DETAILED SUMMARY OF THE FINAL RULES AND GUIDANCE

The adopting release organizes the final rules and guidance into five main topic areas, each of which is discussed in detail below.

Depending on the circumstances, the final rules are applicable to registration statements on Forms S-1, F-1, S-4 and F-4 under the Securities Act; proxy statements on Schedule 14A, information statements on Schedule 14C and tender offer statements on Schedule TO under the Securities Exchange Act of 1934 (Exchange Act); and current reports on Form 8-K.

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1. Specialized Disclosure Requirements for SPAC Transactions

The final rules add new Subpart 1600 to Regulation S-K that prescribes extensive specialized disclosure requirements applicable to SPAC IPOs and de-SPAC transactions, including enhanced disclosures regarding SPAC sponsors, sponsor compensation, conflicts of interest and shareholder dilution, as well as certain disclosures on the prospectus cover page and in the prospectus summary section of registration statements. Subpart 1600 also imposes additional disclosures for de-SPAC transactions, including regarding the background, material terms and effects of such transactions, and the board of directors' determination as to the advisability of the de-SPAC transaction if required by the law of the SPAC's jurisdiction of organization.

The requirements in new Subpart 1600 will codify and standardize some of the disclosures already commonly provided by SPACs. To the extent they overlap with existing disclosure requirements under Regulation S-K that are currently applicable to SPAC IPOs and de-SPAC transactions, the disclosure requirements of Subpart 1600 will be controlling.

All information disclosed pursuant to Subpart 1600 is required to be tagged in Inline XBRL, including detail tagging of the quantitative disclosures and block-text tagging of the qualitative disclosures.[1] As noted above, the final rules allow a one-year phased-in compliance date for the tagging requirements.

Definitions

For purposes of the Item 1600 series of Regulation S-K, Item 1601 assigns the following terms the following meanings:

- "***de-SPAC transaction***" means "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)."

- "***special purpose acquisition company (SPAC)***" means "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 § 230.419 (Rule 419 under the Securities Act); (ii) complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets,

[1] Because non-SPAC issuers are not required to tag any disclosures until they file their first post-IPO periodic report on Form 10-Q, 20-F or 40-F, the tagging requirement for disclosures in SPAC IPO registration statements will accelerate the tagging obligations and related compliance burdens of SPACs compared to those of other filers. The SEC notes that enhancing the usability of the SPAC IPO disclosures through a tagging requirement is of particular importance given the unique nature of SPAC offerings and the potential risks they present to investors.

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."[2]

- "***SPAC sponsor***" means "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."[3]

- "***target company***" means "an operating company, business or assets."

SPAC Sponsors

Item 1603(a) requires additional disclosure about the SPAC sponsor, its affiliates and any promoters in connection with SPAC IPOs and de-SPAC transactions, including, among other things:

- The experience, material roles and responsibilities of these parties, as well as any agreement, arrangement or understanding (i) between the sponsor and the SPAC, its officers, directors or affiliates with respect to determining whether to proceed with a de-SPAC transaction and (ii) between the sponsor and the SPAC's unaffiliated security holders regarding the redemption of outstanding SPAC securities;

- The controlling persons of the sponsor and any persons who have direct and indirect material interests in the sponsor, as well as the nature and amount of their interests;

- Tabular disclosure of the material terms of any lock-up agreements with the sponsor and its affiliates;

- (i) The nature and amounts of all compensation that has been or will be awarded to, earned by or paid to the sponsor, its affiliates and promoters for all services rendered or to be rendered in all capacities to the SPAC and its affiliates;

  (ii) The amount of securities issued or to be issued by the SPAC to the sponsor, its affiliates and promoters and the price paid or to be paid for such securities;

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[2] For the avoidance of doubt, the adopting release includes guidance clarifying that a company ceases to be a SPAC upon consummation of a de-SPAC transaction: "[I]f a company that meets the SPAC definition has completed a de-SPAC transaction…then the company no longer meets the definition of a SPAC and…such companies are not required to comply with the enhanced disclosures under Regulation S-K applicable to SPACs in registration statements they file in later periods after the completion of such de-SPAC transactions."

[3] The adopting release explains that an officer or director of the SPAC that is an affiliate of an entity that is a SPAC sponsor would also be a SPAC sponsor under this definition, and provides the following example: "[I]n the case of a hypothetical SPAC where a third-party management company is a SPAC sponsor and a person is a director of both the SPAC and this third-party management company, then this person would also be a SPAC sponsor."

(iii) Any circumstances or arrangements under which the sponsor, its affiliates and promoters, directly or indirectly, have transferred or could transfer ownership of SPAC securities, or that have resulted or could result in the surrender or cancellation of such securities; and

(iv) The nature and amounts of any reimbursements to be paid to the sponsor, its affiliates and promoters upon the completion of a de-SPAC transaction.

The SEC notes that these disclosure requirements are intended to provide a SPAC's prospective investors and existing shareholders with detailed information relating to the SPAC sponsor that could be important in understanding and analyzing a SPAC, including how the rights and interests of the SPAC sponsor, its affiliates and promoters may differ from, and may conflict with, those of public shareholders.[4]

The SEC further notes that even though SPACs are already providing, to an extent, some of this information in their SEC filings, it believes codifying and amplifying these existing disclosure practices will help ensure that issuers provide consistent and comprehensive information across transactions, so that investors can make more informed voting, investment and redemption decisions.

Conflicts of Interest

To improve investors' ability to analyze risks associated with conflicts of interest related to an investment in a SPAC, Item 1603(b) requires, in both SPAC IPO and de-SPAC transaction filings, disclosure of any actual or potential material conflict of interest between (i) the SPAC sponsor, SPAC officers, SPAC directors, SPAC affiliates or promoters, target company officers or target company directors and (ii) the SPAC's unaffiliated security holders. This includes 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 or directors, or the manner in which a sponsor compensates its own officers and directors.

The adopting release cites the following non-exhaustive examples of situations that could give rise to such potential conflicts, including:

- Conflicts stemming from the nature of the sponsor's compensation or security ownership, which may present significant financial incentives to pursue a de-SPAC transaction even in the absence of attractive target company transaction opportunities;

- Conflicts arising when the sponsor is a sponsor of multiple SPACs and manages several different SPACs at the same time, which may result in decisions regarding the allocation of the sponsor's time and attention and target company acquisition opportunities that may adversely affect SPAC shareholders; and

[4] The adopting release notes that Item 1603(a) will operate in addition to existing disclosure requirements that may be applicable to a SPAC's arrangements with SPAC sponsors such as Item 701 of Regulation S-K (which requires disclosure about, among other things, the terms of any private securities transactions between a SPAC and SPAC sponsors within the past three years) and Item 404 of Regulation S-K (which requires disclosure about certain related party transactions).

- Conflicts arising when the sponsor and its affiliates owe employment, contractual or fiduciary duties to other companies besides the SPAC, which may affect the ability of the SPAC to execute a de-SPAC transaction or the terms to which a SPAC agrees in any ultimate de-SPAC transaction; sponsors and their affiliates also could seek to enter a de-SPAC transaction with a target company they are affiliated with when superior target company transaction opportunities may be available.

In addition, Item 1603(c) requires a brief description of the fiduciary duties each officer and director of a SPAC owes to other companies, which the SEC maintains could allow investors to assess whether and to what extent officers or directors may have to navigate a conflict of interest consistent with their obligations under the laws of the jurisdiction of incorporation or organization, may be compelled to act in the interest of another company or companies that compete with the SPAC for business combination opportunities, or may have their attention divided such that it may affect their decision-making with respect to the SPAC.

Dilution

In light of the potential for significant shareholder dilution embedded within the typical SPAC structure, Items 1602 and 1604 require standardized and more granular information about the potential for dilution at both the SPAC IPO and de-SPAC transaction stages. Potential sources of dilution may include shareholder redemptions, sponsor compensation, underwriting fees, warrants, convertible securities and so-called "PIPE" (private investment in public equity) or other financings.

The SEC believes dilution disclosure is important to SPAC investors because (i) it provides investors a way of understanding the impact of the disparity in price paid by insiders and the price paid by investors for shares; (ii) it enables investor comparisons to other SPACs; and (iii) it helps investors evaluate the economics of the de-SPAC transaction.

SPAC IPOs

Specifically in connection with SPAC IPOs, Item 1602 requires a dilution table, in the following format, presenting at quartile intervals based on percentages of the maximum redemption threshold:[5]

- The offering price;
- As of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, calculated as if the offering and assumed redemption levels have occurred and to give effect to material probable or consummated transactions (other than the completion of a de-SPAC transaction); and
- The difference between the offering price and such net tangible book value per share, as adjusted.

[5] The SEC highlights that the prescribed redemption levels (25%, 50% and 75%) are relative to the maximum redemption level and are not an absolute percentage. To clarify for investors the percentage used, registrants may add information to the table headers. For example, where the maximum redemption is 97.5%, a registrant could add "25% of Maximum Redemption (24.375%)."

Net Tangible Book Value Per Share, as Adjusted				
Offering Price of _____	25% of Maximum Redemption	50% of Maximum Redemption	75% of Maximum Redemption	Maximum Redemption

If the IPO includes an overallotment option, the table must include separate rows showing the above information both with the exercise and without the exercise of the overallotment option.

The tabular disclosure must show the nature and amounts of each source of dilution and the number of shares used in the net tangible book value per share calculation; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted.

Outside of the table, a description of material potential sources of future dilution following the IPO is required, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted. A description of the model, methods, assumptions, estimates and parameters necessary to understand the tabular disclosure is also required.

De-SPAC Transactions

For de-SPAC transactions, Item 1604 requires a dilution table presenting at intervals representing selected potential redemption levels that may occur across a reasonably likely range of outcomes:

- The SPAC IPO offering price;
- As of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, calculated as if the selected redemption levels have occurred and to give effect to (while excluding the de-SPAC transaction itself) material probable or consummated transactions (e.g., funding backstops, forward purchases, PIPE financings) and other material effects on the SPAC's net tangible book value per share from the de-SPAC transaction (e.g., the expected incurrence of transaction expenses to consummate the de-SPAC transaction); and
- The difference between the offering price and such net tangible book value per share, as adjusted.

With respect to each redemption threshold presented, Item 1604 also requires a statement of the company valuation at or above which the potential dilution results in the amount of the non-redeeming shareholders' interest per share being at least the IPO price per share of common stock.[6]

[6] See pages 115-16 of the adopting release for an example of this required disclosure. In response to a commenter's concern that the required disclosure could be misconstrued by investors as a guarantee that the stock will not trade down in the aftermarket, the SEC suggests that "a registrant could provide additional disclosure discussing this issue, such as, for example, explicitly stating that the required disclosure is not a guarantee that the trading price of the combined company will not be below the IPO price nor is the disclosure a guarantee the company valuation will attain one of the stated levels of valuation."

In contrast to the dilution table that must be provided in connection with SPAC IPOs (pictured above), the final rules do not prescribe the redemption levels for which dilution information must be provided in connection with de-SPAC transactions. The SEC notes that while registrants are not required to select exactly four levels, "the presentation of fewer than four levels of redemption is unlikely to constitute a sufficient range of outcomes to inform investors" (though there may be exceptions depending on specific facts and circumstances). Registrants that present fewer than four redemption levels are advised to "ensure such presentation is appropriate and tailored to the unique circumstances of the relevant de-SPAC transaction warranting such a presentation." Companies should not select redemption levels that are not possible.

The tabular disclosure must show the nature and amounts of each source of dilution and the number of shares used in the net tangible book value per share calculation; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted.

Outside of the table, a description of material potential sources of future dilution that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transaction is required, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted. A description of the model, methods, assumptions, estimates and parameters necessary to understand the tabular disclosure is also required.

Prospectus Cover Page Disclosure

SPAC IPOs

On the SPAC IPO prospectus cover page, Item 1602(a) requires that certain key disclosures be made in plain English,[7] including the time frame for the SPAC to consummate a de-SPAC transaction; redemptions; sponsor compensation (including SPAC securities ownership) and whether material dilution may result from such compensation and ownership; the SPAC IPO dilution table described above (except that the table on the prospectus cover page may exclude the individual line-items for each source of dilution used in the calculations as well as the related non-tabular dilution disclosures that are required for the dilution table that appears in the body of the prospectus); and material conflicts of interest.

De-SPAC Transactions

On the de-SPAC transaction prospectus cover page, Item 1604(a) requires information in plain English about any board determination as to the advisability of the de-SPAC transaction and any related outside report, opinion or appraisal; material financing transactions; sponsor compensation (including SPAC securities ownership) and whether material dilution may result from such compensation and ownership; and material conflicts of interest.

The SEC acknowledges that although many SPACs already disclose similar information on prospectus cover pages under current market practice, the final rules will standardize this information across all registration statements filed by SPACs for IPOs and de-SPAC transactions, enabling investors to better

[7] Plain English principles include 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.

identify and assess salient aspects of the transactions that may affect their voting, investment and redemption decisions.

Prospectus Summary Disclosure

SPAC IPOs

In the prospectus summary for SPAC IPOs, Item 1602(b) requires the following disclosures in plain English:

- How the SPAC will identify and evaluate potential business combination candidates and whether it will solicit shareholder approval for the de-SPAC transaction;
- The material terms of the trust or escrow account, including the amount or percentage of gross offering proceeds that will be placed in such account;
- The material terms of the securities being offered, including redemption rights, and whether the securities are the same class as those held by the sponsor and its affiliates;
- The length of the time period during 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 sponsor of not completing an extension of this time period, and whether shareholders will have voting or redemption rights with respect to an extension of time to consummate a de-SPAC transaction;
- Any plans to seek additional financing and how such additional financing might impact unaffiliated security holders;
- Tabular disclosure of sponsor compensation (including SPAC securities ownership) and, outside of the table, the extent to which material dilution may result from such compensation and ownership; and
- Material conflicts of interest.

De-SPAC Transactions

In the prospectus summary for de-SPAC transactions, Item 1604(b) requires the following disclosures in plain English:

- The background and material terms of the de-SPAC transaction;
- Any board determination as to the advisability of the de-SPAC transaction, the material factors the board considered in making such determination and any related outside report, opinion or appraisal;
- Material conflicts of interest;

- Tabular disclosure of sponsor compensation (including SPAC securities ownership) in connection with the de-SPAC transaction or any related financing transaction and, outside of the table, the extent to which material dilution may result from such compensation and ownership;

- The material terms of any material financing transactions in connection with the de-SPAC transaction, the anticipated use of proceeds and any dilutive impact on non-redeeming shareholders; and

- Redemption rights and the potential dilutive impact of redemptions on non-redeeming shareholders.

De-SPAC Transactions: Background, Reasons, Material Terms and Effects

Item 1605 is intended to provide investors with centralized information necessary to evaluate the reasons for a de-SPAC transaction and for choosing a particular structure and financing for the transaction, as well as to promote greater consistency and comparability of this information across de-SPAC transactions. Disclosures required under this item include:

- A summary of the background of the de-SPAC transaction, including a description of any contacts, negotiations or transactions that have occurred concerning the de-SPAC transaction;

- The material terms of the de-SPAC transaction, including but not limited to:

    - A brief description of the de-SPAC transaction;

    - A brief description of any related financing transaction, including any payments from the sponsor to investors in connection with the financing transaction;[8]

    - The reasons for engaging in the de-SPAC transaction and 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 with security holders of the combined company as a result of the de-SPAC transaction; and

    - Disclosure regarding the accounting treatment and the federal income tax consequences of the de-SPAC transaction.

Item 1605 separately requires disclosure regarding:

- The effects of the de-SPAC transaction and any related financing transaction on the SPAC and its affiliates, the sponsor and its affiliates, the target company and its affiliates, and the SPAC's unaffiliated security holders, including a reasonably detailed discussion of both the benefits and

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[8] The SEC notes that in most, if not all, cases, registrants will be required to disclose the price paid by any PIPE investors and other benefits such as derivative securities that are acquired by PIPE purchasers (in addition to SPAC shares) because these are likely to be material terms.

detriments to the aforementioned parties, with such benefits and detriments quantified to the extent practicable;

- Any material interests in the de-SPAC transaction or any related financing transaction held by (i) the SPAC sponsor, officers or directors, including any fiduciary or contractual obligations to other entities as well as any interest in, or affiliation with, the target company; or (ii) the target company's officers or directors that consist of any interest in, or affiliation with, the SPAC or SPAC sponsor; and

- Whether or not security holders are entitled to any redemption or appraisal rights; if so, a summary of such rights; and if not, a brief description of any other rights that may be available to security holders.

Board Determination as to Advisability of De-SPAC Transaction

To enhance investors' ability to assess a SPAC's decision to proceed with a particular de-SPAC transaction, Item 1606(a) requires that, 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), the SPAC must disclose that determination.

This is a change from the proposal, which would have required the SPAC to state whether it reasonably believes the de-SPAC transaction and any related financing transactions are fair or unfair to the SPAC's unaffiliated security holders. The adopting release notes that many commenters raised significant objections to the proposed fairness determination requirement, including that it could be interpreted to require a fairness opinion (even if not explicitly required) and concerns about the cost, increased liability and litigation risk associated with such opinions.

Under Section 251(b) of the Delaware General Corporation Law, a board of directors of a corporation that seeks to enter a merger or consolidation is required to adopt a resolution approving the transaction agreement and declaring its advisability. The adopting release notes that, in the experience of the staff, many SPACs governed by Delaware law already provide a statement in registration statements or proxy statements filed for de-SPAC transactions that the transaction agreement the board approved is advisable and in the best interests of shareholders, and thus the final rules will merely codify existing disclosure practices in this regard.

The SEC emphasizes that **Item 1606(a) does not require the de-SPAC transaction to be substantively fair or the SPAC to make a fairness determination when it is not otherwise required to do so under applicable state or foreign corporate law. Nor does it create a requirement (implicit or explicit) or expectation that a fairness opinion must be obtained to comply with its requirements. The SEC states plainly that "nothing in the final rule requires a SPAC to obtain a fairness opinion in connection with a de-SPAC transaction."**

Factors Considered in Board Determination

Item 1606(b) mandates discussion of the material factors considered by the SPAC board in making this determination. To the extent considered, these factors must include, but need not be limited to, the valuation of the target company; financial projections relied on by the board; the terms of financing

materially related to the de-SPAC transaction; any report, opinion or appraisal obtained from a third party (discussed below); and the dilutive effects of the de-SPAC transaction and any related financing transaction on non-redeeming shareholders. The SEC stresses that the listed factors must be discussed *only to the extent actually considered*, and thus boards are not required to specifically consider the listed factors when determining whether a de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders.

Approvals

To provide additional context for understanding the process by which a SPAC determined to proceed with a particular de-SPAC transaction, Items 1606(c) through (e) further require disclosure of whether or not:

- The de-SPAC transaction is structured so that approval of at least a majority of the SPAC's unaffiliated security holders is required;
- 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 the approval of the de-SPAC transaction;
- The de-SPAC transaction was approved by a majority of the non-employee directors of the SPAC; and
- Any SPAC director voted against, or abstained from voting on, approval of the de-SPAC transaction and, if so, identification of the director and, if known after making reasonable inquiry, the reasons for the vote against the transaction or abstention.[9]

Reports, Opinions and Appraisals in De-SPAC Transactions

Item 1607(a) requires disclosure of certain information if the SPAC or SPAC sponsor received any report, opinion (other than an opinion of counsel) or appraisal from an outside party or unaffiliated representative that materially relates to (i) any board determination as to the advisability of the de-SPAC transaction; (ii) the approval of the de-SPAC transaction; (iii) the consideration or the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction; or (iv) the fairness of the de-SPAC transaction to the SPAC, its security holders or SPAC sponsor.[10]

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[9] The SEC underscores that Items 1603(c) through (e) are only disclosure requirements and are not intended to change market practices or compel SPACs to modify their processes in connection with de-SPAC transaction approval.

[10] While fairness opinions are common in many merger transactions, they are not standard in de-SPAC transactions. The economic analysis contained in the adopting release notes that only 15% and 32% of de-SPAC transactions disclosed that they were supported by fairness opinions in 2021 and 2022, respectively. In contrast, a study of mergers and acquisitions more broadly found that 85% of bidders obtain fairness opinions. The adopting release further notes that, in 2021, the average cost for fairness opinions obtained by SPAC acquirers where such information was presented in SEC filings was approximately $270,000.

To assist investors in considering the usefulness and reliability of any such report, opinion or appraisal, the following information must be disclosed:

- The identity, qualifications and method of selection of the outside party and/or unaffiliated representative;
- Any material relationship between (i) the outside party, its affiliates and/or unaffiliated representative and (ii) the SPAC, SPAC sponsor and/or their respective 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 in the de-SPAC transaction, whether the SPAC or SPAC sponsor determined the amount of consideration to be paid to the target company or its security holders, or the valuation of the target company, or whether the outside party and/or unaffiliated representative recommended the amount of consideration to be paid or the valuation of the target company; and
- A summary concerning the report, opinion or appraisal, including a description of the procedures followed; the findings and recommendations; the bases for and methods used to arrive at such findings and recommendations; instructions received from the SPAC or SPAC sponsor; and any limitation imposed by the SPAC or SPAC sponsor on the scope of the investigation.

All such reports, opinions or appraisals must be filed as exhibits to, or included in, the applicable SEC filing for the de-SPAC transaction.

2. Alignment of Disclosures and Liability Standards Between De-SPAC Transactions and IPOs

The final rules are intended to harmonize the regulatory treatment of target companies entering the public markets through de-SPAC transactions (often referred to by senior SEC officials as the "SPAC target IPO") with that of companies conducting traditional IPOs. In the Commission's view, a private operating company's method of becoming a public company should not negatively impact investor protection. Accordingly, the final rules are intended to provide SPAC investors with disclosure and liability protections comparable to those that would be present if the target company were instead to undertake a traditional firm commitment underwritten IPO.

The final rules address six specific reforms in this area, as discussed below.

Target Company as Co-Registrant

Under existing rules, when a SPAC offers and sells its securities in a registered de-SPAC transaction, only the SPAC, its principal executive officer, principal financial officer, controller or principal accounting officer, and the majority of its board of directors are required to sign the registration statement for the transaction. Because the SEC views the de-SPAC transaction as the functional equivalent of the target company's IPO—and a majority of the relevant disclosure in the de-SPAC registration statement is about the target company, the business operations of which will be those carried on by the combined company going forward—the final rules require that the SPAC and the target company be treated as co-

registrants when the registration statement is filed by the SPAC in connection with a de-SPAC transaction.

This new co-registration requirement will make each of the additional signatories to the registration statement, including the target company's principal executive officer, principal financial officer, controller/principal accounting officer and a majority of the target's board of directors, potentially liable under Section 11 of the Securities Act for any material misstatements or omissions therein at the time of effectiveness (subject to a due diligence defense for all parties other than the SPAC and the target company). The names of all co-registrants must appear on the cover page of the registration statement.

By treating the target company as a co-registrant (and an "issuer," under Section 2(a)(4) of the Securities Act, of the securities of the newly combined public company through which the formerly private company will operate its business), the final rules are designed to provide similar investor protections as if the target had entered the public markets through a conventional IPO. The SEC believes the heightened liability exposure associated with being a co-registrant will help improve the accuracy, completeness and reliability of the disclosure provided to investors in connection with de-SPAC transactions by creating strong incentives for the target company's directors and management to conduct thorough diligence and exercise greater care in the preparation and presentation of disclosures about the target company included in the de-SPAC registration statement.

Exchange Act Reporting Obligations

By virtue of being "registrants" and "issuers," target companies will become Exchange Act reporting companies upon effectiveness of the de-SPAC registration statement, and will be required to file periodic and current reports until the closing of the de-SPAC transaction. The SEC declined to provide an exemption from the Exchange Act reporting requirements in these circumstances, noting that, during the pendency of the de-SPAC transaction, SPAC investors will benefit from receiving updated information about the target company. However, in the event the registration statement becomes effective but the de-SPAC transaction does not close, the target company may look to Exchange Act Rule 12h-3 and Staff Legal Bulletin 18 for guidance on how it can immediately suspend its Exchange Act reporting obligations.

Unavailability of PSLRA Liability Safe Harbor for Financial Projections

The PSLRA provides a safe harbor for forward-looking statements (which includes financial projections) under the Securities Act and the Exchange Act, under which a company is protected from liability for forward-looking statements in any private right of action under the Securities Act or Exchange Act when, among other conditions, the forward-looking statement is identified as such and is accompanied by meaningful cautionary statements. The safe harbor is not available, however, when a forward-looking statement is made in connection with an IPO or an offering by a blank check company that issues "penny stock."

While projections are almost never included in registration statements for traditional IPOs, it has become standard market practice to prepare and disclose projections of the target company's future economic performance in connection with de-SPAC transactions. Moreover, state law and fiduciary obligations, such as in Delaware, may actually require disclosure of projections to investors in registration or proxy statements when relied on by a SPAC's board of directors in determining whether to approve or reject the proposed de-SPAC transaction. Market participants and courts have generally

taken the view that the PSLRA safe harbor (which limits liability for forward-looking statements) is available for projections in these circumstances, which has been a distinct competitive advantage for de-SPAC transactions over traditional IPOs.

To address concerns expressed by some commentators about the reliability and integrity of target company projections used in marketing de-SPAC transactions, the final rules create a new definition of "blank check company" under the PSLRA located in Securities Act Rule 405 and Exchange Act Rule 12b-2 that is not limited by any qualification that the company is an issuer of "penny stock" (as in Securities Act Rule 419) and thus encompasses SPACs (and other companies that would be blank check companies but for the fact they do not sell penny stock). The new definition is exclusively for purposes of the PSLRA safe harbor provisions regarding forward-looking information and not for purposes of any other rules (including Rule 419). Under the final rules, the existing definition of "blank check company" in Rule 419 (which contains the penny stock issuer qualifier) will remain unchanged.

The effect of the final rules will be that the PSLRA safe harbor protections will not apply to projections and other forward-looking statements made by SPACs in connection with de-SPAC transactions, thereby subjecting them to the same level of legal liability that currently exists for IPOs.[11] This is consistent with the SEC's view that forward-looking statements made in connection with de-SPAC transactions should not be treated differently than forward-looking statements made in traditional IPOs, because both kinds of transactions result in public shareholders acquiring a formerly private company; similar informational asymmetries exist between these companies (and their insiders and early investors) and public investors; and there is no track record of public disclosure to help investors evaluate the reasonableness of projections.

While the SEC recognizes that forward-looking statements can be important for investors to aid their valuation of securities—and that such statements may indeed be mandated by state and/or fiduciary legal obligations—the unavailability of the PSLRA liability protections for these statements under the final rules is intended to strengthen the incentives for SPACs to take greater care in avoiding the use of financial projections and other forward-looking information that are unreasonable.

The SEC underscores, however that **the final rules do not prohibit SPACs and other affected blank check companies from making forward-looking statements or any required disclosures (such as under state law)**: "As in an IPO and as SPACs have done in the past, SPACs will continue to be able to disclose projections in connection with de-SPAC transactions after the effective date of the final rules, and securities analysts may elect to use such forward-looking statements as appropriate. In some cases, a SPAC may decide to qualify its disclosure to put it in the proper context."[12]

The SEC also observes that, **notwithstanding the lack of the PSLRA safe harbor, other safe harbors in Commission rules and legal doctrines may mitigate to some extent liability concerns associated with providing projections in de-SPAC transactions**, depending on specific facts and circumstances (e.g., the

[11] The SEC's position is that the PSLRA safe harbor is already not available to target companies in de-SPAC transactions because the target company is not then subject to Exchange Act reporting obligations.
[12] For example, the adopting release notes that, "[t]o the extent a SPAC is concerned that security holders may rely on a summary of third-party projections that the SPAC believes it is required to disclose under State law in instances where the SPAC believes the projections are no longer reliable, a SPAC could provide supplemental disclosure advising and alerting security holders of this fact."

judicially created "bespeaks caution" doctrine, which renders forward-looking representations accompanied by sufficient cautionary language non-actionable under the federal securities laws).

Nevertheless, the heightened litigation risks that will now accompany projections disclosed in connection with de-SPAC transactions, when combined with the enhanced disclosures around projections required under the final rules and the possibility of statutory underwriter liability under the SEC's cryptic new guidance (discussed below), could lead SPACs to reduce or discontinue their use (particularly where the target company is an early-stage startup with little or no revenue or profits historically whose value typically comes in the form of future financial growth) and could further chill an already tepid SPAC market.

The SEC explicitly notes that the final rules and consequent unavailability to SPACs and other affected blank check companies of the PSLRA liability protections for forward-looking information are **not intended to have any retroactive effect related to forward-looking information disclosed prior to the effective date of the final rules**.

Re-Determination of SRC Status

In a traditional IPO, a private company determines whether it qualifies as an SRC at the time of filing its initial registration statement on Form S-1 (or F-1). Most SPACs qualify as SRCs at the time of their IPO and, under existing rules, a post-business combination company after a de-SPAC transaction is permitted to retain this status until the next annual determination date. The SEC observes that the absence of a re-determination of SRC status upon the completion of de-SPAC transactions permits certain post-business combination companies to avail themselves of scaled disclosure and other accommodations when they otherwise would not have qualified as an SRC had they become public companies through a traditional IPO.

To better align the reporting requirements between de-SPAC transactions and IPOs, **the final rules require a re-determination of SRC status prior to the time the post-business combination company makes its first SEC filing (other than the Super 8-K) following the de-SPAC transaction, with the public float threshold measured as of a date within four business days after the completion of the de-SPAC transaction** (the four-business-day window thus will end on the due date for the Super 8-K)[13] and the revenue threshold determined by using the annual revenues of the target company as of the most recently completed fiscal year reported in the Super 8-K. The applicable thresholds in the current SRC definition will remain unchanged.[14]

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[13] The adopting release notes that this four-business-day window will provide some flexibility for issuers to measure public float compared to the annual re-determination of SRC status (which is determined based on a single business day, the last business day of the most recently completed second fiscal quarter). In the SEC's view, this window will allow for a more accurate reflection of a post-business combination company's public float in view of the limited trading history of the common equity securities of the post-business combination company following a de-SPAC transaction.

[14] A company generally qualifies as a smaller reporting company if (i) it has a public float (the aggregate market value of the company's outstanding voting and non-voting common equity held by non-affiliates) of less than $250 million; or (ii) it has annual revenues of less than $100 million and either (a) no public float (because it has no public equity outstanding or no public trading market for its equity exists) or (b) a public float of less than $700 million. For more information, see the SEC's Small Entity Compliance Guide for Issuers available here.

Any loss of SRC status must be reflected in filings made beginning 45 days following the completion of the de-SPAC transaction (including a filing to amend a Super 8-K). As a result, SPACs that initially qualified as SRCs could be required to provide investors with more comprehensive and detailed disclosures (e.g., three years of audited financial statements) considerably sooner following a de-SPAC transaction than under existing rules (subject to potential reporting accommodations available to emerging growth companies (EGCs)). Staff experience is that most post-de-SPAC registrants would be EGCs and would not be required to file the additional year of financial statements in reliance on the EGC accommodations.

The final rules do not provide for re-determination of the combined company's qualification as an accelerated or a large accelerated filer or as an EGC in connection with a de-SPAC transaction.

20-Day Minimum Dissemination Period

To ensure that SPAC shareholders have adequate time to analyze the information presented in de-SPAC transactions before making voting, investment and redemption decisions, the final rules require that de-SPAC transaction prospectuses and proxy/information statements be distributed to shareholders at least 20 calendar days in advance of the SPAC shareholder meeting or the earliest date of action by consent (or the maximum period for disseminating such disclosure documents permitted under the applicable laws of the SPAC's jurisdiction of incorporation or organization if such period is less than 20 calendar days).

Non-Financial Statement Disclosures About Target Company

The final rules prescribe additional non-financial statement disclosures about the target company (comparable to what would be provided in a traditional IPO) in registration statements and proxy/information statements filed in connection with de-SPAC transactions. Specifically, disclosure is required pursuant to the following items in 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);
- Item 403 (security ownership of certain beneficial owners and management); and
- Item 701 (recent sales of unregistered securities).

The SEC notes that this information about the target company is already required to be included in the Super 8-K that must be filed within four business days after the completion of the de-SPAC transaction (and in many, but not all, cases is already voluntarily provided in disclosure documents for de-SPAC transactions). The final rules, however, mandate that these disclosures be provided to shareholders earlier in the de-SPAC process and before they make voting, investment and redemption decisions. Inclusion of this information in a registration statement on Form S-4 (or F-4) (as opposed to a

proxy/information statement) will also afford investors protections against material misstatements or omissions by subjecting issuers and other transaction participants to potential Securities Act liability. In most de-SPAC transactions in the technology and life sciences industries, it is customary to include these disclosures in the proxy statement or Form S-4 registration statement, so we believe the new requirements merely codify existing market disclosure practices.

Commission Guidance on Potential Underwriter Status and Liability in De-SPAC Transactions

In a departure from the proposal, the SEC elected not to adopt proposed new Rule 140a that would have clarified when a specific party is a statutory underwriter in the context of de-SPAC transactions. Specifically, proposed Rule 140a would have deemed a SPAC IPO underwriter that takes steps to facilitate a subsequent de-SPAC transaction, or any related PIPE or other financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction to be engaged in the distribution of the securities of the combined company to the public and to be an underwriter in the de-SPAC transaction, and thereby subject to Section 11 liability for any material misstatements or omissions in the de-SPAC registration statement (subject to a due diligence defense). Such a rule would have significantly expanded the concept of an "underwriter" within the meaning of the Securities Act.

The final rules take a different approach. On pages 282-89 of the adopting release, the SEC instead provides general interpretive guidance regarding when a transaction participant would be considered a statutory underwriter in connection with a de-SPAC transaction and, as such, subject to Section 11 liability, underscoring that it will interpret the statutory terms "distribution" and "underwriter" broadly and flexibly consistent with longstanding SEC practice, as the facts and circumstances of any particular transaction may warrant.

The guidance articulates the SEC's position that:

- **A de-SPAC transaction is a "distribution" of securities** ("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"); and

- **The statutory definition of "underwriter" under Section 2(a)(11) of the Securities Act encompasses any person who sells for the issuer or participates in a distribution associated with a de-SPAC transaction**.

The guidance further explains the circumstances in which a statutory underwriter might be present in a de-SPAC transaction (footnotes omitted; emphasis added):

> "We acknowledge that in a de-SPAC transaction, there is generally no single party accepting securities from the issuer with a view to resell such securities to the public in a distribution in the same manner as a traditional underwriter in traditional capital raising. Nevertheless, **in a de-SPAC distribution, there would be an underwriter present where someone is selling for the issuer or participating in the distribution of securities in the combined company to the SPAC's investors and the broader public**. Depending on the facts and circumstances, **such an entity could be deemed a 'statutory underwriter' even though it may not be named as an underwriter in any given offering or may not be engaged in activities typical of a named**

> **underwriter in traditional capital raising**. Section 11 would apply as it would to anyone acting as underwriter with respect to a registered de-SPAC transaction, and such person will have liability for any material misstatement or omission in the registration statement. Similarly such person would have any defenses available to the parties upon whom the statute imposes liability.
>
> "The prior discussion is **not intended to signal that we believe that every de-SPAC transaction or offering of securities generally involves or needs the involvement of an underwriter. But where a distribution and an underwriter are present, the party acting as underwriter will need to perform the necessary due diligence of the disclosures made in connection with the registered offering of securities or face full exposure to liability without the benefit of the due diligence defense under the Securities Act of 1933**."

The guidance provides no further clarity on what precisely it means to "participate" in a de-SPAC transaction distribution. The ongoing regulatory ambiguity and uncertainty may cause some investment banks to continue to be reluctant to participate in SPAC IPOs or to avoid underwriting SPAC transactions altogether (as first observed following the release of the SEC's proposed rules in March 2022), in light of the potential increased liability and litigation risk. At a minimum, financial institutions serving as SPAC IPO underwriters can be expected to continue to undertake a comprehensive due diligence process in connection with de-SPAC transactions, including obtaining comfort letters from auditors, legal opinions and detailed representations and warranties regarding the target company, consistent with a traditional IPO.

Importantly, the SEC emphasizes that the guidance does not apply to traditional M&A transactions (business combinations not involving a de-SPAC transaction), and "is not intended to influence current practice in traditional M&A."

3. Business Combinations Involving Shell Companies Generally (Including SPACs) and Related Financial Statement Requirements

Shell Company Business Combinations as Sales to Shell Company Investors

Private companies have historically utilized shell companies with Exchange Act reporting obligations in various forms of transactions, such as spin-offs, reverse mergers and de-SPAC transactions, to become public companies, in many cases without filing a Securities Act registration statement. In the Commission's view, the substantive reality of a reporting shell company business combination with an entity that is not a shell company is that, even though no securities may actually be changing hands, reporting shell company investors have effectively exchanged their security representing an interest in the reporting shell company for a new security representing an interest in an entirely different entity—the surviving combined public operating company—which the SEC construes as a fundamental change in the nature of their investment.

Due to the substantial increase in the use of reporting shell company business combination transactions as a means to access the U.S. capital markets (including through the use of SPACs), and in an effort to provide reporting shell company shareholders with more consistent Securities Act disclosure and liability protections across the various available transaction structures, the SEC adopted new Rule 145a under the Securities Act. **Rule 145a deems any direct or indirect business combination of a reporting shell**

company[15] (other than a business combination related shell company)[16] involving a non-shell company (including a de-SPAC transaction) to constitute a "sale" of securities within the meaning of the Securities Act from the combined company to the reporting shell company's existing shareholders, regardless of whether securities are changing hands in the business combination or whether a shareholder vote or consent is solicited, and regardless of transaction structure or the form of business combination (e.g., statutory merger, share exchange, stock purchase, asset purchase).[17]

As a result, de-SPAC transactions and other reporting shell company business combination transactions will require the filing of a Securities Act registration statement (absent an applicable exemption). Registration will trigger the full panoply of federal securities law protections for the reporting shell company's investors (equivalent to what they would receive in a traditional IPO), including potential Section 11 liability for applicable parties—signatories to the registration statement (including the target company, its directors and senior officers), underwriters, auditors and other experts (e.g., valuation consultants, authors of fairness opinions)—for any material misstatements or omissions in the registration statement (subject to a due diligence defense for all parties other than the reporting shell company and the target company).[18] Staff review of the registration statement will lengthen the de-SPAC transaction timeline.

Of particular significance for the life sciences sector, Rule 145a could reduce the appeal of certain types of reverse merger transactions that serve as a non-IPO pathway to the public markets, which have come under increasing scrutiny. In a shift from historical practice, the staff has recently begun finding that, in some circumstances, "fallen angel" public biotech companies (i.e., those with failed clinical programs) are shell companies (rather than operating companies)—a new and more aggressive interpretive position the staff has been communicating through comment letters on transaction filings.

The SEC notes that Rule 145a will not have any impact on traditional M&A transactions between operating businesses (non-shell entities) or that make use of only business combination related shell companies. Nor will it apply to a transaction where a reporting shell company combines with another shell company.

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[15] For purposes of new Rule 145a, a "reporting shell company" is defined 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.

[16] The term "business combination related shell company," as defined in Securities Act Rule 405 and Exchange Act Rule 12b-2, means "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 among one or more entities other than the shell company, none of which is a shell company." Neither a SPAC nor any entity formed for facilitating a transaction with a SPAC is ever a business combination related shell company.

[17] The adopting release emphasizes that Rule 145a applies in situations where, in substance, a shell company business combination is used to convert a private company into a public company (e.g., any company that sells or otherwise disposes of its historical assets or operations in connection with or as part of a plan to combine with a non-shell private company in order to convert the private company into a public one). This is true regardless of whether such sale or disposal of the legacy assets or operations occurs prior to or after the consummation of the business combination.

[18] Rule 145a applies only with respect to a reporting shell company's existing security holders. The surviving company in a de-SPAC transaction must give separate consideration as to whether a registration statement or exemption would be required for any offer and sale of securities to the target company's security holders.

Nothing in Rule 145a prohibits the use of a valid exemption, if available, to cover the deemed sale. However, the SEC reiterates in the adopting release its continuing belief that the exemption under Section 3(a)(9) of the Securities Act (securities exchanged with existing shareholders where no commission or other remuneration is paid for solicitation of such exchange) generally would not be available for a transaction that is a Rule 145a constructive sale.

Financial Statement Requirements

Consistent with the Commission's view that a company's choice of the manner in which it goes public should not result in substantially different financial statement disclosures being provided to investors, the final rules introduce new Article 15 of Regulation S-X and related amendments to more closely align the required financial statements of private operating companies that enter the public markets through a de-SPAC transaction or other reporting shell company business combination transaction with the requirements applicable to companies that conduct a traditional IPO.

Many of the new rules and amendments codify existing staff guidance or financial reporting practices for shell company transactions, with which most companies' reporting already conforms, and thus the SEC does not expect them to result in meaningful changes in disclosures, including with respect to PCAOB audit requirements, the age of financial statements, the inclusion of financial statements of significant businesses recently acquired or probable of being acquired and the exclusion of SPAC historical financial statements after the completion of a de-SPAC transaction.

One notable change expands the circumstances in which target companies may report two years (rather than three years) of audited financial statements. In a departure from current guidance set forth in the staff's Financial Reporting Manual, the final rules permit a SPAC or other shell company to include in its registration statement on Form S-4 (or F-4) or proxy/information statement two years of historical financial statements for the target company for all transactions where both the SPAC or other shell company and the target company qualify as EGCs, irrespective of whether the shell company has filed or was already required to file its first annual report. This is the same number of years of financial statements required to be included in a Securities Act registration statement had the target company gone public via a traditional IPO. (The final rules do not affect the number of years of required financial statements for the target company when it exceeds both the SRC and EGC revenue thresholds, which will continue to be three years.)

4. Enhanced Projections Disclosure for SPACs and All SEC Filers

The final rules amend Item 10(b) of Regulation S-K to expand and update the Commission's views on the use of projections in SEC filings generally, broadening the scope of covered projections and adding detail on the formatting of disclosed projections. The final rules also add new Item 1609 to Regulation S-K that mandates enhanced disclosures specifically relating to financial projections used in de-SPAC transactions, including disclosure of all material bases and assumptions underlying the projections.

Financial Projections in SEC Filings Generally

Item 10(b) of Regulation S-K sets forth guidelines representing the Commission's views on important factors to be considered in formulating and disclosing management's projections of future economic performance in SEC filings. Item 10(b) 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. Item 10(b) further expresses the Commission's views on the need for disclosure of the assumptions underlying the projections, the limitations of such projections and the format of the projections.

Under the final rules, Item 10(b)—*which applies broadly to all companies (not just SPACs) that publicly disclose projections in SEC filings*—will continue to state the Commission's view that projected financial information included in filings subject to Item 10(b) must have a reasonable basis. To address specific concerns that some companies may present projections more prominently than actual historical results (or the fact that they have no operations at all) or use non-GAAP financial measures in the projections without a clear explanation or definition of such measures, the final rules amend Item 10(b) to state that:

- The presentation of 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;

- It generally would be misleading to present projections that are based on historical financial results or operational history without presenting such historical financial measure or operational history with equal or greater prominence; and

- The presentation of projections that include non-GAAP financial measures should include a clear definition or explanation of those financial measures, a description of the GAAP financial measure to which it is most directly comparable (a reconciliation is not required) and an explanation why the non-GAAP financial measure was selected instead of a GAAP measure.[19]

The final rules further revise Item 10(b) to state that the guidelines (including as modified per the above) also apply to any projections of future economic performance of persons other than the registrant, such as the target company in a de-SPAC transaction or other business combination transaction, that are included in the registrant's filings.

Financial Projections in De-SPAC Transactions

New Item 1609 of Regulation S-K complements the changes to Item 10(b) described above and applies only to financial projections presented in connection with prospective de-SPAC transactions, which the SEC believes are particularly prone to abuse.

To help investors evaluate the reliability of projections used in de-SPAC transactions, Item 1609 requires a registrant to provide the following disclosures with respect to any projections disclosed in the filing (or any exhibit thereto):

- The purpose of the projections and the party that prepared them;

[19] The adopting release clarifies that the existing staff guidance provided in Questions 101.01, 101.02 and 101.03 of the Compliance and Disclosure Interpretations related to Non-GAAP Financial Measures, which address whether certain forecasts used in connection with business combination transactions are considered non-GAAP financial measures, will continue to apply.

- 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 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 or not the disclosed projections reflect the current views of the management or board of directors (or similar governing body) of the SPAC or target company, as applicable, about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to shareholders; 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.[20]

Additionally, the disclosures set forth in the first two bullets above will be required in any Form 8-K report or exhibit that relates to a de-SPAC transaction and includes financial projections pertaining to the performance of the SPAC or the target company.

5. Commission Guidance on Investment Company Status of SPACs

The growth of the SPAC industry and recent shareholder litigation have sparked debate about the status of SPACs as investment companies, which is an issue that, prior to the final rules, the Commission had never formally addressed. The Commission has cautioned that SPACs may fail to recognize when their activities raise the investor protection concerns addressed by the ICA, and that SPACs and their sponsors should sharpen their focus on evaluating when a SPAC could be an investment company under the ICA.

In lieu of adopting proposed Rule 3a-10 under the ICA—which would have provided a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the ICA[21] to SPACs that complied with the rule's conditions limiting their asset composition, activities, business purpose and duration—the SEC instead includes interpretive guidance on pages 360-371 of the adopting release illustrating the type of activities that are likely to raise "serious questions" about a SPAC's investment company status, including considerations related to the nature of its assets and income, management activities and duration, among others.

The guidance stresses that to the extent a SPAC's activities—including any of those discussed below—may cause it to meet the definition of an investment company under the ICA, a SPAC should consider options that would bring it into compliance, such as changing its operations, winding down its operations or registering as an investment company under the ICA, or risk regulatory enforcement and civil litigation: "**Issuers that meet the definition of investment company but fail to comply with the [ICA]'s provisions, or otherwise qualify for an exclusion or exemption from the provisions of the [ICA], could, among other things, be subject to enforcement action by the Commission or to private litigation**."

Nature of SPAC Assets and Income

[20] The SEC notes that this provision does not impose a duty to update the disclosed projections.

[21] Section 3(a)(1)(A) defines an "investment company" as any issuer that is or holds itself out as being engaged primarily, or proposes to be engaged primarily, in the business of investing, reinvesting or trading in securities.

A SPAC that holds only the sort of securities typically held by SPACs today—such as U.S. Government securities, money market funds and cash items prior to the completion of the de-SPAC transaction—and that does not propose to acquire investment securities would be more likely not to be considered an investment company. However, an issuer that holds these assets but whose primary business is to achieve investment returns on such assets would still be an investment company.

By contrast, a SPAC that owns or proposes to acquire 40% or more of its total assets (counting both the assets held in a trust or escrow account and any assets held directly) in investment securities would likely need to register under the ICA, and a SPAC whose income is substantially derived from such assets would further suggest the SPAC is an investment company.

Management Activities

The actions of a SPAC's officers, directors and employees is another significant factor that could cause the SPAC to fall within the investment company definition. The SEC "would have serious concerns if a SPAC held its investors' money in securities, but the SPAC's officers, directors and employees did not actively seek a de-SPAC transaction or spent a considerable amount of their time actively managing the SPAC's portfolio for the primary purpose of achieving investment returns. Such activities would affect the analysis as to whether the SPAC was primarily engaged in seeking to complete a de-SPAC transaction and weigh more in favor of the SPAC being primarily engaged in the business of investing, reinvesting or trading in securities such that it would be an investment company under the [ICA]." In addition, SPAC sponsors should be aware that certain management activities could cause them to qualify as "investment advisers" under the Investment Advisers Act of 1940.

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.

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 because it would be proposing to be engaged in the business of investing, reinvesting and trading in securities.

Duration

SPACs whose assets and income are substantially composed of, and derived from, securities are advised to be mindful of the length of time they have been operating prior to entering into an agreement with a target company and then completing the subsequent de-SPAC transaction with that company. The SEC's guidance states that "**[w]hile the duration of a SPAC is not the sole determinant of its status under the [ICA], 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**."

While the proposed safe harbor contemplated 18-month and 24-month timelines to announce and complete a de-SPAC transaction, respectively, **the new Commission guidance introduces 12-month and**

18-month timeframes beyond which a SPAC's operation would trigger concerns that the SPAC is an investment company. The SEC acknowledges this is a shorter period than the 36 months allowed for completion under NYSE and Nasdaq exchange listing rules, but notes "those rules were adopted for a different regulatory purpose and do not address investment company status concerns."

The guidance specifically cites Rule 3a-2 under the ICA and the SEC's position regarding Rule 419 under the Securities Act as potentially relevant guidelines for appropriate SPAC lifespans. Rule 3a-2 provides a **one-year safe harbor** to so-called "transient investment companies" which are issuers that, as a result of an unusual business occurrence, may be considered an investment company under the statutory definitions but intend to be engaged in a non-investment company business.

Although SPACs are not subject to the requirements of Rule 419, the SEC has taken the position that accounts of certain blank check companies relying on Rule 419 need not be required to be regulated under the ICA in part because, among other things, the rule limits the duration of such accounts to **18 months** and restricts the nature of investments.

According to the guidance (emphasis added):

> "**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**. Thus, a SPAC needs to be cognizant that, depending on the facts and circumstances, it could be viewed as a fund-like investment if it operates beyond the duration limits contemplated in other similar contexts. Accordingly, **we believe that a SPAC should reassess its status and analyze whether it has become an investment company if it has, for example, failed to enter into an agreement with a target company beyond such timelines. When considering its status under the Investment Company Act, a SPAC should consider all relevant facts and circumstances, including, among other things, the length of time that it has been operating prior to entering into an agreement with a target company and then completing the de-SPAC transaction with that company."**

At the open meeting to approve the final rules, an official from the SEC's Division of Investment Management stated that **the Enforcement Division will generally consider the 12- and 18-month timeframes referenced in the guidance when evaluating whether the particular facts and circumstances regarding a SPAC cause it to meet the investment company definition**, and thus these timeframes could be used as a basis to bring enforcement actions. While vague, the new guidance could force many SPACs to accelerate their timelines for identifying a target and completing a de-SPAC transaction.