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SEC Proposes Sweeping Changes Regulating SPAC Formation and De-SPAC Transactions

Would Mandate Specific Disclosures, Expand Underwriter Liability to De-SPAC Transactions, Eliminate the PSLRA Safe Harbor for De-SPAC Projections and Seek to Clarify Treatment of SPACs Under the Investment Company Act of 1940

SUMMARY

On March 30, 2022, the Securities and Exchange Commission proposed rules that would impose a wide range of new requirements on special purpose acquisition companies (SPACs)[1] for IPOs and business combinations with private operating companies (which we refer to as de-SPAC transactions).[2] The proposed rules represent the SEC's latest efforts to align the procedural and disclosure requirements for de-SPAC transactions more closely with those for IPOs. The new regulations would significantly affect how SPACs acquire targets, and would meaningfully increase the cost and complexity of compliance for SPACs and their targets.

Key provisions of the proposed rules include:

- Increased disclosure requirements regarding SPAC sponsors, conflicts of interest and dilution;
- Increased disclosure requirements for de-SPAC transactions, including a required statement as to the fairness of the transaction to unaffiliated SPAC security holders; although the proposed rules would not require a SPAC to obtain a fairness opinion from a financial advisor, a SPAC may seek a fairness opinion to substantiate its "reasonable belief" as to the fairness of the transaction;
- A requirement for a post-business combination company to re-determine its "smaller reporting company" ("SRC") status before its first SEC filing after the filing of a "Super Form 8-K," with its public float measured as of a date within four business days following the consummation of a de-SPAC transaction, which would generally require SPACs that initially qualified as SRCs to

provide more comprehensive disclosures earlier following a de-SPAC transaction than under existing rules;

- An amendment to eliminate the Private Securities Litigation Reform Act of 1995 ("PSLRA") safe harbor for forward-looking statements, such as projections, for filings by SPACs, which would likely drive SPACs to use less comprehensive projections or consider discontinuing their use;
- A rule that deems an underwriter in a SPAC's IPO to be an "underwriter" in the de-SPAC transaction if it "takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction," effectively subjecting those banks to liability for the de-SPAC disclosures (subject to a due diligence defense);
- A rule that deems a business combination transaction involving a reporting shell company and another entity that is not a shell company a "sale" of securities to the shell company's shareholders for purposes of the Securities Act, providing a right of action for SPAC shareholders for defects in the de-SPAC disclosures;
- Rules aligning the required financial statements of private operating companies in transactions involving shell companies with those required in registration statements for initial public offerings, including the disclosure of three years of statements of comprehensive income, changes in stockholder's equity and cash flows (subject to potential EGC disclosure accommodations);
- Expansions and updates to the SEC's guidance on the presentation of projections of future economic performance, including disclosures of the purpose of projections, any material assumptions and whether or not projections still reflect the view of the board or management of either the SPAC or the target company; and
- A non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act of 1940 (the "Investment Company Act") for SPACs which meet certain conditions, which would raise questions as to the Investment Company Act status of SPACs that do not comply with the conditions of the safe harbor.

The proposed amendments to expand and update the SEC's guidance on the presentation of projections would also apply to business combinations not involving SPACs.

The SEC voted 3 to 1 (Commissioner Peirce dissenting) to issue the proposed rules. The public comment period ends on the later of May 31, 2022 and 30 days following the publication of the proposing release in the Federal Register.

BACKGROUND

In 2020 and the first half of 2021, the market experienced unprecedented levels of SPAC transaction activity. According to the proposing release, SPACs raised more than $83 billion in IPOs in 2020 and more than $160 billion in IPOs in 2021.[3] Over 250 de-SPAC transactions were announced in 2021.[4] SPAC IPO activity, however, has slowed considerably since—with approximately 50 IPOs raising approximately $9 billion in gross proceeds in the first quarter of 2022, as compared to nearly 300 raising approximately $87 billion in gross proceeds in the first quarter of 2021.[5]

The SEC has made SPACs an area of significant focus following the high levels of SPAC activity in late 2020 and early 2021, and the SEC's proposed rules (the "Proposed Rules") mark the most comprehensive step to date in that regulatory review. In December 2020, the SEC's Division of Corporation Finance released disclosure guidance regarding SPACs, their IPOs and de-SPAC transactions. The guidance, among other things, advised SPACs at the IPO stage to carefully consider disclosure obligations with respect to conflicts of interest and economic incentives of SPAC sponsors, directors, officers and their affiliates.[6] In April 2021, then-Acting Director of the Division of Corporation Finance John Coates questioned the applicability of the PSLRA safe harbor in the context of de-SPAC transactions, whether the SEC should reconsider the concept of "underwriter" in those transactions, and whether guidance was needed about how projections and related valuations are presented and used.[7] In December 2021, Commission Chair Gary Gensler expressed concern that SPAC investors, both at the time of a SPAC's IPO and during the de-SPAC transaction, were not benefiting from the protections they would otherwise receive in IPOs with respect to disclosure, marketing practices and the safeguards provided by gatekeepers such as auditors, brokers and underwriters, and noted that he had asked the SEC Staff for proposals to better align the legal treatment of SPACs with the investor protections in IPOs.[8] On March 22, 2022, the Staff issued a set of new compliance and disclosure interpretations focused on mergers and acquisitions and specifically SPACs.

The Proposed Rules also address the status of SPACs under the Investment Company Act.[9] Recent shareholder litigation has brought attention to the question of whether SPACs may be "investment companies" as defined under the Investment Company Act. The Proposed Rules would provide a non-exclusive safe harbor from "investment company" status under Section 3(a)(1)(A) of the Investment Company Act for a SPAC that satisfies certain conditions that limit the SPAC's duration, asset composition, business purpose and activities.[10] The stated intent of the proposed safe harbor is to provide greater certainty for SPACs regarding their status under the Investment Company Act and to aid in distinguishing between a SPAC that is likely to raise these questions from one that would not.[11] Although the proposed safe harbor is non-exclusive, and therefore would not be the sole basis for concluding that a SPAC is not an investment company,[12] there are indications that a SPAC that does not fall within the safe harbor would be more likely to face scrutiny as to its status under the Investment Company Act.

At the March 30 open meeting to consider whether to propose the amendments, Chair Gensler expressed his view that the proposals would "strengthen disclosure, marketing standards, and gatekeeper and issuer obligations by market participants in SPACs, helping ensure that investors in these vehicles get protections similar to those when investing in traditional initial public offerings."[13] In her dissent, Commissioner Peirce stated that the Proposed Rules did more than mandate disclosures and imposed "a set of substantive burdens that seems designed to damn, diminish and discourage" SPACs.[14]

SUMMARY OF THE PROPOSED RULES

The Proposed Rules comprise new items and amendments to existing items of Regulation S-K; new rules and amendments to existing rules under the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act") and Regulation S-X; and new rules that would adopt a non-exclusive safe harbor under the Investment Company Act. The proposing release categorizes the Proposed Rules into five main areas of focus, which are further discussed below.

1. Proposed New Subpart 1600 of Regulation S-K

The Proposed Rules would add a new Subpart 1600 to Regulation S-K prescribing disclosure requirements regarding the SPAC's sponsor, potential conflicts of interest and dilution. Proposed Subpart 1600 would also require enhanced disclosure for de-SPAC transactions, including by introducing a fairness determination requirement.

- ***SPAC Sponsor and Conflicts of Interest.*** Item 1603(a) of Regulation S-K, as proposed, would specify and expand disclosure requirements to provide information about the SPAC sponsor and its affiliates, as well as any promoters of the SPAC, including, among other things:
  - their experience in organizing SPACs and the extent to which they are involved in other SPACs;
  - their material roles and responsibilities in directing and managing the SPAC's activities;
  - any agreement, arrangement or understanding between the SPAC sponsor and the SPAC, its executive officers, directors or affiliates in determining whether to proceed with a de-SPAC transaction;
  - the nature and amount of compensation that has been or will be awarded, earned by, or paid to the SPAC sponsor, its affiliates and any promoters;
  - any controlling persons and persons who have direct and indirect material interests in the SPAC sponsor, as well as the nature and amount of their interests (and an organizational chart showing the relationships between the SPAC, the SPAC sponsor and the sponsor's affiliates);
  - any agreement, arrangement or understanding, including any payments, between the SPAC sponsor and unaffiliated security holders of the SPAC regarding the redemption of outstanding securities; and
  - tabular disclosure of any material lock-up agreements.

  Additionally, Item 1603(b) of Regulation S-K, as proposed, would require disclosure of actual or potential material conflicts of interest, including in determining whether to proceed with a de-SPAC transaction and arising from the manner in which the SPAC compensates the SPAC sponsor, executive officers and directors, between (i) the sponsor or its affiliates, the SPAC's officers, directors or promoters and (ii) unaffiliated security holders.

- ***Dilution.*** Item 1602(c) of Regulation S-K, as proposed, would require tabular dilution disclosure on the prospectus cover page of SPAC registration statements on Forms S-1 and F-1. Additional information would also be required on the prospectus cover page and within the prospectus summary regarding, among other things, the timing of the SPAC transaction, sponsor compensation, dilution and conflicts of interest.

- ***Fairness of De-SPAC Transaction.*** Proposed Item 1606(a) of Regulation S-K would require a statement in any Forms S-4 and F-4 or Schedules 14A, 14C and TO filed in connection with a de-SPAC transaction as to whether the SPAC reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to the SPAC's unaffiliated security holders, as well as a description of the bases for this statement, as further discussed under the heading "Implications" below.

2. Proposals Designed to Align De-SPAC Transactions with Initial Public Offerings

The Proposed Rules set forth new rules and amendments designed to align the treatment of private operating companies entering the public markets through de-SPAC transactions more closely with those conducting IPOs. In the Staff's view, "a private operating company's method of becoming a public company should not negatively impact investor protection. Accordingly, the proposed new rules and amendments are intended to provide investors with disclosures and liability protections comparable to those that would be present if the private operating company were to conduct a firm commitment initial public offering."[15]

- ***Target as Co-Registrant to Form S-4 and Form F-4.*** The Proposed Rules would require a private operating company to be treated as a co-registrant when a SPAC files a registration statement on Form S-4 or F-4 and as an "issuer" under Section 6(a) of the Securities Act. This requirement would make the target company, its principal executive officer, principal financial officer, principal accounting officer and board of directors (subject to a due diligence defense for all parties other than the SPAC and the target company)[16] liable for any material misstatements or omissions in the registration statement under Section 11 of the Securities Act. This proposed expansion of liability for defects in the registration statement, which principally contains business and financial information about the target, would be relevant for liability of individuals (*i.e*., principal executive officer, principal financial officer, principal accounting officer and the board of directors of the target). While the proposed rule may appear less relevant to the target, given that the target would combine with the SPAC, which would itself be subject to Section 11 liability, directors and named officers of the target company will become subject to enhanced liability which presumably is designed to promote enhanced processes for disclosure controls at the target company, the business, operations and financial results of which willl be described in the registration statement. Currently, the SPAC, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and at least a majority of its board of directors are required to sign the registration statement for a de-SPAC transaction if the SPAC is the entity offering its securities in a de-SPAC transaction.

- ***Underwriter Liability in De-SPAC Transactions.*** Proposed Rule 140a under the Securities Act would provide that "[a] person who has acted as an underwriter of the securities of a special purpose acquisition company 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 will be deemed to be engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction within the meaning of section 2(a)(11) of the Act." This rule would have the effect of subjecting those SPAC IPO underwriters (subject to a due diligence defense) to liability for material misstatements or omissions in the de-SPAC transaction registration statement under Section 11 and Section 12(a)(2) of the Securities Act, as further discussed under the heading "Implications" below.

- ***Elimination of PSLRA Safe Harbor.*** The Proposed Rules also would amend the definition of "blank check company" to eliminate the PSLRA safe harbor for forward-looking statements, such as projections, for filings by SPACs and certain other blank check companies. Under existing Rule 419, SPACs are generally not "blank check companies" because they are not selling "penny stock," as defined in Rule 3a51-1 under the Exchange Act, as further discussed under the heading "Implications" below.
- ***Minimum Dissemination Period.*** In addition, Rules 14a-6 and 14c-2 under the Exchange Act would be amended, and instructions to Forms S-4 and F-4 added, to require that disclosure documents in de-SPAC transactions be disseminated to investors at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the laws of the jurisdiction of incorporation or organization if such period is less than 20 calendar days.[17]
- ***Smaller Reporting Company Re-Determination.*** The Proposed Rules also would require a re-determination of a post-business combination company's SRC status before its first SEC filing after the filing of its "Super Form 8-K" (*i.e*., a Form 8-K with Form 10 information), with its public float measured as of a date within four business days following the consummation of a de-SPAC transaction. The re-determination must also be reflected in the company's first quarterly or annual periodic report following the de-SPAC transaction. This would generally require SPACs that initially qualified as SRCs to provide more comprehensive disclosures (such as three years of financial statements and quantitative and qualitative information about market risk) earlier following a de-SPAC transaction than under existing rules (subject to potential EGC disclosure accommodations). Currently, smaller reporting company status is determined at the time of filing of the SPAC's initial registration statement on Form S-1 or F-1, it is re-determined on an annual basis and the post-business combination company is permitted to retain this status until the next annual determination date when a SPAC is the legal acquirer in the de-SPAC transaction.[18]

3. Projections Disclosure

To address the SEC's concerns over the integrity of projections used in connection with de-SPAC transactions, the Proposed Rules would amend Item 10(b) of Regulation S-K and introduce a new Item 1609 of Regulation S-K. The proposed amendment to Item 10(b), which would apply generally to all issuers, would require, among other things, that any projected measures not based on either financial results or operational history must be clearly distinguished from those that are based on financial results and operational history. Additionally, projections based on historical measures and operating history would need to be presented with equal or greater prominence than their counterparts not based on financial results or operating history. For projections based on a non-GAAP measure, the proposed amendments to Item 10(b) of Regulation S-K would state that the presentation should include a clear definition or explanation of the non-GAAP measure, a description of the most closely related GAAP measure and an explanation why the non-GAAP measure was selected instead of a GAAP measure. However, consistent with existing guidance, the reference to the nearest GAAP measure called for by amended Item 10(b) would not require a reconciliation to that GAAP measure.[19] The need to provide a GAAP reconciliation would continue to be governed by Regulation G and Item 10(e) of Regulation S-K.[20] New Item 1609 of Regulation S-K, which would only apply to de-SPAC transactions, would require SPACs to disclose, among other items, the purpose for which financial projections were prepared, any material assumptions underlying the projections and whether or not the projections still reflect the view of the board or management of either the SPAC or the target company in respect to the financial outlook on the filing date.

4. Status of SPACs under the Investment Company Act

The Proposed Rules would add a new Rule 3a-10 to the Investment Company Act. Proposed Rule 3a-10 would provide a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act for a SPAC that satisfies each of the following conditions:

- The SPAC's assets consist solely of government securities, securities issued by government money market funds and cash items prior to completion of the de-SPAC transaction and those assets are not at any time acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes.
- The SPAC seeks to complete a single de-SPAC transaction as a result of which (i) the surviving entity, directly or through a primarily controlled company, will be primarily engaged in the business of the target company (or companies), which business must not be that of an investment company and (ii) the surviving company will have at least one class of securities listed for trading on a national securities exchange.
- The SPAC is primarily engaged in the business of seeking to complete such a de-SPAC transaction, as evidenced by an appropriate resolution of the SPAC's board of directors (which resolution or action has been recorded contemporaneously in its minute books or comparable documents), as well as by the activities of the SPAC's officers, directors and employees, its public representations of policies and its historical development.
- The SPAC files a Form 8-K with the SEC, no later than 18 months after the effective date of its initial registration statement, disclosing an agreement to engage in the de-SPAC transaction with at least one target company.
- Any assets that are not used in connection with the de-SPAC transaction must be distributed in cash to SPAC shareholders as soon as reasonably practicable after the completion of the de-SPAC transaction.
- The SPAC does not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities.
- The SPAC completes the de-SPAC transaction no later than 24 months after the effective date of its initial registration statement.

The proposing release states that a SPAC would not be able to rely on Rule 3a-2 under the Investment Company Act, which provides a 12-month safe harbor for so-called "transient investment companies," if the SPAC relies on proposed Rule 3a-10 but fails to comply with the above-referenced 18-month or 24-month time frames. As a result, it would not be possible to tack together the safe harbor periods provided under Rule 3a-2 and proposed Rule 3a-10.

While SPACs would not be required to satisfy the non-exclusive safe harbor requirements under Rule 3a-10, a SPAC that does not comply with those requirements could be faced with questions as to its status under the Investment Company Act, as further discussed under the heading "Implications" below. According to the proposing release, the traditional asset composition and sources of income for SPACs may raise questions about a SPAC's status under the Investment Company Act and, in assessing this status, these features would need to be weighed together with other factors that are traditionally used to assess whether a company is an investment company.[21]

5. Business Combinations Involving Shell Companies Generally

The proposing release states that in a business combination between a reporting shell company (including a SPAC) and a company that is not a shell company, investors in the reporting shell company effectively exchange their securities for new securities representing an interest in the combined operating company, and investors in the reporting shell company may not always receive the disclosures and other protections afforded by the Securities Act because the business combination involves an entity that is not a shell company.[22] Proposed Rule 145a under the Securities Act would require that a business combination of a reporting shell company with an entity that is not a shell company would be deemed to involve the "sale" of securities to the shareholders of the reporting shell company. Therefore, the disclosure requirements and liability provisions of the Securities Act would apply to the transaction. The SEC believes this Proposed Rule would eliminate regulatory arbitrage opportunities when structuring transactions involving shell companies.[23]

Additionally, the Proposed Rules add new Article 15 to Regulation S-X. Article 15 would more closely align financial statement reporting requirements in business combinations between a shell company and a private operating company with financial statement reporting requirements in connection with an IPO. These requirements would include, among other items, the disclosure of three years of statements of comprehensive income, changes in stockholder's equity and cash flows. However, under proposed Rule 15-01(b) of Regulation S-X, a shell company registrant would be permitted to include two years of statements of comprehensive income, changes in stockholders' equity and cash flows for the private operating company for all transactions involving an EGC shell company and a private operating company that would qualify as an EGC. In contrast to exsting guidance under the SEC Financial Reporting Manual,[24] this determination would not depend on whether the shell company has filed or was already required to file its annual report.

IMPLICATIONS

The Proposed Rules represent the SEC's latest efforts to align the procedural and disclosure requirements for de-SPAC transactions more closely with those for IPOs, although the Proposed Rules could result in the adoption of customary procedures (*e.g.*, as a result of the requirement of a "fairness" determination and disclosure of the bases of the determination) that go beyond those present in a traditional IPO process. The new regulations would significantly affect how SPACs acquire targets, and would meaningfully increase the cost and complexity of compliance for SPACs and their targets. This will inform decisions by SPAC sponsors as to the desirability of launching new SPACs and is likely to increase the demand for targets in the short term, which may now be more inclined to run dual-track or triple-track processes, in anticipation of the Proposed Rules becoming effective:

- ***Underwriter Liability in De-SPAC Transactions.*** Proposed Rule 140a under the Securities Act would deem a SPAC IPO underwriter to be a statutory "underwriter"[25] in the de-SPAC transaction if it "takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction." For instance, the proposing release states that "it is common for a SPAC IPO underwriter (or its affiliates) to participate in the de-SPAC transaction as a financial advisor to the SPAC, and engage in activities necessary to the completion of the de-SPAC distribution such as assisting in identifying potential target companies, negotiating merger terms, or finding investors for and negotiating PIPE investments."[26] The proposing release notes that the presence of the deferred portion of the IPO underwriters' fees (typically 3.5% of the gross IPO proceeds) means that IPO underwriters have a strong financial interest in taking steps to ensure the consummation of the de-SPAC transaction. While that financial interest in the outcome of the de-SPAC transaction alone may not be sufficient to deem the IPO underwriter an "underwriter" in the de-SPAC transaction, the proposed definition is very broad, and picks up numerous roles that advisors typically play in de-SPAC transactions, including financial advisor, capital markets advisor and PIPE placement agent. Under the proposed rules, if adopted, we would expect that IPO underwriters would take roles in connection with the de-SPAC transaction only if they are able to conduct a due diligence exercise consistent with an IPO and are appropriately compensated. Those arrangements would be expected to extend the timeline for, and increase the costs associated with, a de-SPAC transaction.
- ***Elimination of PSLRA Safe Harbor.*** Projections have long been used in connection with de-SPAC transactions, and market participants have generally taken the view that the PSLRA safe harbor is available. The Proposed Rules, if adopted, would amend the definition of "blank check company" to eliminate the PSLRA safe harbor for forward-looking statements, such as projections, for filings by SPACs and certain other blank check companies. The Proposing Release notes that, for purposes of the PSLRA, the Staff sees no reason to treat forward-looking statements made in connection with de-SPAC transactions differently than forward-looking statements made in IPOs, where projections are not typically used. If adopted, SPAC sponsors would need to consider the potential liability exposure associated with the unavailability of the PSLRA safe harbor when deciding whether and to what extent to use projections in connection with de-SPAC and PIPE transactions. Additionally, similar considerations would be relevant for IPO underwriters that may be deemed statutory "underwriters" under proposed Rule 140a, as discussed above. Excluding SPACs from the safe harbor liability protections of the PSLRA would be expected to reduce investor information and lead to increased litigation with respect to the information that is provided, which, together with the considerations above, would likely drive SPACs to use less comprehensive projections or consider discontinuing their use. The elimination of the PSLRA safe harbor together with the requirement of a "fairness" determination (and disclosure of the bases of the determination), appears to effectively require de-SPAC registration statements to include some form of projections, which will no longer benefit from the safe harbor.
- ***Fairness of De-SPAC Transaction.*** As proposed, Item 1606(a) of Regulation S-K would require a statement in connection with a de-SPAC transaction as to whether the SPAC reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to the SPAC's unaffiliated security holders, as well as a discussion of the bases for this statement. Under proposed Item 1606(b), a SPAC would be required to discuss in reasonable detail the material factors upon which a reasonable belief regarding the fairness of a de-SPAC transaction and any related financing transaction is based and, to the extent practicable, the weight assigned to each factor. These factors would include but not be limited to: the valuation of the private operating company; the consideration of any financial projections; any report, opinion, or appraisal obtained

from a third party; and the dilutive effects of the de-SPAC transaction and any related financing transaction on non-redeeming shareholders.[27] Although the Proposed Rules would not require SPACs to obtain a fairness opinion from a financial advisor, SPACs may seek fairness opinions to substantiate their "reasonable belief" as to the fairness of the transaction. IPO underwriters that render such an opinion in connection with the de-SPAC transaction would be deemed "statutory underwriters" under proposed Rule 140a.

- ***Non-exclusive Safe Harbor under the Investment Company Act.*** Proposed Rule 3a-10 under the Investment Company Act would provide a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act for SPACs if the conditions described above are met. The Staff's statements in proposing the non-exclusive safe harbor raise the question of whether existing SPACs that do not meet the safe harbor conditions would be considered unregistered investment companies by the Staff. Specifically, in response to a question at the March 30 open meeting to consider whether to propose the amendments, William A. Birdthistle, the Director of the SEC's Division of Investment Management, noted that SPACs that are not able to satisfy the safe harbor should be consulting with advisors and carefully considering their compliance obligations.
- ***Timing.*** The public comment period ends on the later of May 31, 2022 and 30 days following the publication of the proposing release in the Federal Register. We expect that the Staff, after considering public comments, will proceed expeditiously to adopt the final rules. SPACs that are considering de-SPAC transactions, companies that are considering a combination with a SPAC and their advisors should carefully consider the Proposed Rules and their implications to pending transactions. Although it is expected that comments will note the importance of providing for a transition period, it is unclear what transition period will be provided in the final rules and how pending transactions will be impacted.

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ENDNOTES

1 A SPAC is a shell company formed for the purpose of acquiring or merging with a private company within a defined time frame. A SPAC completes an initial public offering of shares or units consisting of redeemable shares and warrants. The sponsors of a SPAC typically receive attractively priced warrants and "founder" shares. If the SPAC identifies a target company for a de-SPAC transaction, the SPAC's public shareholders have the option to redeem their shares prior to the de-SPAC transaction to receive a pro rata amount of the remaining proceeds from the SPAC's initial public offering.

2 SEC Release Nos. 33-11048; 34-94546; IC-34549; File No. S7-13-22 (Special Purpose Acquisition Companies, Shell Companies, and Projections) ("proposing release"), *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

3 Proposing release at p. 8, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

4 SpacInsider, Full Year 2021 SPAC Report, at p. 2.

5 Deal Point Data, Issuance Volume and Gross Proceeds ($b), *available at* Deal Point Data - Merger Agreements, Corporate Governance, IPOs, High Yield Debt Covenants, Spin Offs.

6 CF Disclosure Guidance: Topic No. 11, Special Purpose Acquisition Companies (December 22, 2020), *available at* https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies.

7 John Coates, SPACs, IPOs and Liability Risk under the Securities Laws (April 8, 2021), *available at* SEC.gov | SPACs, IPOs and Liability Risk under the Securities Laws.

8 Chair Gary Gensler, Remarks Before the Healthy Markets Association Conference (December 9, 2021), *available at* SEC.gov | Remarks Before the Healthy Markets Association Conference.

9 Proposing release at p. 136, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

10 Proposing release at p. 22, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

11 Proposing release at pp. 138, 264, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

12 Proposing release at p. 136, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

13 Chair Gary Gensler, Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections (March 30, 2022), *available at* SEC.gov | Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections.

14 Commissioner Hester M. Peirce, Damning and Deeming: Dissenting Statement on Shell Companies, Projections, and SPACs Proposal (March 30, 2022), *available at* SEC.gov | Open Meeting.

15 Proposing release at p. 41, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

16 Proposing release at p. 76, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

17 Proposed Item 1608 of Regulation S-K would clarify that SPACs that file a Schedule TO for a redemption must keep the redemption period open for at least 20 business days to comply with Rule 13e-4 and Regulation 14E. Similarly, prospectuses included in Forms S-4 or F-4 must be disseminated at least 20 business days before the shareholders meeting if the registration incorporates any information about the registrant or its target by reference.

18 *See* Item 10(f)(2) of Regulation S-K; Rule 405 under the Securities Act; Rule 12b-2 under the Exchange Act.

19 The Staff noted, as an alternative, that it could adopt a rule requiring firms, when providing projections, to present a reconciliation of projections based on a non-GAAP measure to those based on the nearest GAAP measure, which would likely also increase compliance costs and in turn might reduce the provision of otherwise useful projections. Proposing release at p. 284, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

ENDNOTES (CONTINUED)

[20] Proposing release at p. 131, footnote 286, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

[21] Proposing release at p. 136, footnote 95, https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

[22] Proposing release at p. 76, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

[23] *See* the proposing release at p. 108, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

[24] Paragraph 10220.7 of the SEC's Financial Reporting Manual states that the SEC Staff will not object if two years of the target's annual financial statements and interim financial statements are presented in a proxy statement filed after the legal acquirer's initial public offering of common equity securities but prior to the filing or the filing deadline of the legal acquirer's first Form 10-K, only if (i) the legal acquirer is an EGC that is not a shell company, or (ii) the legal acquirer is a shell company EGC (such as a SPAC EGC) and the target would be an EGC if it were conducting an initial public offering of common equity securities.

[25] Section 2(a)(11) of the Securities Act defines an underwriter as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking."

[26] Proposing release at p. 97, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

[27] Proposing release at p. 53, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

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