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Quarterly Survey of SEC Rulemaking and Major Appellate Decisions (January 1, 2022 – March 31, 2022)

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This issue's Survey focuses on the U.S. Securities and Exchange Commission's ("SEC") rulemaking activities and other decisions relating to the Securities Act of 1933, as amended (the "1933 Act"), the Securities Exchange Act of 1934, as amended (the "1934 Act"), and other federal securities laws from January 1, 2022 through March 31, 2022.

This quarter, the SEC proposed 16 new rules and approved two final rules. In comparison to the last few quarters, there was a significant increase in the number of proposed rules issued by the SEC. It appears that Chair Gary Gensler is hitting his stride and actively implementing his policies and vision at the SEC. As we move forward, we expect that rulemaking will continue to be a priority for the SEC.

Proposed Rules

The Enhancement and Standardization of Climate-Related Disclosures for Investors

On March 21, 2022, the SEC proposed rules that would require domestic and foreign registrants to include certain climate-related information in its registration statements and periodic reports, such as Annual Reports on Form 10-K. Such climate-related information would include:

- climate-related risks and their actual or likely material impacts on the registrant's business, strategy and outlook;
- the registrant's governance of climate-related risks and relevant risk management processes;
- the registrant's greenhouse gas ("GHG") emissions, including (i) GHG emission data from operations that are owned or controlled by the registrant ("Scope 1"), (ii) GHG emission data from the generation of purchased or acquired electricity, steam, heat or cooling that is consumed by operations

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owned or controlled by a registrant ("Scope 2") and (iii) all indirect GHG emission data not otherwise included in Scope 2 ("Scope 3");

- certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and
- information about climate-related targets and goals, and a transition plan, if any.

The proposed disclosures would be incorporated directly into such registration statements and periodic reports, increasing the potential liability for any misleading or inaccurate disclosures.

The proposed rules would require accelerated and large accelerated filers to include, in such applicable filings, an attestation report describing, at a minimum, the disclosure of its Scope 1 and Scope 2 emissions, as well as certain related disclosures about the attestation service provider. The attestation service provider would not be required to be a registered public accounting firm, but there will be certain minimum qualifications and standards that such provider must satisfy. Accelerated and large accelerated filers would have time to transition to satisfy such attestation requirements, as further described below.

The proposed rules would be phased in over time for all registrants. The compliance date would be dependent on the status of the registrant as a large accelerated filer, accelerated or non-accelerated filer or small reporting company. Assuming that the proposed rules are adopted with an effective date in December 2022 and that a filer has a December 31st fiscal year-end, the compliance date for the proposed disclosures in annual reports would be:

Registrant Type	**Disclosure Compliance Date**	
	All proposed disclosures, including GHG emission metrics: Scope 1, Scope 2 and associated intensity metric, but excluding Scope 3	GHG emission metrics: Scope 3 and associated intensity metric
Large Accelerated Filer	Fiscal year 2023 (filed in 2024)	Fiscal year 2024 (filed in 2025)
Accelerated Filer and Non-Accelerated Filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)
Small Reporting Company	Fiscal year 2025 (filed in 2026)	Exempted

The attestation requirements would be subject to even more gradual transition periods. Small reporting companies are exempt from the attestation requirements.

There has already been much debate over this proposed rule from both sides of the political aisle. Certain Republican lawmakers have argued that the proposed rules extend beyond the SEC's mission and authority, while certain Democrats argue that the proposed rules do not go far enough.

The comment period will remain open upon the later of (i) 30 days after the date the proposing release is published in the Federal Register or (ii) May 20, 2022.

Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure

On March 9, 2022, the SEC proposed rules to enhance and standardize disclosure requirements regarding cybersecurity risk management, strategy and governance. Under the proposed rules, public companies would be required to report material cybersecurity incidents, and to disclose policies and procedures implemented to address cybersecurity risks. Companies would also be required to disclose management's role in implementing cybersecurity policies and the board's cybersecurity expertise. These disclosures are intended to better protect investors from the potential impact that cybersecurity risks and incidents can have on a registrant's financial performance.

Reporting of Cybersecurity Incidents on Form 8-K

Under the proposed rules, a registrant would be required to disclose material cybersecurity incidents on a Current Report on Form 8-K within four business days after the registrant determines that it has experienced a material cybersecurity incident. The required disclosure would be triggered on the date in which the registrant determines that it has experienced a "material" cybersecurity incident, rather than the date of discovery. The registrant's determination of the materiality of the cybersecurity risks should be made "as soon as reasonably practicable after discovery of the incident." An ongoing internal or external investigation would not provide a basis for avoiding or delaying disclosure.

To implement the new disclosure requirements, the SEC would amend Form 8-K to include Item 1.05 which requests registrants to disclose the following information about a material cybersecurity incident:

(1) When the incident was discovered and whether it is ongoing;

(2) A brief description of the nature and scope of the incident;
(3) Whether any data was stolen, altered, accessed or used for any other unauthorized purpose;
(4) The effect of the incident on the registrant's operations; and
(5) Whether the registrant has remediated or is currently remediating the incident.

These enumerated items are expected to provide investors with the ability to assess the effects of material cybersecurity incidents on the registrant, including any financial or operational effects. While the SEC expects responses to the enumerated items, the SEC clarified that it does not expect registrants to publicly disclose specifics and detailed remedial plans such that it would impede their remedial ability. The SEC also included a non-exhaustive list of examples of material cybersecurity incidents to provide guidance to registrants. Certain conforming rule changes are also proposed to update Regulation S-K accordingly, amend Form S-3 and apply the new rules to foreign private issuers.

Disclosure of a Registrant's Risk Management, Strategy and Governance Regarding Cybersecurity Risks

The SEC believes that the disclosure of the relevant policies and procedures regarding cybersecurity risk management would benefit investors by providing greater transparency as to the registrant's strategies and actions to manage such risks. Therefore, proposed Item 106(b) of Regulation S-K would require registrants to disclose any policies and procedures to identify and manage cybersecurity risks and threats. Since cybersecurity risks may have an impact on a registrant's business strategy, financial outlook or financial planning, disclosure about the impact of cybersecurity risks on business strategy would be required so that investors may be able to determine whether certain companies will become more resilient or, conversely, more vulnerable to cybersecurity risks in the future. In addition, the SEC intends to require registrants to disclose the cybersecurity expertise of their board members.

Comments regarding the proposed rule amendments will be due by May 9, 2022.

Short Position and Short Activity Reporting by Institutional Investment Managers

On February 25, 2022, the SEC proposed Rule 13f-2 and Form SHO in response to the lack of transparency surrounding short sale transactions. The objective of proposed Rule 13f-2 and Form SHO is to provide transparency through required disclosures and publication of short sale-related data to investors and other market participants. Under Rule 13f-2, institutional investment managers ("Managers") that meet or exceed a specified reporting threshold would be required to report to the SEC confidentially on a monthly basis using the proposed form, specified short position data and short activity for equity securities.

Proposed Rule 13f-2, Proposed Form SHO, and Filing

Under proposed Rule 13f-2, Managers would be required to file Form SHO within 14 days following the end of each calendar month with regard to each equity security and all accounts that the Managers or any person under the Managers' control has investment discretion, if they collectively meet or exceed a quantitative reporting threshold. The specific thresholds are:

- with regard to any equity security of an issuer that is registered pursuant to Section 12 of the 1934 Act or for which the issuer is required to file reports pursuant to Section 15(d) of the 1934 Act (a "reporting company issuer") in which the Manager meets or exceeds either (1) a gross short position in the equity security with a US dollar value of $10 million or more at the close of regular trading hours on any settlement date during the calendar month, or (2) a monthly average gross short position as a percentage of shares outstanding in the equity security of 2.5% or more ("Threshold A"); and
- with regard to any equity security of an issuer that is not a reporting company issuer as described above (a "non-reporting company issuer") in which the Manager meets or exceeds a gross short position in the equity security with a US dollar value of $500,000 or more at the close of regular trading hours on any settlement date during the calendar month ("Threshold B").

The SEC included instructions and guidance in its release on how to determine whether the above thresholds are met. Among the instructions and guidance provided is a definition for "gross short position" which means the number of shares of the equity security that are held short, without the inclusion of any offsetting economic positions, including shares of the equity security or derivatives of such equity security.

If Managers determine that they meet or exceed the specified thresholds, they would need to file Form SHO that would include the name of the eligible security, end of month gross short position information and daily trading activity that affects the Manager's reported gross short position for each settlement date during the calendar month reporting period. Once SEC obtains these disclosures, the SEC plans to aggregate the data and publish it to investors and other market participants. However, all information that would reveal the identity of a Manager filing a Form SHO will remain confidential.

Proposed Amendment to Regulation SHO to Aid Short Sale Data Collection

The SEC is proposing Rule 205 of Regulation SHO to facilitate its collection of more comprehensive data on the lifecycle of short sales. Proposed Rule 205 would establish a new "buy to cover" label requirement for certain purchase orders effected by a broker-dealer for its own account and for the account of another person at the broker-dealer. Specifically, a broker-dealer would be required to mark a purchase order as "buy to cover" if, at the time of order, the purchaser has a gross short position in such security in the specific account for which the purchase is being made. The SEC believes that having a "buy to cover" order marking requirement would provide additional context to the SEC and other regulators regarding the lifecycle of short sales by identifying the timing of the purchases, assisting in reconstructing market events, and identifying and investigating any potentially abusive trading practices including potential manipulative short squeezes. Public comments should be received by the SEC on or before April 26, 2022.

Amendments to Form PF and New Rules for Private Fund Advisers

On January 26, 2022 and February 9, 2022, the SEC proposed two new rules under the Investment Advisors Act of 1940, seeking broad changes to the regulation of private funds and their investment advisers. In the first proposal, the SEC's amendments would decrease the reporting threshold for large private equity and hedge fund advisers and require these advisers to provide additional information to the SEC. The second proposal includes new substantive requirements governing adviser fees, clawbacks and other existing practices. The proposed amendments introduce new confidential reporting requirements covering a range of fund and portfolio company activity, fee structures and other privately negotiated arrangements with investors. In addition, the proposals would prohibit certain controversial fund practices like charging fees for services not yet performed or providing preferential treatment to certain fund investors without disclosing such treatment to other investors.

Amendments to Form PF

The new rules would require all advisers to private equity funds to file a report within one business day of the occurrence of certain events, including the execution of an adviser-led secondary transaction, implementation of a general partner or limited partner clawback or the removal of a fund's general partner, termination of a fund's investment period or termination of a fund. In addition, the threshold for a private equity fund to be required to file Form PF would be reduced to $1.5 billion in assets under management, and the SEC would add new questions aimed at uncovering certain adverse events, conflicts of interest and other relevant data points. The proposal includes other more stringent reporting requirements for hedge funds as well, including as regards significant margin and default events, the suspension of withdrawals or cumulative investor requests for redemption exceeding 50% of a fund's asset value. The SEC argues that the growth in private fund space poses potentially greater systemic risks and that its new proposed rules will facilitate timely assessment of stresses on the financial system, enabling regulators to better manage market shocks like those experienced at the outset of the COVID-19 pandemic.

New Rules for Private Fund Advisers

The February 9, 2022 proposal includes a number of reporting and substantive requirements. Private fund advisers would be required to provide fund-wide reporting in a quarterly statement designed to allow investors to compare the costs of investing across private funds and disclosing detailed data on performance, portfolio investment compensation, ownership interests and fee structures. The SEC's position is that investors would benefit from standardized performance metrics and more reliable data on fund costs.

In addition, private fund advisers would be required to obtain annual financial statement audits, and a fairness opinion in connection with any adviser-led secondary offerings (such as when an adviser offers fund investors the opportunity to sell or exchange their interests in the fund). Finally, private fund advisers would be prohibited from engaging in certain sales practices, conflicts of interest and compensation schemes that the SEC believes are contrary to the public interest, including by offering certain forms of preferential treatment to select investors. These substantive requirements are among the more controversial aspects of the SEC's proposals because they affect the private negotiations of sophisticated parties with deep pockets and specialized investment expertise, a change in the SEC's traditional focus on protecting retail investors that dissenting SEC Commissioner Pierce described as a "meaningful recasting of the SEC's mission."

For its part, the SEC has touted the ability of its new proposals to promote "efficiency, competition and transparency" in the world of private funds. The SEC argues that the information gathering is necessary to identify potential systemic risk lurking in the industry, and that even sophisticated investors may be unable to protect their interests or make sound investment decisions without additional regulation. Nonetheless, many practitioners in the private fund space have signaled opposition to the SEC's expansive new proposals.

Comments are due for the two proposals on March 21, 2022 and April 25, 2022, respectively.

Modernization of Beneficial Ownership Reporting

On February 10, 2022, the SEC proposed amendments to Schedules 13D and 13G relating to beneficial ownership reports. Sections 13(d) and 13(g) of the 1934 Act, along with Regulation 13D-G, require investors who beneficially own more than five percent of a covered class to report such beneficial ownership by publicly filing either a Schedule 13D or a Schedule 13G.

The SEC proposed these amendments to modernize Sections 13(d) and 13(g) by, among other things, accelerating the deadline to file Schedules 13D and 13G, deeming holders of certain cash-settled derivative securities beneficial owners of the referenced covered class and clarifying the disclosure requirements in respect of derivative securities.

Accelerating Filing Deadlines

Currently, investors that exceed five percent of a covered class must file a Schedule 13D within 10 days of the date that the five percent threshold is exceeded. The proposed amendments shorten the filing deadline from 10 days to five days, and require that any amendments must be filed within one business day (currently, amendments must be filed promptly). For qualified institutional investors and exempt investors that file a Schedule 13G, the proposed amendments shorten the initial filing deadline from 45 days after year-end to five business days after the end of the month in which the investor beneficially owns more than five percent of the covered class. For all other Schedule 13G filers, the proposed amendments shorten the initial filing deadline from 10 days to five days. For all Schedule 13G filers, the proposed amendments would require that an amendment to a Schedule 13G be filed five business days after the month in which a material change occurred rather than 45 days after the year in which any change occurred. However, the proposed amendments raise the threshold for what constitutes a reportable change from "any change" to a "material change."

Finally, the proposed amendments also accelerate the amendment obligations when reaching certain ownership thresholds.

Under the proposed amendments, qualified institutional investors would need to amend a Schedule 13G within five days when exceeding ten percent of a covered class instead of 10 days after the month in which such change occurred. This new five-day deadline would apply for any additional deviation of more than five percent of a covered class. Passive investors would need to amend a Schedule 13G within one business day after exceeding ten percent of a covered class instead of "promptly" filing. Additionally, the new one-business-day deadline would also apply for any additional deviation of more than five percent of a covered class by a passive investor.

In an attempt to alleviate the accelerated filing deadlines under the proposed amendments, the proposed amendments would also extend the cut-off time for filing Schedules 13D and 13G and any amendments thereto from 5:30 p.m. ET to 10:00 p.m. ET on a business day, to align with the cut-off time permitted for Section 16 filings.

Regulation of Certain Derivative Securities

The proposed amendments would add new Rule 13d-3(e)(1) providing that a holder of a cash-settled derivative security, other than a security-based swap, will be deemed the beneficial owner of the referenced equity securities if the derivative is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purpose or effect. This would require Schedule 13D filers to disclose cash-settled derivative securities as shares that the filer beneficially owns under Item 6 of Schedule 13D.

Group Formation

The proposed amendments would broaden the definition of a "group" in an attempt to clarify the treatment of two or more persons who act as a group when acquiring, holding or disposing of securities. The proposed amendment to Rule 13d-5 would remove the implication that an express agreement by two or more persons to act together is required in order to form a group. This proposed amendment would align Rule 13d-5 with Sections 13(d)(3) and 13(g)(3) of the 1934 Act to remove any question of fact about an agreement being entered into amongst parties.

In addition, the proposed amendments would clarify the circumstances when two or more persons have formed a group to include, among others, "tipper-tippee" relationships. Such relationship would form a group if a person shares nonpublic information about an upcoming Schedule 13D filing with another person, with the purpose of causing others to make purchases, who then subsequently purchases the issuer's securities based on such information.

However, the proposed amendments would provide certain exemptions that would permit investors to communicate with each other, communicate with the issuer and execute transactions without being subject to regulation as a group. These exemptions would apply when (i) investors communicate with one another or the issuer without the purpose or effect of changing or influencing control of the issuer and (ii) investors and financial institutions enter into agreements governing the terms of derivative securities.

Any comments regarding the proposed rules should be received on or before April 11, 2022.

Special Purpose Acquisition Companies, Shell Companies, and Projections

On March 30, 2022, the SEC proposed rules to further regulate special purpose acquisition companies ("SPACs") and shell companies, as well as enhance disclosure of projections in public filings. The proposed rules focus on:

1. new, enhanced disclosure requirements for SPACs;
2. aligning de-SPAC transactions with initial public offerings ("IPOs");
3. business combinations involving shell companies, such as SPACs, and related financial statement requirements;
4. projections in SEC filings; and
5. new safe harbor for SPACs under the Investment Company Act of 1940, as amended (the "Investment Company Act").

The SEC believes that these proposed rules will improve the usefulness and clarity of the information provided to investors and to enhance investor protections in both SPAC IPOs and de-SPAC transactions.

Background

Over the last few years, SPAC transaction activity boomed to unprecedented levels. At its peak, SPACs raised more than $160 billion in IPOs in 2021, with over 250 de-SPAC transactions announced in 2021. Last year, around the time that SPAC activity was at its highest level, the SEC started to publicize its interest in imposing regulations on SPACs. Within the last year, SPAC transaction activity has started to decrease and it is expected that with further regulation of SPACs by the SEC, such as these proposed rules, SPAC transaction activity will likely continue to slow down. The lone dissenting SEC Commissioner noted that these proposed rules seems designed to stop SPACs in their tracks.

Enhanced Disclosure Requirements for SPACs

The proposed rules would add a new Subpart 1600 to Regulation S-K adding disclosure of various items for SPACs, in particular, disclosure about a SPAC's sponsor, conflicts of interest and dilution. The proposed rules would require SPACs to disclose information about, among other things:

- their sponsor's, its affiliates' and any promoters' experience in organizing SPACs and the extent to which they are involved in other SPACs;
- their sponsor's, its affiliates' and any promoters' material roles and responsibilities in directing and managing the SPAC's activities;
- the nature and amount of compensation that has been or will be awarded, earned by, or paid to the SPAC sponsor, its affiliates and any promoters;
- any controlling persons and persons who have a direct and indirect material interest in the SPAC sponsor, including the nature and amount of their interests. An organizational chart would be required to show the relationships between the SPAC, the SPAC sponsor and the sponsor's affiliates;
- tabular disclosure of any material lock-up agreements;
- actual or potential material conflicts of interest, in particular, when determining whether to proceed with a de-SPAC transaction and the manner in which the SPAC compensates the SPAC sponsor, executive officers and directors, between (i) the sponsor or its affiliates, the SPAC's officers, directors or promoters and (ii) unaffiliated security holders;
- tabular dilution disclosure on the prospectus cover page of SPAC registration statements; and
- the timing of the SPAC transaction, sponsor compensation, dilution and conflicts of interests would be required to be disclosed on the prospectus cover page and in the prospectus summary.

Aligning De-SPAC Transactions with IPOs

When a SPAC undergoes a de-SPAC transaction, the SPAC files a registration statement on Form S-4 or F-4 with the SEC to register the issuance of the SPAC's shares that will be issued to the targets' equity owners at closing. Traditionally, only the SPAC would file the Form S-4 or F-4 as the registrant, however, the proposed rules would require the private operating company that is merging into the SPAC to be treated as a co-registrant when the SPAC files the Form S-4 or F-4 and as an "issuer" under Section 6(a) of the 1933 Act. This requirement would make the target company, its principal executive officer, principal financial officer, principal accounting officer and board of directors liable for any material misstatements or omissions in the registration statement, subject to a due diligence defense for all parties other than the SPAC and the target company.

Underwriters would also become subject to enhanced liability under the SEC's proposed rules. Proposed Rule 140a of the 1933 Act would provide that a person who has acted as an underwriter of the securities of a SPAC and takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction will be deemed to be engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction within the meaning of Section 2(a)(11) of the 1933 Act. This proposed rule would subject underwriters that are involved in the SPAC IPO to liability, subject to a due diligence defense, for material misstatements or omissions in the de-SPAC transaction registration statement.

To further level the playing field with traditional IPOs, the proposed rules would also amend the definition of a "blank check company" to eliminate the Private Securities Litigation Reform Act of 1995 ("PSLRA") safe harbor for forward-looking statements, such as projections, for filings by SPACs and certain other blank check companies. Traditionally, SPACs have used the PSLRA safe harbor in connection with listing projections in its de-SPAC transaction registration statement. However, this proposed rule would strip the safe harbor away, and likely lead to increased litigation with respect to the information provided in de-SPAC registration statements. The SEC noted that it sees no reason to treat forward-looking statements made in connection with de-SPAC transactions differently than forward-looking statements made in traditional IPOs, where projections are not typically used. The proposed rule would subject both SPAC sponsors and underwriters to increased potential liability when using projections in connection with a de-SPAC transaction.

Business Combinations Involving Shell Companies

The SEC noted in the proposed rules that when a reporting shell company, such as a SPAC, conducts a business combination with an entity that is not a shell company, the investors of the reporting shell company effectively exchange their securities in the reporting shell company for a new security representing an interest in the combined operating company. This structure typically leaves investors with less disclosure and fewer protections at the time of the business combination.

To provide greater protection to investors under this structure, the proposed rules add to Rule 145a of the 1933 Act that when a business combination occurs involving a reporting shell company with an entity that is not a shell company, such transaction would be deemed to constitute a sale of securities to the shareholders of the reporting shell company. Thus, the disclosure requirements and liability provisions under the 1933 Act would apply to the transaction.

The SEC emphasized in the proposed rules that proposed Rule 145a is narrowly drawn and business combinations between two bona fide non-shell entities would not be impacted. In addition, proposed Rule 145a would not apply to reporting shell companies that are definitional business combination related shell companies, as well as business combinations involving one shell company into another shell company.

Enhanced Projections

The SEC has been concerned with the reliability of projections that have been used in connection with de-SPAC transactions. The SEC notes in the proposed rules that there are concerns that projections used by the private operating company in a de-SPAC transaction may lack a reasonable basis, listing inflated revenue or market share projections even though some companies do not have any operations at the time such projection was prepared.

To address these concerns, the proposed rules would expand on the current requirements and would generally apply to all issuers, not just SPACs. The proposed rules would require, among other things, that any projections that are not based on historical financial results or operating history be clearly distinguished from projected measures that are based on historical financial results or operating history. In addition, projections that are based on historical measures and operating history would need to be presented with equal or greater prominence than those projections that are not based on financial results or operating history. Also, projections that include non-GAAP financial measures should clearly define or explain the financial measure, describe the GAAP financial measure to which it is most closely related, and then explain why the non-GAAP financial measure was used instead of a GAAP measure.

New Item 1609 of Regulation S-K, which would only apply to de-SPAC transactions, would require SPACs to disclose, among other things, the purpose for which financial projections were prepared, any material assumptions used for making the projections and whether the projections still reflect the view of the board or management of either the SPAC or the target company on the filing date.

Investment Company Act Safe Harbor

The proposed rules would add a new Rule 3a-10 to the Investment Company Act, which would provide a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act for a SPAC that satisfies each of the following:

- must maintain assets comprising solely cash items, government securities and government money market funds prior to the completion of the de-SPAC transaction;
- seeks to complete a de-SPAC transaction after which the surviving entity will be primarily engaged in the business of the target company, which business must not be that of an investment company, and the surviving entity must have at least one class of securities listed for trading on a national securities exchange;
- the activities of a SPAC's officers, directors and employees must be primarily focused on activities related to seeking a target company, and a SPAC's board of directors would need to adopt a resolution to evidence this business purpose; and
- must file a Current Report on Form 8-K announcing it has entered into a business combination within 18 months following its IPO and complete a business combination within 24 months following its IPO.

The SEC has made it clear that this proposed safe harbor is only intended to provide clarity for circumstances in which a SPAC will not be deemed to be an investment company. A SPAC that does not satisfy the conditions listed above will not automatically be an investment company; however, SPACs that do not satisfy the requirements should carefully assess whether the SPAC would otherwise constitute an investment company under the SEC's current rules.

Fairness Opinion

In addition, proposed Item 1606(a) of Regulation S-K would require a statement in a registration statement on Form S-4 and Form F-4, or Schedules 14A, 14C and TO that are filed in connection with a de-SPAC transaction, as to whether the SPAC reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to the SPAC's unaffiliated security holders. The SPAC would be required to discuss the material factors to explain its reasoning for such statement. The factors include, but are not limited to: (i) the valuation of the private operating company; (ii) the consideration of any financial projections; (iii) any report, opinion or appraisal obtained from a third party; and (iv) the dilutive effects of the de-SPAC transaction and any related financing transaction on non-redeeming shareholders. The proposed rule would not require SPACs to obtain a fairness opinion from a financial advisor, however, SPACs may seek fairness opinions to substantiate their "reasonable belief" as to the fairness of the transaction.

The comment period will remain open upon the later of (i) 30 days after the date the proposing release is published in the Federal Register or (ii) May 31, 2022.

Removal of References to Credit Ratings from Regulation M

On March 23, 2022, the SEC re-proposed amendments to remove the requirement that nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities be rated investment grade by at least one Nationally Recognized Statistical Rating Organization ("NRSRO") in order to be excepted from Regulation M. In place of NRSRO's investment grade rating requirement, the SEC is proposing to except nonconvertible debt securities and nonconvertible preferred securities of issuers having a probability of default of less than 0.055%, as measured over a certain period of time and as determined and documented using a "structural credit risk model." Asset-backed securities will be excepted from Regulation M if they are offered pursuant to an effective shelf registration statement filed on a Form SF-3. The SEC also proposed to eliminate the exception under Rule 102 entirely without replacement.

Prior Proposals to Remove References to Credit Ratings in Regulation M

Regulation M is designed to preserve the pricing integrity of securities trading markets by prohibiting issuers, selling security holders, distribution participants and any other affiliated purchasers from engaging in activities that could artificially influence the market for an offered security. Regulation M prohibits issuers and underwriters from bidding for, purchasing or inducing others to bid for or purchase "covered securities" during the applicable restricted period. The length of the applicable restricted period depends on the type of "covered securities." Currently, Rule 101(c)(2) and Rule 102(d)(2) contain an exception for nonconvertible debt securities, nonconvertible preferred securities and asset-backed securities that are rated investment grade by at least one NRSRO.

The SEC has previously proposed two rules with respect to amending NRSRO's rating but neither proposal was adopted. In the 2008 proposal, prior to the Dodd-Frank Act, the SEC proposed to eliminate the exception based on NRSRO's rating. In its place, the 2008 Proposal would have excepted nonconvertible securities of issuers that have issued at least $1 billion aggregate principal amount of nonconvertible securities in primary offerings for cash.

The proposal was not adopted as it was met with opposition from commenters who expressed that the proposal was not necessary and would place an undue burden on issuers and underwriters. In 2011, after the Dodd-Frank Act, the SEC issued a different proposal to amend Regulation M. The 2011 proposal introduced a standard based on the trading characteristics that the SEC believed made the exceptions in Regulation M apply to securities that were less prone to the type of manipulation that Regulation M seeks to prevent. However, similar to the 2008 proposal, the 2011 proposal was met with opposition from commenters and was not adopted.

Proposed Amendments to Rule 101 and 102 to Remove References to Credit

Rule 101

Under the refreshed 2022 proposal, for nonconvertible securities, the SEC proposes to replace the current exception relying on NRSRO's determination of creditworthiness with an exception that is based on a probability of default standard as an indicator of creditworthiness. Specifically, the SEC suggests to except nonconvertible securities of issuers having a probability of default less than 0.055%, as measured over a certain period of time and as determined and documented using "structural credit risk models." Under the proposed amendment to Rule 101, the probability of default less than 0.055% is estimated as of the day of the determination of the offering pricing and over the course of 12 calendar months from such day, as determined and documented in writing by the distribution participant using a structural credit risk model. The SEC believes that unlike the current exception which relies on NRSRO's rating and its assessment of creditworthiness, an exception based on probability of default arguably is more objective as it can be independently determined based on observable market events and information available on a firm's balance sheet. As for investment grade asset-backed securities, the SEC is proposing to replace the existing NRSRO exception with an exception for asset-backed securities that are offered pursuant to an effective shelf registration statement filed on Form SF-3.

In connection with the proposed amendments to Rule 101, the SEC is also proposing a recordkeeping requirement for broker-dealers. The proposed rule would require broker-dealers relying on the exception for non-convertible securities to preserve the written probability of default determination. This written probability of default determination must be kept for at least three years.

Rule 102

The SEC is proposing to amend Rule 102 by removing the existing exception for investment grade nonconvertible securities and asset-backed securities without a replacement. The SEC believes that the applicability of the exception under Rule 102 is limited. Given the limited applicability, along with the incentive for issuers, selling shareholders, and their affiliated purchasers to manipulate the market for the distributed security, the SEC believes that the existing exception should be eliminated.

Any comments regarding the proposed rules should be received on or before May 23, 2022.

Ninth Circuit Affirms Dismissal of Investor Class Action Against Twitter

On March 23, 2022, the Ninth Circuit affirmed the Northern District of California's dismissal of a class action complaint brought by several investors (collectively, "Plaintiffs") against Twitter, Inc. ("Twitter") and several of Twitter's senior management (collectively, "Defendants") for alleged violations of Section 10(b) and 20(a) of the Securities Exchange Act. Plaintiffs commenced the action in September 2019 based on allegations that Defendants failed to disclose that it had experienced a setback in resolving software bugs in Twitter's targeted advertising system and caused a decline in Twitter's advertising revenue. Plaintiffs claimed Twitter's disclosure the work was "ongoing" was materially misleading because investors would believe the work was on track. The District Court found Defendants' statements were puffery and/or forward looking statements accompanied by meaningful cautionary language.

First, the Ninth Circuit found that found that Twitter's statements were "qualified and factually true." Specifically, the panel noted that securities laws "do not require real-time business updates." Rather, as long as a company's statements are true and "do not paint a misleading picture" a company has complied with disclosure requirements. In analyzing Twitter's statement that the work to fix the bug was "continuing" and "ongoing," the panel disagreed with Plaintiffs interpretation that the statements meant the work was "on track." The panel found the statements "suggest a vaguely optimistic assessment that [the advertising system], like almost all product developments, has had its ups and down, even as the company continues to make progress." The panel also noted that Twitter had never provided a timeline or target completion date.

Second, the Ninth Circuit found Plaintiffs did not plead with particularity that the bugs disclosed in August had affected revenue in July. Plaintiffs made inferences that Twitter must have known about the bug in July only based on Twitter's statements in August. The panel found the inferences were unsupported and directly contradicted by Twitter's July and August statements. Twitter's July 10-Q contained a statement that it was continuing its work on the advertising system and another typical disclosure that the Twitter platform may have undetected software errors. In August, Twitter announced it recently discovered the bug. The panel found there were no allegations to support the inference that the Defendants must have known about the bug in July.

Finally, the Ninth Circuit agreed with the District Court that Twitter's statements were protected by the Act's safe harbor provision.

Weston Family Partnership LLP v. Twitter, 2022 WL 853252 (9th Cir. March 23, 2022) available at https://www.law360.com/articles/1476800/attachments/0.