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SEC Seeks to Enhance Disclosures and Provide Additional Investor Protections Related to SPACs

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Citing the "unprecedented surge" in the number of initial public offerings by special purpose acquisition companies (SPACs) over the past two years, the SEC has proposed new rules that would require enhanced disclosures and provide additional investor protections in initial public offerings by SPACs and in "de-SPAC" transactions. To date, the SEC has relied on the comment process and staff guidance to shape SPAC-related disclosures in registration statements and proxy statements. The proposed rules would represent the most significant changes to impact SPACs and could have an effect on the prevalence of SPAC IPOs, as well as the use of de-SPAC transactions as a vehicle for companies to go public. This alert highlights the most noteworthy aspects of the proposed rules. A link to the proposed rules can be found here, and the SEC's fact sheet can be found here.

***Enhanced Disclosures*.** The proposed rules would require:

- enhanced disclosures regarding the sponsor of the SPAC, potential conflicts of interest, and dilution; and

- new disclosures in de-SPAC transactions, including whether the SPAC reasonably believes that the de-SPAC transaction and any related financing are fair or unfair to investors and whether the SPAC has obtained any outside opinion relating to the fairness of the transaction.

***Treating de-SPAC Transactions as Traditional IPOs*.** To provide investors with procedural protections and disclosures in de-SPAC transactions akin to those available in traditional IPOs, the SEC is proposing to:

- deem the target company in a de-SPAC transaction to be a co-registrant of the Form S-4 or Form F-4 registration statement filed for a de-SPAC transaction, so the target company and its signing persons would be subject to liability under Section 11 of the Securities Act of 1933;

- amend the definition of "smaller reporting company" to require a re-determination of smaller reporting company status within four days following the consummation of a de-SPAC transaction, which could eliminate the ability of certain companies to avail themselves of scaled disclosure requirements available to smaller reporting companies;

- amend the definition of “blank check company” to make the liability safe harbor in the Private Securities Litigation Reform Act of 1995 for forward-looking statements, such as projections, unavailable in filings by SPACs;

- deem underwriters of securities in a SPAC IPO that also take steps to facilitate a de-SPAC transaction, or any related financing transaction or otherwise participate in a de-SPAC transaction, to be underwriters in such subsequent de-SPAC transaction, so they are subject to Section 11 liability for the disclosure made in such de-SPAC transaction;

- deem by rule that a de-SPAC transaction constitutes a sale of securities to the SPAC’s shareholders for purposes of the Securities Act; and

- better align the required financial statements of the target companies in de-SPAC transactions with those required in registration statements for IPOs.

***Enhanced Projections Disclosure*.** The SEC is proposing amendments to Regulation S-K that would:

- expand and update the SEC’s guidance on the presentation of projections in SEC filings to allow investors to better assess the reliability of the projections and whether they have a reasonable basis; and

- allow investors to better assess the basis of projections when used in de-SPAC transactions.

***SPAC Status Under the Investment Company Act of 1940*.** To assist SPACs in assessing when they may be subject to investment company regulation, the SEC is proposing a new safe harbor from the definition of “investment company” under the Investment Company Act of 1940 for SPACs that satisfy certain conditions, including:

- maintaining assets comprised only of cash items, government securities, and certain money market funds;

- seeking to complete a de-SPAC transaction after which the surviving entity will be primarily engaged in the business of the target company; and

- entering into an agreement with a target company to engage in a de-SPAC transaction within 18 months after its IPO and complete its de-SPAC transaction within 24 months of the IPO.

With these proposed rules, the SEC is putting market participants on notice that it intends to aggressively

scrutinize SPAC IPOs and their subsequent de-SPAC transactions. Although there may be changes to the proposed rules prior to their final adoption, sponsors considering launching SPACs, as well as companies considering merging with SPACs, should anticipate providing enhanced disclosures in their public filings, significantly longer and more fulsome comment and response processes, and potential liability for forward-looking statements, including disclosed projections.

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