A Spic-and-Span SPAC: Modifying the SEC's New Regulatory Regime

Seffie Wilkinson*

I. INTRODUCTION 1241
II. BACKGROUND 1243
A. *The SPAC* 1244
1. *Structure and Function* 1245
2. *Regulation* 1247
a. *The IPO Phase* 1247
b. *The De-SPAC Phase* 1248
B. *Growth of the SPAC* 1248
C. The 2020 SPAC Boom and its Effects 1249
III. ANALYSIS 1252
A. *Increased Disclosures* 1252
1. *Fairness of Transaction* 1252
2. *Sponsors* 1253
3. *Dilution* 1254
B. *Increased Potential for Expanded Underwriter Liability* 1255
C. *Elimination of the PSLRA Safe Harbor with Increased Potential for "Investment Company" Status* 1256
IV. RECOMMENDATION 1258
A. *The SPAC Must Complete the De-SPAC Transaction Within 36 Months After Formation* 1259
B. *The SPAC Must Hold a Shareholder Vote to Approve Any Extension Beyond the 24-Month Framework* 1260
C. *The SPAC Cannot Have Provisions in its Charter Allowing Timeline Extensions Without Shareholder Approval* 1261
V. CONCLUSION 1262

I. INTRODUCTION

The COVID-19 pandemic has had lasting impacts on a variety of areas of society, including the financial sector. One impact to this sector was the emergence of an optimal environment for the boom of Special Purpose Acquisition Companies ("SPACs") in 2020

* J.D. Candidate, The University of Iowa College of Law, 2024; B.S., Genetics, The University of Wisconsin-Madison, 2018. I want to thank my family and friends for their unwavering support.

and 2021.[1] SPACs have been prevalent since the early 2000s, but the uncertain conditions of the 2020 market made the flexibility of the SPAC very attractive.[2]

This increase in SPAC activity brought some of the issues with this investment vehicle to light.[3] This increase also corresponded with an uptick in shareholder litigation pertaining to disclosures prior to merger and breach of fiduciary duties.[4] The increase in SPAC activity and the corresponding upward trend in shareholder litigation has prompted the Securities and Exchange Commission ("SEC") to focus efforts on regulating SPACs.[5]

SPACs have historically not been subject to the same level of regulations as traditional IPOs.[6] Traditional IPOs have required more detailed disclosures regarding financial projections and conflicts of interest to shareholders at the outset.[7] "Such scrutiny and initial regulatory vetting are not imposed upon SPACs, primarily because they do not sell any goods or services."[8] Parties involved in the traditional IPO transaction have also been subject to a higher degree of liability than those involved in SPAC transactions.[9] Due to the SPAC boom and resulting litigation, the SEC released proposed regulations of the SPAC in the spring of 2022 which were passed in January of 2024.[10] These regulations expand the disclosures that SPACs are required to give shareholders and change statutory protections for parties involved in the SPAC transaction.[11] Guidance documents to these regulations also have the potential to widen those liable to shareholders to include more parties involved in the transaction and the level of liability for transaction stakeholders.[12] Overall, the new regulations aim to regulate SPACs similarly to that of traditional IPOs.[13]

This Note will examine the SEC's new regulations and associated guidance documents and argue that they are a positive protection for shareholders, but the regulatory

---

1. Crystal Tse & Crystal Kim, *SPACs Were Hot in 2020 and Are Hotter Now. Here's Why*, BLOOMBERG PRO. SERVS. (Apr. 23, 2021), https://www.bloomberg.com/professional/blog/spacs-were-hot-in-2020-and-are-hotter-now-heres-why (on file with the *Journal of Corporation Law*).

2. *Id.*

3. *See* Doug Bailey, *The Other SPAC Boom: Lawsuits Against Sponsors Surge as Deals Fizzle*, THE BUS. OF BUS. (Feb. 10, 2022), https://www.businessofbusiness.com/articles/the-other-spac-boom-lawsuits-against-sponsors-surge-as-deals-fizzle [https://perma.cc/BXQ4-8MC7] (citing an increase in lawsuits by SPAC shareholders).

4. *Id.*

5. Brian Breheny et al., *SEC Proposes Significant Changes to the Rules Affecting SPACs*, SKADDEN (Mar. 31, 2022), https://www.skadden.com/insights/publications/2022/03/sec-proposes-significant-changes-to-rules-affecting-spacs [https://perma.cc/DK5F-4EHC].

6. *See* FINRA, REG. NOTICE 08-54, GUIDANCE ON SPECIAL PURPOSE ACQUISITION COMPANIES (2008) (citing differences in regulation between SPACs and IPOs).

7. *Id.*

8. Megan Penick, *SPACs: Their Current Status and the Future of Regulation*, MICHELMAN & ROBINSON, LLP (Nov. 16, 2021), https://www.mrllp.com/spacs-their-current-status-and-the-future-of-regulation [https://perma.cc/BG95-LJ5V].

9. FINRA, *supra* note 6.

10. *See* Breheny et al., *supra* note 5 (citing proposal of new rules); *see also* Press Release, SEC, SEC Adopts Rules to Enhance Investor Protections Relating to SPACs, Shell Companies, and Projections (Jan. 24, 2024), https://www.sec.gov/news/press-release/2024-8 [https://perma.cc/F8SF-C37Y] [hereinafter *Rule Adoption Press Release*] (announcing the adoption of new rules).

11. *See* Breheny et al., *supra* note 5 (enumerating summary of new regulations).

12. *Id.* (citing proposal of new rules).

13. *See Rule Adoption Press Release, supra* note 10 (quoting SEC Chair Gary Gensler, "adoption will help ensure that the rules for SPACs are substantially aligned with those of traditional IPOs").

regime could be improved to ensure maximal SPAC advantage and shareholder protection. The foregoing will focus on the quality of the SEC's SPAC regulatory regime and will form no conclusion regarding the past and future viability of the SPAC vehicle itself. The Note will proceed as follows: Part II will describe the history, growth, and boom of the SPAC; Part III will give an overview of the new regulatory regime and how it will affect shareholders and the SPAC market as a whole; and Part IV will advance potential modifications to the SEC's regulatory regime to address the dual concerns of SPAC utility and shareholder protection.

II. BACKGROUND

The SPAC's history dates as far back as the 1880s.[14] Businessman Henry Villard had a strong foothold in the Pacific Northwest railway industry and wanted to solidify this through the purchase of a regional competitor.[15] After accumulating shares of the competitor's stock, he needed additional capital to gain a controlling share and enticed other investors into being part of a "blind pool."[16] The investors did not know how their money would be used but helped Villard secure his majority share of Northern Pacific Railway.[17] He was able to collect double what he had predicted from investors.[18] This "blind pool" structure became modern-day blank check companies—those that have "no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company."[19] Blank check companies did not gain much traction until the 1980s.[20] During the 1980s, these companies were referred to as shell companies ("shells").[21] The name was derived from their operation as "'shells' that raise[d] money via an initial public offering . . . with the stated purpose of merging with an operating company."[22] These shells differed from traditional initial public offerings ("IPOs") as they were set up to raise money for future investment in an unknown company whereas traditional IPOs involved an existing company raising money and issuing new shares which are in large part sold to institutional investors.[23] During the 1980s, shells were left relatively unregulated by the government and were often vehicles for penny stock fraud.[24] "[A]t that time, state securities regulators found that penny stock traders were

14. *See* Bryan Beach, *The Evolution of the 'Blank Check Company'*, STANSBERRY RSCH. (May 7, 2022), https://stansberryresearch.com/articles/the-evolution-of-the-blank-check-company-2 [https://perma.cc/U9FZ-MFXA].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Blank Check Companies*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/blank-check-company [https://perma.cc/YB6G-NEHU].

20. Ross Greenspan, Money for Nothing, Shares for Free: A Brief History of the SPAC 12 (May 1, 2021) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832710).

21. *Id.*

22. Derek K. Heyman, Note, *From Blank Check to SPAC: The Regulator's Response to the Market, and the Market's Response to Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531, 532 (2008).

23. *Id.* at 532; *see also What are the differences between an IPO, a SPAC, and a Direct Listing?*, SEC (June 27, 2024), https://www.sec.gov/education/capitalraising/building-blocks/registered-offerings [https://perma.cc/UP8M-FGRG].

24. Heyman, *supra* note 22, at 534–35.

losing an estimated 2 billion dollars per year due to widespread fraud . . . occurring in blank check companies."[25] This prompted new regulations by Congress in the early 1990s—most notably the Penny Stock Reform Act ("PSRA") of 1990.[26] The SEC promulgated 17 C.F.R. § 230.419 ("SEC Rule 419") shortly thereafter.[27] This rule placed "strict controls on the proceeds of the blank check offering, and [gave] investors a chance to reconsider their investment with the knowledge of all the facts of the company, including its acquisition target."[28] The new regulatory scheme for shells decreased their activity.[29] Shells needed to evolve for investors to regain trust in blank check vehicles after the widespread fraudulent activity of the 1980s.[30]

A. The SPAC

The blank check vehicle took the new name of SPAC in 1993.[31] David Nussbaum, an investment banker, and David Miller, a lawyer, developed this new vehicle to ensure a degree of investor protection while preventing the company from being defined as selling "penny stock" under the PSRA and thus subject to SEC Rule 419.[32] Nussbaum and Miller launched multiple SPACs during the 1990s.[33] Their first SPAC, Information Systems Acquisition Corporation, merged with Human Designed Systems.[34] It was eventually bought by a subsidiary of Hewlett-Packard.[35] This buyout has been described as "[a] respectable end for a relatively small experiment that, by the time of [the] acquisition, was posed up on to the national exchanges."[36] Parts 1 and 2 of this section enumerate the state of SPAC function and regulation that has existed from the time of the inception of the investment vehicle in the 1990s until the adoption of the SEC's new regulations in January 2024.[37]

---

25. Greenspan, *supra* note 20, at 9.
26. Heyman, *supra* note 22, at 533*; see also* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990).
27. Heyman, *supra* note 22, at 538.
28. *Id.*; *see also* 17 C.F.R. § 230.419 (2021) (showing applicable statute).
29. *See* Greenspan, *supra* note 20, at 11 (detailing how blank check offerings "plummet[ed]" after the PSRA passed).
30. *See id.* at 13 (describing the development of the SPAC as a means "to do blank check IPOs . . . that would deflect the tarnish of the scams of the prior decade").
31. Amrith Ramkumar, *SPAC Pioneers Reap the Rewards After Waiting Nearly 30 Years*, WALL ST. J. (Mar. 9, 2021), https://www.wsj.com/articles/they-created-the-spac-in-1993-now-theyre-reaping-the-rewards-11615285801 (on file with the *Journal of Corporation Law*).
32. *See* Greenspan, *supra* note 20, at 10 (explaining that selling "penny stock" under the PSRA implicates regulation by SEC Rule 419).
33. *Id.* at 14–15.
34. *Id.* at 14.
35. *Id.*
36. *Id.*
37. *See* discussion *infra* Part II.C (citing SEC's new regulations of SPACs promulgated in January of 2024).

1. Structure and Function

"Like the quintessential 'blank check company,' the SPAC starts off with no assets or operating history."[38] They are founded by a management team to raise money through an IPO for an unknown investment.[39] Typically, the "management team . . . [holds a] ~20% interest in the SPAC," with "[t]he remaining ~80% interest [being] held by public shareholders."[40] During the initial "IPO phase", Form S-1 is filed with the SEC.[41] Any issuance and listing of new securities by public companies in the United States requires the filing of this registration statement.[42] Form S-1 describes company operations and the specifics of the stock offering.[43] At this time, the raised funds are put in escrow until the time they are used for investment.[44] Until the closing of the IPO, SPAC management cannot negotiate or discuss a merger with a potential target company.[45]

After the IPO has closed, SPAC management can begin the search for a target company.[46] The timeline from the creation of the SPAC to targeting a company and completing the de-SPAC transaction is typically 12 to 24 months (the "24-month framework").[47] This can be extended beyond this mark with or without approval by SPAC shareholders depending on the SPAC's charter.[48] Some SPAC charters may have specific requirements about when the de-SPAC must be completed,[49] other charters have a "no-vote provision" in which "the SPAC's deadline may be extended without a [shareholder] vote for a limited additional time . . . ."[50] The maximum time to de-SPAC is defined by stock exchange requirements which give up to 36 months to remain in compliance with

---

38. Greenspan, *supra* note 20, at 13 (citing Usha Rodrigues and Mike Stegemoller, *The Evolution of SPACs*, 37 DEL. J. CORP. L. 849, 871 (2012)).

39. *See How Special Purpose Acquisition Companies (SPACs) Work*, PWC, https://www.pwc.com/us/en/services/consulting/deals/library/spac-merger.html [https://perma.cc/2ERY-KXT9] ("[A] SPAC is formed by an experienced management team . . . . Following the IPO . . . the SPAC typically has 18-24 months to identify and complete a merger with a target company . . . .").

40. *Id.*

41. Zac McGinnis, *SPAC Phases: Ensuring Successful Financial Reporting*, RIVERON (May 4, 2021), https://riveron.com/posts/spac-phases-ensuring-success [https://perma.cc/79JB-QP4A].

42. Will Kenton, *SEC Form S-1: What It Is, How to File It or Amend It*, INVESTOPEDIA (Mar. 21, 2022), https://www.investopedia.com/terms/s/sec-form-s-1.asp [https://perma.cc/W9ZL-3TDH].

43. *Id.*

44. FINRA, *supra* note 6.

45. *See id.* ("SPACs do not 'pre-identify' possible acquisition targets . . . .").

46. *See* McGinnis, *supra* note 41 ("Post-IPO, a SPAC seeks a desired target and conducts related diligence procedures.").

47. CLIFFORD CHANCE, GUIDE TO SPECIAL PURPOSE ACQUISITION COMPANIES 2 (2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/09/guide-to-special-purpose-acquisition-companies.pdf [https://perma.cc/UHF9-YMNH].

48. *See* FINRA, *supra* note 6 (describing how recent SPACs have adopted automatic six-month extensions if a transaction has been announced before the close of the 24-month framework).

49. *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 [https://perma.cc/Y2WG-AFMH].

50. John R. Ablan, Ryan H. Ferris & Andrew J. Noreuil, *Special Purpose Acquisition Companies Continue to Face Headwinds*, MAYER BROWN (May 5, 2023), https://www.mayerbrown.com/en/perspectives-events/publications/2023/05/special-purpose-acquisition-companies-continue-to-face-headwinds [https://perma.cc/W7ZH-3E9E].

listing rules.[51] Charters without these mechanisms may also be modified to extend this timeline through shareholder approval.[52]

Underwriters "do not undertake any due diligence on acquisition targets," and therefore, do not face liability during and beyond this part of the transaction.[53] Once a decision has been made about the target company, "the SPAC will execute a letter of intent, complete due diligence, and negotiate the terms of the merger agreement."[54] Shareholder approval is required for most de-SPAC transactions.[55] Public shareholders have a right to redeem their shares before the de-SPAC if they don't wish to go forward.[56] This is referred to as the shareholder's "right of redemption."[57]

The period in which the SPAC merges with the target company is referred to as the "de-SPAC phase."[58] Right before and during this phase, disclosures are made about future projections of the combined company.[59] These projections have traditionally been protected under the Private Securities Litigation Reform Act ("PSLRA").[60] This act "provides a safe harbor for forward-looking statements . . . pursuant to which a company is protected from liability in any private right of action for forward-looking statements when . . . accompanied by meaningful cautionary statements."[61] Blank check companies are barred from this safe harbor, but SPACs have traditionally not been found to fall within the PSLRA definition of a blank check company.[62] The PSLRA safe harbor implies that those participating in the de-SPAC transaction face a limited level of liability relative to disclosures made before and during the transaction.[63]

The merger can occur once shareholder approval has been received, although this may not be required.[64] "The combined company . . . [then] carries on the target operating

---

51. *The SEC Proposes New Rules Regarding SPACs*, KIRKLAND & ELLIS (Apr. 6, 2022), https://www.kirkland.com/publications/kirkland-alert/2022/03/sec-proposes-new-rules-regarding-spacs [https://perma.cc/E7KE-HTZ9].

52. *See* FINRA, *supra* note 6 (outlining this process).

53. *Id.*

54. *Domestic SPAC Mergers – Financial Reporting and Accounting Considerations*, PWC (Sept. 26, 2022), https://viewpoint.pwc.com/dt/us/en/pwc/in_depths/2021/domestic_spac_mergers/domesticspacmergers/domesticspacmergers.html [https://perma.cc/7P97-LA9E].

55. Allison Handy, Perkins Coie, SPACs: A Primer Presentation 4 (2020), https://nufund.com/wp-content/uploads/2020/10/SPACs-A-Primer.pdf [https://perma.cc/L3SN-LKUE].

56. *See* Usha Rodrigues & Michael Stegemoller, *Disclosure's Limits*, 40 YALE J. ON REGUL. BULL. 37, 39 (2022–23) ("One of a SPAC's defining features is the redemption right—the right of SPAC shareholders to redeem their shares and get their money (plus interest) back . . . .").

57. *See* FINRA, *supra* note 6 (referring to stockholder right of redemption).

58. McGinnis, *supra* note 41; *see also* Craig Clay, *What is a De-SPAC Transaction?*, DFIN (May 3, 2021), https://www.dfinsolutions.com/knowledge-hub/thought-leadership/knowledge-resources/what-de-spac-transaction [https://perma.cc/94UB-WWL4] (describing when the de-SPAC process begins).

59. Greenspan, *supra* note 20, at 5.

60. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 102, 109 Stat. 737 (1995).

61. *SEC Proposes New SPAC Rules That Are Expected to Significantly Reduce SPAC Activity*, DAVIS POLK (Apr. 4, 2022), https://www.davispolk.com/insights/client-update/sec-proposes-new-spac-rules-are-expected-significantly-reduce-spac-activity [https://perma.cc/69DT-7K42].

62. *Id.*

63. *See* Greenspan, *supra* note 20, at 5–6 (explaining the safe harbor and implications for transaction participants).

64. *What You Need to Know About SPACs – Updated Investor Bulletin*, *supra* note 49.

company's business."[65] The SPAC will generally liquidate if it does not merge with a target company within the 24-month framework, and shareholders will receive their "pro rata share of the assets in escrow."[66]

2. *Regulation*

SPACs were developed to provide a quicker mode of taking a company public while avoiding the complications of SEC Rule 419.[67] This rule, in addition to the PSLRA safe harbor, has provided the unique regulatory framework SPACs have operated within up until January of 2024.[68] This regulatory framework spans both the IPO and de-SPAC phases.[69]

a. *The IPO Phase*

Like other investment companies, SPACs are required to file a Form S-1 during the IPO phase.[70] This registration statement, and other financial projection disclosures throughout the SPAC process, are governed by SEC Regulation S-K.[71] This regulation only requires that a SPAC "have a reasonable basis for any future performance assessment."[72] Due to the lack of historical data and the open-ended nature of the company, SPACs have not been required to fill out the same kind of detailed disclosures in their registration statement and generally provide minimal detail.[73] Underwriters take on liability for this portion of the SPAC transaction but for nothing beyond the IPO phase.[74] Additionally, the SPAC's exemption from SEC Rule 419 allows the company to have a flexible timeline during the IPO phase as companies governed by this rule must merge within 18 months after filing their registration statement.[75]

Once a target company has been identified, SPACs must file a press release with the SEC using Form 8-K.[76] This press release announces the transaction to the public, and the

---

65. *Id.*

66. FINRA, *supra* note 6.

67. *See* Ramkumar, *supra* note 31 (describing the creation of the SPAC in the context of SEC rules).

68. *See generally* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

69. *See* discussion *infra* Part II.A.2, (discussing the historical SPAC regulatory regime in both phases of the SPAC).

70. Anna T. Pinedo, Mayer Brown, Presentation at Meeting of SEC Small Business Capital Formation Advisory Committee: Discussion of the SEC's Proposed Rules on SPACs, Shell Companies, and Projections 12 (2022), https://www.sec.gov/files/presentation-spacs-anna-pinedo-050622.pdf [https://perma.cc/K3BT-U3CU].

71. Laura Anthony, *SEC Proposes New Rules for SPACs – Part 6*, SEC. L. BLOG (May 17, 2022), https://securities-law-blog.com/2022/05/17/sec-proposes-new-rules-for-spacs-part-6/ [https://perma.cc/4NF8-PZZ7].

72. *Id.*

73. *See* FINRA, *supra* note 6 (explaining the differences between a traditional IPO registration statement and a SPAC registration statement).

74. *See* Michael Stockham, *Writing on the Wall for SPAC Underwriters? New SEC Rule Increases Exposure and Risks*, HOLLAND & KNIGHT (Apr. 15, 2022), https://www.hklaw.com/en/insights/publications/2022/04/writing-on-the-wall-for-spac-underwriters [https://perma.cc/RL94-ATMT] (explaining "there are no traditional underwriters" in the de-SPAC phase).

75. 17 C.F.R. § 230.419 (2024).

76. Pinedo, *supra* note 70, at 12.

SPAC "will usually also publicly release the projected financial information for the target company."[77] This is followed by the submission of a proxy statement, SEC Form S-4, to the SEC and SPAC shareholders.[78] This form must contain audited financial information, as well as "managerial discussion about the SPAC and target company, historical financial data about both parties, cost-per-share information, a description of the structure of the company after the acquisition, and any debt financing agreements."[79]

b. The De-SPAC Phase

During the de-SPAC phase, the SEC reviews the submitted proxy statement.[80] They may request commentary from the SPAC on certain issues.[81] Once the form has been approved by the SEC, the shareholder vote can take place.[82] The final shareholder approval of the de-SPAC transaction is marked by the submission of the "Super 8-K" form to the SEC within four days of the completion of the transaction.[83] At that time, the name of the SPAC will change to the target's name.[84]

B. Growth of the SPAC

Despite initial SPAC success prompted by Nussbaum and Miller, traditional IPOs continued to dominate the market during the 1990s.[85] SPACs "faded from the scene, not because of problems with their structure . . . it was easy during this time for small companies to raise money in traditional IPOs."[86] SPAC activity ramped up again in the early 2000s.[87] This increase in SPAC activity correlated with a decline in traditional IPO activity.[88]

There are a couple of reasons that could have contributed to the rise in early 2000s SPAC activity. One reason may have had to do with the slow of the 1990s "dotcom" bubble.[89] During that time, "[i]nvestors had an appetite for risk, but there was enough risk to go around in the form of traditional IPOs of not-yet profitable companies with a new

---

77. *Id.*
78. *Id.*
79. Clay, *supra* note 58.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*; *see also* Ashley Carpenter et al., *Accounting and SEC Reporting Considerations for SPAC Transactions*, DELOITTE (Apr. 11, 2022), https://dart.deloitte.com/USDART/home/publications/deloitte/financial-reporting-alerts/2020/spac-transactions [https://perma.cc/QPN2-6A2P] (outlining a Super 8-K).
84. Clay, *supra* note 58.
85. Heyman, *supra* note 22, at 532 ("[I]t was easy during this time for small companies to raise money in traditional IPOs.").
86. *Id.*
87. Greenspan, *supra* note 20, at 15–16.
88. *Id.* at 4–5 ("[T]he quantity of IPOs declined 62.3% from the 1990s to 2000s . . . .").
89. Heyman, *supra* note 22, at 532; *see also* Greenspan, supra note 20, at 15 ("[With] the Dot Com bubble expanding, the SPAC was obviated and temporarily fell out of favor, despite its promising start.").

business model and no track record."[90] When the tech boom slowed in the early 2000s, SPACs rose to fill in the gap in risk appetite.[91]

This leads to the other potential reason for the increase in SPAC activity in the early 2000s. Investors and companies looking to go public likely recognized the advantages the SPAC offered over the traditional IPO. The first advantage of the SPAC that companies and investors saw is that the vehicle allows their continued control of operations rather than having to cede control to private equity.[92] Additionally, the SPAC vehicle has typically allowed a company to go public quicker than a traditional IPO.[93] The transaction could generally be completed within a window of three to five months[94], whereas a traditional IPO generally takes around a year to complete.[95] This difference in timing is caused by another advantage of the SPAC seen by investors and companies, which is "fewer SEC comments and questions to answer given the lack of financial statements and related material, and the auditing process is shortened."[96] SPACs also have an advantage from the perspective of companies striving to go public, because underwriters and management have less liability for future projections than a traditional IPO.[97] This lesser degree of liability is due to the protection of projections and disclosures under the safe harbor of the PSLRA.[98] Traditional IPOs don't fall under this safe harbor and therefore expose underwriters and management to more potential for liability.[99]

C. The 2020 SPAC Boom and its Effects

The onset of the COVID-19 pandemic correlated with a historic boom in SPAC activity.[100] "SPACs raised more than $83 billion in 2020 and $160 billion in 2021, and in both of those years, SPACs constituted more than half of all IPOs."[101] The uncertain nature of the pandemic and its long-term effects on the stock market made the advantages of the SPAC even more apparent.[102] The ability of a SPAC transaction to be completed in three

---

90. Heyman, *supra* note 22, at 543.

91. *See id.* at 544 (covering the rise of the SPAC after the dotcom downfall).

92. *See* Heyman, *supra* note 22, at 544 ("[T]he resurgence of the SPAC has resulted from the latter's usefulness . . . to raise money without doing its own IPO, and without having to sacrifice a portion of control by turning to private equity").

93. *See* Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, HARV. BUS. REV. (Aug. 2021), https://hbr.org/2021/07/spacs-what-you-need-to-know (on file with the *Journal of Corporation Law*) (citing advantage of the SPAC over traditional IPO as "greater speed to capital").

94. *Id.*

95. *Id.*

96. Chris Metinko, *SPAC vs. Traditional IPO: Investors See Benefits of Blank-Check Companies*, CRUNCHBASE NEWS (Dec. 3, 2020), https://news.crunchbase.com/public/spac-vs-traditional-ipo-investors-see-benefits-of-blank-check-companies [https://perma.cc/3STU-H9Z4].

97. *See* Carlos Cervantes, *IPO Alternatives Explained: SPACs and Direct Listings vs IPOs*, PITCHBOOK Blog (Feb. 21, 2023), https://pitchbook.com/blog/the-case-for-taking-a-company-public-without-an-ipo [https://perma.cc/V256-GLTZ].

98. *See* discussion *supra* Part II.A (discussing the PSLRA safe harbor).

99. *See* Metinko, *supra* note 96 ("[T]here are fewer SEC comments and questions to answer given the lack of financial statements and related material, and the auditing process is shortened.").

100. Breheny et al., *supra* note 5.

101. *Id.*

102. Tse & Kim, *supra* note 1.

to five months attracted investors and companies looking to go public.[103] With the uncertainty of the stock market, investors were also attracted to the right of redemption of stock before the merger.[104]

As SPACs had a historic uptick in activity, the shortcomings of the business model became apparent; many SPAC transactions did not result in successful companies.[105] Some speculate this has been due to the "structural weaknesses" of offering the redemption power to investors.[106] One study found that SPAC's right of redemption contributes to these "structural weaknesses," because "the companies passed on these costs to the remaining shareholders [and] the companies ended up with about 40 percent less cash than they started with."[107] The same study cited an analysis that looked at 300 companies that went public through a SPAC merger in 2018.[108] These 300 SPACs "averaged a loss of about 33 percent from the IPO price of the SPAC, versus an average loss of 2 percent for the 1,000 other companies that chose to go public through a traditional IPO."[109]

Additionally, the SPAC boom has left many open shareholder lawsuits.[110] Shareholders have brought suits primarily related to breach of fiduciary duties in the form of a lack of disclosure within the de-SPAC transaction process.[111] This wave of fiduciary duty litigation "tends to focus on structural features of SPACs and alleged disclosure deficiencies which impair the shareholder's redemption rights."[112] These lawsuits are primarily related to the activities of sponsors, directors, and underwriters.[113] There have also been upward trends in securities fraud lawsuits which have generally been filed when the resulting company after the de-SPAC transaction does not perform as forecasted.[114] In addition to the structural and litigation issues, SPACs thrive in a low-interest environment, and as the market recovered from COVID-19, interest rates went back up, inflation increased, and there was talk of a looming recession.[115]

Predictably, as these issues began to emerge with the SPAC model, overall SPAC activity decreased in 2022.[116] Traditional IPOs also took a downturn after COVID-19 but

---

103. *See id.* ("One perceived advantage of going public with a SPAC is a shorter timeline to listing relative to a regular IPO.").

104. *Id.*

105. Bailey, *supra* note 3.

106. Michelle Celarier, *SPACs are Sputtering. Desperate New Terms Could Send Them into a Death Spiral*, INSTITUTIONAL INV. (May 16, 2022), https://www.institutionalinvestor.com/article/b1y1r55twc3vn6/SPACs-Are-Sputtering-Desperate-New-Terms-Could-Send-Them-Into-a-Death-Spiral [https://perma.cc/G4ZH-D3FZ].

107. *Id.*

108. *Id.*

109. *Id.*

110. *See generally* Jenny Hochenberg & Justin C. Clarke, *SPAC Litigation: Current State and Beyond*, 55 REV. SEC. & COMMODITIES REGUL. 33 (2022) (discussing SPAC litigation).

111. *Id.* at 40.

112. *Id.* at 35.

113. *Id.*

114. *See* Christopher M. Barlow et al., *Despite Slowdown in SPAC Activity, Opportunities Remain,* SKADDEN (Sept. 2022), https://www.skadden.com/insights/publications/2022/09/quarterly-insights/despite-slowdown-in-spac-activity-opportunities-remain [https://perma.cc/NCS4-PGXV] (citing examples of securities fraud suits that have been brought).

115. Matthew Goldstein, *SPACs Were All the Rage. Now, Not So Much*, N.Y. TIMES (June 2, 2022), https://www.nytimes.com/2022/06/02/business/spacs-inflation-regulation.html (on file with the *Journal of Corporation Law*).

116. *See* Barlow et al., *supra* note 114.

have recovered at a quicker rate.[117] It is hard to distinguish whether this improved recovery over SPACs is due to the advantages of the traditional model over the SPAC or the effect of the proposed regulations for SPACs.[118]

Despite the downturn in activity of the SPAC and the recent rise in lawsuits, industry experts remain optimistic about SPAC activity and the viability of the vehicle taking a company public.[119] SPAC stakeholders have been more creative about structuring transactions adopting methods "such as three-way transactions involving two target companies that would not have been viable public companies on their own."[120] Others have been looking at an international angle due to the issues with the SPAC market in the United States.[121] Industry experts recognize the need for improved regulations, but still see the SPAC as "an important alternative to the traditional initial public offering."[122] The SPAC market has slowed significantly, but some industry stakeholders are still optimistic about the future of the once-booming investment vehicle.[123]

In the wake of the 2020 SPAC boom and subsequent rise in SPAC shareholder litigation, the SEC focused efforts on developing a new regulatory regime. Regulations were first proposed in March of 2022.[124] They aimed to regulate SPACs in the same manner as traditional IPOs[125], and were open for comments until the summer of 2022.[126] The new regulatory regime was adopted in January of 2024.[127] The implications of these regulations for SPAC activity are enumerated in Part III.

---

117. Preston Brewer, *Analysis: IPOs Fall to Earth; A Requiem for SPACs?*, BLOOMBERG L. (July 8, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ipos-fall-to-earth-a-requiem-for-spacs (on file with *Journal of Corporation Law*).

118. *Id.*

119. *Id.*

120. *See* Barlow et al., *supra* note 114.

121. *See id.* ("Sponsors have also been eyeing alternative listing arrangements in response to the waning U.S. SPAC market.").

122. Preston Brewer, *Analysis: Days of Future SPAC – How SPACs Might Be ReWorked*, BLOOMBERG L. (June 15, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-days-of-future-spac-how-spacs-might-be-reworked (on file with the *Journal of Corporation Law*).

123. *See, e.g.*, Simon Moore, *As Deal Optimism Dies, SPACs May Have Surprising Future as Fixed Income Assets*, FORBES (Sept. 23, 2022), https://www.forbes.com/sites/simonmoore/2022/09/23/as-deal-optimism-dies-spacs-may-have-surprising-future-as-fixed-income-investments (on file with the *Journal of Corporation Law*). ("[D]espite the broad pessimism, SPACs may now provide a return to investors.").

124. Breheny et al., *supra* note 5. *See also* Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, & 249) [hereinafter *Adopted Rules*] (citing changes to current SPAC regulatory regime).

125. Breheny et al., *supra* note 5.

126. Soyoung Ho, S*EC Plans to Finalize Two Dozen Rules in 2023*, THOMSON REUTERS (Jan. 13, 2023), https://tax.thomsonreuters.com/news/sec-plans-to-finalize-two-dozen-rules-in-2023 [https://perma.cc/ARB6-ASJ4].

127. *See generally Rule Adoption Press Release*, *supra* note 10.

III. ANALYSIS

In March of 2022, the SEC responded to the SPAC boom of previous years by issuing a new set of proposed regulations for SPACs.[128] A modified version of these regulations which included two new guidance documents was adopted in January of 2024.[129] The goal of this new regulatory regime is to provide further protection for SPAC investors and bring their level of regulation to that of traditional IPOs.[130] The SEC's new regulations and corresponding guidance documents will: (1) increase disclosures required throughout the SPAC process; (2) increase the potential for expanded underwriter liability; and (3) eliminate the PSLRA safe harbor with increased potential for "investment company" status.[131] The new regulatory regime will result in increased faith in SPACs by shareholders but there will continue to be an overall decrease in SPAC activity as disclosure requirements and potential liability become more extensive.

A. Increased Disclosures

The new regulations increase the disclosure requirements for SPACs SEC filings.[132] Regulation S-K is the first area in which this occurs.[133] As of January 2024, new requirements are added to this regulation which "set forth specialized disclosure[s] applicable to SPACs regarding the sponsor, potential conflicts of interest, and dilution, [and] certain disclosures on the [registration statement] cover page and in the [registration statement] summary."[134] The new requirements will generally be concentrated in a new subsection, Regulation S-K.[135] The three main areas in which disclosures would change include (1) the fairness of the transaction, (2) sponsors, and (3) dilution.[136]

1. Fairness of Transaction

Under the new regulations, Regulation S-K would also require new disclosures related to de-SPAC transaction fairness. "If state law requires that the SPAC's board of directors determine whether the de-SPAC transaction is advisable and in the best interests of the

---

128. *See generally* Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29458 (May 13, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249 & 270) [hereinafter *Proposed Rules*].

129. *See generally Rule Adoption Press Release*, *supra* note 10; *Adopted Rules*, *supra* note 124.

130. *See id.* (quoting SEC Chair Gary Gensler, "investors deserve the protections they receive from traditional IPOs").

131. *See Adopted Rules*, *supra* note 124, at 14313–27 (detailing the SEC's final rules).

132. *See generally id.* (outlining the new regulations filing requirements).

133. *See generally Regulation S-K*, CORNELL LEGAL INFO. INST. (Jan. 2022), https://www.law.cornell.edu/wex/regulation_s-k [https://perma.cc/YM9L-6B3P].

134. Breheny et al., *supra* note 5; *See also* Evan D'Amico et al., *SEC Adopts Final Rules to Align SPACs More Closely with IPOS*, GIBSON DUNN (Feb. 2, 2024), https://www.gibsondunn.com/sec-adopts-final-rules-to-align-spacs-more-closely-with-ipos [https://perma.cc/83LT-JCM2] (stating that the final rules adopted additional disclosures within S-K).

135. Breheny et al., *supra* note 5.

136. David Sakowitz et al., *SEC Proposes Sweeping New Regulations of SPAC Transactions*, WINSTON & STRAWN LLP (Apr. 4, 2022), https://www.winston.com/en/capital-markets-and-securities-law-watch/sec-proposes-sweeping-new-regulations-of-spac-transactions.html [https://perma.cc/7UXD-LKK4].

SPAC and its shareholders, the SPAC is required to disclose the determination . . . ."[137] Additionally, if a fairness report is obtained regarding the transaction, this will also need to be disclosed.[138]

These fairness disclosures have not been required for SPACs in the past; however, the board fairness determination disclosure has been the general market practice.[139] The practice of obtaining fairness opinions is very common in the context of traditional IPOs but has not been within the SPAC market.[140] As discussed in Part II, when a SPAC is created, the merging entity is unknown.[141] This is not the case with a traditional IPO where the entity going public is known to the shareholders.[142] There are more uncertain elements for the shareholders when the de-SPAC transaction takes place, and this is the reasoning behind the SEC's focus on additional fairness disclosures for SPACs.

2. *Sponsors*

New amendments to Regulation S-K also require additional disclosures relative to sponsors, affiliates, and promoters involved in the IPO and de-SPAC phases.[143] SPACs will be required to make disclosures relative to conflicts of interest, roles and responsibilities, and relationships between SPAC sponsors and SPAC management.[144] These disclosures will apply at the IPO phase and throughout the SPAC process.[145] They are relatively aligned with what is already done in the market, but create a broader definition of individuals who constitute sponsors for the disclosure.[146]

The increased disclosures related to sponsors in both phases of the SPAC transaction are intended to "provide . . . a more complete understanding of any . . . material conflicts of interest associated with the SPAC and the benefits that may be realized by the sponsor and its affiliates and any promoters arising from these conflicts of interest."[147]

---

137. *SEC Adopts Final SPAC Rules*, DAVIS POLK (Jan. 29, 2024), https://www.davispolk.com/insights/client-update/sec-adopts-final-spac-rules [https://perma.cc/NQ23-FBJN].

138. *Id.*

139. *Id.*

140. *Compare* Tingting Liu, *The Wealth Effects of Fairness Opinions in Takeovers*, 53 FIN. REV. 533, 560 (2018) (citing that 85% of these transactions obtained fairness opinions), *with* CHRISTOPHER BARLOW ET AL., DE-SPAC TRANSACTION TRENDS IN 2023 5 (2023), https://www.skadden.com/-/media/files/publications/2023/06/de_spac_transaction_trends_in_2023.pdf [https://perma.cc/LT36-DMCR] ("32% of SPAC deals had a fairness opinion in 2022 . . . .").

141. *See* discussion *infra* Part II (explaining the creation SPACs).

142. *Id.*

143. Pinedo, *supra* note 70, at 14.

144. *Id.*

145. *SEC Adopts Final SPAC Rules*, *supra* note 137 (citing "new disclosure requirements for SPAC IPOs and de-SPAC transactions").

146. *See* Sakowitz et al., *supra* note 136 ("The SEC noted that the proposed definition [of "SPAC sponsor"] is intended to encompass activities that are commonly associated with sponsors of SPACs and that the term is intended to be defined *broadly*.") (emphasis added).

147. *Proposed Rules*, *supra* note 128, at 29468.

3. Dilution

Amendments to Regulation S-K also require additional disclosures regarding propensity for dilution which can occur after a de-SPAC transaction takes place.[148] The dilution disclosures would be required in Form S-1 in the IPO phase.[149] In many cases, a SPAC will start with over 50 percent of its shares being public, and after the de-SPAC transaction, that majority public share will become a minority share.[150] Modifications to Regulation S-K were designed to require additional disclosure about the potential of dilution.[151] Dilution is affected by a variety of costs including underwriter and sponsor compensation.[152] Currently:

> SPACs' proxy statements do a poor job of disclosing the extent to which a SPAC will have diluted shareholder equity and dissipated cash as of the time its merger . . . . mandating transparency to fix this shortcoming . . . would entail requiring SPACs to disclose the net cash per share that they expect to hold as of the time of a proposed merger.[153]

Disclosures related to dilution potential are intended to provide SPAC investors with further details about the effects of the de-SPAC transaction on their shares.[154] The new disclosures are aimed at helping investors "better understand the potential impact upon them of the various dilutive events that may occur over the lifespan of the SPAC."[155]

Increased disclosures through amendments to Regulation S-K will have a dual effect. On one hand, SPAC investors benefit, because before a de-SPAC transaction, they can make a more informed decision as to whether they want to exercise their right of redemption.[156] These disclosure requirements stem from the array of shareholder lawsuits alleging a lack of fairness in the de-SPAC transaction due to non-transparency in the SPAC process.[157] The new disclosure requirements will certainly increase shareholder faith in SPACs. Although there is a clear benefit to shareholders, the additional disclosures will also cause increases in transaction costs for the SPAC. Gathering the information needed for these disclosures and ensuring that it is of adequate quality will require additional

---

148. *Id.*

149. *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook*, SIDLEY (Apr. 5, 2022), https://ma-litigation.sidley.com/2022/04/expansive-new-sec-rule-proposals-seek-to-rewrite-the-spac-playbook [https://perma.cc/5WBY-Y6RW].

150. Joel L. Rubinstein et al., *SEC Proposes Rules to Regulate SPACs*, WHITE & CASE (Apr. 18, 2022), https://www.whitecase.com/insight-alert/sec-proposes-rules-regulate-spacs [https://perma.cc/EBl6-Q2SQ] (explaining how a SPAC will start with a majority of their shares being public, but will become the minority share after de-SPAC).

151. Pinedo, *supra* note 70, at 14.

152. Rubinstein et al., *supra* note 150.

153. Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 YALE J. ON REGUL. BULL. 18, 30 (2022–23).

154. *Id.*

155. *Proposed Rules*, *supra* note 128, at 29469.

156. *See* discussion *supra* Part II.A.1 (explaining the right of redemption which can be exercised prior to the de-SPAC transaction).

157. *See* Hochenberg & Clarke, *supra* note 110, at 34 (explaining rise in SPAC shareholder derivative lawsuits).

resources.[158] In turn, these requirements will damage a benefit of the SPAC—fewer disclosures—that once drew attention to them over the traditional IPO.

B. Increased Potential for Expanded Underwriter Liability

In addition to increased disclosures, there is potential for increased underwriter liability in both the IPO and de-SPAC phases of the SPAC.[159] Up until the proposed regulations in March of 2022, those parties meeting the definition of statutory underwriters under section 2(a)(11) of the Securities Act of 1933 could be subject to liability for projections made within the IPO phase of the SPAC transaction.[160] That liability did not extend to the de-SPAC phase.[161] The regulations proposed in March of 2022 would have introduced underwriting liability into the de-SPAC phase by expanding on the meaning of a statutory underwriter under Rule 140a of the Securities Act.[162] The new definition would have exposed underwriters who participated in the IPO phase to liability within the de-SPAC phase.[163] The SEC did not end up adopting Rule 140a after pushback during the comment period and instead guided underwriter liability.[164] In this underwriter guidance, the "Commission noted in the Final Rules that it will apply the terms 'distribution' and 'underwriter' 'broadly and flexibly' in light of the facts and circumstances of a particular transaction, including a de-SPAC transaction."[165]

Although the SEC did not implement Rule 140a, there will be effects on SPAC transactions because of this proposed rule and corresponding SPAC Underwriter guidance. The effect of the proposed expanded underwriter liability was already apparent after the release of the proposed rule in March of 2022 as investment banks began reducing their involvement in SPAC transactions.[166] Commentators speculate that there has been uncertainty created by the SEC's retreat from proposed Rule 140a and the final guidance and that "certain financial advisors will [continue to] choose not to participate in SPAC IPOs and de-SPAC transactions as a result of the ambiguity under the Final Rules."[167] This guidance makes it clear that although a formal rule has not been adopted that expands underwriting liability, the SEC is focused on this area and will potentially apply increased

158. *See* R. Randall Wang, *SEC Adopts Tough New Rules for SPACs*, BCLP (Jan. 31, 2024), https://www.bclplaw.com/en-US/events-insights-news/sec-adopts-tough-new-rules-for-spacs.html [https://perma.cc/MC9V-6PW5] (citing increased costs to SPACs resulting from new regulations).

159. Rubinstein et al., *supra* note 150.

160. Stockham, *supra* note 74.

161. *Id.*

162. *Reverberations Felt from SEC's SPAC Proposal Even Before Rules are Adopted*, BASS, BERRY & SIMS (Aug. 4, 2022), https://www.bassberrysecuritieslawexchange.com/sec-spac-proposal [https://perma.cc/CRU8-GWF4].

163. *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook*, *supra* note 149.

164. *See* D'Amico et al., *supra* note 134 (citing parts of the regulations adopted and foregone in a summary of the final rules).

165. *Id.*; *see also Adopted Rules*, *supra* note 124, at 14236 (outlining SPAC underwriter guidance).

166. *See, e.g.*, Sridhar Natarajan & Ruth David, *Goldman is Pulling Out of Most SPACs over Threat of Liability*, BLOOMBERG (May 9, 2022), https://www.bloomberg.com/news/articles/2022-05-09/goldman-is-pulling-out-of-most-spacs-over-threat-of-liability (on file with the *Journal of Corporation Law*) (citing large banks backing out of SPACs).

167. D'Amico et al., *supra* note 134.

scrutiny.[168] This is beneficial to SPAC investors as it has the potential to increase confidence in projections made by underwriters, but SPAC transactions have already become more difficult to execute as parties that would otherwise underwrite are hesitant to participate with the looming threat of potential increased liability.

C. Elimination of the PSLRA Safe Harbor with Increased Potential for "Investment Company" Status

In addition to increased disclosures and potential expansion of underwriter liability, the new regulatory regime eliminates the safe harbor for SPACs that have existed under the PSLRA[169] and increases the likelihood that a SPAC is found to be an "investment company" under the Investment Company Act.[170] Regarding the elimination of the safe harbor, this has never applied to traditional IPOs, and under the new regulations, it would not apply to SPACs either.[171] The definition of a "blank check company" was modified to include SPACs.[172] The regulations proposed in March of 2022 included an amendment to the Investment Company Act that would have deemed SPACs to also be "investment companies" unless they met the specific requirements of a safe harbor.[173] This amendment was not included in the final regulations adopted in January of 2024. Instead, a guidance document on when a SPAC will be an "investment company" for the Investment Company Act was included.[174] This guidance deems this to be a fact-specific inquiry and emphasizes

> certain activities "that would raise concerns about [a SPAC's] status as an investment company under the Investment Company Act": (1) the nature of SPAC assets/income; (2) the actions of its directors, officers and employees, including the amount of time spent by such individuals seeking a de-SPAC transaction; (3) the duration of time before a SPAC announces and completes the de-SPAC; (4) whether the SPAC holds itself out in a manner that suggests investors should invest primarily to gain exposure to its portfolio; and (5) whether the SPAC ultimately merges with an investment company.[175]

Particularly, as it relates to the third factor, duration, the SEC expressed skepticism of SPACs not registered as investment companies taking longer than 18 months for the de-SPAC transaction.[176]

---

168. See *id.* ("The introduction of proposed underwriter liability in the Proposed Rules and pivot back to statutory interpretation creates further ambiguity and uncertainty . . . .").

169. *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook*, *supra* note 149.

170. *See Adopted Rules*, *supra* note 124, at 14261 (establishing the SPAC Investment Company Act guidance).

171. *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook*, *supra* note 149.

172. *Id.*

173. *Id.*

174. *See Adopted Rules*, *supra* note 124, at 14261 (establishing the SPAC Investment Company Act guidance).

175. *SEC Adopts New Rules Regarding SPAC Transactions*, ROPES & GRAY (Feb. 1, 2024), https://www.ropesgray.com/en/insights/alerts/2024/02/sec-adopts-new-rules-regarding-spac-transactions [https://perma.cc/5Y8W-PYW2].

176. *See id.* ("Regarding the duration factor, the SEC identified the 12-month time period . . . and the 18-month time period . . . as potentially relevant periods by analogy that could factor into whether a SPAC is deemed an investment company.").

The impact of the elimination of the PSLRA safe harbor is that there is potential liability for "forward-looking statements . . . included in de-SPAC registration."[177] This is beneficial for SPAC investors as this will increase confidence in their investment.[178] This will prove costly to SPAC management as projections that include de-SPAC registration statements will need to be crafted more carefully to avoid potential liability.[179] The impact of the increased likelihood that a SPAC is found to be an "investment company" under the Investment Company Act on SPAC management is unclear. On one hand, management benefits from not having the black-and-white requirements that would be imposed by the safe harbor.[180] On the other hand, the factors cited in the guidance document make it clear that the SEC will be more carefully scrutinizing the investment company status of SPACs, especially as it relates to asset holdings and the length of the transaction.[181] This guidance seems to make 18 months to complete the de-SPAC transaction an informal requirement of the durational factor of the investment company analysis.[182] Beyond 18 months, the SEC may weigh the duration factor in favor of investment company status and subject the SPAC to further requirements.[183] As discussed in Part II, up until January of 2024, SPAC transactions have generally operated within the 24-month framework, and have been permitted to take up to 36 months for de-SPAC while still complying with applicable stock exchange rules.[184] This informal 18-month requirement in the guidance would significantly shorten this timeline requiring SPAC management to expend more resources to comply on time.[185]

On its face, the primary benefit of the investment company guidance seems to lie with the SPAC shareholders. Specifically, as it relates to the informal 18-month requirement as SPAC shareholders would have an interest in seeing the de-SPAC transaction completed sooner rather than later. However, "[i]n the race to close a deal before time expires . . . these deals can be rushed . . . . The incentives to push a deal through, even a bad deal, are simply too great for SPAC sponsors."[186] The informal duration requirement included in the guidance may not have as clear of a benefit to shareholders as it seems. As with the other new regulations, transaction costs will increase for the SPAC because of working

177. *Id.*

178. *See* Gary Gensler, Chair, SEC, Statement on Proposal on Special Acquisition Companies (SPACs), Shell Companies, and Projections (Mar. 30, 2022), https://www.sec.gov/news/statement/gensler-spac-20220330 [https://perma.cc/9HB8-TWRY] (citing the purpose of the regulations is to "ensure that investors in these vehicles get protections").

179. *See* Wang, *supra* note 158 (postulating that scrutiny of projections will "increase costs by subjecting them to more rigorous scrutiny and disclosure").

180. *See* D'Amico et al., *supra* note 134 (showing the lack of a black-and-white rule because "the Final Rules opt to provide general guidance regarding activities that could cause a SPAC to be an 'investment company'").

181. *See* discussion *supra* Part II.C (enumerating guidance factors given by the SEC which show increased scrutiny that did not exist before that document).

182. *See SEC Adopts New Rules Regarding SPAC Transactions*, *supra* note 175 (citing the 18-month period as a relevant factor for SEC analysis).

183. *Id.*

184. Rubinstein et al., *supra* note 150.

185. *See SEC Proposes New Rules Targeting SPAC Disclosures*, BAKER BOTTS (Apr. 8, 2022), https://www.bakerbotts.com/thought-leadership/publications/2022/april/sec-proposes-new-rules-targeting-spac-disclosures [https://perma.cc/4CDB-73BY] (explaining the increased cost and paperwork associated with regulation changes).

186. Brewer, *supra* note 117.

towards completing additional disclosures and transaction tasks on a compressed timeline. SPACs will get far less time than they would have under the current regulatory regime to explore the activities of their target company and complete a merger. Companies looking to go public may be attracted to the requirement of a compressed timeline but may also be wary of the SPAC's harsh deadlines. Those involved in simple SPAC transactions may not feel the effects of this new requirement as much as complex SPAC transactions. Overall, there is a risk that, with less time for due diligence, SPAC managers and shareholders may be disappointed when their target company is not what they anticipated.

As discussed in Part II.A through C, the new regulations and corresponding guidance documents will largely hold advantages for SPAC investors.[187] They will have more information earlier in the SPAC transaction process which will allow them to decide whether it is appropriate to exercise their right of redemption.[188] This would likely lead to fewer SPAC shareholder lawsuits. However, the downside is that the SPAC will lose some of its utility as an alternative to the traditional IPO. Increased disclosures will take up more time and resources and the potential for expanded underwriter liability will make it more difficult to find a bank willing to participate in a SPAC transaction. These new requirements will also fall within a more condensed timeline for the transaction as there is looming potential to be deemed an investment company if there is no de-SPAC completion after 18 months. Part IV will recommend three modifications to the new investment company guidance which will balance interests in maintaining the utility of the SPAC while still advocating for investors.

IV. RECOMMENDATION

As discussed in Part III, the overall effect of the SEC's new regulations and guidance documents governing SPACs will increase faith in the vehicle for investors. This advocacy is vital to ensuring SPACs don't become like the fraudulent shells of the 1980s and requires balancing if the market wants SPACs to persist as a viable alternative to the traditional IPO. SPAC activity began to decrease shortly after the announcement of the new regulations and these rates have continued to decline.[189] To balance the viability of the SPAC with maintaining protections for investors, this Note proposes three modifications to the informal duration requirement of the recently promulgated SPAC Investment Company Act guidance.[190] It should be noted that while guidance documents are not "binding in the way that regulations are," issuing agencies "can issue *de facto* regulations simply by calling them guidance," which highlights why this Note's proposed modifications to the guidance are important.[191] Under this proposed solution, the SEC

187. *See* discussion *supra* Part II.A–C (discussing impacts of the SEC's new regulations of SPACs).

188. *See* discussion *supra* Part II.A.1 (explaining the right of redemption which can be exercised prior to the de-SPAC transaction).

189. Goldstein, *supra* note 115.

190. *See SEC Adopts New Rules Regarding SPAC Transactions*, *supra* note 175 (establishing the 18-month period as a factor in SEC analysis of investment company status). *See also Adopted Rules*, *supra* note 124, at 14260 (stating that within the context of an 18-month maximum a "SPAC that operates beyond these timelines raises concerns that the SPAC may be an investment company, and these concerns increase as the departure from these timelines lengthens").

191. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 165 (2019) (emphasis added).

should update the SPAC Investment Company Act guidance to find that the duration factor does not weigh in favor of finding investment company status when a SPAC: (A) completes the de-SPAC transaction within 36 months after formation; (B) holds a shareholder vote to approve any extension beyond the 24-month framework; and (C) does not have a provision in its charter allowing de-SPAC timeline extensions without shareholder approval. Industry leaders have responded to the SEC's new guidance by suggesting modification (A) broadly,[192] but this is not enough to address the agency's concerns relative to investor protection. This Note's proposed modifications strike an appropriate balance of interests.

A. The SPAC Must Complete the De-SPAC Transaction Within 36 Months After Formation

As proposed by industry leaders, the SEC should not penalize SPACs which take up to 36 months to complete the de-SPAC transaction in the investment company factor analysis.[193] This should be accomplished through a change to language that accompanies the duration factor within the SPAC Investment Company Act guidance. The language referencing an informal durational requirement of 18 months should be removed[194] and replaced with a statement that a SPAC which takes up to 36 months to complete the de-SPAC transaction is not met with skepticism regarding its status as an investment company. Beyond the 36-month mark, the duration factor should weigh in favor of finding the SPAC is an investment company.

The new SPAC regulations are requiring increased disclosures and potentially a higher level of liability for all parties managing and executing the SPAC transaction.[195] This is going to increase costs for the SPAC at the outset of the transaction and has already had the effect of deterring large, reputable banks from involvement with these investment vehicles.[196] Increasing costs and potential liability for the SPAC transaction should be offset by a longer timeframe than the informal requirement of 18 months proposed.

Parties that face potentially increased liability but are still willing to participate in SPAC transactions will want to ensure that the acquisition target has been thoroughly vetted before proceeding with the de-SPAC transaction. Eighteen months to complete target identification and the de-SPAC transaction is likely not enough time in this era of increased liability. This is evidenced by the 24-month framework most typically allowed by stock exchanges.[197] The threat of being deemed an investment company and having

192. *See, e.g.*, Rubinstein, *supra* note 150 (recommending that "the 36-month requirement in NYSE and Nasdaq listing rules . . . should remain the standard"); D'Amico et al., *supra* note 134 (explaining issues that less than 36 months will pose).

193. *See id.*; Thurston J. Hamlette & Erin E. Martin, *SEC's Proposed Rules Aim to Protect Investors – Will They Stop SPACs in Their Tracks?*, MORGAN LEWIS (Apr. 13, 2022), https://www.morganlewis.com/pubs/2022/04/secs-proposed-rules-aim-to-protect-investors-will-they-stop-spacs-in-their-tracks [https://perma.cc/6FEY-5TGX] (observing that "stock exchange rules allow SPACs a maximum for 36 months to complete a de-SPAC transaction").

194. *See Adopted Rules*, *supra* note 124, at 14260 (stating that within the context of an 18-month maximum a "SPAC that operates beyond these timelines raises concerns that the SPAC may be an investment company, and these concerns increase as the departure from these timelines lengthens").

195. *See generally Proposed Rules*, *supra* note 128 (citing increased disclosures and liability).

196. See Natarajan & David, *supra* note 166 (citing Goldman Sachs a bank backing out of IPOs).

197. *See* discussion *supra* Part II.A.1 (discussing that de-SPAC transactions are generally completed by the 24-month mark).

additional capitalization and liability is too great.[198] Additionally, as mentioned by industry leaders, a 36-month duration requirement is consistent with historic stock exchange maximum rules.[199] They have allowed up to this period for completion of the de-SPAC transaction to satisfy listing requirements.[200]

Modifying the guidance to allow SPACs that fall within the 36-month mark to potentially remain outside the definition of an investment company would address SPAC management concerns related to increased disclosures, increased party liability, and historic expectations of SPACs. Additionally, the right of redemption that SPAC shareholders have when evaluating a proposed de-SPAC transaction is an existing measure that ensures that an extended period for SPAC target identification does not negatively impact shareholders.[201] If SPAC leadership is taking longer than a shareholder is comfortable with within the 36-month timeline, the shareholder can get out before the de-SPAC transaction.

Furthermore, while the primary benefit of allowing increased transaction time appears to lie with the SPAC itself, more time could also benefit shareholders. This requirement ensures that SPACs have enough time to carefully disclose what is required rather than rushing to make the 18-month timeline.

B. The SPAC Must Hold a Shareholder Vote to Approve Any Extension Beyond the 24-Month Framework

The SEC should modify the duration factor of the investment company factor analysis to require that any SPAC that extends beyond the 24-month framework must hold a SPAC shareholder vote to do so. Without this shareholder vote to approve the timeline change, the duration factor will weigh in favor of finding investment company status. This new voting requirement should be accomplished by a change to the language explaining the duration factor in the SPAC Investment Company Act guidance.[202] The explanation that accompanies the factor should include a statement that it will weigh in favor of finding investment company status for any SPAC that has a transaction timeline extension beyond the 24-month framework without a shareholder vote. Additional language should also be included regarding what constitutes a proper shareholder vote. This language should state that to find a proper shareholder vote for the duration factor, the SPAC should be required to give shareholders an update as to the disclosures discussed above in Part III.A before the vote,[203] and the vote should take place anytime there is a timeline extension.

Relative to disclosure updates, these should provide shareholders with an informed basis for voting. Barring extreme changes in SPAC organization and operation, these disclosures should not need to be re-done. Disclosure updates should include an update to

---

198. James Chen, *Investment Company Act of 1940 Definition*, INVESTOPEDIA (Aug. 24, 2023), https://www.investopedia.com/terms/i/investmentcompanyact.asp [https://perma.cc/39JT-8VHR] (citing the Investment Company Act's "robust" financial requirements).

199. *See* Rubinstein, *supra* note 150 (recommending a 36-month timeline based on stock exchange rules).

200. *Id.*

201. *See Redemption Rights at SPACs*, GREENBERG TRAURIG (June 28, 2021), https://www.gtlaw.com/en/insights/2021/6/published-articles/redemption-rights-bij-spacs [https://perma.cc/LV7R-Z6ZR] (explaining the right of redemption).

202. *See Adopted Rules*, *supra* note 124, at 14260 (showing the duration factor language).

203. *See* discussion *supra* Part III.A (citing new fairness disclosures).

the board fairness and fairness opinion disclosures[204] when the timeline for the de-SPAC transaction is changed. A potentially appropriate standard for disclosure updates would be a statement as to whether the disclosures have remained the same "in all material respects."[205] If they have not remained the same to the level that this standard requires then the updated disclosure must call out those areas which have changed.

Relative to voting frequency, a shareholder vote would need to be held each time there was a change to either the target identification date or the de-SPAC date, or both. For instance, if SPAC management decided they needed 30 months for the de-SPAC transaction rather than the 24-month framework, then this timeline would require a shareholder vote. If, at the 28-month mark, SPAC management realizes they need 36 months to complete the de-SPAC transaction, then this change would require an additional shareholder vote.

This voting and disclosure update aspect of the duration factor is necessary because SPAC shareholders generally expect that the de-SPAC transaction will be completed in the 24-month framework based on industry trends.[206] A timeline that deviates from what is expected, potentially going as long as 36 months, should build in measures that allow investors a chance to evaluate why the transaction is taking more time and if they want to proceed. A vote with disclosure updates counterbalances the extended timeline allowance in Part IV.A[207] by advocating for shareholders through maintaining transparency. This measure is also positive for the market because it allows shareholders the option to exit and choose to seek alternative, more promising investments.

C. The SPAC Cannot Have Provisions in its Charter Allowing Timeline Extensions Without Shareholder Approval

It follows from Part IV.B that under these proposed modifications, the duration factor of the Investment Company Act guidance will weigh in favor of investment company status where a SPAC employs a no-vote provision for timeline extension. This is worth calling out specifically because there are SPAC charters that allow a certain number of timeline extensions without investor approval.[208] This requirement should be accomplished by modifying the duration factor language under the SPAC Investment Company Act guidance.[209] The language explaining the duration factor should include that it will weigh in favor of finding investment company status where a SPAC modifies their transaction timeline based on a no-vote provision. As mentioned in Part IV.B, this promotes increased transparency for shareholders counterbalancing the timeline extension proposed in Part IV.A. Additionally, disposing of no-vote provisions in SPAC charters further advocates for SPAC shareholders by avoiding an agreement on timelines without enough information.

---

204. *Id.*

205. *See* Daniel E. Wolf & Eric L. Schiele, *Materiality and Efforts Qualifiers—Some Distinctions, Some Without Differences*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 31, 2018), https://corpgov.law.harvard.edu/2018/10/31/materiality-and-efforts-qualifiers-some-distinctions-some-without-differences [https://perma.cc/4SJH-U7Z8] (explaining the material respects standard).

206. *See* discussion *supra* Part II.A (discussing the typical timeline for a SPAC).

207. *See* discussion *supra* Part IV.A (outlining 36 months as recommended durational requirement).

208. *See supra* Part II.A (discussing the no-vote provision).

209. *See Adopted Rules*, *supra* note 124, at 13260 (showing the duration factor language).

V. CONCLUSION

The SEC's new regulations of SPACs allow shareholders to make more informed decisions throughout the SPAC process. This will be accomplished through increased disclosures, and the potential for limited timelines and increased underwriter liability. These additional regulations of SPACs are necessary to support shareholder rights, but risk obfuscating the advantages of the SPAC vehicle. Actors in the market believe and desire for SPACs to continue to be a viable vehicle for taking a company public in the future.[210] Therefore, in regulating SPACs, interests in shareholder rights must be balanced with measures to ensure the viability of the vehicle. This balance is struck by modifying the SPAC regulatory regime to ensure transaction timing requirements simultaneously comport with historical expectations and equip shareholders with the necessary transaction information to advocate for themselves. SPAC activity will continue in the future, and the SEC has the power to ensure it does so in a manner that protects shareholders and promotes the interests of the market.

---

210. *See, e.g.*, Barlow et al., *supra* note 114; Brewer, *supra* note 117; Moore, *supra* note 123.