Public Statement

Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies

Division of Corporation Finance

March 31, 2021

This staff statement[1] addresses certain accounting, financial reporting and governance issues that should be carefully considered before a private operating company undertakes a business combination[2] with a special purpose acquisition company (a "SPAC").

Shell Company Restrictions

As shell companies,[3] SPACs are subject to certain limitations that should be considered by the SPAC and the private companies engaging in business combinations with SPACs before undertaking in such a transaction.[4] These include:

- Financial statements for the acquired business must be filed within four business days of the completion of the business combination pursuant to Item 9.01(c) of Form 8-K. The registrant is not entitled to the 71-day extension of that Item;
- The combined company will not be eligible to incorporate Exchange Act reports, or proxy or information statements filed pursuant to Section 14 of the Exchange Act, by reference on Form S-1 until three years after the completion of the business combination;[5]
- The combined company will not be eligible to use Form S-8 for the registration of compensatory securities offerings until at least 60 calendar days after the combined company has filed current Form 10 information;[6] and
- The combined company will be an "ineligible issuer" under Securities Act Rule 405 for three years following the completion of the business combination, which has consequences during that period that include that the combined company:
    - cannot qualify as a well-known seasoned issuer;
    - may not use a free writing prospectus;[7]
    - may not use a term sheet free writing prospectus available to other ineligible issuers;[8]
    - may not conduct a roadshow that constitutes a free writing prospectus, including an electronic roadshow;[9] and
    - may not rely on the safe harbor of Rule 163A from Securities Act Section 5(c) for pre-filing communications.[10]

Books and Records and Internal Controls Requirements

Issuers with Exchange Act reporting obligations are subject to two requirements that are among the most important for effective and reliable financial information for investors and our markets. The first, often referred to as the "books and records" provision, requires issuers to maintain books, records, and accounts in reasonable detail that accurately and fairly reflect the issuer's transactions and dispositions of its assets.[11] The second, often referred to as the "internal controls" provision, requires that issuers must devise and

maintain a system of internal accounting controls sufficient to provide reasonable assurances about management's control, authority, and responsibility over the issuer's assets.[12]

Other fundamental requirements for effective and reliable financial reporting include management's responsibility to establish and maintain adequate internal control over financial reporting ("ICFR") and disclosure controls and procedures ("DCP").[13] Management is also required, except for its first annual report, to evaluate the effectiveness of the issuer's ICFR at the end of its fiscal year and disclose such assessment in the annual report.[14] Management must evaluate and disclose the effectiveness of DCP more frequently, quarterly for domestic issuers.[15]

These books and records and internal control requirements apply to SPACs before the business combination. These requirements generally also apply to the combined company after the business combination.[16] It is important for a SPAC and the private operating company to consider these requirements when planning for a business combination because the private operating company may not have prior experience, among other things, with the following:

- Annual or interim reporting;
- Application of SEC rules and disclosure requirements, including reporting deadlines, filer status and its impact on disclosure, predecessor determination, the form and content of financial statements, and when other entity financial statements and pro forma financial information are required by Regulation S-X; and
- Adoption of new accounting standards in the financial statements required in the business combination filing or the subsequent Form 8-K that are not yet effective for private companies.[17]

Upon consummation of the business combination, the combined company will need the necessary expertise, books and records, and internal controls to provide reasonable assurance of its timely and reliable financial reporting. A private operating company may have viewed the necessity for those capacities differently prior to the business combination, and may not be able to develop those capacities without advance planning and investment in resources.

Initial Listing Standards of National Securities Exchanges

If the SPAC is listed on a national securities exchange, such as the New York Stock Exchange LLC or The NASDAQ Stock Market LLC, in order to remain listed after the merger, the combined company must satisfy quantitative and qualitative initial listing standards upon consummation of the business combination,[18] which include certain corporate governance requirements.[19] A private company merging with a SPAC should consider how it will maintain a listing throughout and after the merger. Any material risks associated with delisting, such as the likelihood of the commencement of delisting proceedings by an exchange or the failure to maintain a listing, could trigger disclosure requirements for the combined company.

The quantitative standards are designed to ensure that a company has sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[20] A company seeking to list must meet minimum standards, such as the number of round lot holders, publicly held shares, market value of publicly held shares, and share price.[21] For example, if the SPAC lost round lot holders through redemptions prior to the business combination, the combined company should consider whether it would meet the round lot holder requirement upon consummation of the business combination.

The combined company also must meet qualitative standards regarding corporate governance, such as requirements regarding a majority independent board of directors, an independent audit committee consisting of directors with specialized experience, independent director oversight of executive compensation and the director nomination process, and a code of conduct applicable to all directors, officers, and employees.[22] There is a risk that a private operating company that has not prepared for an initial public offering and is quickly acquired by a SPAC may not have these elements in place in order to meet the listing standards at the time required. Advance planning may be necessary to identify, elect, and on-board a newly-constituted independent board and audit committee, and for them to adequately oversee the preparation and audit of the company's financial statements, books and records, and internal controls.

If the combined company fails to satisfy a listing standard or receives a notice regarding non-compliance from the national securities exchange, it will need to consider certain disclosure requirements. The combined company must file an Item 3.01 Form 8-K to report, among other things, receipt of the notice and any action or response that it has determined to take in response to the notice. Non-compliance with a listing standard may also present a material risk requiring disclosure under Item 105 of Regulation S-K.

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[1] The statement represents the views of the staff of the Division of Corporation Finance. It is not a rule, regulation, or statement of the Securities and Exchange Commission ("Commission"). The Commission has neither approved nor disapproved its content. This statement, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person. References herein to the "Securities Act" refer to the Securities Act of 1933 and references to the "Exchange Act" refer to the Securities Exchange Act of 1934.

[2] The term "business combination" in this statement relates to type of transaction and not the accounting for the transaction.

[3] Shell companies have no or nominal operations, and either no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets. *See* Securities Act Rule 405 and Exchange Act Rule 12b-2.

[4] These limitations do not apply to "business combination related shell companies"—that is, shell companies that are used in certain change of domicile or business combination transactions. *See* Securities Act Rule 405 and Exchange Act Rule 12b-2. However, any exceptions to the Commission's shell company limitations designed for business combination related shell companies do not apply to SPACs and any shell company formed to facilitate a merger with a SPAC. Neither a SPAC nor any such entity formed to facilitate a merger with a SPAC meets the definition of a business combination related shell company because neither of these entities is a shell company formed solely for the purpose of changing the corporate domicile solely within the United States or formed solely for the purpose of completing a business combination transaction among one or more entities other than the shell company, none of which is a shell company.

[5] *See* General Instruction VII.D.1(b) to Form S-1.

[6] *See* General Instruction A.1 to Form S-8.

[7] *See* Securities Act Rule 164(e)(1).

[8] *See* Rule 164(e)(2).

[9] *See* Rule 433(a)-(b).

[10] *See* Securities Act Rule 163A(b)(3)(ii).

[11] *See* Section 13(b)(2)(A) of the Exchange Act.

[12] Section 13(b)(2)(B) of the Exchange Act requires that the internal accounting controls are sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

[13] *See* Section 404(a) of the Sarbanes Oxley Act of 2002, and Exchange Act Rules 13a-15 and 15d-15.

[14] *See* Exchange Act Rules 13a-15 and 15d-15 and Item 308 of Regulation S-K.

[15] *See* Exchange Act Rules 13a-15 and 15d-15 and Item 308 of Regulation S-K.

[16] In some instances, management of the combined company may be unable to assess internal control over financial reporting in the fiscal year in which the transaction was consummated. In those instances, the staff

would not object if the combined company were to exclude management's assessment of internal control over financial reporting in the Form 10-K covering the fiscal year in which the transaction was consummated. For a discussion of those limited circumstances, *see* Compliance and Disclosure Interpretation for Regulation S-K, Question 215.02.

[17] For example, the adoption date of the new U.S. GAAP lease accounting standard is January 1, 2022 for a private calendar year-end company. In contrast, the adoption date for calendar year-end issuers that are not emerging growth companies was January 1, 2019. *See* FASB ASU 2020-05 – *Revenue from Contracts with Customers (Topic 606) and Leases (Topic 842): Effective Dates for Certain Entities*. A private company that applies U.S. GAAP and has revenue over $1.07 billion for its most recently completed fiscal year may be required to adopt the new lease standard in the financial statements included in the business combination filings.

[18] *See* NYSE Listed Company Manual Sections 102, 802.01,and Section 3; Corporate Responsibility as well as Nasdaq Rule 5300, 5400 or 5500 Series and Rule 5600 Series; Corporate Governance Requirements.

[19] *See, e.g.*, Release No. 34-90995 (stating that "all initial listing requirements apply to the combined company upon consummation of a business combination . . .")

[20] *See id.* at 5-6 and accompanying footnotes.

[21] *See* NYSE Listed Company Manual Sections 102.01A, 802.01 and, for example, for the Nasdaq Global Select Market, Nasdaq Rule 5315(e), (f)(1), (f)(2).

[22] NYSE Listed Company Manual Sections 303A.01, 303A.04-.07, 303A.10; Nasdaq Rules 5605(b)(1), (c)(2), (d), (e)(1); Nasdaq Rule 5610.