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SEC Proposes New SPAC Rules

The SEC has proposed significant new rules (available here) that, if adopted, could have a profound impact on SPACs. Fundamentally, the proposed rules aim to treat de-SPAC transactions more like traditional initial public offerings ("IPOs"). In an effort to promote accountability, the proposed new rules would impose new liabilities in connection with de-SPAC transactions, including on SPAC underwriters and de-SPAC targets and their management. In addition, the SEC proposal would modify the scope of the safe harbor of the Private Securities Litigation Reform Act of 1995 ("PSLRA") for forward looking statements so that projections and other forward looking information used in de-SPAC registration statements would not be eligible for safe harbor protections conventionally given to such disclosure outside of the traditional IPO context. The proposed rules include a number of disclosure enhancements at the SPAC IPO and de-SPAC stages, and most notably would require a fairness determination by the SPAC regarding the de-SPAC transaction. The proposed rules also wade into the debate over the status of SPACs as investment companies, and propose a new, non-exclusive safe harbor for SPACs that would accelerate most SPAC timelines. Taken together, the new rules, if enacted, would effectuate recent promises by senior SEC officials to more closely scrutinize, and exercise stricter oversight over, the SPAC market. Notwithstanding that some of the proposed changes (e.g. some of the disclosure proposals) have already been adopted by market participants as best practices, other parts of the proposals (such as underwriter status for financial advisors in the de-SPAC process) would represent significant changes. Comments on the proposal will be due by the later of (i) May 31, 2022, and (ii) 30 days after its publication in the *Federal Register* and we expect there will be a significant number of comments.

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

De-SPAC Transaction Underwriter Liability: In an effort to better align de-SPAC transactions with traditional IPOs and motivate SPAC underwriters to "exercise the care necessary to help ensure the accuracy of the disclosures in these transactions," the SEC has proposed new Rule 140a, which would deem any SPAC IPO underwriter who facilitates the de-SPAC transaction or related financing, or otherwise participates in the de-SPAC transaction, to be an underwriter in the distribution of securities that is the de-SPAC transaction. The receipt of compensation in connection with the de-SPAC transaction, including receipt of deferred SPAC IPO underwriting fees, acting as a financial advisor to the SPAC and otherwise engaging in activities necessary to the de-SPAC transaction (including assisting with identifying targets, merger negotiations, identifying investors and PIPE investment negotiations) would all be considered "participation" in the distribution, and would be subject to traditional underwriter liability under the federal securities laws.

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

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

Target Disclosures: To better synchronize de-SPAC and traditional IPO disclosures, the proposed rules would (i) require certain non-financial Regulation S-K disclosures of targets in de-SPAC business combination filings, instead of in the post-closing “Super 8-K” so that SPAC investors will be able to review and consider the disclosure prior to making any voting or investment decision, and, to the extent that information is included in a registration statement on Form S-4 of F-4, subject such information to liability under the Securities Act of 1933, as amended, and (ii) codify existing SEC guidance regarding financial statements in business combinations involving shell companies in a new Article 15 of Regulation S-X.

SPAC Disclosures: The proposed rules would create a new Subpart 1600 of Regulation S-K, setting forth specific SPAC disclosure requirements for SPAC IPOs (including regarding SPAC sponsors, conflicts of interest and dilution, largely codifying and amplifying existing SEC guidance) and de-SPAC transactions (including requiring the SPAC to make a statement about the fairness of the de-SPAC transaction and any related financing to unaffiliated securityholders). The SPAC would have to discuss in reasonable detail the material factors upon which a reasonable belief regarding the fairness of a de-SPAC transaction and any related financing transaction is based and, to the extent practicable, the weight assigned to each such factor. These factors would include: the valuation of the private operating company; the consideration of any financial projections; any report, opinion or appraisal obtained from a third party; and the dilutive effects of the de-SPAC transaction and any related financing transaction on non-redeeming shareholders.

Smaller-Reporting Company Status: Post de-SPAC companies would be required to re-evaluate their smaller reporting company status within four days following the consummation of a de-SPAC transaction (instead of retaining this status until its next annual report).

Investment Company Act: The SEC has proposed a new, non-exclusive safe harbor under the Investment Company Act for SPACs. While most of the conditions of this safe harbor will be easily met by SPACs (regarding assets and activities), the safe harbor would impose an accelerated de-SPAC time frame: specifically SPACs would be required to enter into an acquisition agreement with a target within 18 months of the SPAC IPO, and to close the transaction within 24 months (currently, though SPACs terms vary, many SPACs initially have up to 24 months to enter into and consummate an acquisition, and may extend this period via a shareholder vote). As currently drafted, these deadlines would not be subject to extension.

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

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