MAYER | BROWN

January 26, 2024

Legal Update

# SEC Adopts Final Rules Relating to SPACs, Shell Companies and Projections

On January 24, 2024, the U.S. Securities and Exchange Commission (the "SEC") adopted new rules and amendments to existing rules and forms (the "Final Rules") addressing (i) the treatment under the securities laws of special purpose acquisition companies ("SPACs") in connection with their initial public offerings ("IPOs") and their subsequent business combination transactions ("de-SPAC transactions") with target operating companies; (ii) business combinations with shell companies; and (iii) presentation of projections in SEC filings. The SEC had issued proposed rules ("Proposed Rules") on March 30, 2022.[1]

This Legal Update (i) discusses changes from the Proposed Rules; (ii) summarizes the Final Rules; and (iii) offers key takeaways and practical considerations.

## Changes from the Proposed Rules

With limited exceptions, the Final Rules were adopted substantially as proposed. The Final Rules:

- require increased public disclosures in connection with SPAC IPOs and de-SPAC transactions, such as mandating additional disclosures regarding SPAC sponsors, dilution, SPAC sponsor compensation, factors considered by the SPAC's board in evaluating a proposed business combination, disclosures of any opinion received from a third party regarding the de-SPAC transaction (e.g., a fairness opinion) and additional disclosures about the target company;
- require new disclosures related to projections in de-SPAC transactions, including requiring disclosure of the purpose for which projections were prepared and who prepared them, all material bases and assumptions underlying the projections and whether the projections continue to reflect the views of the preparer;
- adopt a new definition of "blank check company" for purposes of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") that renders the PSLRA's the safe harbor for forward-looking statements unavailable for SPACs;
- require the target company in a de-SPAC transaction to be a co-registrant, which has the significant consequence of imposing potential liability under the Securities Act of 1933, as amended (the "Securities Act") on the target company's directors and executive officers required to sign the

registration statement in connection with the registration statement on a Form S-4 or Form F-4 filed in connection with a de-SPAC transaction (the "de-SPAC Registration Statement");

- require redetermination of smaller reporting company ("SRC") status following completion of a de-SPAC transaction;
- require the dissemination and public filing of prospectuses and proxy statements at least 20 calendar days prior to a stockholder meeting; and
- adopt amendments to Regulation S-X intended to align financial statement requirements between IPOs and business combinations.

While the SEC did not formally adopt its proposed Rule 140a relating to statutory underwriter status for investment banks participating in the SPAC IPO, which was arguably the most controversial aspect of the Proposed Rules, the SEC instead sought to substitute the formal rule with guidance on the matter, as we discuss in more detail below. The SEC also did not adopt the proposed safe harbor Rule 3a-10 under the Investment Company Act of 1940, as amended (the "Investment Company Act"), and instead provided guidance in assessing when a SPAC meets the definition of an "investment company" under the Investment Company Act.

## Background on SPACs

A SPAC is a shell company that completes an IPO with no business operations of its own. Instead, a SPAC's sole purpose is to identify and consummate a business combination, often called a "de-SPAC" transaction, with a target operating company, a process that the SPAC has a limited time to complete. Upon completion of the business combination, the target operating company effectively becomes a publicly traded company. Because a SPAC has no operations, the disclosure in a SPAC IPO typically focuses on the prior experience of the SPAC's organizers/founders (referred to as "sponsors"), which are expected to find a target company and complete the de-SPAC transaction. Although terms vary from offering to offering, a SPAC IPO typically consists of the sale of units, comprised of one share of Class A common stock and a fraction of a redeemable warrant to purchase one share of Class A common stock. The gross proceeds from a SPAC IPO are placed in a trust account and are generally unavailable to the SPAC prior to consummation of a de-SPAC transaction. Funds in the trust account may be removed only in limited circumstances, primarily if either: (i) the SPAC completes a de-SPAC transaction; (ii) the SPAC seeks permission from its stockholders to amend its charter to extend the time it has to complete a business combination and offers its Class A stockholders the opportunity to redeem their shares; or (iii) the SPAC fails to complete a de-SPAC transaction in the allotted time and dissolves, in which case the funds in the trust account are returned to the public stockholders. Investment banks that underwrite a SPAC IPO typically receive a portion, typically one-third, of their underwriting compensation upon the closing of the SPAC IPO, with the remaining portion payable when, and only if, the SPAC completes the de-SPAC transaction.

The terms of a SPAC's charter typically include a requirement that the SPAC must offer to redeem its Class A shares (though not its warrants) in connection with the consummation of the de-SPAC transaction. The redemption price equals the investor's original investment plus the investor's pro rata share of any interest earned on the funds held in the trust account.

SPAC sponsors typically receive a "sponsor promote" consisting of shares of a separate class of common stock (sometimes referred to as "founder shares") issued prior to the SPAC IPO for a nominal amount and warrants purchased in a private placement consummated simultaneously with the SPAC IPO. The founder shares typically represent 20% of the SPAC's total outstanding common stock after the closing of the SPAC IPO. The number of private placement warrants varies based on the size of the SPAC IPO and the price per warrant paid. The proceeds from the sale of the private placement warrants fund the SPAC IPO expenses and working capital while

the SPAC searches for a target company. Once a SPAC identifies a target company with which to combine, the SPAC will often seek to raise additional capital through a private investment in public equity ("PIPE") transaction in order to provide additional cash for the post-business combination company and to mitigate the risk that a significant number of SPAC stockholders will tender their Class A shares for redemption.

Prior to consummating a de-SPAC transaction, a SPAC will seek approval for the transaction from its stockholders using a proxy statement to solicit proxies to be voted at a special stockholder meeting. The proxy statement will describe, among other things, the terms of the business combination as well as how the target company was selected, including the target company's business, results of operations, financial condition, prospects and risks. In many cases, SPACs combine the proxy statement with a prospectus registering securities to be issued in the de-SPAC transaction on a de-SPAC Registration Statement.

If the de-SPAC transaction is approved by the stockholders and the other conditions precedent to the business combination agreement have been satisfied, the SPAC will consummate its de-SPAC transaction shortly after the stockholder meeting and the target company becomes a publicly listed company. Funds from the trust account are released to the target company (net of any amounts returned to investors who tender their Class A shares for redemption and payment of any deferred IPO underwriting fee to the underwriters of the SPAC IPO) and any financing transactions are simultaneously consummated.

## The Final Rules

The Final Rules and guidance represent a significant change in the treatment of SPACs and impact, among other things, (i) the disclosures required in SPAC IPOs and de-SPAC transactions; (ii) the potential liability of various transaction participants in a de-SPAC transaction; (iii) the removal of the PSLRA safe harbor for forward-looking statements, including projections, in de-SPAC transactions; and (iv) a SPAC's status under the Investment Company Act.

### SPECIALIZED DISCLOSURE REQUIREMENTS

The Final Rules introduce a new Subpart 1600 to Regulation S-K that sets forth specialized disclosure requirements in connection with SPAC IPOs and de-SPAC transactions.[2]

#### *SPAC Sponsor Information*

New Item 1603(a) requires additional disclosures about a SPAC sponsor,[3] its affiliates and any promoters in registration statements or schedules used in either a SPAC IPO or de-SPAC transaction, including:

- the experience, material roles, and responsibilities of these parties, as well as any agreement, arrangement or understanding (1) between the SPAC sponsor and the SPAC, its officers, directors or affiliates with respect to determining whether to proceed with a de-SPAC transaction; and (2) regarding the redemption of outstanding securities;
- the control persons of the SPAC sponsor and any persons who have direct or indirect material interests in the SPAC sponsor;
- tabular disclosure of the material terms of any lock-up agreements with the SPAC sponsor and its affiliates; and
- the nature and amounts of all compensation that has been or will be awarded to, earned by, or paid to the SPAC sponsor, its affiliates and any promoters for all services rendered or to be rendered in all capacities to the SPAC and its affiliates; the amount of securities issued or to be issued to the same persons and the price paid or to be paid for such securities, including any circumstances or

arrangements under which the ownership of these securities were or could be transferred; as well as the nature and amounts of any reimbursements to be paid to the SPAC sponsor, its affiliates and any promoters upon the completion of a de-SPAC transaction.

Most of this information is already provided by market participants in SEC filings. The Final Rules codify and amplify these existing disclosure practices.

***Conflicts of Interest***

In both SPAC IPOs and de-SPAC transaction filings, new Item 1603(b) requires disclosure of actual or potential material conflicts of interest between (a) the SPAC sponsor or its affiliates; the SPAC's officers, directors or promoters; and the target company's officers or directors and (b) unaffiliated security holders of the SPAC. New Item 1603(b) requires a description of any material conflict of interest in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which a SPAC compensates the SPAC sponsor or the SPAC's officers or directors, and the manner in which a SPAC sponsor compensates its own officers and directors. Below are some sample potential conflicts of interest that could become more acute as the SPAC nears the end of the period in which it can complete a de-SPAC transaction:

- conflicts stemming from the contingent nature of the SPAC sponsor's compensation that results in the SPAC sponsor having an incentive to complete a de-SPAC transaction, even when doing so results in lower returns to Class A stockholders compared to a liquidation of the SPAC or an alternative transaction;
- conflicts arising when a SPAC sponsor is a sponsor of multiple SPACs simultaneously and manages several different SPACs at once;
- conflicts arising when a SPAC sponsor and/or its affiliate holds financial interests in, or has contractual obligations to, other entities;
- conflicts arising when a SPAC's target is affiliated with the SPAC sponsor, the SPAC or its founders, officers or directors; and
- conflicts arising from the fact that a SPAC's officers may not work full time for the SPAC and have limited ability to devote the time necessary to find and execute a de-SPAC transaction.

Additionally, new Item 1603(c) requires disclosing any fiduciary duties that each officer and director of the SPAC owes to other companies.

***Dilution***

New Item 1602(c) requires all SPAC registration statements, other than those for a de-SPAC transaction, to include a description of all material potential sources of future dilution following a SPAC IPO as well as a tabular disclosure at quartile intervals of possible redemption scenarios of the amount of offering price; net tangible book value per share, as adjusted; and the difference between the offering price and such net tangible book value per share, as adjusted.

The tabular disclosure must describe the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted. Item 1602(c) also requires a description of the model, methods, assumptions, estimates and parameters necessary to understand such tabular disclosure is required.

In addition, new Item 1602(a)(4) requires disclosure in tabular format specified at quartile intervals based on percentages of the maximum redemption threshold of dilution to new investors using the most recent balance

sheet and disclosing dilution in net tangible book value per share, as adjusted for the offering and assumed redemption levels and giving effect to material probable or consummated transactions (other than the de-SPAC transaction) on the cover page of any prospectus included in SPAC registration statements on Forms S-1 or F-1 (the "IPO Registration Statement"). If the offering includes an overallotment or "green shoe" option, the table must include separate rows showing the effects of redemptions in both non-exercise and full exercise scenarios.

For de-SPAC transactions, new Item 1604(c) requires all de-SPAC registration statements to include a description of all material potential sources of future dilution that may be experienced by non-redeeming stockholders in a de-SPAC transaction, as well as a tabular disclosure, under a range of potential redemption levels, of the offering price in the SPAC IPO as of the most recent balance sheet date filed; the pro forma net tangible book value per share, as adjusted; and the difference between the offering price and the net tangible book value per share, as adjusted. Similar to what the new Item 1602(c) requires, the tabular disclosure required in new Item 1604(c) also must mention the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted.

Finally, with respect to each redemption level, new Item 1604(c)(1) requires disclosure of the company valuation at or above which the potential dilution results in the amount of the non-redeeming stockholders' interest per share being at least the initial public offering price per share of common stock. SPACs are also required to include a description of the model, methods, assumptions, estimates and parameters necessary to understand such tabular disclosure.

***Prospectus Cover Page and Prospectus Summary Disclosure***

*SPAC IPOs and other registered offerings other than a de-SPAC transaction*

For registered offerings by SPACs other than de-SPAC transactions, Item 1602(a) requires the prospectus cover page to include, in plain English:[4]

- the time frame in which a SPAC must consummate a de-SPAC transaction and whether this time frame may be extended;
- whether security holders will have the opportunity to redeem the securities offered and whether redemptions will be subject to any limitations;
- the amount of compensation received or to be received by the SPAC sponsor, its affiliates and promoters, the amount of securities issued or to be issued to the same persons and the price paid or to be paid for such securities, and whether this compensation and securities issuance may result in material dilution of the purchasers' equity interests; and
- whether there may be actual or potential conflicts of interest between SPAC sponsor, its affiliates or promoters; and the purchasers in the offering with a cross reference to the location of related disclosures.

Item 1602(b) requires the following information to be included in the prospectus summary section, in plain English:

- the manner by which a potential business combination candidate will be identified and evaluated;
- whether the SPAC will solicit stockholder approval for the de-SPAC transaction;
- the material terms of the trust or escrow account, including the amount of gross offering proceeds that will be placed in the trust or escrow account;

- the material terms of the securities being offered, including redemption rights;
- whether the securities being offered are of the same class as those held by the SPAC sponsor and its affiliates;
- the period in which the SPAC intends to consummate a de-SPAC transaction, and its plans if it does not do so, including whether and how the time period may be extended, the consequences to the SPAC sponsor of not extending this time period, and whether stockholders will have voting or redemption rights with respect to an extension;
- any plans to seek additional financing and how such additional financing might impact unaffiliated stockholders;
- tabular disclosure of the nature and amount of compensation received or to be received by the SPAC sponsor, its affiliates and promoters; the amount of securities issued or to be issued to the same persons and the price paid or to be paid for such securities, and, outside the table, whether this compensation and securities issuance may result in material dilution of the purchasers' equity interests; and
- material conflicts of interest.

*De-SPAC Transactions*

In de-SPAC transactions, new Item 1604(a) requires that SPACs include the following on the cover page of the prospectus or proxy statement, in plain English:

- the determination that the board of directors of the SPAC has made as to whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders, if the law of the SPAC's jurisdiction requires such a determination;
- if applicable, if the SPAC or the SPAC sponsor has received a report, opinion or appraisal from an outside party or an unaffiliated representative, relating to any determination disclosed pursuant to the previous bullet, the approval of the de-SPAC transaction, the consideration or fairness of the consideration to be offered to security holders of the target company or the fairness of the de-SPAC transaction to the SPAC, its stockholders, or SPAC sponsor;
- a brief description of any material financing transactions that have occurred since the SPAC IPO or will occur in connection with consummation of the de-SPAC transaction;
- the amount of compensation received or to be received by the SPAC sponsor, its affiliates and promoters in connection with the de-SPAC transaction or any related financing transaction, the amount of securities issued or to be issued to the same persons and the price paid or to be paid for such securities, and whether this compensation and securities issuance may result in material dilution of the equity interests of non-redeeming stockholders who hold the securities until consummation of the de-SPAC transaction; and
- whether, in connection with the de-SPAC transaction, there may be any actual or potential material conflicts of interest, including any material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which the SPAC compensates a SPAC sponsor, officers and directors or the manner in which a SPAC sponsor compensates its officers and directors, between: on one hand, the SPAC sponsors, their affiliates, SPAC officers, SPAC directors, or promoters, target company officers or target company directors; and, on the other hand, unaffiliated security holders of the SPAC.

Item 1604(b) requires a brief description of the following information in the summary section of the prospectus or proxy statement, in plain English:

- the background and material terms of the de-SPAC transaction;
- the information noted above (first and second bullets) regarding the SPAC board's determination and any third-party opinions as provided in new Item 1607(a);
- any actual or potential material conflict of interest, as noted above (fifth bullet);
- in a tabular format, the terms and amounts of compensation received or to be received by the SPAC sponsor, its affiliates and promoters in connection with the de-SPAC transaction or any related financing transaction, the amount of securities issued or to be issued to the same persons and the price paid or to be paid for such securities in connection with the de-SPAC transaction or any related financing transaction; and, outside of the table, the extent to which that compensation and securities issuance has resulted or may result in a material dilution of the equity interests of non-redeeming stockholders of the SPAC;
- the material terms of any material financing transactions that have occurred or will occur in connection with consummation of the de-SPAC transaction, the anticipated use of proceeds from these financing transactions and the dilutive impact, if any, of these financing transactions on non-redeeming stockholders; and
- the rights of security holders to redeem the outstanding securities of the SPAC and the potential dilutive impact of redemptions on non-redeeming stockholders.

Many of these disclosure requirements are consistent with the recommendations made to the SEC by the SEC's Investor Advisory Committee in September 2021,[5] and are consistent with the requirements that were set forth in proposed legislation introduced in Congress.[6]

***Disclosure and Procedural Requirements for de-SPAC Transactions***

*De-SPAC transaction background*

New Item 1605 requires disclosure of the background, material terms and effects of the de-SPAC transaction, including:

- a summary of the background of the de-SPAC transaction, including a description of any contacts, negotiations or transactions relating to the de-SPAC transaction;
- a brief description of any related financing transaction, including any payments from the SPAC sponsor to investors in connection with the financing transaction;
- the motivations of the SPAC and the target company to engage in the particular de-SPAC transaction and the rationale for the structure and timing of the de-SPAC transaction and any related financing transaction;
- an explanation of any material differences in the rights of SPAC and target company security holders as compared to those of the security holders of the post-business combination company; and
- disclosure regarding the accounting treatment and the federal income tax consequences of the de-SPAC transaction to the SPAC, the target company and their respective security holders.

Item 1605(c) requires "a reasonably detailed discussion of both the benefits and detriments" (which must be quantified to the extent practicable) of the de-SPAC transaction and any related financing transaction on the

SPAC and its affiliates, the SPAC sponsor and its affiliates, the target company and its affiliates, and unaffiliated security holders of the SPAC.

Item 1605(d) requires disclosure of material interests (including non-pecuniary interests) that the SPAC sponsor or the SPAC's officers or directors have in a de-SPAC transaction or any related financing transaction, including fiduciary or contractual obligations owed to other entities, as well as any interest in, or affiliation with, the target company, or held by the target company's officers or directors that consist of any interest in, or affiliation with, the SPAC sponsor or the SPAC. New Item 1605(e) requires disclosure of whether security holders are entitled to any redemption or appraisal rights and, if so, a summary of such rights.

*SPAC board's consideration and evaluation of the de-SPAC transaction*

If the law of the domicile in which a SPAC is organized requires its board of directors (or similar governing body) to determine (or otherwise make a comparable determination) to consider whether a de-SPAC transaction is advisable and in the best interests of the SPAC's security holders, new Item 1606(a) requires that the SPAC disclose that determination and the basis for it. New Item 1606(b) requires the SPAC to discuss the material factors that were considered in making any such determination. The extent considered by the board, such factors must include, but need not be limited to: the valuation of the target company; the financial projections relied on by the board of directors; the terms of financing materially related to the de-SPAC transaction; any report, opinion, or appraisal pursuant to new Item 1607(a); and the material potential sources of future dilution described in new Item 1604(c).

These requirements are substantially similar to the requirements in Item 1014 of Regulation M-A applicable to "going private" transactions under Rule 13e-3 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), of course, now being applied in a very different context—a "going public" context.

Additional disclosure requirements include whether:

- the de-SPAC transaction is structured so that approval of at least a majority of unaffiliated security holders of the SPAC is required;
- any of the SPAC's directors voted against, or abstained from voting on, approval of the de-SPAC transaction (if so, these persons should be identified and their reasons for voting against or abstaining from voting on the transaction);
- a majority of directors who are not employees of the SPAC has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the de-SPAC transaction and/or preparing a report concerning approval of the de-SPAC transaction; and
- the de-SPAC transaction was approved by a majority of the directors of the SPAC who are not employees of the SPAC.

Item 1607(a), similar to Item 1015 of Regulation M-A, requires disclosure about whether the SPAC or the sponsor received any report, opinion (other than an opinion of counsel) or appraisal from an outside party or an unaffiliated representative materially relating to (i) the determination, if any, of the board of directors of the SPAC has made as to whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders; (ii) the approval of the de-SPAC transaction; (iii) the consideration or the fairness of the consideration to be offered to security holders or (iv) the fairness of the de-SPAC transaction to the SPAC, its security holders or the SPAC sponsor. If any outside party rendered any such report, opinion, appraisal or negotiation, Item 1607(b) requires disclosure of:

- the identity, qualifications and method of selection of the outside party and/or unaffiliated representative;
- any material relationship between (1) the outside party, its affiliates, and/or unaffiliated representative; and (2) the SPAC, the SPAC sponsor and/or their affiliates, that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship;
- if the report, opinion or appraisal relates to the fairness of the consideration to be offered to security holders of the target company, whether the SPAC or the SPAC sponsor determined the amount of consideration to be paid to the private operating company or its security holders, or the valuation of the private operating company, or whether the outside party and/or unaffiliated representative recommended the amount of consideration to be paid or the valuation of the private operating company; and
- a summary concerning the negotiation, report, opinion or appraisal, which would be required to include a description of the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the SPAC or the SPAC sponsor; and any limitation imposed by the SPAC or the SPAC sponsor on the scope of the investigation.

Any such report, opinion or appraisal would be required to be included as an exhibit to a de-SPAC Registration Statement or a Schedule TO for a de-SPAC transaction and included directly in any proxy or information statement for a de-SPAC transaction.

## ALIGNMENT OF DISCLOSURES IN DE-SPAC TRANSACTIONS WITH THOSE IN TRADITIONAL IPOS

In the adopting release, the SEC articulated its view that a private operating company's method of becoming a public company (i.e., via a de-SPAC transaction as compared to a traditional IPO) should not affect investor protections. Starting from this premise, which does not take into account the fact that there already are requirements applicable to business combinations, the adopting release states that the Final Rules contain various provisions designed, according to the adopting release, to provide investors with disclosures and liability protections comparable to those that would be present if a private company undertaking a de-SPAC transaction were instead conducting a traditional IPO.

### ***Non-Financial Statement Disclosure Requirements***

In de-SPAC transactions involving a target company not already subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, disclosure with respect to the target company in the registration statement or proxy or information statement filed with the SEC will be required to include the following items from Regulation S-K:

- Item 101 (description of business);
- Item 102 (description of property);
- Item 103 (legal proceedings);
- Item 304 (changes in and disagreements with accountants on accounting and financial disclosure);
- Item 403 (security ownership of certain beneficial owners and management, assuming completion of the de-SPAC transaction and any related financing transaction); and
- Item 701 (recent sales of unregistered securities).

If the target company is a foreign private issuer,[7] the Final Rules include the option to provide disclosure in accordance with the following items of Form 20-F:

- Item 4 (Information on the Company, including history, business overview; organizational structure and property, plants and equipment);
- Item 6.E (Directors, Senior Management and Employees; Share Ownership);
- Item 7.A (Major Shareholders);
- Item 8.A.7 (Legal and Arbitration Proceedings); and
- Item 16F (Change in Registrant's Certifying Accountant).

Inasmuch as the above information is already required to be included in what has become known as the "Super 8-K"[8] (or "Super 20-F" for SPACs that are foreign private issuers[9]), which is filed after completion of the de-SPAC transaction, the Final Rules effectively accelerate the disclosure of this information earlier in the de-SPAC process and prior to when the voting, tender or redemption decision is to be made by investors. The adopting release also notes that including this information in a registration statement (as opposed to a proxy or information statement) means that investors would be further protected against material misstatements or omissions by subjecting transaction participants to potential liability under Sections 11 or 12 of the Securities Act.

***Required Dissemination Period for de-SPAC Transaction Documents***

Under the Final Rules, prospectuses, proxy statements and information statements filed in connection with a de-SPAC transaction will be required to be distributed to stockholders at least 20 calendar days in advance of a stockholder meeting or the earliest date of action by consent. If the maximum period for disseminating such documents permitted under the laws of a SPAC's jurisdiction of incorporation or organization is shorter than 20 calendar days, the Final Rules permit that shorter period to govern.

***Target Company as Co-Registrant to de-SPAC Registration Statement***

When a SPAC proposes to register the issuance of shares in connection with a de-SPAC transaction on a de-SPAC Registration Statement, the Final Rules require the target company be deemed a co-registrant. The target company and its directors and executive officers who sign the de-SPAC Registration Statement will be subject to Securities Act liability.

***Redetermination of Smaller Reporting Company Status***

In a traditional IPO, a private company would determine whether it qualifies as a "smaller reporting company"[10] at the time of filing of its IPO Registration Statement. This determination is important because SRCs are eligible for certain disclosure accommodations in various forms under the Securities Act and Exchange Act. Most SPACs qualify as SRCs at the time of their IPOs. Once a company determines it is an SRC, it is required to make a redetermination of its continued eligibility only once a year, as of the last business day of its second fiscal quarter.

The adopting release notes that, without a requirement for a redetermination upon completion of a de-SPAC transaction, certain post-business combination companies were allowed to avail themselves of scaled disclosure requirements and other accommodations when they otherwise would not have qualified as an SRC had they become public companies through a traditional IPO.

The Final Rules now require a newly combined company to redetermine whether it qualifies as an SRC following consummation of a de-SPAC transaction. This redetermination would be required to occur prior to the time the

newly combined combination company makes its first filing with the SEC (excluding the "Super 8-K") with public float measured as of a date within four business days after the consummation of the de-SPAC transaction and revenue determined using the annual revenues of the target company as of the most recently completed fiscal year for which audited financial statements are available. If a post-business combination company does not qualify as an SRC, its filings would need to reflect this fact by including any necessary incremental disclosure beginning 45 days after consummation of the de-SPAC transaction.

***Inapplicability of PSLRA***

Subject to certain conditions, the PSLRA provides a safe harbor under which a company is protected from liability in any private right of action brought under the Securities Act or Exchange Act based on material misstatements or omissions in forward-looking statements. The adopting release asserts that limiting the availability of the PSLRA safe harbor will "help protect investors by incentivizing SPACs to take more care in avoiding the use of forward-looking statements that are unreasonable." In his remarks during the open meeting adopting the Final Rules, Commissioner Uyeda wondered whether this change went too far and would perhaps incentivize overly pessimistc projections thus depriving investors of the opportunity to understand the true potential of a particular investment opportunity. The adopting release notes that registrants may continue to use projections, referencing the SEC's 1973 position and its guide for disclosure of projections. That said, the SEC also acknowledged market realities and liability implications, including the possibility that removal of the safe harbor may result in increased insurance costs for target companies, among other things.

The PSLRA safe harbor is not available in an IPO. The PSLRA safe harbor is also not available for offerings made by "blank check companies." In short, a "blank check company" is a development stage company that has no specific business plan or purpose or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies and that is issuing "penny stock" (as defined in Exchange Act Rule 3a51-1). By raising more than $5 million in their IPOs, SPACs traditionally avoided being deemed "blank check companies" under this definition thus enabling them to rely on the PSLRA safe harbor in connection with disclosing projected financial information as part of the de-SPAC transaction. The Final Rules amend the definition of "blank check company" for purposes of the PSLRA by removing the requirement that a company issue "penny stock" in order to be considered a "blank check company." The adopting release states that amending this definition clarifies that the PSLRA's safe harbor is not available for forward-looking statements, including projections, made by a SPAC in connection with a de-SPAC transaction. It also notes that the safe harbor is already not available to target companies in a de-SPAC transaction, as the target company is not then subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act.

As foreshadowed by Commissioner Peirce's dissenting statement to the proposal,[11] this portion of the Final Rules may face a legal challenge in the future.

***Who is a Statutory Underwriter?***

The SEC did not adopt proposed Rule 140a, arguably the most controversial aspect of the Proposed Rules. Instead, as noted above, the adopting release provides guidance regarding statutory underwriter status. The guidance may raise many of the same concerns raised by proposed Rule 140a. The adopting release notes specifically that, "[f]or the avoidance of doubt, this guidance does not implement proposed Rule 140a." That said, the adopting release cautions that the statutory terms "distribution" and "underwriter" will be applied broadly and flexibly as warranted by the facts and circumstances. The discussion identifies various transactions or elements or components of transactions that may involve a "distribution." For example, the adopting release notes that, "in the context of a de-SPAC transaction, interests in the typically private target company are dispersed to the public via a business combination with a SPAC. The distribution is therefore the process by which the SPAC's investors, and therefore the public, receive interests in the combined operating company." So,

based on this view, the business combination is the "distribution." As noted elsewhere in this Legal Update, the Final Rules adopt Rule 145a and, regardless of facts, that rule deems there to be a "sale" from the combined company to the SPAC's existing stockholders in a de-SPAC transaction—even one in which the target company is not offering or selling its securities in the market. The adopting release goes out of its way to point out the distinctive aspects of a SPAC and a de-SPAC transaction and the need to think about these transactions differently when trying to identify when or where a "distribution" is occurring and who is or might be an "underwriter." In this regard, the adopting release also distinguishes de-SPAC transactions and Rule 140a "from any business combination not involving a de-SPAC transaction," noting that this particular analysis regarding statutory underwriter status is specific to SPACs and de-SPAC transactions.

## BUSINESS COMBINATIONS INVOLVING SHELL COMPANIES GENERALLY

The following Final Rules apply to business combination transactions involving a shell company generally, whether or not that shell company is a SPAC.

***Business Combinations with a Shell Company as Sales to the Shell Company's Stockholders***

Under new Rule 145a, any business combination of a reporting shell company[12] involving another entity that is not a shell company would be deemed to involve a "sale" of securities to the reporting shell company's stockholders. Since a SPAC would be a reporting shell company and, under Section 5 of the Securities Act, all sales of securities must either be registered under the Securities Act or exempt from registration, new Rule 145a effectively requires any de-SPAC transaction to either be registered or qualify for an applicable exemption.

The adopting release explains the rationale for this rule by stating that "[a] change in a reporting shell company's status via a business combination with an operating company results in the reporting shell company investors effectively exchanging their security representing an interest in the reporting shell company [...] for a new security representing an interest in a combined operating company."

According to the adopting release, the SEC "continue[s] to believe" Section 3(a)(9), which exempts any securities exchange by an issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange, would likely not be available for transactions covered by new Rule 145a. The primary reason for this view, according to the adopting release, is that the deemed exchange by the reporting shell company's existing stockholders for the combined company's securities should be viewed as part of the same offer as the exchange of the private company's securities for their interests in the combined company and, as a result the exchange, is not "exclusively with the reporting shell company's existing security holders." The adopting release also notes that shell companies often hire and compensate a proxy solicitor to solicit approval of the reporting company's stockholders for the business combination, a practice that would be an independent reason to render Section 3(a)(9) inapplicable. Even if an exemption were available, by deeming these transactions to include a "sale" under the Securities Act, investors would have the protections of the anti-fraud provisions in Section 17(a) of the Securities Act and Section 10(b) of, and Rule 10b-5 under, the Exchange Act.

New Rule 145a does not apply to:

- business combinations between two bona fide non-shell entities;
- transactions involving reporting shell companies that are business combination-related shell companies;[13] and
- business combinations of one shell company into another shell company.

***Financial Statement Requirements***

The Final Rules include amendments that the SEC asserts are designed to more closely align the financial statement reporting requirements in business combinations involving a shell company and a private operating company with those applicable to a traditional IPO.

*Number of Years of Financial Statements*

One exception applicable to business combinations permits two years of financial statements of a target company to be presented (instead of three) when the target company: (1) would be an emerging growth company (an "EGC") if it were conducting an IPO of common equity securities; and (2) the registrant is an EGC that has not yet filed or been required to file its first annual report. Final Rule 15-01(b) removes whether or not the shell company has filed its first annual report as a factor in determining the number of years required.

*Audit Requirements of Target Company*

When a target company will be deemed the predecessor to a shell company in a registration statement or proxy statement, final Rule 15-01(a) requires a target company's financial statements to be audited by an independent accountant in accordance with the Public Company Accounting Oversight Board (PCAOB) standards.

*Age of Financial Statements*

Final Rule 15-01(c) provides that the age of financial statements for a business that will be acquired by a shell company in a registration statement or proxy statement will be based on the age requirements in Rule 3-12 or Rule 8-08 of Regulation S-X, rather than the target company provisions in Item 17 of Form S-4. A target company that qualifies as an SRC would apply Rule 8-08 for the age of its financial statements, which permits registration statements and proxy statements with an effective or mailing date, respectively:

- within 45 days after the end of the fiscal year, to include financial statements only as current as of the end of third fiscal quarter; and
- after 45 days, but within 90 days of the end of the fiscal year, to omit audited financial statements for such fiscal year if:
  - all reports due have otherwise been filed (if the target is already a reporting company);
  - for the most recent fiscal year for which audited financial statements are not yet available, the SRC reasonably and in good faith expects to report income from continuing operations attributable to the registrant before taxes; and
  - for at least one of the two fiscal years immediately preceding the most recent fiscal year, the SRC reported income from continuing operations attributable to the registrant before taxes.

Target companies not meeting the definition of smaller reporting company would not benefit from the second bullet above and need to include a new audit for the most recent fiscal year when the effective date or mailing date is 46 days or more after the end of such fiscal year.

*Recent or Probable Acquisitions of Businesses by the Target Company*

When a target company in a business combination transaction has itself acquired, or it is probable that it will acquire, another business (an "Other Acquisition"), historical financial statements of that Other Acquisition may be required in the business combination registration statement or proxy statement. Currently, such financial statements are required only when omission of those financial statements would render the target company's financial statements substantially incomplete or misleading.

Final Rule 15-01(d) requires application of the Regulation S-X provisions related to financial statements of an acquired business (*i.e.*, Rules 3-05 or 8-04, depending on the facts and circumstances) to such situations. Final Rule 15-01(d)(1) provides that the significance tests set forth in Rule 1-02(w) of Regulation S-X, which determine when an acquired business' financial statements are required, would be calculated using the predecessor's financial information for the denominator instead of the shelf company registrant's financial information.

If, after application of Rule 3-05, the financial statements of an Other Acquisition are omitted because the significance of the Other Acquisition is greater than 20% but less than 50%, the current rules would require those financials to be filed on a Form 8-K within 75 days after the consummation of the acquisition. However, it is possible that this 75-day period would expire before a target company has completed a de-SPAC transaction. In such a case, it is unclear how that target company would file a Form 8-K. Final Rule 15-01(d)(2) provides that the omitted financial statements in such a case would be required to be filed as an exhibit to the "Super 8-K" following completion of the de-SPAC transaction or 75 days after consummation of the acquisition, whichever is later.

*Financial Statements of a Shell Company After a Business Combination*

Final Rule 15-01(e) provides that a registrant post-combination may exclude the financial statements of a shell company, including a SPAC, for periods prior to the business combination that results in the combined entity no longer being a shell company once the following conditions have been met: (1) the financial statements of the predecessor have been filed for all required periods through the acquisition date and (2) the financial statements of the combined entity registrant include the period in which the acquisition was consummated, which would also include the accounting for the business combination.

## ENHANCED PROJECTIONS DISCLOSURE

Current Item 10(b) of Regulation S-K states that management has the option to present in SEC filings its good faith assessment of a registrant's future performance, but it also states that management must have a reasonable basis for such an assessment. The Final Rules amend current Item 10(b) to state that:

- any projected measures not based on historical financial results or operational history should be clearly distinguished from projected measures based on historical financial results or operational history;
- it generally would be misleading to present projections based on historical financial results or operational history without presenting such historical financial results 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 directly comparable, and an explanation as to why the non-GAAP financial measure was used instead of a GAAP measure.

The Final Rules also clarify that the guidance in Item 10(b), including as modified per the above, would apply to projections relating to the registrant and to persons other than the registrant, including a target company in a business combination transaction.

***Specific Rules for de-SPAC Transactions***

New Item 1609 of Regulation S-K applies to disclosures of projections in connection with de-SPAC transactions. Under new Item 1609, a SPAC is required to provide the following disclosures:

- with respect to any projections disclosed by the registrant in the filing (or any exhibit thereto), 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 material factors that may affect such assumptions (including a discussion of any factors that may cause the assumptions to be no longer reasonable, material growth or reduction rates or discount rates used in preparing the projections, and the reasons for selecting such growth or reduction rates or discount rates); and
- whether the disclosed projections still reflect the view of the board (or similar governing body) or management of the SPAC or target company, as applicable, as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders; if not, then discussion of the purpose of disclosing the projections and the reasons for any continued reliance by the management or board (or similar governing body) on the projections.

## SEC GUIDANCE ON STATUS OF SPACS UNDER THE INVESTMENT COMPANY ACT OF 1940

The SEC had proposed a new Rule 3a-10, which would have provided a non-exclusive safe harbor from the definition of "investment company" under Investment Company Act Section 3(a)(1)(A) for SPACs, subject to a number of conditions. The SEC did not adopt the proposed new Rule 3a-10, and instead it provided guidance to be used in assessing whether a SPAC may be characterized as an investment company. This guidance does not raise novel aspects of an investment company status analysis, but it is nevertheless helpful in that the SEC addresses activities specific to SPACs that cause concern.

The SEC recognized that a SPAC typically will, as a result of the de-SPAC transaction, either be an operating company or will, through at least primarily controlled company, operate an operating company (and thus would not be an "investment company"). However, the SEC warned that, like any other issuer, depending on the facts and circumstances, a SPAC, at any point in its lifetime, may meet the definition of investment company under Investment Company Act Sections 3(a)(1)(A) or 3(a)(1)(C) or both. Although the latter section includes an objective 40% asset best, the analysis under the former section and in other contexts historically has been based on five primary factors (often referred to as the *Tonopah* factors): (1) the company's historical development, (2) its public representations of policy, (3) the activities of its officers and directors (as well as of the company's employees),[14] (4) the nature of its present assets; and (5) the sources of its present income.[15] Accordingly, an analysis of a company's investment company status is based on all relevant facts and circumstances and quite individualized. Further, it is not a stagnant analysis – a SPAC or other issuer could be an investment company at any stage of its operation. The SEC stated its view that a SPAC should evaluate its investment company status both at its inception and throughout its existence, with no one specific duration period being the sole determinant of a SPAC's status as an investment company (although duration is relevant, as discussed below). The SEC then provided more specific guidance to assist a SPAC in evaluating its investment company status, focusing on certain activities that raise concerns regarding its status as an investment company:

- *As to the nature of a SPAC's assets and income*. The SEC believes that a SPAC may hold, or propose to hold, assets (whether held directly or in a trust or escrow account) that would weigh heavily in favor of it being an investment company (e.g., if a SPAC were to invest in corporate bonds or if it were not to engage in a de-SPAC transaction but instead acquire a minority interest in a company with the intention of being a passive investor).[16] In addition, a SPAC that owns or proposes to acquire 40% more of its total assets in "investment securities" generally would need to register under the Investment Company Act unless an exclusion from the definition applies.[17] In addition, a SPAC whose income is substantially derived from such assets would further suggest that the SPAC is an investment company.

  A SPAC will likely not be deemed to be an "investment company" under Section 3(a)(1)(C) if the SPAC's assets consist solely of "government securities," as defined in the Investment Company Act; securities

issued by government money market funds, as defined in Rule 2a-7(a)(14); and cash items prior to completion of the de-SPAC transaction. While government securities and money market funds are securities for purposes of Section 3(a)(1)(A), asset composition is only one of the factors that should be considered in analyzing a SPAC's status under the Investment Company Act. Thus, an issuer that holds these 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).

- *As to management activities*. The SEC would have 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 their time actively managing the SPAC's portfolio for the primary purpose of achieving investment returns, as these activities would cast doubt on the proposition that the SPAC was primarily engaged in seeking to complete a de-SPAC transaction and instead weigh in favor of the SPAC being primarily engaged in an investment company business.

  The SEC also warned that, 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.[18]

- *As to duration*. The topic of duration is particularly important when it comes to evaluating a SPAC's investment company status during its lifetime, particularly the length of time that the SPAC has been operating prior to entering into an agreement with a target company and completing the de-SPAC transaction. The SEC warned that a SPAC's activities may become more difficult to distinguish from those of an investment company the longer the SPAC takes to achieve its stated business purpose (i.e., consummating a de-SPAC transaction with an operating company) as the *Tonopah* factors may point toward an investment company posture. When evaluating duration, the SEC suggested that SPACs consider related time periods in the Investment Company Act and SEC positions (e.g., Investment Company Act Rule 3a-2 (12-month period), Securities Act Rule 419 (18-month period)).

  The SEC stated that a SPAC that operates beyond these timelines raises concerns that the SPAC may be an investment company, and these concerns increase as the departure from these timelines lengthens. As a result, the SEC believes that a SPAC should reassess its status and analyze whether it has become an investment company if it has, for example, not entered into an agreement with a target company beyond such timelines.

- *As to holding out*. A SPAC that holds itself out in a manner that suggests that investors should invest in its securities primarily to gain exposure to its portfolio of securities prior to the de-SPAC transaction would likely be an investment company under the definition in Section 3(a)(1)(A). For example, if a SPAC were to market itself primarily as a fixed-income investment, as an alternative to an investment in a mutual fund, or as an opportunity to invest in U.S. Treasury securities or money market funds, it would likely be holding itself out as being primarily engaged in an investment company business and thus would likely be an investment company.

- *As to 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 investment company, such as a closed-end fund or a business development company, the SPAC is likely to be an investment company under Section 3(a)(1)(A) because it would be proposing to be engaged in the business of investing, reinvesting and trading in securities as set out in Section 3(a) of the Investment Company Act. A SPAC that seeks to engage in a de-SPAC transaction with an investment company would, at some point prior to the de-SPAC transaction, be proposing to engage in the business of being an investment company.

## Key Takeaways and Practical Considerations

The Final Rules fail to address many of the issues raised by commenters and affect many of the required disclosures and market practices associated with SPACs, SPAC IPOs and de-SPAC transactions. Many of the Final Rules have as their stated purpose to reduce or eliminate differences in the regulatory treatment of de-SPAC transactions compared to traditional IPOs. However, despite the effort to treat "like as like," the rules do not align in many ways how the securities laws treat companies that begin life as SPACs or emerge following de-SPAC transactions.

The following are some key takeaways and practical considerations:

**Statutory Underwriter.** As discussed above, while proposed Rule 140a was not adopted, the guidance offered in the adopting release may not be any more helpful to market participants. Following the release of the Proposed Rules, and considering much of the language contained in the proposing release relating to statutory underwriter status, market participants reviewed their existing diligence and documentation practices in connection with SPAC IPOs, de-SPAC transactions and related financings, including, for example, SPAC PIPE transactions. The discussion contained in the proposing release had identified different parts of the de-SPAC transaction process and the different roles played by financial institutions, including sometimes acting only in advisory capacities. The comments made in connection with the SEC's open meeting by certain SEC Commissioners make clear that there is an imperative to find "statutory underwriters" or "gatekeepers" in these transactions. While, of course, in reality, in some transactions, there just may not be "underwriters" or traditional "gatekeepers." In the past, the SEC has readily acknowledged this fact—for example, when the SEC considered and approved the securities exchange rules regarding direct listings. Informed by this, market participants likely will continue to review and improve the diligence, documentation and execution practices that have developed in recent periods relating to these transactions. All of this should be done in context, and that context has been made more complex (the adopting release's guidance and its assertion of a broad reading of the statutory terms "distribution" and "underwriter," preceded by the proposing release language, and followed by the adoption of Rule 145a that reflects a new view of when an "offer" and a "sale" have occurred).

**Projections**. The Final Rules have a lot to say about projections. On the one hand including them in the list of factors that must be disclosed when a board considers them in making its "best interests" determination makes them more likely to be required to be included in de-SPAC Registration Statements. On the other hand, the SEC has removed the PSLRA's safe harbor from de-SPAC transactions, a key protection that Congress afforded companies like SPACs from litigation concerning these. This aspect to the Final Rules may face a court challenge.

**Investment Company Act Guidance**. Many commenters had opposed the Investment Company Act safe harbor, and the SEC did not adopt proposed Rule 3a-10. The guidance provided by the SEC is helpful in some ways as it gives specific examples of facts that could give rise to a finding that a SPAC is an investment company and confirms that the traditional analysis applied to other vehicles is also applicable to SPACs. In our experience, it would be unusual for the concerning factors the SEC identifies to present themselves in the case of SPACs that are diligently pursuing a business combination with an operating company as its primary activity. Since the adopting release confirms that duration is not the "sole determinant" of an investment company analysis, it stands to reason that there would be facts and circumstances that a SPAC could continue searching for a target company beyond the 12-month and 18-month time periods mentioned in the release, although that proposition is coupled with regulatory risk as outline in the release. The determination regarding whether a SPAC is an investment company is a facts and circumstances determination, however, and SPACs and SPAC sponsors should review the guidance carefully, take advice and proceed accordingly. Although not a rule, the SEC's guidance serves as an important reminder for SPACs to tread carefully when it comes to their investment company status. It would be prudent for SPACs to follow the guidance until a regulation or case law clarifying

this matter becomes available. In particular, SPACs should evaluate the five *Tonopah* factors throughout their lifetimes, as well as the matters regarding duration discussed by the SEC, and bear in mind that the target's own investment company status will influence the SPAC's status as well.

**SPAC board's determination about the de-SPAC transaction**. Item 1606 now focuses on situations in which a determination regarding the advisability of the business combination is required by the law of the jurisdiction in which the SPAC is organized. As a result, only if applicable law requires a determination regarding whether the transaction is advisable and in the best interests of the SPAC and its security holders must it be disclosed. However, this is required in Delaware,[19] the Cayman Islands and many other jurisdictions. The adopting release goes out of its way to make clear that there should be no "misimpression that Item 1606(a) creates a requirement, implicit or explicit, or expectation that a fairness opinion must be obtained to comply with its requirements." The adopting release also acknowledges the tension between obtaining a fairness opinion and increasing the need to include projections in support of the a board's "best interests" determination. All that said, Item 1606 listing the factors that may be considered by the board of directors in making its decision to proceed with a de-SPAC transaction, while non-exhaustive, is fairly detailed and prescriptive. In this regard, if a de-SPAC transaction is in essence a business combination (and, for state law purposes, it is usually a "merger" or "acquisition" and the board is subject to the state law's fiduciary duty related corporate code and caselaw), it is not clear why it should be treated differently than other business combinations by having more prescriptive disclosure requirements regarding the process undertaken by the board of the acquiror and the factors considered in respect of the decision to proceed with the acquisition.

**Co-Registrant Status**. The SEC states its view that the target company is "an issuer of securities under Section 2(a)(4) of the Securities Act" a de-SPAC transaction, but it does not explain its rationale for this view. As noted by many commenters during the public comment period, there are many examples of co-registrant status (such as in the securitization context, with a sponsor or depositor, or in a repackaging), where there is actual control person status. The adopting release cites the legislative history of Section 2(a)(4) for the proposition that it looks to the economic realities of the transaction, but it does not carry this through to any relevant example or explain how an entity without any measure of control regarding the issuance process can be an "issuer." Co-registrants will appear on the cover page. This means that a target company will be a registrant. The SEC distinguishes the application of Section 11 liability in this instance from that in an IPO pointing to the hybrid nature of de-SPAC transaction that makes it "distinguishable" from a traditional IPO and also distinguishable from other business combinations. All of this raises interesting and complex questions regarding Securities Act liability that may extend beyond the SPAC and de-SPAC transaction context and muddies the waters on many issues beyond the scope of this Legal Update. Importantly, being a co-registrant may subject the target company (to the extent that it became a reporting company by virtue of being a co-registrant in a de-SPAC transaction that may not have been consummated) to Exchange Act periodic reporting obligations under Section 15(d) of the Exchange Act. On this matter, the adopting release provides scant relief—pointing to Exchange Act Rule 12h-3 and Staff Legal Bulletin 18 for guidance on suspending its Exchange Act reporting obligations.

**Implementation.** The Final Rules will become effective 125 days after their publication in the Federal Register.[20] The Final Rules will likely be subject to court challenges that could impact when (or if) they become effective. The Final Rules will be applicable to filings made on or after the effective date; however, the applicability of the Final Rules and their practical impact to ongoing transactions that have already made filings with the SEC is uncertain at this stage.

See the Final Rules and the related Fact Sheet and SEC announcement.

*For more information about the topics discussed in this Legal Update, please contact any of the following authors.*


**John R. Ablan**
+1 312 701 8018
jablan@mayerbrown.com

**David S. Bakst**
+1 212 506 2551
dbakst@mayerbrown.com

**Edward S. Best**
+1 312 701 7100
ebest@mayerbrown.com

**Leslie S. Cruz**
+1 202 263 3337
lcruz@mayerbrown.com

**Gonzalo Go**
+1 212 506 2390
ggo@mayerbrown.com

**Brian D. Hirshberg**
+1 212 506 2176
bhirshberg@mayerbrown.com

**Anna T. Pinedo**
+1 212 506 2275
apinedo@mayerbrown.com

The Free Writings & Perspectives, or FW&Ps, blog provides news and views on securities regulation and capital formation. The blog provides up-to-the-minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or "late stage" private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities-related topics that pique our and our readers' interest. Our blog is available at: www.freewritings.law.

## ENDNOTES

[1] *See* Proposed Rules, available at https://www.sec.gov/files/rules/proposed/2022/33-11048.pdf. For a summary of the Proposed Rules, *see* Mayer Brown Legal Update, *SEC Proposes a "Sea Change" Set of New Rules Applicable to SPACs and Other Market Participants* (Apr. 4, 2022), available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/04/sec-proposes-a-sea-change-set-of-new-rules-applicable-to-spacs-and-other-market-participants.pdf?rev=4182e91616e3480381f39d2326623c8b.

[2] New Item 1601(a) of Regulation S-K defines "de-SPAC transaction" as "a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, involving a special purpose acquisition company and one or more target companies (contemporaneously, in the case of more than one target company)." New Item 1601(b) defines "special purpose acquisition company" to mean a company that has (1) indicated that its business plan is to (i) conduct a primary offering of securities that is not subject to the requirements of Rule 419 under the Securities Act; (ii) complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, with one or more target companies within a specified time frame; and (iii) return proceeds from the offering and any concurrent offering (if such offering or concurrent offering intends to raise proceeds) to its security holders if the company does not complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, with one or more target companies within the specified time frame; or (2) represented that it pursues or will pursue a special purpose acquisition company strategy.

[3] New Item 1601(c) of Regulation S-K defines "SPAC sponsor" as "any entity and/or person primarily responsible for organizing, directing, or managing the business and affairs of a special purpose acquisition company, excluding, if an entity is a SPAC sponsor, officers and directors of the special purpose acquisition company who are not affiliates of any such entity that is a SPAC sponsor. The Final Rules exclude from the scope of the definition of "SPAC sponsor" the activities performed by natural persons in their capacities as directors and/or officers of a SPAC sponsor only if they are not considered as its affiliates.

[4] Rule 421(d) has been the SEC's rule requiring use of plain English in certain filings. This rule requires registrants to write the prospectus cover page, prospectus summary, and risk factors sections of prospectuses using plain English principles, including the use of short sentences; definite, concrete, everyday language; active voice; tabular presentation of complex information whenever possible; no legal or business jargon; and no multiple negatives.

[5] *See* Recommendations of the Investor Advisory Committee Regarding Special Purpose Acquisition Companies (Sept. 9, 2021), *available at*: https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210909-spac-recommendation.pdf.

[6] *See, e.g.,* "The Sponsor Promote and Compensation Act," *available at* https://www.kennedy.senate.gov/public/_cache/files/8/c/8c5a665c-b7e8-48ce-a2bf-6cd1dbc504c3/A1E8BB9BDA5EB64CB106B92056D91B57.the-sponsor-promote-and-compensation-act-spac-act-.pdf

[7] "Foreign private issuer" is defined in Securities Act Rule 405 and Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50% of its assets are located in the United States or (iii) its business is principally administered in the United States.

[8] A "Super 8-K" refers to a Current Report on Form 8-K with Form 10 information that is filed pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of the form.

[9] A "Super 20-F" refers to a Transition Report on Form 20-F pursuant to Section 13 or 15(d) of the Exchange Act. A SA foreign private issuer that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before a transaction that causes it to cease to be a shell company must file this transition report in accordance with the requirements set forth in Rule 13a-19 or Rule 15d-19 under the Exchange Act (17 CFR 240.13a-19 and 240.15d-19). Issuers filing such reports shall provide all information required in, and follow all instructions of, Form 20-F relating to an Exchange Act registration statement of all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction, with such information reflecting the registrant and its securities upon consummation of the transaction.

[10] In general, a smaller reporting company is a company that is not an investment company, an asset-backed issuer or a majority-owned subsidiary of a parent that is not a smaller reporting company, and had (1) a public float of less than $250 million; or (2) had annual revenues of less than $100 million during the most recently completed fiscal year for which audited financial statements are available and either had no public float or a public float of less than $700 million. *See* Rule 12b-2 under the Exchange Act and Item 10(f) of Regulation S-K.

[11] Commissioner Peirce's dissenting statement includes the following passage: "the proposal would change the existing definition of "blank check company" for purposes of the PSLRA—the definition Congress looked to when it wrote the PSLRA—to include SPACs by removing the "penny stock" condition. Look over there, Congress, while we rewrite the statute!"

[12] New Rule 145a defines "reporting shell company" as a company, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has: (a) no or nominal operations; (b) either: (1) no or nominal assets; (2) assets consisting solely of cash and cash equivalents; or (3) assets consisting of any amount of cash and cash equivalents and nominal other assets; and (c) an obligation to file reports under Section 13 or Section 15(d) of the Exchange Act.

[13] The term "business combination related shell company" is defined in Securities Act Rule 405 and Exchange Act Rule 12b-2 as a shell company that is: "(1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or (2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in 17 CFR 230.165(f)) among one or more entities other than the shell company, none of which is a shell company."

[14] *See*, e.g., Rule 3a-8 under the Investment Company Act.

[15] *See In the Matter of Tonopah Mining Co.*, 26 S.E.C. 426 (Jul. 21, 1947).

[16] The SEC noted that a SPAC that does not hold any securities would generally not implicate the Investment Company Act, unless it *proposes* to engage in the business of being an investment company.

[17] These activities would also weigh in favor of a SPAC being considered to be an "investment company" under Section 3(a)(1)(A).

[18] *See Request for Comment on Certain Information Providers Acting as Investment Advisers*, Securities and Exchange Commission (June 15, 2022), *available at* https://www.sec.gov/rules/other/2022/ia-6050.pdf. The definition generally includes three elements for determining whether a person is an investment adviser: (i) the person provides advice, or issues analyses or reports, concerning securities; (ii) the person is in the business of providing such services; and (iii) the person provides such services for compensation. Each element must be met in order for a person to be deemed an investment adviser.

[19] There has been a noticeable downward trend in SPAC IPOs in the United States involving SPACs with Delaware as the jurisdiction of incorporation. Data from Woodruff Sawyer notes that the percentages of SPACs domiciled in Delaware that have undergone SPAC IPOs vis-a-vis total SPAC IPOs per year are 71% in 2019 (42 out of 59), 61% in 2020 (150 out of 248), 56% in 2021 (343 out of 613), 49% in 2022 (42 out of 86) and 30% in 2023 (9 out of 31).

[20] The Final Rules have not yet been published in the Federal Register when this Legal Update is released.

**Annex A**

## Summary of the Changes to Certain Forms, Including Affected Forms and Schedules

The table below is a copy of the table in the adopting release summarizing the disclosure changes to Regulation S-K.

The Final Rules add a new Subpart 1600 to Regulation S-K, which items are detailed below.

| Final Requirement and Effects | Affected Forms and Schedules |
| --- | --- |
| **Item 1602: Registered offerings by SPACs**<br>• Require certain information on the prospectus cover page and in the prospectus summary of registration statements for offerings by SPACs other than de-SPAC transactions.<br>• Require enhanced dilution disclosure in these registration statements. | • Forms S-1 and F-1 |
| **Item 1603: SPAC sponsor; conflicts of interest**<br>• Require certain disclosures regarding a SPAC sponsor, its affiliates, and any promoters of the SPAC.<br>• Require disclosure regarding conflicts of interest between: (1) a SPAC sponsor; its affiliates; officers, directors, or promoters of a SPAC; or target company officers or directors; and (2) unaffiliated security holders of the SPAC. | • Forms S-1, F-1, S-4, and F-4<br>• Schedules 14A and 14C<br>• Schedule TO |
| **Item 1604: De-SPAC transactions**<br>• Require certain information on the prospectus cover page and in the prospectus summary of registration statements for de-SPAC transactions.<br>• Require enhanced dilution disclosure in these registration statements. | • Forms S-4 and F-4<br>• Schedules 14A and 14C<br>• Schedule TO |
| **Item 1605: Background of and reasons for the de-SPAC transaction; terms of the de-SPAC transaction; effects**<br>• Require disclosure on the background, material terms, and effects of the de-SPAC transaction. | • Forms S-4 and F-4<br>• Schedules 14A and 14C<br>• Schedule TO |
| **Item 1606: Board determination about the deSPAC transaction**<br>• Require disclosure if the law of the jurisdiction in which the SPAC is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders or otherwise make any comparable determination.<br>• Require a discussion of the material factors the board of directors (or similar governing body) considered in making the determination.<br>• Require certain disclosures as to the approval of security holders, the approval of directors, and the retention of unaffiliated representatives. | • Forms S-4 and F-4<br>• Schedules 14A and 14C<br>• Schedule TO |
| **Item 1607: Reports, opinions, appraisals, and negotiations**<br>• Require disclosure regarding any report, opinion (other than an opinion of counsel), or appraisal received by a SPAC or a SPAC sponsor from an outside party or an unaffiliated representative acting on behalf of unaffiliated security holders relating to any determination described in response to Item 1606(a), approval of the deSPAC transaction, consideration to be offered in the de-SPAC | • Forms S-4 and F-4<br>• Schedules 14A and 14C<br>• Schedule TO |

| | |
|---|---|
| transaction, or fairness of the deSPAC transaction to the SPAC, its security holders, or SPAC sponsor.<br><br>• Require disclosure of the qualifications of the outside party or unaffiliated representative, method of selection, and certain material relationships that existed during the past two years. | |
| **Item 1608: Tender offer filing obligations**<br><br>• Require additional disclosures in a Schedule TO filed in connection with a de-SPAC transaction. | • Schedule TO |
| **Item 1609: Projections in de-SPAC transactions**<br><br>• Require additional disclosures regarding projections disclosed in a disclosure document for a de-SPAC transaction. | • Forms S-4 and F-4<br><br>• Schedules 14A and 14C<br><br>• Schedule TO<br><br>• Form 8-K |
| **Item 1610: Structured data requirement**<br><br>• Require information disclosed pursuant to Subpart 1600 to be tagged in a structured, machine-readable data language. | • Forms S-1, F-1, S-4, and F-4<br><br>• Schedules 14A and 14C<br><br>• Schedule TO |
| **Amendments to Regulation S-X**** Amend financial statement requirements and the forms and schedules filed in connection with business combination transactions involving shell companies (other than business combination related shell companies), including de-SPAC transactions, to align more closely required disclosures about the target company with those required in a Form S-1 or F-1 for an IPO, including:<br><br>• Expanding the circumstances in which target companies may report two years, instead of three years, of audited financial statements (resulting in a decrease in burden) (Rule 15-01(b)); and<br><br>• Further aligning the requirements for audited financial statements in these transactions with those required in a registered IPO (resulting in an increase in burden) (Rule 15-01(c), (d) and (e)). | • Forms S-4 and F-4<br><br>• Schedules 14A and 14C<br><br>• Schedule TO |
| **Amendments to Align Non-Financial Statement Disclosures in De-SPAC Transactions**<br><br>• Amend the forms and schedules filed in connection with de-SPAC transactions to align more closely required non-financial statement disclosures about the target company with those required in a Form S-1 or F-1 for an IPO. | • Forms S-4 and F-4<br><br>• Schedules 14A and 14C<br><br>• Schedule TO |
| **Amendment to Forms S-4 and F-4**<br><br>• Amend Form S-4 and Form F-4 to require that if the securities to be registered on the form will be issued by a SPAC or another shell company in connection with a de-SPAC transaction, the registrants also include the target company. | • Forms S-4 and F-4 |

** [The SEC] estimate[d] that there will be a negligible or no change in burden to Form 20-F and Form 8-K as a result of the final amendments to Regulation S-X, in that these final amendments codify how existing rules are applied in practice.