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SEC Proposes Major Changes to SPAC Rules

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The Securities and Exchange Commission ("SEC") recently proposed rules that would impose significant new requirements that affect disclosure and liability in initial public offerings by special purpose acquisition companies ("SPACs") and in their later business combination transactions with private operating companies ("de-SPAC" transactions).[1] Ostensibly, the SEC proposals are intended to better align the requirements of de-SPAC transactions with those for IPOs.

The proposals significantly change the regulatory regime for SPACs and others as follows.

1. Underwriter Liability at de-SPAC Transaction for SPAC IPO Underwriters. The proposals would add a rule that deems underwriters in a SPAC IPO to be a "statutory underwriter" in the de-SPAC transaction if it takes steps to facilitate the de-SPAC transaction or related financing. This effectively imposes liability on those IPO investment banks for the de-SPAC transactions and forces them to independently "due diligence" the Form S-4 or F-4 disclosure. For current transactions, investment bankers are treating this as guidance that would apply now and are requiring due diligence now.

2. Fairness Statements. The proposals would require the SPAC to state whether it reasonably believes that the de-SPAC transaction and any related financing are fair or unfair to the SPAC's unaffiliated investors. This will likely lead to SPACs obtaining fairness opinions from their financial advisors.

3. Form S-4/F-4 for all de-SPAC Transactions and Including Targets as Co-Registrants. The proposals would add a rule that deems a business combination involving a de-SPAC transaction to be a "sale" of securities to the SPAC's shareholders under the Securities Act, providing a right of action to SPAC shareholders for failures in the de-SPAC transaction. This rule would apply even when the shell company's shareholders are making no voting or other investment decision for the transaction. Additionally, this rule would require a Form S-4/F-4 registration statement in every de-SPAC transaction even when the particular transactions would only trigger a proxy statement under current rules. Second, the proposals would require that the private company target be a co-registrant when a SPAC files a registration statement on Form S-4 or Form F-4 for a de-SPAC transaction increasing liability for the target and those directors and officers who sign the registration statement.

4. Protection for Projections to be Eliminated. The proposals would eliminate the safe harbor under the Private Securities Litigation Reform Act of 1995 ("PSLRA") for forward-looking statements such as projections in the filings by SPACs. This will likely reduce their use.

5. Investment Company Act Safe Harbor Subject to New Time Limits. The proposals would add a safe harbor from the definition of "investment company" under the Investment Company Act of 1940 (the "Investment Company Act") if the SPAC meets certain conditions, including that the SPAC enter into an agreement for a de-SPAC transaction with a target within 18 months of its IPO and complete the de-SPAC transaction within 24 months of its IPO with no extensions permitted. These duration limits are shorter than the actual timeline of some SPACs that recently completed their de-SPAC transactions. This proposal responds to claims

in certain litigation and attempts to eliminate a risk that had not been explicitly addressed, i.e., that SPACs could be characterized as 'investment companies' subject to registration under the Investment Company Act.

6. Disclosure Enhancements.

   1. The proposals would require a smaller reporting company to redetermine its status within four days after the closing of a de-SPAC transaction, i.e., 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 after the closing of a de-SPAC transaction. This would generally force SPACs that initially qualify as small reporting companies to provide more comprehensive disclosures after a de-SPAC transaction than earlier than currently required.

   2. The proposals would expand disclosures concerning projections, any related material assumptions and whether the projections still reflect the view of the board or management of either the SPAC or the target (which would also apply to non-SPAC transactions).

   3. The proposals increase disclosure requirements regarding: (a) compensation paid to sponsors, (b) conflicts of interest, and (c) dilution.

7. Financial Statement Requirements.

   1. The proposals would require that the financial statements of target companies in a de-SPAC transaction be the same as those for IPOs, i.e., three years of audited financial statements (and possibly two years for EGCs).

I. INTRODUCTION

In the past two years, the U.S. securities markets have experienced an unprecedented surge in the number of initial public offerings by SPACs, with SPACs raising more than $83 billion in 2020 and more than $160 billion in 2021. In 2020 and 2021, more than half of all initial public offerings were conducted by SPACs. By comparison, SPAC's raised a total of $13.6 billion in initial public offerings in 2019 and a total of $10.8 billion in initial public offerings in 2018.

The Release expressed the following concerns about various aspects of the SPAC structure: (a) the amount of sponsor compensation and other costs and their dilutive effects on a SPAC's shareholders, (b) the nature of the sponsor compensation (i.e., dependent on the completion of a de-SPAC transaction) as a potential conflict of interest in the SPAC structure that could lead sponsors to enter into de-SPAC transactions that are unfavorable to unaffiliated shareholders of the SPACs without performing robust due diligence on these transactions, (c) stock exchange listing rules which permit SPAC shareholders to vote in favor of proposed de-SPAC transactions while still redeeming their shares before the closing of the transactions, (d) relatively poor returns for investors in companies after a de-SPAC transaction, (e) inadequate disclosures of the potential benefits, risks and effects for investors, as well as the potential benefits for the sponsor and other affiliates of the SPAC, (f) the disclosure about the private operating company provided through the de-SPAC transaction process may be less complete and less reliable than that provided by an issuer in a traditional initial public offering, (g) the use of projections in de-SPAC transactions that have appeared to be unreasonable, unfounded or potentially misleading, particularly where the target company is an early stage company with no or limited sales, products, and/or operations, (h) the lack of a named underwriter in these transactions that would typically perform traditional gatekeeping functions, such as due diligence, and would be subject to liability under Sections 11 and 12 of the Securities Act for false or misleading statements of material facts, and (i) whether sponsors and target companies have engaged in regulatory arbitrage by using de-SPAC transactions as a path to the public markets.

II. UNDERWRITER LIABILITY AT DE-SPAC TRANSACTION FOR SPAC IPO UNDERWRITERS

Proposed Rule 140a would provide that a person who has acted as an underwriter in a SPAC initial public offering ("SPAC IPO underwriter") and takes steps to facilitate the de-SPAC transaction, or any related financing transaction,[2] 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 under Section 2(a)(11) of the Securities Act. This rule would impose liability on SPAC IPO underwriters under Section 11 and 12(a)(2) of the Securities Act, subject to a due diligence defense, for material misstatements and omissions in the de-SPAC registration statement.

The Release also states that Federal courts and the SEC may find that other parties are involved in securities distributions, including other parties that perform activities necessary to the successful completion of de-SPAC transactions, are "statutory underwriters" under Section 2(a)(11). For example, the SEC states that financial advisors, PIPE investors, or other advisors, depending on the circumstances, may be deemed statutory underwriters in connection with a de-SPAC transaction if they are purchasing from an issuer "with a view to" distribution, are selling "for an issuer," and/or are "participating" in a "distribution."

III. FAIRNESS STATEMENT

Proposed Item 1606(a) would require a statement from a SPAC as to whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to the SPAC's unaffiliated security holders, with a discussion of the bases for this statement.[3]

Proposed Item 1606(a) would require disclosure whether any director voted against, or abstained from voting on, approval of the de-SPAC transaction or any related financing transaction, and if so, identification of the director and, if known after making a reasonable inquiry, the reasons for the vote against the transaction or abstention.

Proposed Item 1606(b) would require a SPAC to discuss 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: 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.

Proposed Item 1607(a) would require disclosure about whether or not the SPAC or its sponsor has received any report, opinion, or appraisal obtained from an outside party relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the de-SPAC transaction or any related financing transaction to the SPAC, the sponsor or security holders who are not affiliates. Proposed Item 1607(c) would require all such reports, opinions or appraisals to be filed as exhibits to the applicable SEC forms for the de-SPAC transaction.[4]

IV. FORM S-4/F-4 FOR ALL DE-SPAC TRANSACTIONS AND INCLUDING TARGET AS CO-REGISTRANT

Proposed Rule 145a would deem any business combination of a reporting shell company involving another entity that is not a shell company to involve a sale of securities to the reporting shell company's shareholders. This will treat the reporting shell company investors as having exchanged their security representing an interest in the reporting shell company for a new security representing an interest in the combined operating company. By deeming such transactions to be a "sale" for the purposes of the Securities Act, the proposed rule would impose Securities Act disclosure and liability provisions on business combinations involving reporting shell companies.

Second, proposed amendments to Form S-4 and Form F-4 would require that the SPAC and the target company be treated as co-registrants when these registration statements are filed by the SPAC for a de-SPAC transaction and the target company as an issuer under Section 6(a) and the signature requirements of FormS-4 or Form F-4. This would make the signatories to the form, including the principal executive officer, principal financial officer, controller or principal accounting officer, and a majority of the board of directors or persons performing similar functions of the target company, liable under Section 11 for any material misstatements or misleading omissions in the Form S-4 or Form F-4, subject to a due diligence defense for all parties other than the SPAC and the target company.

V. PROTECTION FOR PROJECTIONS TO BE ELIMIINATED

The proposals would eliminate the statutory safe harbor in the PSLRA for forward-looking statements, such as projections, in filings in de-SPAC transactions involving an offering of securities by a SPAC or other issuer that meets the amended definition of "blank check company".

VI. INVESTMENT COMPANY ACT SAFE HARBOR SUBJECT TO NEW TIME LIMITS

Proposed Rule 3a-10, would provide a safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act for SPACs that meet the conditions discussed below. SPACs that meet the proposed rule's conditions would not need to register under the Investment Company Act.

There are two tests for investment company status. The proposed safe harbor addresses investment company status under Section 3(a)(1)(A) of the Investment Company Act (the "subjective test"). Section 3(a)(1)(C) of the Investment Company Act provides an alternate "objective test" that defines an "investment company" as any issuer that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and that owns or proposes to acquire investment securities,[5] having a value exceeding 40% of the value of the company's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. If a SPAC owns or proposes to acquire 40% or more of investment securities, it would likely need to register and be regulated as an investment company under the Investment Company Act.[6]

Proposed new Rule 3a-10 of the Investment Company Act would provide a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) (the "subjective test") if it meets each of the following conditions:

a. Nature and Management of SPAC Assets. The SPAC's assets[7] must consist solely of Government securities,[8] Government money market funds[9] and cash items[10] before the completion of the de-SPAC transaction and those assets may not at any time be acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes. An issuer that holds these types of assets, but whose primary business is to achieve investment returns on such assets, would still be an investment company under Section 3(a)(1)(A).

b. De-SPAC Transactions. The SPACs must seek to complete a single de-SPAC transaction as a result of which the surviving public entity (the "surviving company"), either directly or through a primarily controlled company, will be primarily engaged in the business of the target operating company or companies, which is not that of an investment company.[11] The one de-SPAC transaction may involve the combination of multiple target companies, provided that the SPAC treats them for all purposes as part of a single de-SPAC transaction. Second, the surviving company after the de-SPAC Transaction must have at least one class of securities listed for trading on a national securities exchange. Third, the surviving company must have "control" of the SPAC and the degree of that control must be greater than that of any other person.

c. Evidence of Primary Engagement. The SPAC must be primarily engaged in the business of seeking to complete a de-SPAC transaction in the manner and within the time frame set forth in the rule.[12] Second, the officers, directors and employees of the SPAC must be primarily focused on activities related to seeking a target company to operate and not on activities related to the management of its securities portfolio. Third, the SPAC's board of directors must adopt an appropriate resolution evidencing that the company is primarily engaged in the business of seeking to complete a single de-SPAC transaction as described by the rule, which is recorded contemporaneously in its minute books or comparable documents. Fourth, the SPAC may not hold itself out as being primarily engaged in the business of investing, reinvesting or trading in securities.

d. Duration Limitations. The SPAC must file a report on Form 8-K with the SEC announcing that it has entered into an agreement with the target company (or companies) to engage in a de-SPAC transaction no later than 18 months after the effective date of the SPAC's registration statement for its initial public offering. The SPAC must then complete the de-SPAC transaction no later than 24 months after the effective date of its registration statement for its initial public offering.[13] Following the completion of the de-SPAC transaction, any assets that are not used in connection with the de-SPAC transaction must be distributed in cash to investors as soon as reasonably practicable thereafter. The SPAC would also be required to distribute its assets in cash to investors as soon as reasonably practicable if it does not meet either the 18-month deadline or the 24-month deadline. A SPAC may enter into agreements with additional target companies[14] after the 18-month period provided that the business combination contemplated by such later agreements are part of the de-SPAC transaction and all of the transactions close contemporaneously within the 24-month period.

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.[15] Thus, if the de- SPAC transaction requires fewer assets than are owned by the SPAC, the SPAC would be unable to seek another de-SPAC transaction with its remaining assets, or otherwise continue to operate as a SPAC, even if the de-SPAC transaction met the duration conditions. As discussed previously, a SPAC that is relying on the safe harbor would already be precluded from engaging in more than one de-SPAC transaction pursuant to proposed Rule 3a-10(a)(3)(i).

A SPAC would not be able to rely on Rule 3a-2 (for transient investment companies) after it relied on proposed Rule 3a-10 if it fails to meet either proposed Rule 3a-10's 18-month or 24-month time frame.

VII. DISCLOSURE ENHANCEMENTS

a. Re-Determining Smaller Reporting Company Status After Consummating the de-Spac Transaction. The proposed rules would require a smaller reporting company ("SRC") to redetermine its status after closing a de-SPAC transaction. This re-determination of smaller reporting company status would occur before the post-business combination company makes its first SEC filing, after the filing of its Super Form 8-K (i.e., the Form 8-K with Form 10 information), with the public float threshold measured and the revenue threshold determined by using the annual revenues of the private operating company as of the most recently completed fiscal year for which audited financial statements are available.

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).

VIII. ENHANCED PROJECTIONS DISCLOSURE

1. Item 10(b) of Regulation S-K. The proposed amendments to Item 10(b) would continue to state the SEC's view that projected financial information included in filings subject to Item 10(b) must have a reasonable basis. Item 10(b) would state that:

- Any projected measures that are not based on historical financial results or operational history should be clearly distinguished from projected measures that are based on historical financial results or operational history;

- Projections that are based on historical financial results or operational history must be presented with such historical measure or operational history with equal or greater prominence; and

- The presentation of projections that include a non-GAAP financial measure should include a clear definition or explanation of the measure, a description of the GAAP financial measure to which it is most closely related,[16] and an explanation why the non- GAAP financial measure was used instead of a GAAP measure.

Finally, Item 10(b) would be amended to state that its guidance applies to any projections of future economic performance of the registrant and other persons, such as the target company in a business combination transaction, that are included in the registrant's SEC filings.

2. Item 1609 of Regulation S-K. New Item 1609 of Regulation S-K would apply only to de- SPAC transactions, and would require a registrant to provide the following disclosures:For any projections disclosed by the registrant, the purpose for which the projections were prepared and the party that prepared the projections;

All material bases of the disclosed projections and all material assumptions underlying the projections, and any factors that may materially affect such assumptions (including a discussion of any factors that may cause the assumptions to be no longer reasonable, material growth rates or discount multiples used in preparing the projections, and the reasons for selecting such growth rates or discount multiples); and

Whether the disclosed projections still reflect view of the board or management of the SPAC or target company, as applicable, as of the date of the filing; if not, then discussion of the purpose of disclosing the projections and the reasons for any continued reliance by the management or board on the projections.

IX. PROPOSED NEW SUBPART 1600 OF REGULATION S-K

The SEC proposed to add a new Subpart 1600 to Regulation S-K to provide specialized disclosure requirements for SPACs regarding the sponsor, potential conflicts of interest, and dilution, and to require certain disclosures on the prospectus cover page and in the prospectus summary. Proposed Subpart 1600 would also require enhanced disclosure for de- SPAC transactions, including a fairness determination requirement.

1. Sponsors. Proposed Item 1603(a) would require additional disclosure about the sponsor, its affiliates and any promoters of the SPAC, including disclosure of the following among other things:

    - Their experience, material roles, and responsibilities and any agreement, arrangement or understanding: (1) between the sponsor and the SPAC, its executive officers, directors or affiliates, in determining whether to proceed with a de- SPAC transaction, and (2) regarding the redemption of outstanding securities;

    - The controlling persons of the sponsor and any persons who have direct and indirect material interests in the sponsor,

    - The nature and amounts of all compensation and reimbursements that has or will be paid to the sponsor, its affiliates and any promoters for all services rendered in all capacities to the SPAC and its affiliates.

2. Conflicts of Interest. Proposed Item 1603(b) would require disclosure of any actual or potential material conflict of interest between: (1) the sponsor or its affiliates or the SPAC's officers, directors, or promoters, and (2) unaffiliated security holders. This would include disclosure or any conflict of interest in determining whether to proceed with a de-SPAC transaction and any conflict of interest arising from the manner in which a SPAC compensates the sponsor or the SPAC's executive officers and directors, or the manner in

which the sponsor compensates its own executive officers and directors. Proposed Item 1603(c) would require disclosure regarding the fiduciary duties each officer and director of a SPAC owes to other companies.

3. Dilution. Proposed Items 1602(a)(4), 1602(c) and 1604(c) would require additional disclosure about the potential for dilution in: (1) registration statements filed by SPACs, including those for initial public offerings, and (2) de-SPAC transactions.

4. Background of and Reasons for the De-SPAC Transaction; Terms and Effects. Proposed Item 1605 would require disclosure of the background, material terms, and effects of the de-SPAC transaction, as well as the SPAC sponsor's, officers, and directors' material interests in the de-SPAC transaction or any related financing transaction and any redemption or appraisal rights of security holders of the SPAC.

X. FINANCIAL STATEMENT REQUIREMENTS in BUSINESS COMBINATION TRANSACTIONS INVOLVING SHELL COMPANIES

Proposed new Article 15 of Regulation S-X and related amendments are intended to more closely align the financial statement reporting requirements in business combinations involving a shell company and a private operating company with those in traditional initial public offerings.

a. Number of Years of Financial Statements. If the SPAC is an EGC and the target company is an EGC, the target would be permitted to report two years of financial statements, without regard as to whether or not the shell company has filed its first annual report. Three years of financial statements would still be required for the private operating company when it exceeds both the smaller reporting company and EGC revenue thresholds.

b. Audit Requirements of Predecessor. Proposed Rule 15-01(a) would require a target private operating company to have its financial statements examined by an independent accountant in accordance with PCAOB standards.

c. Age of Financial Statements of the Predecessor. Proposed Rule 15-01(c) would provide that the age of financial statements for a private operating company that would be the predecessor to a shell company in a registration statement or proxy statement would be based on whether the private operating company would qualify as smaller reporting company if filing its own initial registration statement.[17]

d. Acquisitions of Businesses by a Shell Company Registrant or Its Predecessor That Are Not or Will Not Be the Predecessor. The financial statements of a target private operating company that is or will be the predecessor to a shell company registrant are required in registration statements or proxy statements related to the business combination. The financial statements of any other businesses, besides the predecessor, that have been, or are probable to be, acquired may also be required. For example, "Shell Company A" and "Target Private Operating Company B" are part of a business combination and a Form S-4 registration statement is filed. Target Private Operating Company B acquired "Company C" before the Form S-4 was filed. The proposed amendments in this section would address the reporting required for Company C in this example.

Proposed Rule 15-01(d) of Regulation S-X would apply for Rules 3-05 or 8-04 (or Rule 3-14 for a real estate operation), the current provisions for financial statements of an acquired business, to acquisitions of businesses by a shell company registrant, or its predecessor, that are not or will not be the predecessor to the registrant. This proposal would be consistent with the current market practice of applying Rule 3-05 (or Rule 8-04) to acquisitions by the target private operating company in a de-SPAC transaction.

Currently, Rule 1-02(w) requires the financial information of the registrant, which may be a shell company, to be used as the denominator to determine significance. Because a shell company has nominal activity, applying this test results in limited to no sliding scale for business acquisitions, including those made by the private operating company that will be the predecessor to the shell company, because every acquisition would be significant and thus require financial statements.[18] The proposed amendment to Rule 1-02(w) of Regulation S-X would require that significance of the acquired business be calculated using the private operating company's financial information as the denominator instead of that of the shell company registrant.

Related to the significance tests, the SEC considered the effect of Rule 11-01(b)(3)(i)(B) of Regulation S-X. This rule permits, in certain circumstances, the use of pro forma amounts that depict significant business acquisitions and dispositions consummated after the latest fiscal year-end, for which the registrant's financial statements are required to be filed, for the registrant's financial information in the significance tests.[19] While the SEC did not propose amendments to Rule 11-01, based on the proposed amendment to Rule 11-01(d) described below, applying this rule may change and result in a future acquired business being compared to the pro forma amounts related to the shell company and target private operating company business combination transaction in filings made after the consummation of the business combination transaction.[20] Consequently, the SPAC's financial statements, including its cash, would be part of the pro forma financial information and will likely increase the denominator in the significance tests compared to measuring an acquisition solely on the target private operating company.

Proposed new Rule 15-01(d)(2) would specify that the financial statements of the acquired business omitted from the previously-filed registration, proxy, or information statement (i.e., financial statements of a probable of being acquired or recently acquired business omitted from a registration, proxy, or information statement because their significance is measured at 50% or less (or Rule 3-14(b)(3)(ii) for a real estate operation) would be required in an Item 2.01(f) Form 8-K filed with Form 10 information within 75 days after closing the acquisition.

e. Financial Statements of a Shell Company Registrant After the Combination with Predecessor. Proposed new Rule 15-01(e), would allow a registrant to exclude the financial statements of a shell company, including a SPAC, for periods before the acquisition once the following conditions have been met: (1) the financial statements of the shell company have been filed for all required periods through the acquisition date, and (2) the financial statements of the registrant include the period in which the acquisition was consummated. The financial statements of the SPAC would be required in all filings (including registration statements and the Form 8-K with Form 10 information filed following the de-SPAC transaction) before the filing of the first periodic report that includes those post- business combination financial statements.

f. Other Amendments. The SEC proposed a number of other related amendments including to amend Rule 11-01(d) of Regulation S-X to state that a SPAC is a business for purposes of the rule. As a result of the proposed rule, an issuer that is not a SPAC may be required to file financial statements of the SPAC in a resale registration statement on Form S-1.

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[1] Securities and Exchange Commission Release No. 33-11048 (the "Release"), March 30, 2022.

[2] Most SPAC deals contain an available cash condition that represents a minimum amount of proceeds below which the target will not be obligated to consummate the transaction. The cash condition represents a number the sponsor group believes it can reasonably achieve given their banking syndicate, network, access to capital, and the target company itself. Since cash in trust is subject to redemption, one mechanism to ensure the cash condition will be satisfied is to secure commitments for a PIPE investment. For the vast majority of PIPEs associated with de-SPAC transactions, the closing of the PIPE financing is cross- conditioned on the closing of the de-SPAC transaction.

[3] A SPAC would be required to include this statement in any Forms S-4 and F-4 or Schedules 14A, 14C, and TO be filed for a de-SPAC transaction. The SEC is proposing an instruction to Item 1606 that a "statement that the special purpose acquisition company has no reasonable belief as to the fairness or unfairness of the de-SPAC transaction or any related financing transaction to unaffiliated security holders will not be considered sufficient disclosure in response to [Item 1606(a)]." As proposed, a SPAC would not be required to disclose that a de-SPAC transaction and any related financing transaction are fair but rather would be required to state its reasonable belief as to the fairness or unfairness of the transaction as well as the bases for this statement.

[4] Form S-4, Form F-4 and Schedule TO for the de-SPAC transaction or included in the Schedule 14A or 14C for the transaction.

[5] Section 3(a)(2) of the Investment Company Act generally defines "investment securities" to include all securities except Government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which are not investment companies or certain private investment companies. 15 U.S.C. 80a-3(a)(2).

[6] The remaining company (or companies) after the de-SPAC transaction may also raise separate questions of Investment Company Act status. If a remaining company meets the definition of "investment company" following the de-SPAC transaction, that company would need to register as an investment company or rely on an appropriate exclusion or exemption under the Investment Company Act.

[7] For purposes of the rule, any references to the SPAC's assets refer to both the assets held in the trust or escrow account and any assets held by the SPAC directly.

[8] The term "Government security" has the same meaning as defined in Section 2(a)(16) of the Investment Company Act. 15 U.S.C. 80a-2(a)(16).

[9] The term "Government money market fund" has the same meaning as defined in paragraph (a)(14) of Rule 2a-7 under the Investment Company Act. 17 CFR 270.2a-7.

[10] The SEC has previously included the following as cash items for purposes of Rule 3a-1: cash, coins, paper currency, demand deposits with banks, timely checks of others, cashier checks, certified checks, bank drafts, money orders, travelers' checks, and letters of credit.

[11] The proposed rule defines the term "primarily controlled company" to mean an issuer that (i) is controlled within the meaning of Section 2(a)(9) of the Investment Company Act by the surviving company following a de-SPAC transaction with a degree of control that is greater than that of any other person and (ii) is not an investment company. Proposed Rule 3a-10(b)(2).

[12] Such evidence may also include its articles of incorporation or other formation documents.

[13] Proposed Rule 3a-10(a)(3)(ii) and (iii). As we discuss below, the average time between the announcement by a SPAC of its intended de-SPAC transaction and the completion of that transaction is approximately 5 months.

[14] These additional agreements would need to be evidenced by the filing of a Form 8-K. One press report suggests that the average period of time between a SPAC's initial public offering and the signing of its business combination agreement may be decreasing, with the average such period of time being approximately 7.5 months for de-SPAC transactions that closed in 2021. See "De-SPACs Still Popular But Becoming Harder To Close," available at https://www.law360.com/mergersacquisitions/articles/1464716/de-spacs-still-popular-but-becoming-harder-to-close.

[15] Proposed Rule 3a-10(a)(4)(i). Some SPACs in the past have sought to extend their lifespan by obtaining approval of their shareholders. The proposed rule does not provide for any extensions.

[16] The reference to the nearest GAAP measure called for by amended Item 10(b) would not require a reconciliation to that GAAP measure. The need to provide a GAAP reconciliation would continue to be governed by Regulation G and Item 10(e) of Regulation S-K.

[17] For example, in an annual report, a domestic company with net losses in its recently completed fiscal year would have up to 90 days after its most recently completed fiscal year-end to update its third quarter financial statements. In contrast, in an initial registration statement, it would have up to only 45 days. See General Instruction A. to Form 10-K and 17 CFR 210.3-12 (Rule 3-12 of Regulation S-X).

[18] For example, financial statements of a business that the private operating company has acquired and represents less than 5% of its total assets, revenue and net income could be required in the Form S-4 because the acquired business would be compared to the shell company's financial statements.

[19] Such pro forma use is permitted if the registrant has filed audited financial statements for any such acquired business for the periods required by Rule 3-05 or Rule 3-14 and the pro forma information required by Rule 11-01 through 11-02 of Regulation S-X.

[20] Pursuant to the proposed amendment to Rule 11-01(d) that would stipulate that the SPAC is a business, an acquisition of the SPAC is considered to be an acquisition of a business, and the conditions to use pro forma financial statements depicting the acquisition as the denominator in the significance tests may be met.

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