acquisition Corp., Notice of Effectiveness for Form S-1, File No. 333-227652 (Oct. 23, 2018), https://www.sec.gov/Archives/edgar/data/1748621/999999999518002693/xsIEFFECTX01/primary_doc.xml.

[7] *See* Alberton Acquisition Corp., Item 5.07 to Current Report (Form 8-K) (Apr. 23, 2020), https://www.sec.gov/Archives/edgar/data/0001748621/000121390020010000/ea121016-8k_alberton.htm (extending date from April 27, 2020 to October 26, 2020); Alberton Acquisition Corp., Item 5.07 to Current Report (Form 8-K) (Oct. 26, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390020033306/ea128917-8k_alberton.htm (extending date from October 26, 2020 to April 26, 2021); Alberton Acquisition Corp., Item 1.01 to Current Report (Form 8-K) (Oct. 28, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390020033618/ea129025-8k_albertonacq.htm (announcing the merger agreement).

[8] See Alberton Acquisition Corp., Item 5.07 to Current Report (Form 8-K) (Apr. 26, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390021022805/ea139881-8k_alberton.htm (extending the date from April 26, 2021 to October 26, 2021); Alberton Acquisition Corp., Item 5.07 to Current Report (Form 8-K) (Oct. 22, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390021054537/ea149328-8k_alberton.htm (extending the date from October 26, 2021 to April 26, 2022).

[9] See Alberton Acquisition Corp., Registration Statement (Amendment No. 8 to Form S-4) (Apr. 4, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001748621/000121390022017603/ea157901-s4a8_alberton.htm.

[10] See John Coates, Acting Director, Division of Corporation Finance and Paul Munter, Acting Chief Accountant, Office of the Chief Accountant, Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”), (Apr. 12, 2021), <https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs>. See also *supra* note 9 at 198-99 (disclosing restatements of financial statements by Alberton in response to the statement).

[11] See Chair Gary Gensler, Statements on Investor Protection Related to Recent Developments in China (July 30, 2021), <https://www.sec.gov/news/public-statement/gensler-2021-07-30>; Division of Corporation Finance, Sample Letter to China-Based Companies, SEC (Dec. 20, 2021), <https://www.sec.gov/corpfin/sample-letter-china-based-companies>.

[12] See Proposing Release No. 33-11048, Special Purpose Acquisition Companies, Shell Companies, and Projections (Mar. 30, 2022), <https://www.sec.gov/rules/proposed/2022/33-11048.pdf>; Commissioner Hester M. Peirce, Damning and Deeming: Dissenting Statement on Shell Companies, Projections, and SPAC Proposal (Mar. 30, 2022), <https://www.sec.gov/news/statement/peirce-statement-spac-proposal-033022>.

[13] SEC Open Commission Meeting (Mar. 30, 2022), https://www.youtube.com/watch?v=t6qX8FGil_8 (discussion at 43:25-44:45).

[14] *Id.*

[15] See *generally* Pragues’s Kafka International Named Most Alienating Airport, The Onion (Mar. 24, 2009), <https://www.youtube.com/watch?v=gEyFH-a-XoQ>.