Capital Markets Alert

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SEC Adopts Rule Changes For SPAC and De-SPAC Transactions in Contentious 3-2 Vote

Following a lengthy comment and review period that resulted in perhaps the most critical examination of proposed Securities and Exchange Commission (SEC) rule-making since the time of the "Aircraft Carrier" release in the late 1990s, the SEC today approved by a divided vote changes to those provisions of the federal securities laws most relevant to special purpose acquisition companies (SPACs) and the private companies they seek to take public. Two SEC commissioners expressed their strong disapproval of the changes—at times in no uncertain terms—and dissented from the decision of the agency.

As adopted, the amendments reflect new disclosure requirements concerning:

- Sponsor identity and compensation, conflicts of interest and dilutive effects of securities held by the sponsor and transactions entered into in connection with the de-SPAC transaction
- Enhanced regulation of projections used in de-SPAC transactions, including elimination of the liability safe harbor for forward-looking statements previously available for SEC filings by SPACs, and expanded guidance concerning use of projections in SEC filings by all registrants
- New requirements applicable to the financial statements to be filed by the target company in a de-SPAC transaction and deeming the target company a "co-registrant" under any S-4 or F-4 registration statement filed with respect thereto, which now will be required for most de-SPAC transactions as a result of new Rule 145a deeming any business combination involving both an operating company and a shell company a "sale of securities"
- Requiring a 20-calendar-day minimum dissemination period for de-SPAC disclosure documents and a redetermination of a former SPAC's filing status as a "smaller reporting company" under SEC rules governing post-closing filings

As noted in the comment letter submitted by Loeb & Loeb on June 13, 2022, regarding the rule proposals, many of the disclosure-related changes (including those regarding dilution, sponsor arrangements, projections, Investment Company Act (ICA) issues and board discussions) have largely been reflected in comments provided by the SEC Staff regarding filings made in connection with the numerous SPAC initial public offerings (IPOs) and de-SPAC transactions completed since the beginning of 2020. Accordingly, many of these technical amendments are not expected to result in significantly modified disclosures in light of the industry's coordination and cooperation with the SEC Staff during that process.

Notably, the proposed deemed underwriter liability attaching to a SPAC IPO underwriter participating in a de-SPAC transaction was not enacted, nor was the proposed safe harbor under the ICA that was generally

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seen as problematic due to several proposed features. Instead, the adopting release includes informal "guidance" regarding the facts and circumstances that the SEC Staff believes would create a heightened risk for SPACs and their investors prior to de-SPAC of being deemed an unregistered investment company under the ICA, which led to several forceful objections by Commissioner Mark Uyeda, who noted in his dissenting statement: "One might reasonably conclude that the Commission is expressing its view that all SPACs that hold any percentage of their assets in investment securities are investment companies that must either register under the Investment Company Act or qualify for an exemption." Whether the SEC was simply putting a marker down regarding portfolio composition as currently followed in the market or presaging further scrutiny is unclear, but SPACs and the entities holding their trust accounts may derive some comfort from the mention in the adopting release that: "A SPAC that holds only the sort of securities typically held by SPACs today, such as U.S. Government securities, money market funds and cash items prior to the completion of the de-SPAC transaction, and that does not propose to acquire investment securities, would be more likely not to be considered an investment company."

The full adopting release can be found here. The new rules will become effective 125 days following publication of the adopting release in the *Federal Register*.

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