SPAC REGULATION—PAST, PRESENT AND FUTURE

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I. INTRODUCTION

Special purpose acquisition companies (SPACs) are companies formed to raise capital in an initial public offering (IPO) with the purpose of using the proceeds to acquire an operating business or assets to be identified after the IPO. Securities offerings and mergers by SPACs have garnered substantial attention in recent years. The attention is justified, with IPOs completed by SPACs increasing from 34 in 2017 to 611 in 2021, outpacing the number of IPOs by operating companies in both 2020 and 2021. Since 2017, the frequency that an operating company went public via a combination with a SPAC (a "De-SPAC transaction" or a "De-SPAC") as compared to an IPO has steadily increased, from roughly one De-SPAC for every ten traditional IPOs in 2017 to roughly one De-SPAC for every two traditional IPOs in 2021—one-third of the operating companies that went public in the United States in 2021 did so via a De-SPAC.

SPACs are subject to well-established laws and regulations, namely those applicable to all public companies and their securities offerings and proxy solicitations. While there are regulations specific to shell companies (which SPACs qualify as), the substantive laws and regulations currently applicable to SPACs, De-SPAC transactions, and publicly traded operating companies resulting from combinations with SPACs ("former SPACs") are not specifically directed at SPACs. On March 30, 2022, the commissioners of the Securities and Exchange Commission (SEC) announced proposed new rules and regulations directed at SPACs and other shell companies ("Proposed SPAC Rules").[1]

SPACs can be listed on national securities exchanges ("listed SPACs") or traded over-the-counter ("OTC traded SPACs"). However, in recent years SPACs have been almost exclusively listed SPACs.[2] OTC traded SPACs went from a majority of SPACs in the 2000s[3] to zero or *de minimis* from 2016 through 2021.[4] Given the astronomic increase in the number of SPAC IPOs in 2020 and 2021, OTC traded SPACs have been a small minority (less than ten percent) of total SPACs since 2001.[5] Because almost all SPACs in recent years have been exchange listed, this

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1. SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections, SEC (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-56. See also Special Purpose Acquisition Companies, Shell Companies, and Projections, 17 Fed. Reg. 29458 (May 13, 2022) (to be codified at 17 CFR 210.15-01, 17 CFR 229.1601 through 229.1610, 17 CFR 230.140a, 17 CFR 230.145a, and 17 CFR 270.3a-10 [hereinafter Proposed SPAC Rules].

2. *See, e.g.*, Usha Rodrigues & Michael Stegmoller, *Why SPACs: An Apologia* 30 (Univ. of Ga. Sch. of L., Legal Rsch. Paper No. 2022-04, 2022) ("[T]he move of SPAC IPOs from a relatively unknown listing on the OTC in . . . 2010 and 2011 . . . to almost exclusively being listed on the NYSE and Nasdaq in the later years.").

3. See Proposed SPAC Rules, supra note 1, at 29509.

4. *Id.* (reporting zero OTC traded SPACs from 2016 to 2021); *cf* Rodrigues & Steg-moller, *supra* note 2, at 31 (suggesting there were two OTC traded SPACs in 2018 but none in any other years from 2013 to 2019).

5. Rodrigues & Stegmoller, *supra* note 2, at 33 tbl. 1.

article focuses on SPACs listed on a national securities exchange. In the Proposed SPAC Rules, the SEC would define "special purpose acquisition company" in a manner that included OTC traded SPACs.[6] Where listed SPACs or OTC traded SPACs have or may justify a different regulatory treatment, we specify the type of SPAC.

SPACs fall within the definition of "shell company,"[7] but not "blank check company"[8] or an issuer of "penny stock."[9] The commissioners and staff of the SEC have contributed to confusion over the different types of shell companies by describing SPACs as "blank check companies."[10] Laws and regulations that target shell companies were adopted over the last thirty years, starting with the Securities Enforcement Remedies and Penny Stock Reform Act in 1990 ("Penny Stock Reform Act").[11] These laws and regulations include those applicable to blank check companies, penny stock issuers, and shell companies other than "business combination related shell companies"[12]—this article will refer to these laws and regulations collectively as "Shell Company Regs."[13]

Prior to the Proposed SPAC Rules, statements by regulators presaged regulations specifically focused on today's SPACs. As described in "SEC and Legislative Statements" below, recent regulatory action outside of the rule-making context and congressional proposals and inquiries provide in-sight into regulators' and legislators' views of SPACs and De-SPAC transactions as well as potential new laws and regulations specifically directed at SPACs and De-

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6. Prosed SPAC Rules, supra note 1, at 29509.

7. 17 C.F.R. § 230.405 (2021). The term "shell company" is defined in Rule 405 under the Securities Act of 1933 ("Securities Act") as a registrant, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has: (1) no or nominal operations; and (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets. *Id.*

8. *Id.* § 230.419 The term "blank check company" is defined in Rule 419 under the Securities Act as a company that: (i) is a development stage company that has no specific business plan or purpose, or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and (ii) is issuing "penny stock," as defined in Rule 3a51-1 under the Securities Exchange Act of 1934 ("Exchange Act"). *Id.*

9. *Id.* § 240.3a51-1. The term "penny stock" is defined in Rule 3a51-1 under the Exchange Act and is structured as an exclusionary definition—penny stock is any equity security other than securities that fit in a number of exclusions. *Id.* Notably, this includes stock listed on a national securities exchange under certain listing standards (which does not apply to most, if any, SPACs), and issuers that have at least $5 million of net tangible assets (which is the exception that SPACs generally rely upon).

10. *See, e.g.*, Off. of Inv. Educ. and Advoc., *What You Need to Know About SPACs" – Updated Investor Bulletin*, SEC (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin ("SPAC stands for special purpose acquisition company—what are also commonly referred to as blank check companies"); *Blank Check Company,* INVESTOR, https://www.investor.gov/introduction-investing/investing-basics/glossary/blank-check-company (last visited Jul. 31, 2022) ("[a] type of blank check company is a 'special purpose acquisition company,' or SPAC for short,"); Gary Gensler, Chair, SEC, Remarks Before the Healthy Markets Association Conference (Dec. 9, 2021), https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921 ("blank-check companies raise cash from the public through initial public offerings (IPOs). I call this step the 'SPAC blank-check IPO.'").

11. Pub. L. No. 101-429, 104 Stat. 951 (codified as amended at 15 U.S.C. §§ 78a, 78o).

12. 17 C.F.R. § 230.405 (2021). The term "business combination related shell company" is defined in Rule 405 under the Securities Act 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 among one or more entities other than the shell company, none of which is a shell company. *Id.*

13. *See infra* Annex A.

SPAC transactions. Many of those views were reflected in the proposing release for the Proposed SPAC Rules.[14]

This article argues that: (i) the national securities exchange listing drives key differences between listed SPACs and other types of shell companies, and that these differences justify a different regulatory framework for SPACs and former SPACs than the Shell Company Regs applicable today; (ii) many of the concerns espoused by legislators and regulators, in addition to general public commentary, are addressed by existing laws and regulations, or are misplaced concerns in light of how De-SPAC transactions are in fact executed; and (iii) any new regulations should be carefully crafted to balance the protection of investors, on one hand, against the fiduciary duties of SPAC directors and officers, the legitimate economic interests of public investors in SPACs, and facilitation of capital formation, on the other.

II. HISTORICAL DEVELOPMENT OF REGULATIONS APPLICABLE TO SHELL COMPANIES

The Shell Company Regs represent more than thirty years of legislation and regulation of different types of shell companies. Beginning in the late 1980s, there was a widespread perception of fraud and abuse in "blank check" offerings that were viewed as a common way of perpetrating "pump-and-dump" schemes utilizing penny stock companies.[15] Penny stock promoters would arrange to issue the initial shares of a company to themselves, friends, or relatives. After the offering, the promoters would create artificial excitement about the stock, pumping up the stock price, and then resell the shares to unwitting investors at multiples of what they initially paid for the shares. Once sold, the promoters would cease their promotional activities and the price would eventually collapse, leaving investors with huge losses and the promoters, if the scheme went according to plan, with huge gains.

Following Congress' adoption of the Penny Stock Reform Act, the SEC adopted the first regulations applicable to shell companies in 1992 to combat the perceived fraud and abuse. The first regulations were Rule 419 under the Securities Act[16] and Rule 3a51-1 under the Exchange Act.[17] Rule 419 defined the term "blank check company" and imposed restrictions on blank check companies. These restrictions include the following: (i) requiring almost all funds raised and shares issued in a public offering to be placed in escrow pending a merger and held in cash, or invested only in U.S. treasury securities (or money market accounts investing in the same); (ii) imposing

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14. *See* SEC, *supra* note 1.

15. *See, e.g.*, SEC v. Geneva Grp., Litigation Release No. 15496, 65 SEC Docket 1047 (Sept. 17, 1997) (alleging that the defendants were marketing a shell company with no apparent business operations but with a name and ticker symbol similar to a Canadian company); Use of Form S-8 and Form 8-K by Shell Companies, Securities Act Release No. 33-8407, Exchange Act Release No. 34-49566, 69 Fed. Reg. 21649 (Apr. 21, 2004) (to be codified at 17 C.F.R. pts. 230, 239, 240, 249); SEC v. 2DoTrade, Inc., No. 3:03-CV-2247-G (FISH), at *1–4 (N.D. Tex. Sept. 20, 2003) (defendants acquired substantially all of the shares of a shell company, causing the shell company to merge with 2DoTrade, Inc.; defendants then engaged in fraudulent promotional campaigns by touting the company's ownership of import/export contracts (which were worthless) and claimed that the company was testing an anti-anthrax compound when no testing ever occurred or was ever seriously contemplated).

16. Penny Stock Transactions, 57 Fed. Reg. 18003, 18043 (Apr. 28, 1992) (to be codified at 17 C.F.R. pts. 230 & 240).

17. *Id.* at 18032 (to be codified at 17 C.F.R. pt. 240).

an eighteen-month time limit to complete a merger; and (iii) mandating investor reconfirmation of an investment prior to a merger.[18]

Although Rule 419 substantially limited and restricted blank check companies, they were not outlawed entirely. Then SEC Chairman, Richard Breeden, recognized that "blank check offerings could be and were used in legitimate business transactions *outside the penny stock area*."[19] As part of the same rulemaking, the SEC adopted Rule 3a51-1 to define "penny stock."[20] Initially, Rule 3a51-1 excluded from the definition of penny stock all securities with a share price of five dollars or more, but in 1993, the SEC recognized that "the five dollar price threshold presents an easy mechanism for avoiding the regulatory scheme contemplated by Congress" and revised the definition to eliminate the exclusion.[21]

In 2005, the SEC adopted changes to Form 8-K[22] and Form S-8[23] in order to "address two variations of abusive shell company transactions not covered by Rule 419."[24] Specifically, the SEC sought to: (i) prevent the misuse of Form S-8 by shell companies to raise capital[25] and register shares issued to persons who do not in fact provide services to the company; and (ii) correct the uneven level of disclosure in the reporting of transactions with shell companies and lack of information available to investors.[26] The SEC described the rule changes as part of its "ongoing campaign against fraud and abuse in the market for highly speculative securities, especially securities that trade at low share prices."[27] Rather than limiting the applicability of these changes to blank check companies, the SEC defined the term "shell company" and made the new rules applicable to all companies qualifying as "shell companies," including shell companies that are not issuers of penny stock.[28] The SEC explained that "we believe the term 'shell company' and our proposed definition of the term better describe the type of company involved in the *schemes*

18. 17 CFR § 230.419 (2021).

19. H.R. REP. No. 101-617, at 22 (1990) (emphasis added).

20. *See* Penny Stock Transactions, 57 Fed. Reg. 18003, 18032 (Apr. 28, 1992) (to be codified at 17 C.F.R. § 240.3a51-1).

21. Penny Stock Definition for Purposes of Blank Check Rule, 58 Fed. Reg. 58099, 58100 (Oct. 29, 1983) (to be codified at 17 C.F.R. pt. 240); 17 C.F.R. § 240.3a51-1 (2021).

22. Form 8-K, also referred to as a "current report," is used by public companies "to announce major events that shareholders should know about." *8-K*, INVESTOR, https://www.investor.gov/introduction-investing/investing-basics/glossary/8-k (last visited Oct. 8, 2022).

23. Form S-8 is used to register the issuance of securities as equity compensation. PRACTICAL LAW CORP. & SECS., SECURITIES LAW CONSIDERATIONS IN ISSUING EQUITY COMPENSATION (2015), Westlaw 2-604-9985.

24. Use of Form S-8 and Form 8-K by Shell Companies, 69 Fed. Reg. 21649, 21651 (Apr. 21, 2004) (to be codified at 17 C.F.R. pts. 230, 239, 240, 249).

25. Prior to the change to Form S-8, the form already provided that it could not be used to raise capital. *Id.* at 21651 ("The use of Form S–8 by registrants to raise capital is prohibited. Some shell companies—which rarely have employees—have used Form S–8 registration statements improperly to register sales of securities that, while fashioned as sales under employee benefit plans, in fact are capital-raising transactions."). Rather than enforcing the existing limitations, the adopted changes prohibited any use of S-8 by shell companies and provided a sixty-day period from ceasing to be a shell company before a former shell company could use S-8. *Id.* at 21658.

26. *Id.*

27. *Id.* at 21650.

28. *Id.* ("We propose to define a 'shell company' as a company with no or nominal operations, and with no or nominal assets or assets consisting solely of cash and cash equivalents.").

that we are attempting to address,"[29] apparently referring to pump-and-dump promoters that avoid the definition of "blank check company" in Rule 419.[30] For example, in 2000, the SEC announced fraud charges against thirty-three companies and individuals for manipulating microcap stocks, including a shell company broker that embarked on a pump-and-dump scheme to take a development-stage company public at five dollars per share without registering a public offering.[31] Importantly, when the rules were proposed in 2004 and adopted in 2005, there were no listed SPACs, as the first national securities exchange listed SPAC went public on the American Stock Exchange in November of 2005.[32]

As part of the 2005 rulemaking, the SEC's final rules adopted amendments to Form 8-K to require a company to file a Form 8-K to report the event that causes it to cease being a shell company and to include in that Form 8-K the information that would be required to register a class of securities under Section 12 of the Exchange Act.[33] The SEC also prohibited the use of Form S-8 by shell companies and former shell companies until sixty calendar days after the former shell company ceases being a shell company and files Form 10 equivalent information.[34] The SEC explained that, [filings associated with transactions with shell companies] often do not contain much of the information useful to investors in making informed decisions about investing in the company, such as the information contained in Management's Discussion and Analysis of the Financial Condition and Results of Operations required by Item 303 of Regulation S-K and Regulation S-B.[35]

These rules require former SPACs to file "Super 8-Ks" within four business days of closing a De-SPAC transaction, despite the fact that the required disclosure essentially duplicates the disclosure made at least several weeks before in a listed SPAC's final proxy statement/prospectus.

In 2005, the SEC also adopted rules titled "Securities Offering Re-form,"[36] which substantially modernized how public offerings were conducted. Securities Offering Reform greatly increased flexibility for issuers—adding the concepts of well-known seasoned issuer and

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29. Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, 70 Fed. Reg. 42233, 42236 (July 21, 2005) (to be codified at 17 C.F.R. pts. 230, 239, 240, 249) (emphasis added).

30. The SEC stated, "We have become aware of a practice in which a promoter of a company . . . appear[s] to place assets or operations within an entity with the intent of causing that entity to fall outside of the definition of "blank check company." *Id.* at 42236 n.32.

31. SEC Continues Nationwide Crackdown Against Internet Fraud, SEC NEWS DIGEST, Sept. 6, 2000, at 1, 1–3.

32. For example, Cold Spring Capital Inc. went public on November 16, 2005. *See* Cold Springs Capital Inc., Final Prospectus (Form 424B4) (Nov. 11, 2005), https://www.sec.gov/Archives/edgar/data/1330446/000104746905026763/a2165074z424b4.htm. References to earlier entities as "SPACs," (e.g., SEC Chairman Gary Gensler's reference to the first SPAC going public in 2003, Gensler, *supra* note 10) refer to OTC traded SPACs.

33. *See* Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, 70 Fed. Reg. 42233, 42235 (July 21, 2005). Form 10 is the form used by companies to register securities under the Exchange Act and is akin to the information required in a registration statement for an IPO. *Exchange Act Reporting and Registration*, SEC, https://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting (last modified Apr. 28, 2022).

34. *See* Use of Form S-8 and Form 8-K by Shell Companies, Securities Act Release No. 33-8407, Exchange Act Release No. 34-49566, 69 Fed. Reg. 21649, 21652 (Apr. 15, 2004) (to be codified at 17 C.F.R. pts. 230, 239, 240, 249).

35. *Id.*

36. Securities Offering Reform, Securities Act Release No. 33-8591, Exchange Act Release No. 34-52056, 70 Fed. Reg. 44722 (Dec. 1, 2005) (to be codified at 17 C.F.R. pts. 200, 228, 229, 230, 239, 240, 243, 249, 274).

free writing prospectuses as well as adding a safe harbor for certain communications that occurred prior to the public filing of a registration statement.[37] However, as part of Securities Offering Reform, the SEC chose to limit certain flexibilities to issuers that were not "ineligible issuers."[38] The SEC chose to list shell companies as "ineligible issuers" for three years following the completion of the transaction with the shell company, citing a "repeatedly stated [SEC] belief that blank check companies, shell companies, and penny stock issuers may give rise to disclosure abuses."[39] The SEC did not go into detail with respect to shell companies but instead cited prior SEC statements from the 1990s that focused on blank check companies and penny stock issuers as well as a brief reference to the 2005 release adopting changes to Form S-8 and Form 8-K described above.[40]

In 2007, the SEC adopted amendments to Rules 144[41] and 145[42] under the Securities Act. Similar to Securities Offering Reform,[43] this was a modernization of the rules, relaxing the requirements to rely on Rule 144 (shortening the holding period, among other changes) and eliminating the presumptive underwriter rule in Rule 145, but in each case either excluded (in the case of Rule 145) or adopted more stringent requirements (in the case of Rule 144) for shell companies and former shell companies.[44] The SEC codified its guidance from 2000, known as the "Worm/Wulfe letter,"[45] prohibiting the use of Rule 144 by shell companies and requiring at least one year to elapse after Form 10 information is filed with the SEC before a security holder can resell any securities of an issuer that was formerly a shell company.[46] In the Worm/Wulfe letter, the SEC cited the 1990s concern that "these kinds of issuers were common vehicles for fraud and manipulation *in the market for penny stocks* which undermines investor confidence and inhibits legitimate capital formation by small issuers and other companies."[47] Again, the concern was

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37. *Id.*
38. *Id.*
39. *Id.* at 44746.
40. *Id.*
41. Rule 144 provides a safe harbor for certain secondary sellers to not be considered underwriters under the Securities Act. *See* Revisions to Rule 144 and 145, 72 Fed. Reg. 71545, 71546 (Dec. 17, 2007) (to be codified at 17 C.F.R. pts. 230, 239).
42. Rule 145 provides that transactions involving a shareholder vote for a reclassification of securities, mergers or consolidations, or transfers of assets, are deemed to include a sale of the securities and requires registration unless there is an exemption—this portion of the Rule remains. *See id.* at 71558. Prior to amendment, the Rule also provided that parties to the transaction, or affiliates of such parties, were deemed to be underwriters, known as the "presumptive underwriter rule," such that resales by such presumptive underwriters of the securities they received in the transaction would require registration or an exemption therefrom. *Id* at 71558–59.
43. Securities Offering Reform, Securities Act Release No. 33-8591, Exchange Act Release No. 34-52056, 70 Fed. Reg. 44722 (Dec. 1, 2005) (to be codified at 17 C.F.R. pts. 200, 228, 229, 230, 239, 240, 243, 249, 274).
44. Revisions to Rule 144 and 145, 72 Fed. Reg. 71545, 71546 (Dec. 17, 2007) (to be codified at 17 C.F.R. pts. 230, 239).
45. *See* NASD Regulation, Inc., SEC Interpretive Letter, 2000 SEC No-Act. LEXIS 42 (Jan. 21, 2000). The SEC stated its view that:

> both before and after the business combination or transaction with an operating entity or other person, the promoters or affiliates of blank check companies, as well as their transferees, are "underwriters" of the securities issued. . . . Rule 144 would not be available for resale transactions in this situation, regardless of technical compliance with that rule, because these resale transactions appear to be designed to distribute or redistribute securities to the public without compliance with the registration requirements of the Securities Act.

Id. at *4.

46. *See id.* at 2–4.
47. *Id.* at *1–2 (emphasis added).

fraudulent unregistered distribution by promoters of penny stock, with the SEC stating in the Worm/Wolfe letter, "Nonetheless, transactions in blank check company securities by their promoters or affiliates, especially where they control or controlled the 'float' of the 'freely tradable' securities, are not the kind of ordinary trading transactions between individual investors of securities already issued that Section 4(1) was designed to exempt."[48] Similarly, in the Rule 144 revision release the SEC stated that "the one-year period is necessary for investor protection given the comments relating to the abuse and micro-cap fraud occurring in connection with the securities of shell companies." [49] The concern underlying the exclusion for shell companies in Rule 144 and Rule 145 revisions was the same pump-and-dump scheme used by penny stock issuers.

Listed SPACs are meaningfully different than the penny stock issuers and blank check companies that drove adoption of the Shell Company Regs. A listed SPAC's securities are listed on a national securities exchange, and the SPAC's organizational documents provide substantial protections for investors. While not technically subject to Rule 419, listed SPACs still operate in accordance with many protective restrictions similar to, or more restrictive than, those outlined in Rule 419, including the following: (i) an amount equal to the amount raised in the IPO, if not more, is held in trust until the completion of the De-SPAC transaction; (ii) the SPAC is required to hold the trust proceeds in cash or invest only in U.S. treasury securities (or money market accounts investing in the same); and (iii) the SPAC is required to return the trust proceeds to its shareholders if the SPAC fails to complete a De-SPAC transaction within a limited period of time.[50]

Additionally, applicable law or the rules of the national securities exchange where the listed SPAC's securities are listed generally require shareholder approval[51]in connection with the De-SPAC transaction. Because the listed SPAC's securities are listed on a national securities exchange, the proxy solicitation rules set forth in Regulation 14A of the Exchange Act apply and the proxy statement (or joint proxy statement/prospectus) is subject to SEC review and comment.[52] Such rules require extensive disclosure regarding both the SPAC and the target company in connection with the required SPAC shareholder vote, similar to what is required by Form S-1 in connection with an IPO.[53] Furthermore, if a shareholder vote is not required and the listed SPAC does not otherwise hold a shareholder vote on the De-SPAC transaction, the offer to redeem the SPAC shareholders' shares will be conducted pursuant to Rule 13e-4 and Regulation 14E of the Exchange Act.[54] Compliance with Rule 13e-4 and Regulation 14E would entail the SPAC filing tender offer documents with the SEC that contain substantially the same information as is included in a proxy statement/prospectus for a SPAC shareholder vote.

In light of these and other characteristics of listed SPACs, a De-SPAC transaction is closer to an IPO than a transaction where a promoter of a blank check company pumps and dumps stock.

48. *Id*. at *3.

49. Revisions to Rule 144 and 145, 72 Fed. Reg. 71545, 71558 (Dec. 17, 2007) (to be codified at 17 C.F.R. pts. 230, 239).

50. *See Prosed SPAC Rules*, *supra* note 1, at 29460; *see also* NYSE, NYSE LISTED COMPANY MANUAL para 102.06 (2017).

51. *See* NYSE, NYSE LISTED COMPANY MANUAL para 312.03 (2017).

52. *See* 17 C.F.R. § 240.14a-101 (2021).

53. *Id.* Item 14(b) of Rule 14a-1 or Part I.A. and Item 4 of Form S-4 set forth certain information that is required in a proxy statement or registration statement involving mergers, consolidations, acquisitions, and similar matters that would not be required by Form S-1 for an IPO.

54. 17 CFR §§ 240.13e-4 & 240.14e-1–14f-1 (2021).

Securities regulations applicable to listed SPACs and former SPACs should acknowledge these differences. The shares issued in the SPAC's IPO are not secretively placed with friends and family of a promoter, the SPAC is not acquiring a company with little to no public information, and SPAC sponsors are not propping up the share price in order to dump their stock before public information is available (the timing of the proxy statement or registration statement and the standard lockup applicable to founder shares would make that difficult). The Form 10 information that is required in the Super 8-K, which the SEC requires to be disclosed for a specified amount of time before former SPACs can utilize certain securities law provisions, is largely duplicative of the listed SPAC's final proxy statement/prospectus, which is available in preliminary form for many months prior to the closing of the De-SPAC transaction and includes similar information as would be required in an IPO. Furthermore, after the closing of the De-SPAC transaction, the combined company operates identically to a newly public company after its IPO and would benefit greatly from many of the provisions that would have been available to it had it gone public via an IPO rather than a De-SPAC transaction.[55] The SEC should revisit the application of the Shell Company Regs to listed SPACs and former SPACs and seek to tailor these restrictions, taking into consideration the many characteristics of listed SPACs that mitigate the original concerns underlying the Shell Company Regs.

In addition to actual regulations, the SEC has provided SPAC-specific informal interpretations of existing regulations. The SEC can effectively expand or modify the form requirements or regulatory requirements outside of formal rulemaking. For example, in September of 2020, the SEC issued Compliance and Disclosure Interpretation 115.18 that prohibited the use of Form S-3 by former SPACs until twelve months following the Super 8-K filing.[56] Similarly, in October of 2020, the SEC updated the Division of Corporation Finance's Financial Reporting Manual to require target company financial statements, audited in compliance with Public Company Accounting Oversight Board (PCAOB) standards, in proxy statements for De-SPAC transactions.[57] In both instances, the SEC's guidance is inconsistent with the requirements of the forms, but where the SEC has the ability to review filings (i.e., S-1, proxy, or S-4/F-4) in advance of effectiveness or mailing, it can make informal, policy driven changes, without going through the formal rulemaking process.

III. SEC AND LEGISLATIVE STATEMENTS

The SEC has a panoply of existing laws and regulations at its disposal that are more effective than the Shell Company Regs to protect investors in SPACs and De-SPAC transactions, which is highlighted by recent statements by commissioners and staff of the SEC and SEC comment letters on SPAC SEC filings.[58] The SEC staff has provided guidance about how it expects SPACs to comply with such laws and regulations through disclosure and otherwise,[59] and

55. In this respect, companies going public via De-SPAC transactions are subject to regulatory penalty for this IPO alternative.

56. *Securities Act Forms: Questions and Answers of General Applicability*, SEC, https://www.sec.gov/corpfin/securities-act-forms (last updated Sep. 21, 2020)

57. SEC, DIVISION OF CORPORATION FINANCE, FINANCIAL REPORTING MANUAL §§ 1140.5, 2200.7 & 4110.5 (2021).

58. *E.g.*, John Coates, *SPACs, IPOs and Liability Risk under the Securities Laws,* SEC (Apr. 8, 2021), https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws.

59. *E.g.*, Div. of Corp. Fin., *Special Purpose Acquisition Companies,* SEC (Dec. 22, 2020), https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies.

the commissioners and staff of the SEC have commented on the need for further regulation.[60] In addition, a handful of recent high-profile settlements with the SEC have highlighted the SEC's enforcement priorities and approach relative to De-SPAC transactions.[61]

The commissioners and staff of the SEC have provided their views on SPAC IPOs and De-SPAC transactions in a variety of forms, including disclosure and accounting releases, guidance in the Division of Corporation Finance's Financial Reporting Manual, investor alerts, statements and speeches, and comment letters as well as informal conversations with advisors to SPACs and target companies.

Some of the statements made by the SEC staff regarding SPACs have been high-level and relatively innocuous—warning investors not to invest in a SPAC merely because of a celebrity sponsor,[62] noting audit and financial reporting issues to be considered by target companies going public via De-SPAC transactions,[63] or outlining financial reporting and governance issues for target companies to consider in going public via De-SPAC transactions.[64] Other statements and actions have had massive ramifications for SPACs, former SPACs, and De-SPAC transactions, but the impacts were one-off or transitory issues that, once digested, do not fundamentally change how SPACs are structured or how De-SPAC transactions are executed.[65] The best example of this is the April 12, 2021, statement issued by John Coates (then-Acting Director of the SEC's Division of Corporation Finance) and Paul Munter (Acting Chief Accountant of the SEC) titled "Staff Statement on Accounting and Reporting Considerations for Warrants Issued by [SPACs]."[66] This was effectively a "you're all doing it wrong"-blast statement to SPACs and former SPACs with respect to how they were accounting for warrants.[67] The statement focused on two provisions common in most SPAC warrants—disparate treatment for warrants held by the SPAC sponsor that would cease to apply if the warrants were transferred, and a vague change of control provision.[68] The statement suggested that such provisions require the warrants to be classified as liabilities, rather than equity, with equity being the long-standing method used by virtually all SPACs to

60. *E.g.*, Gary Gensler, Chair, SEC, Prepared Remarks Before the Investor Advisory Committee (Sept. 9, 2021), https://www.sec.gov/news/speech/gensler-iac-2021-09-09; Gary Gensler, Chair, SEC, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 14, 2021), https://www.sec.gov/news/testimony/gensler-2021-09-14; Gary Gensler, Chair, SEC, Remarks Before the Small Business Capital Formation Advisory Committee (May 6, 2022), https://www.sec.gov/news/speech/gensler-remarks-sbcfac-050622.

61. *See infra* notes 101–07 and accompanying text (discussing examples of recent high-profile settlements).

62. Off. of Inv. Educ. and Advoc., *Celebrity Involvement with SPACs*, SEC (Mar. 10, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert ("Never invest in a SPAC based solely on a celebrity's involvement or based solely on other information you receive through social media, investment newsletters, online advertisements, email, investment research websites, internet chat rooms, direct mail, newspapers, magazines, television, or radio.").

63. Paul Munter, *Financial Reporting and Auditing Considerations of Companies Merging with SPACs*, SEC (Mar. 31, 2021), https://www.sec.gov/news/public-statement/munter-spac-20200331.

64. Div. of Corp. Fin., *Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies,* SEC (Mar. 31, 2021), https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31.

65. John Coates & Paul Munter, Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs"), SEC (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs.

66. *Id.*

67. *Id.*

68. *Id.*

account for warrants. This statement had a huge impact on SPACs and former SPACs. SPAC IPOs were effectively stalled as auditors would not sign off on the registration statement disclosure even though the warrants were not reflected in the historical financial statements included in the registration statement. Pending De-SPAC transactions that had not yet had registration statements declared effective, or proxy statements mailed to SPAC investors, were stalled pending resolution of the accounting treatment of the warrants. Post-IPO SPACs and former SPACs that still had warrants outstanding were forced to evaluate their accounting for possible restatements of their financial statements. In all, approximately 570 public companies had to restate their financial statements.[69]

In December of 2020, the SEC's Division of Corporate Finance ("Corp Fin") issued Disclosure Guidance Topic Number 11.[70] In this disclosure guidance, Corp Fin focused on disclosures by SPACs in connection with IPOs and De-SPAC transactions.[71] With respect to disclosure in connection with IPOs, Corp Fin admonished SPACs to provide clear disclosure of the following: conflicts of interest of the SPAC's sponsor, directors, and officers; the financial incentives of the SPAC's sponsor, directors, and officers; key structural terms of the SPAC; and fees payable to the underwriters of the SPAC's IPO and conflicts of interest arising therefrom.[72] In regard to De-SPAC transactions, Corp Fin suggested detailed background information on the De-SPAC transaction (i.e., contacts and negotiations among the parties, what material factors the board considered in approving the transaction, et cetera) as well as the same conflicts and fee disclosures as Corp Fin suggested for IPO disclosure.[73] This was useful, welcome guidance. However, such disclosure was already largely included in registration statements for SPAC IPOs and proxy statements or registration statements for De-SPAC transactions, although the guidance did call for a few specific details or alternative presentations that were not consistently disclosed.[74] In addition, several of the emphasized items became a theme of requests in SEC comment letters on proxy statements or registration statements for De-SPAC transactions.[75]

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69. Hester M. Pierce, Inside Chicken: Remarks before Fordham Journal of Corporate and Financial Law Conference: "Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market, SEC (Apr. 12, 2021), https://www.sec.gov/news/speech/peirce-remarks-fordham-journal-102221.

70. Div. of Corp. Fin., *supra* note 64.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *E.g.*, Benessere Cap. Acquisition Corp., SEC Comment Letter (July 6, 2022), https://www.sec.gov/Archives/edgar/data/1828735/000000000022007134/filename1.pdf:

Please expand your proposed revised disclosure in the proxy statement to clarify, if true, that each of your special advisors holds membership interests in your sponsor. Please also further clarify conflicts of interest. For example, similar to potential conflicts disclosed in the S-1 with respect to officers and directors, it appears conflicts may arise in determining whether a business combination target is appropriate given the special advisors' personal and financial interests, including their interests in founder shares that were acquired by the sponsor for approximately $0.009 per share and would be worthless if you do not complete an initial business combination.;

FTAC Zeus Acquisition Corp, SEC Comment Letter (Apr. 1, 2021), https://www.sec.gov/Archives/edgar/data/1844270/000000000021003898/filename1.pdf:

In this section, and elsewhere, you reference unquantified consulting and advisory fees (i.e., 'payment of certain consulting fees to persons engaged by an entity affiliated with certain of our directors and officers' and 'at the closing of our initial business combination, a customary advisory fee to affiliates of our sponsor, in an amount that constitutes a market standard advisory fee for comparable transactions and services provided'). Please revise to describe the types

On April 8, 2021, John Coates issued a statement titled "SPACs, IPOs and Liability Risk under the Securities Laws."[76] The focus of the statement was on the applicability of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act (PSLRA) to statements made in the proxy statement or registration statement for a De-SPAC transaction, and also whether that safe harbor resulted in lesser liability than would apply in a traditional IPO.[77] The Acting Director stated that "some . . . practitioners and commentators have claimed that an advantage of SPACs over traditional IPOs is lesser securities law liability exposure for targets and the public company itself. They sometimes specifically point to the Private Securities Litigation Reform Act (PSLRA) safe harbor for forward-looking statements . . . ."[78] Fundamentally, this line of argument is based on a false premise that participants in De-SPAC transactions view the availability of the PSLRA as a meaningful differentiator between a De-SPAC transaction and an IPO, often referred to as "regulatory arbitrage."[79] In the authors' experience, the PSLRA is never considered in determining whether to pursue a De-SPAC transaction—that is, the myth of regulatory arbitrage is itself a myth[80]—but there is a grain of truth underlying this false premise. The truth is that many participants, particularly investment bankers and SPAC sponsors, incorrectly believe that projections are prohibited in IPOs but are allowed in De-SPAC transactions. The Acting Director referenced a Bloomberg article that cited an interview with Chamath Palihapitiya (a sponsor of a number of SPACs) who stated "[b]ecause the SPAC is a merger of companies, you're all of a sudden allowed to talk about the future" and suggested that this was a reference to the availability of the PSLRA safe harbor in proxy statements and registration statements for De-SPAC transactions.[81] On the contrary, Chamath Palihapitiya was in fact contrasting De-SPAC transactions with the common misconception that "in an S-1 process for a normal IPO . . . you are explicitly legally not allowed to talk about the future."[82] The Acting Director speculated on whether a De-SPAC transaction might constitute an "initial public offering" (which is excluded from the safe harbor in the PSLRA but is undefined in the Securities Act or the Exchange Act).[83] In addition to the PSLRA discussion, the Acting Director acknowledged that projections in connection with business combinations not only can be key components for boards in negotiating economics but also may be required disclosure.[84] He also recited the major liability provisions in the Securities Act and the Exchange Act that could apply to material misstatements

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of 'consulting' and 'advisory' services which you refer to and quantify such fees and how they will be calculated. If these fees have no limitations, please disclose this fact.

76. Coates, *supra* note 65.

77. *Id.*

78. *Id.*

79. Gensler, *supra* note 10.

80. If the authors had a nickel every time the PSLRA was discussed between SPAC and target, the authors would be penniless. In addition to the lack of discussion about the PSLRA, the myth of regulatory arbitrage is undercut by other considerations routinely resulting in transaction structures that are arguably "initial public offerings" (e.g., "double dummy" structures where a new issuer registers the issuance of stock to acquire both the SPAC and the target, or structures where the target company goes public by registering an issuance of stock to acquire the SPAC). In reality, projections are not prohibited in IPOs (they are actually encouraged by Regulation S-K Item 10), but they are practically prohibited by underwriters. Underwriters will refuse to participate in follow-on offerings by public companies due to projections that are clearly covered by the PSLRA. Accordingly, the IPO vs. De-SPAC distinction is irrelevant.

81. Coates, *supra* note 65.

82. Semil Shah & Chamath Palihapitiya, *Alignment Summit Chats: SPACs (w. Chamath Palihapitiya)*, YOUTUBE (Dec. 2, 2020), https://www.youtube.com/watch?v=sC3Q5eJjGgw.

83. Coates, *supra* note 65.

84. *Id.*

or omissions in connection with De-SPAC transactions, and stated that "in some ways, liability risks for those involved are higher, not lower, than in conventional IPOs."[85] In this respect the Acting Director was correct; however, the reason that target companies pursue De-SPAC transactions is not because of regulatory arbitrage (or other myths about speed or cost) but for other reasons.

On September 9, 2021, the SEC Investor Advisory Committee (IAC)[86] made recommendations to the SEC regarding SPACs.[87] The recommendations included "exercising enhanced focus and stricter enforcement of existing disclosure rules," specifically as it related to the role of the SPAC sponsor and conflicts of interest, plain English disclosure of the economic interests of the various participants, and a number of suggested additions relating to the De-SPAC process.[88] In terms of new disclosure requirements and regulatory changes, the IAC suggested "requiring disclosure of the identity and relationship of PIPE (private investment in public equity) investors and whether any side payments are to be made to certain shareholders as an inducement not to redeem their shares"[89] in the proxy or registration statements for the De-SPAC transaction, and suggested eliminating the PSLRA safe harbor for De-SPAC transactions in response to the claims regarding regulatory arbitrage.[90] The IAC also noted the lack of an underwriter in the De-SPAC process and suggested the SEC consider making recommendations for statutory changes by Congress.[91]

Responding to the recent attention SPACs have received and certain public criticisms of De-SPAC transactions (including the allegations of regulatory arbitrage described elsewhere herein), Congress has made a few proposals. One proposed bill would eliminate the PSLRA safe harbor for De-SPAC transactions.[92] Another would require disclosure regarding cash per share, side payments or agreements to pay sponsors, investors, or private investors for participation in the merger, and fees or other payments to sponsors, underwriters, et cetera.[93] A third would amend the Investment Advisers Act of 1940 to prohibit registered investment advisors, brokers, and their

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85. *Id.*

86. The IAC is a committee, established under the Dodd-Frank Act, to "advise and consult with the [SEC] on—(i) regulatory priorities . . . ; (ii) issues relating to . . . the effectiveness of disclosure; (iii) initiatives to protect investor interests; and (iv) initiatives to promote investor confidence and the integrity of the securities marketplace." 15 U.S.C. § 78pp. Other than the SEC's Investor Advocate, the members of the IAC are not SEC employees but instead are individuals that are knowledgeable about investment issues with reputations of integrity and are representative of state securities commissions and the interests of senior citizens, individual investors, or institutional investors. *See Spotlight on Investor Advisory Committee*, SEC, https://www.sec.gov/spotlight/investor-advisory-committee.shtml (last visited Oct. 8, 2022). While the recommendations of the IAC do not represent statements by the SEC commissioners or staff, the SEC is required to review the findings and recommendations of the IAC, issue a public statement assessing the findings or recommendations, and disclose the action, if any, the SEC is taking in response. *See id.*

87. *See* INV. ADVISORY COMM., SEC, RECOMMENDATIONS OF THE INVESTOR ADVISORY COMMITTEE REGARDING SPECIAL PURPOSE ACQUISITION COMPANIES (2021).

88. *Id.* at 2 (suggesting disclosure of mechanics and timeline of the process, the boundaries of areas the SPAC might be willing to seek a target in, expected acceptable PIPE terms, and the due diligence that the sponsor would commit to).

89. *Id.* at 2, n.4.

90. *Id.* at 6.

91. *Id.* at 7.

92. Holding SPACs Accountable Act of 2021, H.R. 5910, 117th Cong. (2021).

93. Sponsor Promote and Compensation Act, S. 1504, 117th Cong. (2021).

representatives from facilitating[94] the transaction or recommending the securities of SPACs to non-accredited investors unless the SPAC has a sponsor "promote or similar economic compensation" of five percent or less, or disclosure to be prescribed by the SEC is made.[95] In addition, a number of Democratic senators (including Senator Elizabeth Warren, D-Mass) requested information from a number of high-profile SPAC sponsors raising concerns about "abuses by the creators and operators of SPACs"[96] and requesting information "in order to understand what sort of Congressional or regulatory action may be necessary to better protect investors and market integrity and ensure a fair, orderly, and efficient marketplace."[97] Following these requests and the Proposed SPAC Rules, Senator Warren's office released a report titled "The SPAC Hack: How SPACs Tilt the Playing Field and Enrich Wall Street Insiders,"[98] that criticizes SPACs for misaligned incentives, high fees, incentives for inflated, inadequate, or fraudulent disclosure and self-dealing, and previews a "SPAC Accountability Act of 2022."[99] While the proposed act is not published at the time of this writing, it would codify the Proposed SPAC Rules as well as introduce the requirement that the lockup period for SPAC sponsors last until the target company has projected being revenue positive in disclosed forward-looking statements.[100]

While Corp Fin has been busy with guidance, investor education, and commentary on De-SPAC proxy statements or registration statements, the SEC enforcement division has also been busy, bringing and settling claims relating to a number of De-SPAC transactions. These include transactions involving Nikola Corp.,[101] Akazoo[102] and Momentus.[103] In each of the settlements, the primary claim is fraud by the target company or its executive officers (i.e., violations of Section 17, Section 10, and Rule 10b-5 under the Securities Act)[104] that was not discovered by the SPAC

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94. "Facilitating a transaction" is not defined in the Investment Advisors Act, *see* 15 U.S.C. § 80b-2, but the intent could be to impose a retail trading moratorium.

95. Protecting Investors from Excessive SPACs Act of 2021, H.R. 5913, 117th Cong. (2021).

96. Warren, Brown, Smith, and Van Hollen Request Information from SPAC Creators Amid "Astonishing" Reports of Abuse and Market Dysfunction, ELIZABETH WARREN (Sept. 22, 2021), https://www.warren.senate.gov/oversight/letters/warren-brown-smith-and-van-hollen-request-information-from-spac-creators-amid-astonishing-reports-of-abuse-and-market-dysfunction.

97. *Id.*

98. Office of Sen. Elizabeth Warren, The Spac Hack: How Spacs Tilt the Playing Field and Enrich Wall Street Insiders 1 (2022).

99. *Id.* at 4–6, 12, 14.

100. *Id.* at 19.

101. *Nikcola Corporation to Pay $125 Million to Resolve Fraud Charges*, SEC (Dec. 21, 2021), https://www.sec.gov/news/press-release/2021-267; Nikola Corp., Securities Act Release No. 11018, Exchange Act Release No. 93838 (Dec. 21, 2021) [hereinafter *Nikcola Settlement*]; Complaint at 1–2, SEC v. Milton, Civil Action No. 1:21-cv-6445 (S.D.N.Y. July 29, 2021).

102. *Post-SPAC Music Streaming Company Reaches $38.8 Million Settlement in Ongoing Fraud Action*, SEC (Oct. 27, 2021), https://www.sec.gov/news/press-release/2021-216; Complaint at 1, SEC v. Akazoo S.A., No. 1:20-cv-08101-AKH (S.D.N.Y. Sept. 30, 2020).

103. *SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination*, SEC (July 13, 2021), https://www.sec.gov/ news/press-release/2021-124; Momentus, Inc., Securities Act Release No. 10955, Exchange Act Release No. 92391 (July 1, 2021) [hereinafter *Momentus Settlement*].

104. *See Ni/cola Settlement*, *supra* note 101, at 10 (describing violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act; Complaint at 10–11, SEC v. Akazoo S.A., No. 1:20-cv-08101-AKH (S.D.N.Y. Sept. 30, 2020) (alleging violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder); *Momentus Settlement*, *supra* note 103, at 12 (describing violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 14(a) of the Exchange Act and Rule 14a-9 thereunder).

and was repeated or left uncorrected.[105] In two of the three, there are also internal control deficiency claims for post-closing repetition of the fraudulent claims, and in one instance there are claims that the SPAC failed to conduct sufficient due diligence to unearth and disclose the underlying falsehood, and thus negligently included material misstatements or omissions in public filings by the SPAC.[106] Interestingly, the charges were primarily about misrepresentations of historical performance or achievement (e.g., number of subscribers, financial results, and countries of operation by Akazoo, successful commercial test by Momentus, and a host of historical achievements in respect of Nikola).[107] The harm to SPAC investors was not a misstatement of the projected financial results of the target, other than indirectly, but rather the alleged harm was a misstatement or omission of historical or present facts.

IV. CHAIR GENSLER'S REQUESTS FOR RECOMMENDATIONS

Prior to the release of the Proposed SPAC Rules, there were a number of speeches by commissioners of the SEC providing breadcrumbs (or more blatant indications) of their views as to SPACs, and the need for changes in the SEC's approach to enforcing existing regulations, new regulations, or legislative action. There are five commissioners of the SEC, appointed by the President with the advice and consent of the Senate, and no more than three may belong to the same political party.[108] As of the date of the release of the Proposed SPAC Rules, the SEC commissioners comprised three members of the Democratic party (Chair Gensler, Allison Lee, and Caroline Crenshaw) and one member of the Republican party (Hester Peirce), with one vacancy.[109] Subsequently the vacancy was filled with a Republican (Mark Uyeda) while Jaime Lizárraga (a Democrat) replaced Allison Lee.[110]

Chair Gensler has been the most vocal of the commissioners regarding SPACs. His most recent and extensive public statement regarding SPACs, other than casual references, was his remarks before the Healthy Markets Association Conference on December 9, 2021.[111] In this speech, the Chair noted the increased number of companies going public via De-SPAC transactions, which he refers to as a "SPAC target IPO," and suggested they were doing this to "arbitrage the rules."[112] He also frequently referred to Aristotle's maxim "treat like cases alike," but somewhat ironically cites the maxim to an article that concludes "the maxim is either unhelpful or pernicious" and "invoking the like-cases maxim is not just a waste of paper; it may also be

105. *See Momentus Settlement*, *supra* note 103, at 3 ("SRAC's due diligence failures compounded Momentus's and Kokorich's misrepresentations and omissions and resulted in the dissemination of materially false and misleading information to investors."); *Ni/cola Settlement*, *supra* note 101, at 5 ("[N]o one at Nikola routinely reviewed Milton's social media posts prior to their publication . . . [and] Nikola did not correct these statements."); Complaint at 7, SEC v. Akazoo S.A., No. 1:20-cv-08101-AKH (S.D.N.Y. Sept. 30, 2020) ("[T]he proxy and investor presentations . . . included many of the same false claims . . . .").

106. *See Momentus Settlement*, *supra* note 103, at 3.

107. *See* Complaint at 5–7, SEC v. Akazoo S.A., No. 1:20-cv-08101-AKH (S.D.N.Y. Sept. 30, 2020); *Nikola Settlement*, *supra* note 101, at 5–10.

108. *Current SEC Commissioners*, SEC, https://www.sec.gov/Article/about-commissioners.html (last visited Nov. 1, 2022).

109. *Historical Summary of Chairmen and Commissioners*, SEC, https://www.sec.gov/about/sechistoricalsummary (last visited Oct. 27, 2022).

110. *Id.*

111. Gensler, *supra* note 10.

112. *Id.*

deeply insidious."[113] Implicit in the maxim, although sometimes expressly stated, is its inverse: different cases should be treated differently. He noted the core principles addressed by the Securities Act and the Exchange Act as: (1) leveling out information asymmetries; (2) guarding against misleading information and fraud; and (3) mitigating conflicts.[114]

The Chair then described the tools under the Securities Act and the Exchange Act to achieve the core principles: (1) providing full and fair disclosure to investors "at the time they're making their crucial decisions;" (2) standards around marketing practices and prohibiting tactics that "condition the market" before the required disclosure reaches investors; (3) gatekeeper obligations, that is, requiring parties involved in the sale of securities, such as auditors, brokers, and underwriters, to be responsible for the basic parts of their work; and (4) a "cop on the beat" in the form of the SEC to enforce the rules.[115] He indicated that he asked the SEC staff for proposals "to better align the legal treatment of SPACs and their participants with the investor protections provided in other IPOs, with respect to [(i)] disclosure, [(ii)] marketing practices, and [(iii)] gatekeeper obligations."[116]

With respect to disclosure, Chair Gensler noted that the concept of full and fair disclosure is not just about substance "but also the timing," although he emphasized timing more in his marketing practices points.[117] Interestingly, he states that "PIPE investors may gain access to information the public hasn't seen yet, at different times, and can buy discounted shares based on that information."[118] He also stated that "retail investors may not be getting adequate information about how their shares can be diluted throughout the various stages of a SPAC" and that "dilution largely falls on the 'remainers,' not those who cash out after the vote."[119] The Chair asked the SEC staff for recommendations to make investors "better informed about the fees, projections, dilution, and conflicts" of a De-SPAC transaction, and "how investors can receive those disclosures *at the time they're deciding whether to in-vest.*"[120]

In our view, the concept of PIPE investors getting access to different information is inconsistent with how De-SPAC PIPEs are marketed. Due to Regulation FD[121] (short for "fair disclosure") considerations, PIPE investors are bound by confidentiality and use restrictions while in possession of material non-public information, and insist on a covenant to "cleanse" the information promptly through public disclosure after announcing the De-SPAC. In essence, the PIPE investors get access to identical information that the public SPAC investors receive at the announcement of the De-SPAC. In rare circumstances, PIPE investors will request access to additional information—for example, additional diligence information or diligence re-ports—but will agree to long-term confidentiality and use restrictions in order to receive information that will not be publicly "cleansed." With respect to dilution falling on the "remainers" and the lack of adequate information: first, the concept that dilution is borne primarily by non-redeeming SPAC

113. Benjamin Johnson & Richard Jordan, Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice 1, 29 (Mar. 1, 2017) (unpublished manuscript) (on file with Princeton University).

114. *See* Gensler, *supra* note 10.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Gensler, *supra* note 10 (emphasis added).

121. 17 C.F.R. pt. 243 (2021).

shareholders is inaccurate—in most De-SPAC transactions the target shareholders own the substantial majority of the surviving company,[122] meaning they bear considerably more of the dilution than the non-redeeming SPAC shareholders; and second, the components of dilution (typically the founder shares, which were purchased for relatively modest consideration, and out-of-the money) are relatively simple, and meaningful disclosure to investors can be easily made to investors in response to SEC comments (rather than new strict rules). Finally, the material conflicts of interest are disclosed at the time of the SPAC IPO.

With respect to marketing practices, the Chair suggested that the common practice of a De-SPAC transaction being "announced with a slide deck, a press release, and even celebrity endorsements" may be "priming the market without providing robust disclosures," and that "[i]nvestors may be making decisions based on incomplete information or just plain old hype."[123] The Chair indicated he asked the staff to make recommendations to guard against "improper conditioning of the [De-SPAC] market . . . includ[ing] providing more complete information at the time that a [De-SPAC] is announced."[124]

Not to hoist the Chair with his own petard, but the current practice of announcing a De-SPAC transaction with a slide deck and press release is treating like cases alike. The SPAC merger with the target company is a merger of a public company (the SPAC) and a larger private company. This type of transaction is relatively common for public companies and has a common disclosure practice—announce the transaction with a Current Report on Form 8-K, press release, and investor presentation, and later file a registration statement or proxy statement with more detailed information.[125] The rules under the Securities Act and Exchange Act expressly deal with the concept of preliminary disclosure, in Rule 14a-12 under the Exchange Act[126] and Rule 425 under the Securities Act,[127] requiring prominent language that investors should read the forthcoming proxy statement or registration statement. Similarly, the SEC rules contemplate a "stop, look and listen" communication in the context of tender offers.[128] So, the concept that investors may not have all information at a point when they can make an investment decision is tolerated in the area of public company mergers and acquisitions. Moreover, the same information is provided to PIPE investors as is publicly disclosed at a De-SPAC announcement, in which the issuer has concluded

122. For De-SPAC transactions that closed in 2021, according to SPAC Research data, the target shareholders received on average more than five times the amount of equity as was sold in the SPAC IPO (which includes both the "remainers" and the "redeemers").

123. Gensler, *supra* note 10.

124. *Id.*

125. For example, in the merger of Kraft Foods Group, Inc. (which was publicly traded) and H.J. Heinz Holdings Corp. (which was privately held) in 2005, the transaction was announced via press release on March 25, 2015, see H.J. Heinz Holding Corp., H.J. Heinz Company and Kraft Foods Group Sign Definitive Merger Agreement to Form The Kraft Heinz Company (Form 425) (Mar. 25, 2015), and an investor presentation, see H.J. Heinz Holding Corp., Creating a Global Food & Beverage Leader (Form 425) (Mar. 25, 2015), touting "Unparalleled Portfolio of Powerful and Iconic Brands," a "transformational combination," "Substantial Value for Kraft Shareholders," "$1.5 bn of Cost Efficiencies and Synergies", et cetera. The registration statement for the merger was filed several weeks later, on April 10, 2015, and went through several rounds of SEC comments before finally being declared effective on July 2, 2015. H.J. Heinz Holding Corp., Registration Statement (Form S4) (Apr. 10, 2015); The Kraft Heinz Co., Annual Report (Form 10-K) (Jan. 3, 2016).

126. 17 C.F.R. § 240.14a-12 (2021).

127. *Id.* § 230.425.

128. *Id.* § 240.14d-9.

that all material information for an investment decision, albeit from sophisticated institutions that invest in PIPEs, has been disclosed in the context of a Section 4(a)(2) private placement.

With respect to gatekeeper obligations, the Chair offered no concrete suggestions. He asked, "who's performing the role of gatekeepers . . . directors, officers, SPAC sponsors, financial advisors, and accountants [in the De-SPAC transaction]?"[129] and hinted that some of the participants in the De-SPAC transactions are statutory underwriters. He asked the staff for recommendations to "better align incentives between gatekeepers and investors, and how we can address the status of gatekeepers' liability obligations."[130] The Chair, through his "SPAC target IPO" concept, has answered his own question—if a De-SPAC transaction is like an IPO of the target company, the SPAC is the underwriter and serving that gatekeeper role. In comparison to a typical underwriter, the SPAC and its directors, officers, and controlling parties have a higher standard of care under the Securities Act or Exchange Act for misstatements as well as, in the case of the directors and officers, fiduciary duties.[131] The Chair quoted John Coates' statement referenced above "[a]ny simple claim about reduced liability exposure for SPAC participants is overstated at best, and potentially seriously misleading at worst."[132] Since the liability exposure is already there, the Chair seems to be asking the question: "Can we expand the liability to investment banks?" But, treating like for like, the investment banks fulfill the same role as they do in public company mergers: advisory roles to the parties and not purchasing with a view to, or otherwise participating in, a distribution. This is consistent with the treatment under Delaware law of investment banks that provide M&A advisory services in connection with mergers— definitively not gatekeepers.[133]

V. PROPOSED SPAC RULES, OTHER POSSIBLE REGULATORY ACTION AND POSSIBLE LEGISLATIVE CHANGE

On March 30, 2022, the SEC approved the Proposed SPAC Rules by a 3–1 vote along party lines.[134] The Proposed SPAC Rules cover a wide range of topics, including expanding underwriter liability for disclosures in connection with De-SPAC transactions as well as target company and officer and director liability for such disclosures, and expanding and revising disclosure requirements applicable to SPAC IPOs and De-SPAC transactions. While some of the proposed rules simply codify existing SEC staff positions and guidance or standard SPAC industry practice, or are repetitive of existing rules, others are likely to have substantive impacts on SPACs, SPAC sponsors, SPAC IPO underwriters, private companies seeking to go public via De-SPAC

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129. *See* Gensler, *supra* note 10.

130. *Id.*

131. Underwriters in an IPO are subject to liability under Section 12 of the Securities Act. SPAC directors are subject to potential liability under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the Securities Act, and Section 14(a) of the Exchange Act and Rule 14a-9 thereunder as well as for potential breaches of fiduciary duties in approving or recommending a business combination to shareholders. *See, e.g.*, In re MultiPlan Corp. Stockholders Litig., 268 A.3d 784, 796 (Del. Ch. 2022).

132. *See* Gensler, *supra* note 10 (quoting Coates, *supra* note 62).

133. RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

134. *See Final Commission Votes for Agency Proceeding*, SEC, https://www.sec.gov/ about/commission-votes/annual/commission-votes-ap-2022.xml (last visited Oct. 29, 2022) (recording the vote on March 30, 2022, release no. 33-11048, regarding Special Purpose Acquisition Companies, Shell Companies, and Projections).

transactions, and other participants in De-SPAC transactions.[135] The Proposed SPAC Rules were subject to a comment period that expired on June 13, 2022, and garnered eighty-three comment letters from law firms, professors, accounting firms, lobbyists, trade organizations and associations, think tanks, individual investors, et cetera.[136]

The Proposed SPAC Rules may change in response to public comments or further consideration by the staff and commissioners of the SEC, and theoretically, the SEC could determine not to adopt some or all of the rules. In addition to adoption of the Proposed SPAC Rules, SPACs could be subject to: (i) new interpretations of existing regulations; (ii) other new rules adopted by the SEC; and (iii) legislation. The following is a discussion of the Proposed SPAC Rules and speculation about other potential actions by the SEC or Congress. The proposed rules generally cover the following topics: (1) enhancing disclosure and investor protection, including expanding gatekeeper obligations; (2) revising the registration requirements for De-SPAC transactions, including aligning statutory liability under the Securities Act for target companies with what would apply in a traditional IPO; (3) projections disclosure, including expanding the SEC's position with respect to projection disclosure, requiring incremental disclosure for De-SPAC transactions, and aligning the status of forward looking statements for De-SPAC transactions with that applicable in an IPO; and (4) status of SPACs under the Investment Company Act of 1940.

A. Disclosure

The SEC was already quite active in respect of guidance and enhanced enforcement of the existing securities regulations prior to the Proposed SPAC Rules. This activity has been both public (e.g., Corp Fin issued Disclosure Guidance Topic Number 11) and private, with a number of new topics clearly being prioritized in SEC comment letters on proxy statements and registration statements. Disclosure of fees, projections, dilution, and conflicts can all be required by the SEC under the existing regulations and form requirements, rendering legislation that would expand the scope of required disclosure (such as the proposed Sponsor Promote and Compensation Act) potentially surplusage. Most of the disclosure requirements under the Proposed SPAC Rules would merely codify existing disclosure practices in De-SPAC transactions or codify SEC positions with respect to such disclosure.[137]

New requirements that are not merely a codification of existing practice would include:

- Enhanced disclosure regarding projections, including who prepared the projections and for what purpose, whether or not the projections were based on historical operations (and more prominent disclosure of historical

135. For example, the threat of underwriter liability has caused Goldman Sachs & Co. to halt involvement in De-SPACs. *See* Sridhar Natarajan & Ruth David, *Goldman Is Pulling Out of Most SPACs Over Threat of Liability*, BLOOMBERG (May 9, 2022, 10:20 AM), https://www.bloomberg.com/news/articles/2022-05-09/goldman-is-pulling-out-of-most-spacs-over-threat-of-liability.

136. *Comments on Special Purpose Acquisition Companies, Shell Companies, and Projections*, SEC, https://www.sec.gov/comments/s7-13-22/s71322.htm (last visited Oct. 29, 2022).

137. For example, much of the proposed dilution disclosure in proposed Item 1602 is already disclosed in practice, as is disclosure responsive to S-K Items 101, 102, 103, 304, and 403 for the target company, and proposed Item 1605 is redundant with the standard proxy statement disclosure of the background of any public merger.

operations), and whether the projections still reflect the view of the board or management of the SPAC or the target company as of the date of filing.[138]

- Disclosure regarding whether the SPAC reasonably believes that the De-SPAC transaction and any related financing are fair or unfair to unaffiliated security holders of the SPAC.[139] This proposed disclosure requirement is modeled after Item 1014(a) of Regulation M-A, which sets forth disclosure requirements for "going private" transactions and requires disclosure of director voting (independence, and votes against or abstaining), disclosure of the material bases considered for determining fairness, and whether approval by a majority of unaffiliated shareholders is required to approve the De-SPAC.[140] The new requirements would not mandate that the SPAC board receive a fairness opinion or third-party valuation. Nevertheless, SPAC boards may be more likely to seek fairness opinions or third-party valuations, which may be what the SEC is hoping to achieve.

- Disclosure of a number of specific items relating to any report, opinion, or appraisal from an outside party relating to the consideration or the fairness of the consideration to be offered to security holders, or the fairness of the De-SPAC transaction or any related financing transaction to the SPAC, SPAC sponsor, or security holders who are not affiliates.[141]

In addition, the Proposed SPAC Rules would require incremental disclosure regarding sources and impact of dilution, with a sensitivity analysis,[142] conflicts of interest[143] (although the material conflicts are already disclosed by industry practice), and disclosure regarding the SPAC's sponsor.[144]

Chair Gensler noted that full and fair disclosure is not just about scope and substance, which the SEC can already enforce through its existing rules, but is also about timing.[145] The timing of the formal disclosure in a De-SPAC transaction and public trading is effectively reversed as compared to a traditional IPO—trading commences before the offering document (the proxy statement or registration statement for the De-SPAC) has been subject to SEC review and comment.[146] This is akin to the pattern of disclosure in a merger of any public company with a private target, in which investors should recognize that important information is coming and that they should review it before making an investment decision.

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138. *See Proposed SPAC Rules*, *supra* note 1, at 29495–96 (describing proposed amendment to Item 10(b) of Regulation S-K and proposed Item 1609 of Regulation S-K); *id.* at 29473 (describing proposed Item 1606 of Regulation S-K).

139. *Id.*

140. 17 C.F.R. § 229.1014 (2022).

141. *See Proposed SPAC Rules*, *supra* note 1, at 29474 (describing proposed Item 1607 of Regulation S-K).

142. *See id.* at 29468–70 (describing proposed Items 1602(a)(4), 1602(c), and 1604(c) of Regulation S-K).

143. *See id.* at 29467–68 (describing proposed Item 1603(b) of Regulation S-K).

144. *See id.* at 29466–67 (describing proposed Item 1603(a) of Regulation S-K).

145. *See* Gensler, *supra* note 10.

146. *See* Div. of Corp. Fin., *Filing Review Process*, SEC, https://www.sec.gov/divisions/corpfin/cffilingreview (last modified Sept. 27, 2019).

Interestingly, the Proposed SPAC Rules would not accelerate timing of disclosure from the proxy statement or registration statement into the transaction announcement (Form 8-K) that the SPAC is required to file within four business days after signing the De-SPAC transaction ("Signing 8-K"). However, the SEC requested comment on whether to require incremental disclosure, such as more disclosure on the private operating company or risk factor disclosure,[147] in the Signing 8-K. The SEC is also proposing to require certain disclosures that would normally only apply to a registration statement or the Super 8-K in proxy statements.[148]

If the SEC requires additional disclosure in the Signing 8-K when final rules are adopted, the scope of incremental disclosure should be limited to balance investor protection with fiduciary duties of SPAC directors and officers, the legitimate economic interests of public investors in SPACs, and facilitation of capital formation. For example, requiring all the information that would appear in the Super 8-K[149] in the Signing 8-K. Delay is the enemy of any M&A transaction, so requiring extensive disclosure would either put the transaction at risk to the detriment of existing public investors, who essentially hold options on the transaction in the form of their redeemable common stock or warrants, or would result in a rushed disclosure that is not particularly useful to investors.[150] Thus, the SEC should narrowly tailor any incremental Form 8-K disclosure to that which is truly material to investors, recognizing that in many transactions, such as in public M&A and tender offers, investors are expected to exercise restraint and wait for meaningful information.

B. Marketing Practices

Chair Gensler's commentary around marketing practices overlaps substantially with that of the timing of disclosure. However, separately from requiring robust prompt disclosure, the SEC could have sought to limit the contents of the press release, slide deck, et cetera, announcing the De-SPAC transaction in order to prevent "priming the market" or "plain old hype."[151] Nevertheless, the Proposed SPAC Rules include no such limitations.

C. Gatekeepers

The desire to expand liability for misstatements or omissions in De-SPAC transaction disclosures was the most significant of Chair Gensler's concepts and is the most significant proposal in the Proposed SPAC Rules. The Securities Act and the Exchange Act do not generally mandate under-writers.[152] In an IPO, stock exchange listing requirements effectively mandate a

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147. *See Proposed SPAC Rules*, *supra* note 1, at 29504.

148. *Id.* at 29477.

149. Including audited historical financial statements of the target, a robust description of the target's business, and a discussion and analysis of the target's historical performance and compensation.

150. For example, Far Point Acquisition Corporation (a SPAC) announced a business combination with Global Blue Group, AG (a "technology and payments partner empowering global merchants to capture the growth of international shoppers") in January 2020. *Global Blue and Far Point Acquisition Corporation (NYSE: FPAC) Announce Business Combination*, BLOOMBERG (Jan. 16, 2020), https://www.bloomberg.com/press-releases/2020-01-16/global-blue-and-far-point-acquisition-corporation-nyse-fpac-announce-business-combination.

151. Gensler, *supra* note 10.

152. *E.g.,* Self-Regul. Orgs.; New York Stock Exch. LLC; Ord. Setting Aside Action by Delegated Auth. & Approving A Proposed Rule Change, As Modified by Amend. No. 2, to Amend Chapter One of the Listed Co. Manual to Modify the Provisions Relating to Direct Listings, Release No. 34-90768, Exchange Act Release No. 90768, 85 Fed. Reg. 85807, 85815 (Dec. 22, 2020) ("The Commission agrees with the Exchange that the Securities Act does not require the involvement of an underwriter in registered offerings.").

firm commitment underwriting[153] but many offerings (direct listings, registered direct follow-on offerings, et cetera) do not have an underwriter participating. The SEC is clearly able to hold SPACs responsible for insufficient due diligence and extend that liability to SPAC sponsors, as evidenced by the Momentus settlement.[154] However, the SEC is clearly interested in mandating an investment bank to act as a statutory underwriter or interpreting investment bank functions in the De-SPAC transaction by classifying them as such.[155]

In the SPAC Rules Proposing Release, the SEC alleges that every De-SPAC transaction constitutes a distribution of the combined company's securities because "the result of a [D]e-SPAC transaction, however structured, is consistent with that of a traditional initial public offering."[156] The Proposed SPAC Rules[157] would provide that underwriters of a SPAC's IPO who "take[] steps to facilitate the [D]e-SPAC transaction, or any related financing transaction, or otherwise participate[] (directly or indirectly) in the [D]e-SPAC transaction, will be deemed to be engaged in the distribution of the securities of the [combined company resulting from] the [D]e-SPAC trans-action."[158] This would make those investment banks liable for any material misstatements or omissions appearing in the disclosure, subject to a due diligence defense.[159] The SEC purports to merely interpret the phrase "or participates or has a direct or indirect participation in [the distribution of any security],"[160] in addition to determining that all De-SPAC transactions are, in economic substance, a distribution of the target companies' securities to the SPACs' shareholders.[161]

This is similar to the statements of the SEC when approving the NYSE's "Primary Direct Floor Listing" proposal.[162] In the adopting release, the SEC speculated that the financial advisor engaged to advise on valuation, as required by the NYSE listing rules for direct listings, may be deemed to be a statutory underwriter.[163] Commissioners Allison Herren Lee and Caroline A. Crenshaw (two of the sitting Democratic Commissioners at the time of the Proposed SPAC Rules) dissented, stating that the SEC should have provided more guidance on what might trigger

153. *See, e.g.*, NYSE, NYSE LISTED COMPANY MANUAL para. 102.01B(E) ("Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO").

154. In *Momentus*, the settlement order found that the SPAC, among other things, violated the Securities Act and the Exchange Act by soliciting a proxy statement containing a materially false statement, and that the SPAC's sponsor and the SPAC's CEO caused such violations due to negligent misconduct in repeating and disseminating misrepresentations made by the target company and its CEO. *Momentus, Inc.*, File No. 3-20393 2, 12 (Secs. Exch. Comm'n July 13, 2021).

155. *See e.g.*, Gary Gensler, Chair, SEC, Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections (Mar 30, 2022); Caroline Crenshaw, Commissioner, SEC, Statement on the SPACs Proposal (Mar 30, 2022).

156. *See Proposed SPAC Rules*, *supra* 1, at 29485.

157. Specifically, proposed Rule 140a under the Securities Act. *Id.* at 29486–87

158. Proposed Rule 140a under the Securities Act. *Id.* at 29486.

159. *Id.* at 29480

160. 15 U.S.C. § 77b(a)(11).

161. *See Proposed SPAC Rules*, *supra* 1, at 29485.

162. Self-Regulatory Organizations; New York Stock Exchange LLC; Order Setting Aside Action by delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings, SEC Release No. 34-90768, 85 Fed. Reg. 85807 (Dec. 29, 2020).

163. *Id.* at 85815.

statutory underwriter classification, and suggesting that such classification would be useful to provide an incentive to conduct robust due diligence.[164]

While the SEC purports to be merely interpreting the definition of "underwriter," concluding that the traditional investment bank role in De-SPAC transactions qualifies as statutory underwriters[165] is difficult under applicable caselaw, such that the Proposed SPAC Rules appear to exceed the SEC's authority. These traditional roles encompass PIPE placement agent (a role that constitutes participation in a distribution but not a public distribution), M&A advisor (a role that does not constitute an underwriter in public company M&A) to either the SPAC or the target, and capital markets advisor (advising on analyst day presentations and road shows with institutional investors). None of these roles seem to easily constitute an "underwriter" as defined in Section 2(a)(11) of the Securities Act.[166] While the term "participation" is used in the definition of underwriter, the incidental participation is not sufficient under caselaw interpreting the term. "[P]articipat[ion] only in non-distributional activities that may facilitate securities' offering by others"[167] is not sufficient for an institution to be a statutory underwriter. Underwriter status is limited to those "people (or entities) responsible for distributing securities to the public, that is, on those engaged in the public offering."[168]

If the SEC desires to mandate that investment banks act as gatekeepers in connection with a De-SPAC transaction, it would appear that either new rulemaking mandate a distributional role for an investment bank or legislative changes are required. For example, the SEC could require, as a condition of stock exchange listing, that every listed SPAC use a registered broker-dealer to act as dealer-manager for the redemption offer, or an investment bank to perform a valuation of the target company for purposes of meeting the eighty percent requirement[169] and define the De-SPAC as a distribution.

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164. *See* Allison Herren Lee & Caroline A. Crenshaw, Commissioners, SEC, Statement on Primary Direct Listings (Dec. 23, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23.

165. 15 U.S.C. § 77b. Underwriter is defined in Section 2(a)(11) of the Securities Act as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term issuer shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." *Id.*

166. *See* 15 U.S.C. § 77b.

167. In re Lehman Bros. Mortg. Backed Sec. Litig., 650 F.3d 167, 177 (2d Cir. 2011).

168. *Id.* at 181.

169. Applicable stock exchange requirements as well as SPACs' charter documents require the De-SPAC to be with a target company worth at least eighty percent of the value of the assets in the SPACs' trust accounts, excluding the amount of deferred underwriter discounts. Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Nasdaq IM-5101-2 To Permit an Acquisition Company To Contribute a Portion of Its Deposit Account to Another Entity in a Spin-Off or Similar Corporate Transaction, SEC Release No. 34-93219, 86 Fed. Reg. 55664, 55665 (Oct. 6, 2021) ("Nasdaq IM-5101-2 requires that within 36 months of the effectiveness of its IPO registration statement, or such shorter period that the Acquisition Company specifies in its registration statement, the Acquisition Company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (excluding any deferred underwriters fees and taxes payable on the income earned on the deposit account) at the time of the agreement to enter into the initial combination.").

D. Other Proposed or Discussed Changes

The SEC is proposing to amend the definition of "blank check company" for purposes of the PSLRA to mean "a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person."[170] This would make SPACs ineligible for the safe harbor provided by the PSLRA.[171] The PSLRA, while talked about as if it is important to De-SPAC participants, is not that important.[172] If it were eliminated, it would change the posture in litigation (instead of claiming the safe harbor of the PSLRA, the SPAC would claim the comparable protections under the common law "bespeaks caution" doctrine[173]), but would likely not change behavior.

In response to recent allegations that SPACs are unregistered investment companies under the Investment Company Act of 1940,[174] the SEC is proposing a new Rule 3a-10 under the Investment Company Act of 1940 that would establish a safe harbor from investment company act status for SPACs so long as certain conditions are met.[175] Notably, in order to qualify, the SPAC would need to announce a De-SPAC transaction within eighteen months from its IPO, and close such De-SPAC transaction within twenty-four months from its IPO.[176] The SPAC would be required to return any cash not utilized in the De-SPAC transaction and liquidate if it did not meet each of these deadlines.[177]

The SEC is proposing that all De-SPAC transactions be deemed to involve an offering to the SPAC's shareholders, effectively requiring that all De-SPAC transactions be registered on Form S-4 or F-4.[178] While many De-SPAC transactions are already registered on such a form, the proposed rule would effectively require registration even for transactions that would otherwise only require a proxy.[179]

The SEC is also proposing to amend Form S-4 and Form F-4 to require that the SPAC and the target company are treated as co-registrants.[180] Specifically, the SEC is proposing to amend the signature instructions to Forms S-4 and F-4 to state that if a SPAC is offering its securities in

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170. *See Proposed SPAC Rules*, *supra* note 1.

171. *See id.*

172. *See* Coates, *supra*, note 65.

173. For a discussion of the PSLRA and bespeaks caution doctrine, see Andrew W. Fine, *A Cautionary Look at a Cautionary Doctrine*, 10 BROOK. J. CORP. FIN. & COM. L. (2016).

174. *See, e.g.*, Assad v. Pershing Square Tontine Holdings, Ltd., 21 Civ. 6907 (AT) (S.D.N.Y. Aug. 23, 2021). The authors believe SPACs and their trust accounts should not be investment companies for the same reasons set forth in the Rule 419 final release, namely "in light of the purposes served by the regulatory requirement to establish such an account, the limited nature of such investments, and the limited duration of the account [(up to 18 months)], such an account will neither be required to register as an investment company nor regulated as an investment company as long as it meets the requirements of Rule 419." Blank Check Offerings, 57 Fed. Reg. 18037 (Apr. 28, 1992) (to be codified at 17 C.F.R. pts. 230, 240); *see also* Penny Stock Definition for Purposes of Blank Check Rule, 58 Fed. Reg. 58099 (Oct. 29, 1993) (to be codified at 17 C.F.R. pt. 240).

175. *See Proposed SPAC Rules*, *supra* note 1, at 29573–74.

176. *See id.* at 29573 (to be codified at 17 C.F.R. § 270.3a-10).

177. *See id.*

178. *See id.* at 29567 (to be codified at 17 C.F.R. § 230.145a).

179. *See id.* at 29567.

180. *See id.* at 29570.

a De-SPAC transaction that is registered on the form, then the term "registrant" for purposes of the signature requirements of the form would mean the SPAC and the target company.[181] This would expand formal Section 11 liability to the target company and its officers and directors signing the registration statement. If a De-SPAC is conceptualized as an IPO of the target, one potential gap is that there is not the same express liability for the target company's officers and directors as there would be if they signed a registration statement on Form S-1. While this change would expand express liability, the settlements in Momentus, Akazoo, and Nikola have indicated that the SEC clearly can capture such actors under the existing liability regime.[182]

While the SEC has not proposed a rule change on "empty voting," it has requested comment on whether to address the "empty voting" phenomenon where SPAC shareholders can vote against a De-SPAC transaction and still exercise redemption rights.[183] Most SPACs permit such decoupling of the vote from continued ownership in the company.[184] The concerns over empty voting are overstated, as the individual redemption right of each shareholder makes the vote a mere formality. More importantly, the current system of proxy solicitation in the U.S. (requiring a record date, mailing, and the proposed minimum dissemination period[185]) already introduces a risk of empty voting in all public company mergers which means that purchasers of SPAC shares after the record date for the vote do not have the right to vote for or against the transaction. If SPAC shareholders were required to vote "no" on the transaction in order to have redemption rights (which is permissible under the exchange listing rules[186]), any purchaser of shares after the record date would have irredeemable shares. To the extent that aligning the De-SPAC process with the traditional IPO process is desired, there is no requirement in an IPO for a vote among the offerees, and no minimum percentage acceptance by offerees in order to proceed with the offering.

In the SPAC Rules Proposing Release, the SEC notes that former shell companies, including SPACs, are subject to different treatment under a variety of existing rules—that is, the Shell Company Regs.[187] Many of the concerns do not apply to exchange-listed SPACs due to the need for a proxy solicitation in almost every De-SPAC transaction, and the proposed rules would even further mitigate the concerns that motivated the Shell Company Regs.

E. Potential Legislative Changes

In addition to regulatory action by the SEC, legislative action may be taken to mandate new disclosure, eliminate the safe harbor of the PSLRA, expand underwriter status, or make other changes. New disclosure mandates would likely be redundant with what the SEC has already been requiring, which will likely be codified in the Proposed SPAC Rules.

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181. *See Proposed SPAC Rules*, *supra* note 1, at 29570–71.

182. See supra notes 101–07 and accompanying text.

183. *See Proposed SPAC Rules*, *supra* note 1, at 29504.

184. *See, e.g.*, Usha Rodrigues & Michael Stegmoller, *Redeeming SPACs* 28 (Univ. of Ga. Sch. of L. Legal Studies Rsch. Paper No. 2021-09, 2021) ("Every SPAC in our sample gives shareholders the right to redeem their shares – regardless of vote.").

185. 17 C.F.R. § 240.14a-16 (2021).

186. *See* NYSE, NYSE LISTED COMPANY MANUAL para 102.06 (2017) (only requiring redemption rights, described as "conversion rights" by the NYSE, for public shareholders voting against the De-SPAC).

187. *See* SEC, *supra* note 1.

The possibility to prohibit brokerage facilitation of retail trades before De-SPAC announcement, or between De-SPAC announcement and a point where adequate disclosure is made (perhaps declaration of effectiveness of the registration statement, or filing or mailing of the definitive proxy statement?) is interesting. This might balance the need for speed in execution of the De-SPAC transaction with a desire to protect retail investors prior to information availability. However, such a trading moratorium was recently abandoned as a requirement for UK-listed SPACs,[188] suggesting that it might counter the desire for U.S. capital markets to remain competitive. Moreover, the same concerns about trading prior to complete information are tolerated in respect of public company mergers and tender offers.[189]

VI. CONCLUSION

The Shell Company Regs applicable to De-SPAC transactions, in addition to blank check and penny stock transactions, arose out of pump-and-dump schemes of the 1980s and 1990s that are fundamentally different from today's SPACs and De-SPAC transactions. A key distinguishing feature of SPACs is the national securities exchange listing, which mandates a pre-De-SPAC proxy statement with robust disclosure subject to review and comment by the SEC. While there are clearly negative aspects of SPACs and De-SPAC transactions (expense and dilution being two key issues), there are also substantial positives, including filling gaps where traditional underwritten IPOs are not a viable option for one reason or another. This opens up new opportunities for public investors in companies that would otherwise remain owned by venture capital or private equity firms, and is helping to reverse the decline in the number of U.S. public companies. Foreign exchanges (e.g., UK, Hong Kong and Singapore) are seeking to emulate the effectiveness of the U.S. SPAC structure to raise capital and form new public entities.[190] The authors welcome new regulation or legislation in the interest of protecting investors, but such regulation or legislation should be balanced by the benefits of SPACs in the area of capital formation.

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188. *See FCA consults on strengthening investor protections in SPACs*, FCA (Apr. 30, 2021),https://www.fca.org.uk/news/press-releases/fca-consults-strengthening-investor-protections-spacs; *FCA publishes final rules to strengthen investor protections in SPACs*, FCA (July 27, 2021), https://www.fca.org.uk/news/news-stories/fca-publishes-final-rules-to-strengthen-investor-protections-in-spacs.

189. The proxy or registration statement for public company mergers and tender offer schedule for tender offers are not required to be filed at the time of announcement of the applicable transaction.

190. *See Changes to UK SPAC rules open door for more listings*, S&P GLOB. MKT. INTEL. (Sep 15, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/changes-to-uk-spac-rules-open-door-for-more-listings-66199184; *New Listing Regime For Special Purpose Acquisition Companies*, HONG KONG EXCHANGES AND CLEARING LTD. (Dec 27, 2021), https://www.hkex.com.hk/News/Regulatory-Announcements/2021/211217news?sc_lang=en; *SGX introduces SPAC listing framework*, SINGAPORE EXCH. LTD. (Sept 2, 2021), https://www.sgxgroup.com/sgxgroup/media-centre/20210902-sgx-introduces-spac-listing-framework.

ANNEX A

	Purpose of Rule/Effect of Exclusion	**Applicable Duration**
Prospectus /Offering Safe Harbors	Rules 137 through 139 and 163A provide safe harbors from certain Communications (such as analyst reports) being "prospectuses" or distribution of such communications being deemed to be participation in an offering by an issuer. Shell companies and former shell companies, and communications regarding such issuers, are not eligible for such rules.	Pre-IPO until three full calendar years after ceasing to be a shell company.
Free Writing Prospectuses	Rule 164 and Rule 433 allow issuers to use free writing prospectuses (FWPs). Shell companies and former shell companies are prohibited from using FWPs.	Pre-IPO until three full calendar years after ceasing to be a shell company.
Form S-1	Shell companies and former shell companies are not eligible to incorporate by reference into registration statements on Form S-1. By contrast, other issuers can incorporate previously filed information by refence if they have filed at least one 10-K.	Pre-IPO until three full calendar years after ceasing to be a shell company.
S-3 "Baby Shelf"	Form S-3 is available with limitations for registrants, other than Shell companies and former shell companies, with a public float of less than $75 million.	Twelve full calendar months after De-SPAC and at least twelve months from Super 8-K filing.
WKSI Status	Well known seasoned issuers (WKSIs) are eligible for immediate effectiveness of registration statements, "pay as you go" for registration fees, and other registration flexibility. Shell companies and former shell companies are not eligible for WKSI status.	Pre-IPO until three full calendar years after ceasing to be a shell company.
Updating selling stockholder shelves	S-3 eligible issuers (even those that are not WKSIs) are eligible to update the identities of selling securityholders and the amount of securities offered via prospectus supplement or incorporated documents. Shell companies and former shell companies are not eligible for such	Three full calendar years after ceasing to be a shell company.

	Purpose of Rule/Effect of Exclusion	Applicable Duration
	flexibility, and must update selling stockholder information via a post-effective amendment.	
Form S-8	Form S-8 is used to register offerings of securities pursuant to employee benefit plans. Shell companies and former shell companies are not eligible to use Form S-8 until sixty days after the Super 8-K is filed.	Until sixty days after filing of Super 8-K.
Rule 144	Rule 144 provides a safe harbor for purchasers of securities in unregistered transactions and affiliates of the issuer to seek securities and not be deemed to be underwriters. Securityholders of shell companies and former shell companies are prohibit- ed from reliance on Rule 144 for a period, and thereafter subject to an ongoing requirement that the former shell company be publicly traded and current in filing its periodic (i.e. 10-Qs and 10-Ks) reports.	Prohibition on reliance on Rule 144: from IPO until one year after the Super 8-K is filed. Requirement that former shell companies be publicly traded and current on current reports: perpetual.
Rule 145	Rule 145 is designed to provide protection for investors to persons offered securities in business combinations that require a shareholder vote and involve reclassifications, mergers, or asset transfer. Where a business combination includes a shell company, any party to such transaction, other than the issuer, and any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, are deemed underwriters for purposes of Rule 145.	Until the same requirements for reliance on Rule 144 have been satisfied (including one year having passed since the Super 8-K is filed).

	Purpose of Rule/Effect of Exclusion	**Applicable Duration**
Form 8-K	When reporting on Form 8-K an event that causes the shell company to cease being a shell company, the shell company must include in that report the information that it would be required to file to register a class of securities under Section 12 of the Exchange Act using Form 10. Financial statements for the target must be filed within four business days of the completion of the De-SPAC transaction pursuant to Item 9.01(c) of Form 8-K. The registrant is not entitled to the seventy-one-day extension of that Item.	Until the registrant ceases to be a shell company.