



**ICGN**

International Corporate Governance Network  
*Inspiring good governance & stewardship*

Vanessa A. Countryman, Secretary  
100 F Street, NE  
Securities and Exchange Commission  
Washington, DC 20549-1090

Via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

June 13<sup>th</sup>, 2022

Dear Secretary Countryman,

**Re: S7-13-22, Special Purpose Acquisition Companies, Shell Companies, and Projections, [Proposed rule: Special Purpose Acquisition Companies, Shell Companies, and Projections \(sec.gov\)](#)**

The International Corporate Governance Network (ICGN) welcomes the Securities and Exchange Commission's (SEC) consultation and request for comment on the proposed rule related to Special Purpose Acquisition Companies, Shell Companies and Projections.

Led by investors responsible for assets under management of around \$70 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Headquartered in London, our membership is based in over 40 countries, with 23% based in the USA, and includes companies, advisors, and other stakeholders. ICGN offers an important international investor perspective on corporate governance and investor stewardship to help inform public policy development and the encouragement of good practices by capital market participants. For more information on the ICGN, please visit [www.icgn.org](http://www.icgn.org).

ICGN has two seminal policy documents that provide the basis for our comments to the themes and draft language identified in the Proposal. The ICGN Global Governance Principles (ICGN GGP)<sup>1</sup> and the ICGN Global Stewardship Principles (ICGN GSP)<sup>2</sup> set out best practices in relation to governance and stewardship obligations. Both documents form the core foundation of ICGN's policy framework and embody ICGN's mission to advance the highest standards of corporate governance and investor stewardship worldwide in pursuit of long-term value creation, contributing to healthy and sustainable economies, society, and the environment.

ICGN has noted the rise in the use of special purpose acquisition companies ("SPACs") in the past two years as an alternative mechanism for initial public offerings ("IPOs"). We also note that SPACs bring both opportunities and risks to investors, and that these risks are not equally

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<sup>1</sup> [ICGN Global Governance Principles | ICGN](#) (2021)

<sup>2</sup> [ICGN Global Stewardship Principles 2020](#) (2020)

shared between a SPAC sponsor and underlying investors. The sponsor in many cases stands to gain even when the underlying investors do not.<sup>3</sup>

ICGN appreciates this review by the SEC to ensure that investors receive the information they need to make informed and responsible investment decisions in relation to SPACs. The business transactions utilized by SPACs, the sponsors behind the transactions and private operating companies should be subject to appropriate disclosure requirements for investors to adequately evaluate their investments in these enterprises or make a decision not to invest.

Additionally, documentation on de-SPAC transaction dealings may not be readily available and therefore, should be subject to additional disclosures to investors to make appropriate investment or redemption decisions. Finally, the disclosure around conflicts of interest from sponsors, compensation paid to sponsors and related parties, dilution concerns and clear voting analyses are also critical components for investor decision-making.

We join the SEC in its view that “greater transparency and more robust investor protections could assist investors in evaluating and making investment, voting, and redemption decisions with respect to these transactions.”<sup>4</sup> As an investor-led organisation, we support the SEC’s effort to strengthen investor confidence in the markets, whatever the latest investment trend might be. As Chair Gary Gensler stated, upon the SEC’s consideration of the proposed rule, the adoption could help “ensure that investors in these vehicles get protections similar to those when investing in traditional initial public offerings (IPOs)”.<sup>5</sup>

Research into SPACs during 2019-2021 indicates that, all too often, SPAC costs are not born by the companies they take public but by the SPAC shareholders, who hold the shares by the time the SPACs merge.<sup>6</sup> These include steep post-merger losses by contract with the SPAC sponsors’ profits. ICGN is concerned that the losses that non-redeeming SPAC shareholders have incurred suggest that relevant and material information is not being provided with the necessary transparency. The information provided should cover the SPACs pre-merger cash per share and the terms of the private investment in public equity (PIPE) investments.

Our response is divided into the categories within the proposed rule of most importance to ICGN members. As the predominant sources to our comments, ICGN has referred to the ICGN Global Governance Principles, Global Stewardship Principles, , and the ICGN Guidance on Investor Fiduciary Duties.<sup>7</sup> ICGN adopted the Global Stewardship Principles, (“ICGN GSP”), to provide a framework for investors to implement stewardship practices<sup>8</sup> in fulfilling their fiduciary obligations to beneficiaries or clients. As investors consider complex investment strategies,<sup>9</sup> which may include IPOs and SPACs, they need adequate disclosures to determine whether the

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<sup>3</sup> [A Sober Look at SPACs \(harvard.edu\)](#), by Michael Klausner, Nancy and Charles Munger Professor of Business and Professor of Law at Stanford Law School; Michael Ohlrogge, Assistant Professor of Law at NYU School of Law; and Emily Ruan of Stanford University, November 19, 2020.

<sup>4</sup> [SEC Proposed Rule](#), p. 17.

<sup>5</sup> [Statement on Proposal on Special Purpose Acquisition Companies \(SPACs\), Shell Companies, and Projections, Chair Gary Gensler, SEC](#), March 30, 2022.

<sup>6</sup> Philip Braun, Forbes, December 31, 2021.

<sup>7</sup> [ICGN Guidance on Investor Fiduciary Duties](#)

<sup>8</sup> In the Preamble, ICGN stated “stewardship enhances overall financial market stability and economic growth, and, by focusing on long-term value creation, stewardship is directly linked to sustainable benefits for the economy, environment, and society”.

<sup>9</sup> The ICGN GSP provide that “the broad principles of stewardship are relevant to other classes, including corporate and public sector debt, private equity, real estate, and infrastructure”. [ICGN Global Stewardship Principles 2020](#), p. 7.

investments meet their due diligence requirements. The ICGN Guidance on Investor Fiduciary Duties was adopted by the membership in 2018 and provides an “investor perspective of how fiduciary duties and responsibilities take shape when applied to the management of financial assets.”<sup>10</sup>

### **New Subpart 1600 of Regulation S-K**

***In new Subpart 1600, the SEC has proposed to, among other things:***

- ***Require additional disclosures about the sponsor of the SPAC, potential conflicts of interest, and dilution;*** (Questions 7-14, 15-19, 20-25)
- ***Require additional disclosures on de-SPAC transactions, including a requirement that the SPAC state (1) whether it reasonably believes that the de-SPAC transaction and any related financing transaction are fair or unfair to investors, and (2) whether it has received any outside report, opinion, or appraisal relating to the fairness of the transaction; and*** (Questions 26-30)
- ***Require certain disclosures on the prospectus cover page and in the prospectus summary of registration statements filed in connection with SPAC initial public offerings and de-SPAC transactions.*** (Questions 31-35)

ICGN supports the inclusion of new Subpart 1600 to require additional disclosures about the sponsors of a SPAC transaction, the potential conflicts of interest, and concerns on dilution. As the SEC clarified in an Updated Investor Bulletin, “If you invest in a SPAC at the IPO stage, you are relying on the management team that formed the SPAC, often referred to as the *sponsor(s)*, as the SPAC looks to acquire or combine with an operating company.”<sup>11</sup> The disclosure should include the sponsor’s affiliates and promoters of the SPAC, as proposed. Adequate disclosure is one of the most important aspects of any financial transaction, which should be a *quid-pro-quo*, where both parties know what they are receiving in an arm’s length transaction.

As proposed, it would be important for investors for the SEC to require disclosure about the “experience and material roles and responsibilities of the sponsor, its affiliates and any promoters of the SPAC in directing and managing the SPAC’s activities”. Investors have their own due diligence reviews, part of which is to consider the relevant experience and responsibilities of individuals that are part of any investment strategy. Potential conflicts of interest are more easily identified if all the affiliates and involved parties are disclosed. ICGN believes that disclosures should include the names of all sponsors and their financial arrangements with SPACs, whether or not the sponsors will act as advisers to proposed or later identified targets, and information on the nature of the claims the investors have on the SPAC if no de-SPAC transaction takes place during the two year period (or the period of time before a de-SPAC specified by its governing instruments) or if they choose to exit before the de-SPAC is completed, accepting the pro-rata amount of the initial public offering. ICGN believes that the latter needs to be specified in the final rule.

This is why investors need disclosure on the sponsors and any potential conflicts of interest. If a management team is forming the SPAC, the members will have their own motivations and financial interests. The transaction creating the public company may not come until a year or up

<sup>10</sup> [ICGN Guidance on Investor Fiduciary Duties](#), Preamble, p. 3.

<sup>11</sup> [SEC.gov | What You Need to Know About SPACs – Updated Investor Bulletin](#), May 25, 2021.

to two years later, without the same financial practices required by a private company as it advances to the IPO stage. It is important for investors to know the equity interests of each sponsor and how their ownership impacts the ability of investors to vote on the SPAC business transaction. If, however, the sponsors have locked in enough voting interest to approve the transaction, the remaining investors will have limited ability to impact the transaction and may wish to redeem their shares. Such cases should require some form of labeling so that investors are aware of these risks. Sponsors may be eligible for more favorable terms in the transaction. Investors should be able to evaluate whether the less favorable terms are still in line with their own investment strategy.

ICGN has followed the case, *In Re Multiplan Corp. Stockholders Litigation*, filed in the Court of Chancery in the state of Delaware, in 2021. According to a summary of the case, the decision on the Motion to Dismiss, issued on January 3, 2022, is the first time that “Delaware courts have applied fiduciary duty principles in the SPAC context. Second, the opinion touches on multiple topics, including conflicts of interest, disclosure, and the legal standard to be used for SPAC-related cases”.<sup>12</sup> Vice Chancellor Will determined that conflicts of interest existed in this case among the SPAC, its CEO and Chairman, and his affiliate. It was clear that the SPAC board selected a financial advisor that compounded the conflicts in the related transaction. According to the summary, these “interrelations led Vice Chancellor Will to conclude that the less defendant-friendly “entire fairness standard” rather than the more common “business judgement rule” standard should be applied in this case.”<sup>13</sup> This case may provide future plaintiffs with grounds to sue on conflicts of interest. Therefore, the SEC’s effort to require additional disclosures may be quite timely.

According to a study from Stanford University and the New York School of Law, dilution is “inherent in the SPAC structure”.<sup>14</sup> SPAC sponsors may compensate themselves with shares, may offer premium returns on shares to attract investors to lock up their investment for up to two years and pay the underwriting fee out of the IPO proceeds, even if shares are redeemed.<sup>15</sup> It is incumbent on investors to know the sum total of their interest, as shares or cash, during and after the transaction. Dilution may not be avoidable in this type of transaction and if so, some investors may wish to invest later or not at all. Nevertheless, the potential dilution should be disclosed.

The details of de-SPAC transactions, in which a company goes public by merging with a SPAC, should be reflected in updated disclosures, which may need to be reflected in any financing and prospectus documents to provide robust disclosure to investors. The SEC’s consideration whether the de-SPAC transaction is “fair” to investors, calls for enough information to be available for investors to discern whether the transaction is fair or not, and act accordingly. If the transaction will retain preferred stock for sponsors and/or early investors, this could come at the expense of other investors who may only receive common stock that is not on par value, thereby marginalising minority shareholder positions. Investors should be able to determine

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<sup>12</sup> American Bar Association, [https://www.americanbar.org/groups/business\\_law/publications/blt/2022/03/spacs-in-choppy-water-multiplan-litigation-from-the-d-o-insurance](https://www.americanbar.org/groups/business_law/publications/blt/2022/03/spacs-in-choppy-water-multiplan-litigation-from-the-d-o-insurance) March 18, 2022. See full opinion, [here](#)

<sup>13</sup> Ibid.

<sup>14</sup> [A Sober Look at SPACs \(harvard.edu\)](#), by Michael Klausner, Nancy and Charles Munger Professor of Business and Professor of Law at Stanford Law School; Michael Ohlrogge, Assistant Professor of Law at NYU School of Law; and Emily Ruan of Stanford University, November 19, 2020.

<sup>15</sup> Ibid.

whether any statutory appraisal rights remain in the de-SPAC transaction, too. Any side letters, voting agreements and special terms should be disclosed to investors. Clearly when the purpose of a SPAC is so similar to an IPO this should be the standard. The process described in Section III; “Aligning De-SPAC Transactions with Initial Public Offerings” is supported by ICGN.<sup>16</sup>

## **De-SPAC Transactions**

***In addition, in view of the increasing number of private companies using de-SPAC transactions to become publicly traded reporting companies, we are proposing amendments to provide procedural protections and to align the disclosures provided, as well as the legal obligations of companies, in de-SPAC transactions more closely with those in traditional initial public offerings. (Questions 36-42, 43-45)***

In our review of the proposed rule, ICGN supports the de-SPAC transaction disclosure because it requires that corporate documents, including registration statements, be amended to disclose information to investors prior to the shareholder meeting or within the timeline set under the laws of the jurisdiction in which the incorporation will occur.

In the initial offering by a SPAC, when the shell company seeks to raise the funds to finance all, but usually only a part, of its hoped-for-acquisition of a yet-to-be-named target, then certain disclosures are necessary. Investors need to know about the sponsors and their financial arrangements, the procedural protections of SPACs, and what kind of returns the SPAC is likely to develop without a de-SPAC transaction or for those who decide to exit before the transaction; for example, does an investor get the original investment back or not?

In particular, ICGN would like to see the definition of “blank check company” amended to include SPACs and other companies under the Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>17</sup>. Given the growth of SPAC and de-SPAC transactions, in the past few years, the ability for these entities to limit their use of the safe harbor provisions under the PSLRA for forward-looking statements should be revised.

## **Structured Data Requirement**

***We are proposing to require SPACs to tag all information disclosed pursuant to Subpart 1600 of Regulation S-K in a structured, machine-readable data language. Specifically, we are proposing to require SPACs to tag the disclosures required under Subpart 1600 in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual. The proposed requirements would include detail tagging of the quantitative disclosures and block text tagging of the narrative disclosures that would be required under Subpart 1600. (Questions 51-55)***

As mentioned in our previous SEC comment letters, ICGN supports the proposed requirement to tag all information to be disclosed in Subpart 1600 of Regulation S-K. Tagging the quantitative and narrative disclosures would provide investors with searchable formats to access the information they would like to review, including potential conflicts of interests and

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<sup>16</sup> [Special Purpose Acquisition Companies, Shell Companies, and Projections \(Conformed to Federal Register version\) \(sec.gov\)](#), p. 64.

<sup>17</sup> The Private Securities Litigation and Reform Act of 1995, “PSLRA”, [H.R.1058 - 104th Congress \(1995-1996\): Private Securities Litigation Reform Act of 1995 | Congress.gov | Library of Congress](#)

potential risks. The proposed rule should increase the searchability of SPAC initial public offering disclosures, which are of interest to investors as they seek ways to invest in the IPO market.

The SEC has already required tagging through Inline XBRL in several other proposed and final rules. The use of Inline XBRL provides both machine-readable and human-readable filings which benefit investors, and ultimately companies, as they search the filings of peers or competitors. There does not seem to be a compelling reason that these requirements should offer exemptions or different requirements for foreign private issuers, smaller reporting companies, or emerging growth companies.

## Proxy Statement Distribution

***We are proposing to amend Exchange Act Rules 14a-6 and 14c-2, as well as to add instructions to Forms S-4 and F-4, to require that prospectuses and proxy and information statements filed in connection with de-SPAC transactions be distributed to shareholders at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the applicable laws of the SPAC's jurisdiction of incorporation or organization if such period is less than 20 calendar days.*** (Questions 61-64)

ICGN realises that the entire lifespan of a created SPAC is to complete a de-SPAC transaction within a designated time frame. For investors, after a SPAC has searched for a potential business candidate for up to two years, time may be running out. Investors should be able to receive proxy and prospectus statements within a reasonable time frame that provides them with the ability to assess the de-SPAC business transaction and vote accordingly.

The SEC has proposed that all proxy and information statements be distributed at least 20 calendar days in advance of a shareholder meeting. In the ICGN GGP, ICGN has recommended that a “board should ensure that the meeting agenda is posted on the company’s website at least one month prior to the meeting taking place” and that information is made “available to investors in a timely fashion to allow them to prepare for the meeting.”<sup>18</sup> We understand that it is up to each jurisdiction of incorporation to determine the dissemination period. Investors need time to review the materials and adequate time to approve or disapprove of the transaction.

## Underwriters

***Underwriters play a critical role in the securities offering process as gatekeepers to the public markets. In light of this important role, we are proposing a new rule, Securities Act Rule 140a, that would deem anyone who has acted as an underwriter of the securities of a SPAC and takes steps to facilitate a de-SPAC transaction, or any related financing transaction or otherwise participates (directly or indirectly) in the de-SPAC transaction to be engaged in a distribution and to be an underwriter in the de-SPAC transaction. By affirming the underwriter status of SPAC IPO underwriters in connection with de-SPAC transactions, the proposed rule should better motivate SPAC underwriters to exercise***

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<sup>18</sup> [ICGN Global Governance Principles 2021](#), Principle 10. Shareholder meetings, 10.3. Meeting Notice, p. 36.

***the care necessary to ensure the accuracy of the disclosure in these transactions by affirming that they are subject to Section 11 liability for that information.***

***Due to the significant increase in the use of reporting shell company business combination transactions as a means to enter the U.S. capital markets, and in an effort to provide reporting shell company shareholders with more consistent Securities Act protections regardless of transaction structure, we are proposing to add new Rule 145a that would deem any business combination of a reporting shell company, involving another entity that is not a shell company, to involve a sale of securities to the reporting shell company's shareholders.*** (Questions 82-90)

ICGN supports the inclusion of these provisions. The utilisation of SPAC and de-SPAC transactions to enter the capital markets should not put investors at a disadvantage due to the lack of full knowledge of the circumstances involved in those investments. Underwriters play a critical role in the initial securities offering phase, so much so that investors need to understand the underwriter's role in the SPAC and de-SPAC transactions, if involved in both. The potential to limit the liability of underwriters for their review of SPAC or de-SPAC transactions, could mean that investors are assuming more of the risk should an issue occur. Underwriters should be required to disclose any work undertaken for sponsors and any transaction that could be considered a conflict of interest.

The SEC's proposed rules provide what is needed for de-SPAC transactions to address this liability for investors. It says, "De-SPAC transactions also often lack named underwriters that perform due diligence and other traditional gatekeeping functions, and it may be more difficult for investors to trace their purchases to the registered de-SPAC transactions for the purposes of a Section 11 claim for material misstatements or omissions in de-SPAC disclosure documents."<sup>19</sup> We agree.

Interestingly enough, the list of the top SPAC underwriters is a Who's Who of financial institutions that already have a sizeable market share of business in the non-SPAC space.<sup>20</sup> The disclosure of an underwriter's involvement in SPAC and de-SPAC transactions, the fees charged for underwriting, revenue anticipated pre- and post-IPO, and the extent of the underwriting, will provide investors with necessary information. Requiring underwriters to carry their role forward from the SPAC to de-SPAC transaction phases, could be a necessary deterrent to ensure due care and accuracy by underwriters. If not, then another underwriter would need to be brought in, which could also require other underwriters, bringing a lack of continuity to the process and potentially creating higher fees. This requirement will also compel any potential underwriter for an initial SPAC transaction to consider whether it wants to be involved with the de-SPAC side of the underwriting responsibility.

With respect to the proposal to add a new Rule 145a, with the purpose to deem "any business combination of a reporting shell company, involving another entity that is not a shell company, to involve a sale of securities to the reporting shell company's shareholders", ICGN is supportive. Otherwise, the other entity's shareholder base could be harmed without being able to vote on the sale. We also suggest that the SEC include language in the new Rule 145a that this is a "disposition of a security or interest in a security...for value." Registration in this context would

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<sup>19</sup> [Special Purpose Acquisition Companies, Shell Companies, and Projections \(Conformed to Federal Register version\) \(sec.gov\)](#), p. 119.

<sup>20</sup> [Top underwriters by SPAC IPO volume worldwide 2021 | Statista](#), September 22, 2021.

result in enhanced liabilities for signatories to any registration and underwriter liability, but would also apply to experts such as accountants, engineers, appraisers, etc. and so increase protections for investors by providing them with fair and reliable information.

### **New Article 15 of Regulation S-X**

***Further, we are proposing new Article 15 of Regulation S-X, as well as related amendments, to more closely align the financial statement reporting requirements in business combinations involving a shell company and a private operating company with those in traditional initial public offerings. This is consistent with our view that the manner in which a company goes public should not generally result in substantially different financial statement disclosures being provided to investors.*** (Questions 103-109)

ICGN supports the new Article 15 in Regulation S-X, to level the playing field for investors whether they are investing in a traditional IPO or SPAC that ultimately morphs into a public company by virtue of a separate transaction or de-SPAC event. The required explanation referring to the use of GAAP or non-GAAP financial measures in the presentation of financial projections is important and we appreciate its inclusion.

According to a report by Audit Analytics, it noticed the beginning of restatement activity in companies created through the SPAC process, in slightly heightened numbers in 2021 than through traditional IPO offerings. The report stated:

The companies with warnings amount to more than 10% of the 232 companies that listed through SPACs in that period. That percentage is roughly double that for companies that listed through more-traditional initial public offerings. The count excludes hundreds of IPOs by blank-check companies—SPACs before they merge with a private company—which often carry going-concern notices of their own.<sup>21</sup>

For investors, restatements can be a cause for concern. Of course, it depends on the circumstances surrounding the restatement and the need to ensure that the revised disclosure is not related to a misstatement or fraudulent reporting event. Financial statement disclosures should be required throughout the lifetime of a public company and the genesis of a company, whether from a traditional IPO or a SPAC-related transaction, should be substantially similar for investors.

### **Projections Disclosure in de-SPAC Transactions**

***We are also proposing amendments intended to enhance the reliability of projections disclosure in Commission filings, as well as additional requirements when projections are disclosed in connection with de-SPAC transactions. The proposed amendments to Item 10(b) of Regulation S-K would address broader concerns regarding the use of projections generally, while proposed Item 1609 of Regulation S-K would address concerns specific to de-SPAC transactions.*** (Questions 110-118)

As the SEC pointed out in the proposed rule, “Disclosure of financial projections is not expressly required by the federal securities laws; however, there are various reasons why registrants

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<sup>21</sup> [What happened with financial restatements in 2021? – Cooley PubCo](#), May 25, 2022.

produce and disclose such information.”<sup>22</sup> ICGN recognizes that SPACs and the resulting de-SPAC companies will not have the customary business transaction history that more traditional IPOs will have. Investors will need to understand how any resulting projections have been calculated, even with limited information. Investors will generally review projections that are available to determine the terms of the investment and whether any conditions have been added. If a SPAC has targeted a company and will be utilizing a de-SPAC transaction, the sponsors should provide information to investors to assist in their review of the risks involved.

As these amendments stand, ICGN believes that the SEC should add additional language here. First, it should be made entirely clear to which company the projections apply and in this context, it is the target company, which is the most relevant from the investors’ point of view. The accompanying statements should make it clear that the statements apply to the target company, which might be a start-up. For the benefit of investors, it should be clear that registration statement is made by the acquiring company.

Secondly, any conflict of interest between the SPAC and the target company should be made clear to investors, if, for example, the sponsors of the SPAC are also advisers or have any other role or responsibility for the target company. The projections should be made by relevant independent experts who, as made clear in the proposed rule changes are liable for the projections they provide. Not only is the point about making it clear whether the projections are based on historical financial results or operational history an important step but that it not sufficient on its own. Projections that are based on historical measures and operating history must be presented in the filing with equal or greater prominence. The projection should also include an explanation about the way in which such information has been used to assess the company’s potential.

The additional requirements under the proposed Item 1609 are clearly vital given the history of SPACs in 2020 and 2021. These refer mainly to the motivations for the projections.

ICGN recommends that an addition to the proposed rule in this section should include the warning that “past performance is no guarantee that future performance will be the same”.

We also suggest the addition of language in the proposed rule that if a registrant does not have a history of operations for the basis of projections, then it is possible to acquire an outside review of the projections as support for the “reasonable” projections. If the report of such an outside review is to be included in the registration, then this would have to include specified disclosures about the reviewer and how the report was obtained. The reviewer would have to be considered an expert and their consent to being an expert in a registration statement would have to be obtained and filed as an exhibit. This is another protection for investors.

In Item 1604(b) of Regulation S-K, ICGN appreciates that in addition to strengthening the basis of projections, the SEC is proposing requirements for the statement of fairness, including a statement of whether the SPAC reasonably believes that the de-SPAC transaction is fair or unfair to unaffiliated security holders. In this regard, the SPAC or its sponsor should receive a report, opinion, or appraisal from an outside party regarding the fairness of the transaction. The

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<sup>22</sup> [Special Purpose Acquisition Companies, Shell Companies, and Projections \(Conformed to Federal Register version\) \(sec.gov\)](#), p. 127.

SPAC would also have to discuss in reasonable detail, the factors on which it relied in making a fairness determination.

### **Safe Harbor Under the Investment Company Act**

***We are concerned that SPACs may fail to recognize when their activities raise the investor protection concerns addressed by the Investment Company Act. To assist SPACs in focusing on, and appreciating, when they may be subject to investment company regulation, we are proposing a new safe harbor under the Investment Company Act. The proposed rule would provide a safe harbor from the definition of “investment company” under Section 3(a)(1)(A) of the Investment Company Act for SPACs that satisfy certain conditions that limit a SPAC’s duration, asset composition, business purpose and activities.*** (Questions 119-128)

ICGN understands the need for certain safe harbor provisions which protect companies from liability for forward-looking statements under the Securities Exchange Act and Securities Act, as long as they are described as such and disclosed accordingly. It appears that the SEC is attempting to clarify when a SPAC will be considered an investment company or not. Given that neither IPOs nor blank check companies may avail themselves of the safe harbor, it appears that the proposal includes SPACs in the definition. The situation with de-SPAC transactions is more problematic. How an underwriter or parties to the transaction are able to disclose projections for investors without reliance on a safe harbor is unknown. However, we are aware that there are opinions that they do not expect that “the absence of the safe harbor will have a substantial impact on current market disclosure practices”.<sup>23</sup>

The first point to note is that it is believed that the Private Securities Litigation Reform Act (PSLRA) provides a ‘safe harbor’ for SPACs but not for IPOs. The safe harbor provision means that with the right kind of cautionary language, a company making a forward-looking statement without actual knowledge that it is false will not be held liable in a private action brought under securities laws. Projections are quite common in SPACs’ investor protections. Rather than consider why such a belief may have been held, it is simpler to clarify what information should be provided by SPACs in connection with de-SPAC transactions.

ICGN would suggest to the SEC that rather than pursue the issue whether SPACs are investment companies during the period in which they are seeking a target, it is much better to set out the regulations and clarify the liabilities involved in a SPAC. The proposed definition of a SPAC as a “company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person”, noting that there is no reason for treating forward-looking statement made by SPACs differently from IPOs. The statutory safe harbor for PSLRA would clearly not apply to SPACs.

Thank you for the opportunity to comment on the proposed rule, which provides protection for investors and does not appear to be burdensome in the continued facilitation of SPAC and de-SPAC transactions.

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<sup>23</sup> [SPACs Remain in the SEC’s Crosshairs \(harvard.edu\)](#), [SPACs Remain in the SEC’s Crosshairs](#) Posted by Derek Dostal, Pedro J. Bermeo, and Lee Hochbaum, Davis Polk & Wardwell LLP, on Sunday, April 24, 2022.

While there may be concerns, the proposed rule provides the necessary protections for investors, while preserving some of the flexibility that has caused SPACs to flourish. If you would like to follow up with questions or comments, please contact me or Carol Nolan Drake, ICGN Governance and Stewardship Policy Manager: [carol.nolandrake@icgn.org](mailto:carol.nolandrake@icgn.org)

Yours faithfully,



**Kerrie Waring**

**Chief Executive Officer, ICGN**

CC: George Dallas, ICGN Policy Director  
Catherine McCall, Chair of the ICGN Global Stewardship Committee  
Dr. Oonagh McDonald, CBE, Member of the ICGN Global Governance Committee