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# SEC Adopts New SPAC Rules

The SEC has adopted new rules regarding SPAC and de-SPAC transactions. While the SEC did not ultimately adopt some of its proposed rules and safe harbors, the rules it did adopt and guidance it chose to issue will substantially alter the SPAC and de-SPAC landscape. Fundamentally, these rules will treat de-SPAC transactions more like traditional initial public offerings ("IPOs") – extending (via guidance) statutory underwriter liability on participants in de-SPAC transactions, making the target company in a de-SPAC transaction a co-registrant and eliminating the availability of the safe harbor of the Private Securities Litigation Reform Act of 1995 ("PSLRA") for projections included in de-SPAC registration statements. Rather than adopting the safe harbor that it initially proposed, the SEC issued guidance regarding the circumstances that could cause SPACs to be investment companies. In addition, the new rules expand the statutory disclosure requirements for SPAC and de-SPAC transactions, mandate a minimum dissemination period for security holder communication materials in de-SPAC transactions, and require a re-determination of smaller reporting company ("SRC") status following consummation of a de-SPAC transaction. Taken together, the new rules effectuate promises by senior SEC officials to more closely scrutinize, and exercise stricter oversight over the SPAC market. The rules will become effective 125 days after publication in the *Federal Register*, with compliance for structured data requirements mandated 490 days after publication.

Below is a summary of the highlights of the SEC's new rules.

**De-SPAC Transaction Underwriter Liability**: The SEC did not adopt proposed Rule 140A, which would have deemed any SPAC IPO underwriter who facilitates the de-SPAC transaction or related financing, or otherwise participates in the de-SPAC transaction, to be an underwriter in the distribution of securities that is the de-SPAC transaction. Instead, the SEC issued guidance that:

- A de-SPAC transaction is a distribution of securities (the SEC noted its adoption of Rule 145a, which deems there to be a sale from the combined company to the SPAC's existing shareholders even in de-SPAC transaction structures where the target company is not "selling" or "distributing" its own securities into the market); and
- Participants in a de-SPAC distribution may be statutory underwriters where they are selling for the issuer or participating in the distribution of securities in the combined company to the SPAC's investors and the broader public.

**De-SPAC Co-Registrants**: As was proposed, the final rules amend Forms S-4 and F-4 to require that both the SPAC and the target company be treated as co-registrants. As a result, the target company, its principal executive officer, its principal financial officer, its controller/principal accounting officer, and a majority of its board of directors will be required to sign the registration statement and be subject to liability for any material misstatements or omissions in the registration statement.

In addition, the final rules:

- Require that the names of all co-registrants appear on the cover page;
- Clarify that the target company is a registrant (and not merely a signatory to the registration statement);
- Where the target consists of a business or assets, deem the seller of the business or assets to be a registrant (and require the seller to sign the registration statement); and

- Make conforming amendments to Form S-1 and Form F-1.

**Projections**: As proposed, the final rules eliminate the availability to SPACs and other blank check companies of the PSLRA safe harbor with respect to forward-looking statements. As a result, de-SPAC transactions will be treated like traditional IPOs (where the PSLRA safe harbor is also not available). To improve the presentation of projections, the SEC has also adopted additional disclosure requirements for projections via amendments to Item 10(b) of Regulation S-K (which would be applicable to all registrants, not just SPACs, and codify the SEC's guidance by giving greater prominence to projections based on historical results and require additional disclosures for any non-GAAP measures used in the projections ) and new Item 1609 of Regulation S-K (which will only apply to de-SPAC transactions, and would require specific disclosures about the preparation of projections (who prepared them and for what purpose), the material bases and assumptions underlying the projections, and whether they still reflect the view of the board and management).

**Enhanced Disclosures by Both the Target and SPAC:**

- *Target Disclosures.* To better synchronize de-SPAC and traditional IPO disclosures, the final rules, as initially proposed, (i) require certain non-financial Regulation S-K disclosures of targets in de-SPAC business combination filings, instead of in the post-closing "Super 8-K" so that SPAC investors will be able to review and consider the disclosure prior to making any voting or investment decision, and, to the extent that information is included in a registration statement, subject such information to liability under the Securities Act of 1933, as amended, and (ii) codify existing SEC guidance regarding financial statements in business combinations involving shell companies in a new Article 15 of Regulation S-X.

- *SPAC Disclosures.* The final rules create a new Subpart 1600 of Regulation S-K, setting forth specific SPAC disclosure requirements for SPAC IPOs (largely as proposed, including regarding SPAC sponsors, conflicts of interest and dilution, largely codifying and amplifying existing SEC guidance) and de-SPAC transactions. Notably, the SEC moved away from its proposal to require a statement about the fairness of the de-SPAC transaction and related financing. Instead, if the law of the jurisdiction of the SPAC's organization requires the SPAC's board of directors to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders, the SPAC will be required to disclose that determination. In making that determination, the following factors should be considered (though it is not an inclusive list): the valuation of the target company, financial projections relied upon by the board, the terms of financing materially related to the de-SPAC transaction, any report, opinion, or appraisal and the dilutive effect of the de-SPAC transaction and related financing.

**Smaller-Reporting Company Status**: Post de-SPAC companies will be required to re-evaluate their smaller-reporting company status prior to the time they make their first post de-SPAC SEC filing (other than the Super 8-K), measuring the public float as of a date within four business days of the consummation of a de-SPAC transaction.

**Investment Company Act**: The SEC did not adopt its proposed Investment Company Act safe harbor for SPACs. Instead, the SEC issued the following guidance regarding the facts and circumstances SPACs should consider in evaluating their status as investment companies:

- *The nature of SPAC assets and income.* The types of assets held by a SPAC will impact its analysis as an investment company. Investments by a SPAC in corporate bonds, or in minority interests with a view to passive investment, would affect the analysis of whether a SPAC is an investment company. The SEC specifically noted that a SPAC that owns or proposes to acquire 40% or more of its total assets in investment securities would likely need to register under the Investment Company Act unless an exclusion from the definition applies. The SEC also noted that such activities would also weigh in favor of a SPAC being considered to be primarily engaged in the business of investing, reinvesting, and trading in securities. In addition, a SPAC whose income is substantially derived from such assets would further suggest that the SPAC is an investment company. A SPAC that holds only the sort of securities typically held by SPACs, such as U.S. Government securities, money market funds and cash items prior to the completion of the de-SPAC transaction, and does not propose to acquire investment securities, would be more likely *not* to be considered an investment company; however, an issuer that holds these assets, but whose primary business is to achieve investment returns on such assets would still be an investment company.

- *Management Activities.* The SEC noted that it would have serious concerns if a SPAC held its investors' money in securities, but the SPAC's officers, directors and employees did not actively seek a de-SPAC transaction or spent a considerable amount of time actively managing the SPAC's portfolio for the primary purpose of achieving investment returns. Further, depending on the facts and circumstances, the management of a SPAC also could cause SPAC sponsors to come within the definition of "investment adviser" in Section 202(a)(11) of the Investment Advisers Act of 1940.

- *Duration.* The longer a SPAC takes to achieve its stated business purposes, the more difficult it will be to distinguish a SPAC's activities from those of an investment company. Accordingly, SPACs that operate without entering an agreement for a de-SPAC transaction within 12 to 18 months raise concerns that they may be investment companies. These concerns increase as the departure from these timelines lengthens.

- *How the SPAC presents itself to investors.* A SPAC positioning itself as (or "holding itself out as") an opportunity for investors to primarily invest in its securities for exposure to its portfolio prior to the de-SPAC transaction is likely to meet the definition of an investment company. Marketing as a fixed-income alternative suggests an active engagement in the business of investing, reinvesting or trading in securities.

- *Merging with an investment company.* If a SPAC were to engage or propose to engage in a de-SPAC transaction with a target company that meets the definition of an investment company, such as a closed-end fund or a business development company, the SPAC is likely to be an investment company.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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