THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 57 No. 14 August 21, 2024

FPIs IN SPAC LAND – CONSIDERATIONS FOR FOREIGN PRIVATE ISSUERS IN CONNECTION WITH SPACs

Special Purpose Acquisition Companies that are Foreign Private Issuers or acquire Foreign Private Issuers should be mindful of new SEC rules, especially SEC Guidance on timing of Foreign Private Issuer status.

By Paul M. Dudek *

In recent years, and particularly throughout 2020, 2021, and the first half of 2022, the number and dollar amount of initial public offerings ("IPOs") by special purpose acquisition companies ("SPACs") and business combination transactions involving SPACs and private target operating companies increased markedly. Subsequently, in response to asserted concerns relating to the adequacy of disclosures and other investor protection matters relating to SPACs, the US Securities and Exchange Commission adopted a comprehensive set of disclosure, procedural, and financial statement mandates affecting both SPAC IPOs and so-called deSPAC transactions on January 24, 2024.[1] These rules became effective on July 1, 2024, after which compliance is required for all filings scoped in under the new rules, regardless of whether a particular transaction document was previously filed with the SEC prior to that effective date.

Foreign private issuers ("FPIs") are a meaningful part of the SPAC universe: FPIs can be SPACs, the private operating business that is the subject of a deSPAC transaction and the resulting SEC-registered entity after the deSPAC transaction.[2] This article discusses how FPIs have historically navigated SEC rules relating to SPACs and how the SEC's new rules specifically impact FPIs.[3]

[1] Special Purpose Acquisition Companies, Shell Companies and Projections, Rel. No. 33-11265 (2024).

[2] An FPI is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States. Rule 405 under the Securities Act of 1933 and Rule 3b-4(c) under the Securities Exchange Act of 1934. In its adopting release, the SEC noted that non-US corporations, especially from the Cayman Islands and Marshall Islands, are involved in some facet of the SPAC lifecycle and represent a significant percentage of SPAC entities.

[3] Other recent SEC rules affecting FPIs are discussed in "The Unique Impact of Recent SEC Rules on Foreign Private Issuers," by the author, 56 Rev. of Securities & Compliance Reg'n 227 (Sept 27, 2023).

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RSCR Publications LLC Published 22 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $1,197 per year in U.S., Canada, and Mexico; $1,262 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call 609-683-4450; fax 609-683-7291; write Subscriber Services, RSCR Publications, PO Box 585, Kingston NJ 08528; e-mail cri.customer.service@comcast.net; or visit our website at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail sarah.s.himmelfarb@gmail.com. To submit a manuscript for publication contact Ms. Himmelfarb.

THE SPAC LIFECYCLE – FROM IPO TO deSPAC TRANSACTION

A SPAC can be broadly characterized as a publicly listed company that has undertaken its IPO with no or minimal operations and whose business purpose is to acquire a private target operating company within a certain timeframe. That acquisition, referred to as a deSPAC transaction, results in the target company becoming publicly listed and, colloquially speaking, stepping into the shoes of the SPAC. A deSPAC transaction has many facets, with elements of a traditional IPO and elements of a traditional corporate acquisition. Several alternative transaction structures may be used to carry out a deSPAC transaction, often depending on tax or other regulatory considerations. Three common transaction structures are:

- *SPAC as acquiror.* The SPAC acquires all of the shares of the private target, which could be affected by a simple purchase of shares of the private target from its shareholders (who are often small in number), or a merger of the private target into the SPAC or a subsidiary of the SPAC. Regardless of the acquisition method, in all situations, the SPAC survives and continues to exist after the deSPAC transaction. This structure is perhaps the most classic structure.

- *Target as acquiror.* The target acquires all of the shares of the SPAC, which usually would be effected by a merger of the SPAC into the target or a subsidiary of the target. In this situation, the target company survives after the deSPAC transaction and the shareholders of the SPAC effectively exchange their shares in the SPAC for shares of the target company and become the shareholders of the target, alongside the prior shareholders of the target company.

- *New holding company as acquiror.* A new holding company is set up to acquire all of the shares of the SPAC and the target, usually effected by concurrent mergers of the SPAC and target into the new holding company or a subsidiary of the new holding company. In this situation, the new holding company survives the deSPAC transaction and the shareholders of both the SPAC and the target become shareholders of the new holding company. This form of transaction is known as a double dummy.

SEC REGULATORY FRAMEWORK FOR SPACs

The regulatory treatment of a SPAC IPO is much the same as for IPOs of an operating company: the company prepares a registration statement under the Securities Act that describes the SPAC and its securities. After the IPO, the SPAC will file periodic reports under the Exchange Act. When the SPAC qualifies as an FPI, the SPAC can register its IPO on Form F-1, and after the IPO file and submit reports under the Exchange Act on Form 20-F and Form 6-K, in the same manner as operating companies that are FPIs. Additionally, like other FPIs, a SPAC FPI can take advantage of provisions under SEC and US stock exchange rules that account for home country disclosure and governance practices.[4] As discussed later in this article, an important provision is that FPIs are permitted to use in their SEC filings financial statements that are prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS") or US generally accepted accounting principles (US "GAAP").[5]

Differences can arise for FPIs in connection with the deSPAC transaction. Each of the deSPAC transaction structures has implications for which entities make filings with the SEC, both in connection with the deSPAC transaction itself and on a go-forward basis, after completion of the transaction. For example, a deSPAC transaction often requires the shareholders of the SPAC to approve some portion of the transaction, such as amendments to the certificate of incorporation,

[4] These are discussed in "Current SEC Initiatives Impacting Foreign Private Issuers," by the author, 51 Rev. of Securities & Commodities Reg'n 179 (Sept 5, 2018).

[5] FPIs are also permitted to prepare financial statements in accordance with other accounting principles as long as a reconciliation to US GAAP is provided.

the issuance of a large number of shares to target shareholders, or the merger of the SPAC into another entity. When the SPAC is not an FPI, the SPAC would prepare a proxy or information statement in accordance with Regulation 14A or 14C under the Exchange Act. Although home country laws or stock exchange listing standards may similarly require an FPI to seek shareholder approval of some aspect of a deSPAC transaction, the proxy or information statement would not be subject to Regulation 14A or 14C.

If the SPAC, target company or new holding company is issuing shares or other securities in the deSPAC transaction, the offer and sale of those shares must be registered under the Securities Act or qualify for an exemption from registration; such registration would be affected by filing a Form F-4 if the registrant qualifies as an FPI and Form S-4 if it does not. For an FPI or other non-US SPAC, an exemption from registration may be available under Section 3(a)(10) of the Securities Act. This section exempts transactions when there is a fairness determination by a judge or government agency in connection with an exchange of securities. The corporate statutes of many Commonwealth countries, such as the United Kingdom and Canada, provide for a corporate acquisition process that meets the conditions of Section 3(a)(10). If a SPAC or target company is incorporated in such a jurisdiction and the transaction structure is such that the SPAC or target company is being acquired and shareholders are exchanging shares, the acquiror company issuing shares may be able to avoid registration under the Securities Act in reliance on the exemption.[6]

One distinctive aspect of a deSPAC transaction is the filing with the SEC by the combined company of a full disclosure document shortly after completion of the transaction. Under Exchange Act Rule 13a-19, a SPAC FPI is required to file a special Shell Company Report on Form 20-F that includes all the information that the combined company would file with the SEC, as if it were registering a class of securities under the Exchange Act.[7] The SEC adopted this rule in 2005 to address disclosure issues with respect to what were called reverse mergers involving shell companies – well before the recent increase in SPAC offerings and deSPAC transactions.[8]

THE SEC'S NEW RULES AFFECTING SPACs

Prior to the SEC's new rules in 2024, there were not a specific set of disclosure and procedural standards designed expressly for SPACs and deSPAC transactions. Instead, private market participants and the SEC Staff applied the SEC's principles-based disclosure rules to elicit appropriate disclosures for investors. The new rules apply a highly prescriptive approach, requiring extensive information about SPAC sponsors and their compensation, conflicts of interest, dilution, and much more. In general, these rule changes apply in the same manner to FPIs as to domestic companies. However, there are several areas in which FPIs, both as SPACs and as target companies, should pay careful attention.

Addressing FPI Status Pre- and Post-deSPAC Transaction Closing

Qualifying as an FPI can be particularly important when it comes to financial reporting matters. For example, if a combined company after a deSPAC transaction qualifies as an FPI, it can prepare its financial statements in accordance with IFRS. This may be especially important when a target company has been preparing its financial statements in accordance with IFRS and not US GAAP. If the entity does not qualify as an FPI, then IFRS cannot be used. In that event, the process of converting two or three years of audited financial statements, as well as any interim period, from IFRS to US GAAP can be a substantial, costly and time-consuming undertaking that could significantly delay or entirely scuttle a proposed acquisition of a non-US target company. The SEC addressed FPI status and the use of FPI forms by SPACs and in deSPAC transaction documents in the context of rule changes relating to qualifying as a smaller reporting company ("SRC").[9]

As part of its overall rules package, the SEC revised the timing for the company surviving a deSPAC transaction to determine whether it qualifies as an SRC and thus is able to take advantage of the several scaled disclosure accommodations afforded to SRCs. Previously, SRC status had been assessed as of the last business day of a registrant's second fiscal quarter. This

[6] Staff Legal Bulletin No. 3A (June 18, 2008) describes the availability of the exemption, and the SEC Staff has issued a number of no-action letters addressing the availability of the exemption under the corporation law of many countries.

[7] A US issuer would file a Current Report on Form 8-K (referred to as a Super 8-K) that similarly is required to include so-called Form 10 information as if the issuer were registering a class of securities under the Exchange Act.

[8] Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Rel. No. 33-8587 (2005).

[9] Item 10(f) of Regulation S-K provides the definition of an SRC and a list of scaled disclosure accommodations available to SRCs.

approach was consistent with the SEC's other status determination dates, including for FPI status. However, the SEC was concerned that, because most SPACs qualify as SRCs, a surviving company could retain SRC status and avail itself of the scaled disclosure accommodations after a deSPAC transaction when the company otherwise would not have qualified as an SRC if the company had sold shares in a traditional IPO. As a result, in a change from the once-a-year status determination date, under new SEC rules, SRC status must be re-determined as of a date within four business days after the deSPAC transaction is closed and is based on the annual revenues of the target company.

At the proposal stage, although the SEC did not formally recommend rule changes to similarly address FPI status, the SEC did request comment on whether there should be a re-determination of FPI status after completion of a deSPAC transaction. In response, several commenters supported such a re-determination, noting that transaction structures can be based on many factors and that the strict legal structure of a particular deSPAC transaction should not necessarily be determinative of FPI status of the resulting entity. In addition, allowing a surviving company to re-determine whether it qualifies as an FPI immediately after the closing would promote consistency of treatment with SRCs.

Notwithstanding such support from commenters, the SEC did not adopt rule changes for FPI status to be re-determined at the completion of a deSPAC transaction.[10] Notably, the SEC did provide guidance with respect to FPI status in these transactions.

The SEC observed that the FPI status of the post-deSPAC transaction surviving company would not affect the registration form to be filed in connection with the deSPAC transaction. Similarly, since FPI status is not re-assessed after a deSPAC transaction is completed, the surviving entity, whether it is the SPAC, the target company, or a new holding company, must qualify as an FPI prior to the closing in order to use IFRS and otherwise use the FPI forms. When the surviving company is not already registered and reporting with the SEC under the Exchange Act (for example, which would likely be the case with the target and a new holding company), the assessment of FPI status would be made within 30 days of the public filing of the Form F-4; when the surviving company is already so registered and reporting (for example, which would be the case with the SPAC), the assessment of FPI status would be made as of the last business day of the most recent second fiscal quarter.

Projections Used for deSPAC Transactions

The SEC adopted two amendments relating to projections used in connection with deSPAC transactions: (1) it amended Item 10(b) of Regulation S-K to expand and provide additional guidance with respect to the use of projections[11] and (2) it adopted new Item 1609 of Regulation S-K, which requires specified disclosures relating to projections contained in registration statements and proxy statements used for deSPAC transactions.[12] FPIs that register deSPAC transactions on Form F-4 will be subject to these new items in the same manner as US issuers.

In addition, the SEC noted that projections relating to a deSPAC transaction may be provided in materials filed on Form 8-K prior to the filing of any projections in a registration statement or proxy statement. In this connection, the SEC expressed the view that investors may look to these earlier-provided projections to form a view on the deSPAC transaction. As a result, the SEC amended Form 8-K in order to apply the Item 1609 requirements to those projections. FPIs may also submit similar materials on a Form 6-K, but those materials would not specifically be subject to Item 1609. To the extent that projections are included on a Form 6-K that is filed under the Exchange Act, Item 10(b) would apply to those projections.

Omitting Financial Statements of the SPAC in Registration Statements After the deSPAC Transaction Closing

The SEC noted continued questions from registrants about whether the historical financial statements of the SPAC were required in filings made after the closing of the deSPAC transaction. For example, shortly after the closing, the surviving company often is required to file a

[10] The SEC also did not adopt rule changes to re-determine filer status as a large accelerated filer, accelerated filer, or emerging growth company.

[11] The guidance under Item 10(b) applies to projections contained in all SEC filings, not just to those contained in transaction documents relating to deSPAC transactions.

[12] The new matters required to be addressed under Item 1609 include who prepared the projections and why, material underlying assumptions for the projections, factors that could cause the assumptions to change, and whether the projections still reflect the views of the board or management of the SPAC or the target as of the date of filing relating to the deSPAC transaction.

Form F-1 or S-1 shelf registration statement to register the resale of certain shares and warrants. After the closing, the financial statements of the SPAC, as a shell company with no operations and nominal assets and liabilities, would not appear relevant or meaningful to investors. In addition, it may often be difficult or costly to engage the independent audit firm to provide a consent for any historical financial statements of the SPAC.

To address this situation, the SEC adopted Rule 15-01(e) of Regulation S-X, which provides that financial statements of the SPAC for periods prior to the completion of the deSPAC transaction may be omitted once the financial statements of the combined company have been filed in a periodic report or other filing that includes the period in which the deSPAC transaction closed. In the adopting release, the SEC explained that a registration statement filed before the first periodic report, such as a Form 10-Q, that includes post-deSPAC transaction financial statements, would otherwise be required to include the historical financial statements of the SPAC.[13] Although the SEC did not specifically address financial statements that are submitted on a Form 6-K, FPIs should be able to take advantage of the rule to omit SPAC financial statements after including on a Form 6-K the financial statements of the surviving entity that meet the requirements for interim financial statements under Rule 10-01 of Regulation S-X or IAS 34, Interim Financial Statements.[14]

Age of Financial Statements and Keeping FPI Financial Statements Current in Registration Statements and Prospectuses Under the Securities Act

FPI financial statements in registration statements go stale more slowly than for a US company: audited financial statements of an FPI may be as old as 15 months prior to effectiveness of a Form F-4 and unaudited six-month interim financial statements are required only after nine months from fiscal year end.[15] However, in the context of a Form F-4, FPIs are required to comply with an ongoing updating requirement that does not apply to US companies.

Form F-4 is a type of shelf registration statement under Securities Act Rule 415(a)(1)(viii) in that it registers the solicitation of shareholders to approve the deSPAC transaction and, therefore, is a continuous offering of securities. Item 22(a) of Form F-4 requires that registrants furnish the undertakings required by Item 512 of Regulation S-K for offerings under Rule 415. Item 512(a)(4) requires an FPI to file a post-effective amendment to a registration statement to include any financial statements required by Item 8.A of Form 20-F at the start of any delayed offering or throughout a continuous offering. The Financial Reporting Manual ("FRM") published by the SEC's Division of Corporation Finance explains that this undertaking means that the financial statements in a registration statement and prospectus relating to a merger or acquisition transaction must remain current until shareholder approval has occurred, and that a continuous offering should be suspended if the financial statements are not current.[16]

This special undertaking also creates a particular issue for FPIs in connection with the resale registration statements that are frequently filed after the closing of the deSPAC transaction. Often as part of the closing of a deSPAC transaction, the surviving company will sell shares and warrants to investors in a private placement, and the company will agree to use its best efforts to have an effective registration statement covering those securities so that they may be freely resold. For an FPI that is eligible to use Form F-3, the undertaking under Item 512(a)(4) provides that financial statements can be updated via the filing of reports on Form 6-K that are incorporated by reference into a prospectus, obviating the need for a formal post-effective amendment. Fairly frequently, however, the surviving company to a deSPAC transaction is not eligible to use Form F-3 and must file its resale registration statement on Form F-1. As a result, an FPI that survives a deSPAC transaction can be expected to file at least one and maybe two post-effective amendments in order to keep the financial statements current, until such time as the FPI has been filing reports under the Exchange Act for 12 full months and becomes eligible to convert its Form F-1 resale shelf registration statement into a Form F-3.

[13] For example, if a deSPAC transaction closed on June 1, a Form F-1 or S-1 filed before the June 30 interim financial statements are published would be required to include SPAC financial statements.

[14] The SEC also did not specifically address situations when the first periodic report after a deSPAC transaction was an annual report on Form 20-F or 10-K. Those situations should clearly be covered under Rule 15-01(e).

[15] In contrast, US issuers are subject to tighter staleness deadlines under Rule 3-12 of Regulation S-X.

[16] Section 6230.1 of the FRM. This is in contrast to US issuers, which are not specifically required to update their financial statements once a registration statement has been declared effective. Section 2045.3 of the FRM.

Generally, with respect to the age of financial statements under the SEC's new rules relating to deSPAC transactions, the SEC adopted new Rule 15-01(c) under Regulation S-X in order to clarify that the age of financial statements of the target company in a deSPAC transaction must generally conform to the requirements as if the target company were registering securities in a traditional IPO. For a target that is an FPI and is registering securities on Form F-4, the approach is the same: the SEC amended an instruction to Item 8 of Form 20-F to note that registrants must comply with new Rule 15-01, which specifically addresses the overall financial statement requirements in deSPAC transactions. Rule 15-01(c) cross-references to the requirements of Rule 3-12 of Regulation S-X, which governs the age of financial statements in registration statements and proxy statements. In turn, Rule 3-12(f) refers to the age limitations of Item 8.A of Form 20-F.

Board Determination About the deSPAC Transaction

The SEC adopted new disclosure requirements under which the SPAC must make statements in the document seeking shareholder approval of the deSPAC transaction regarding the fairness of the transaction and the factors considered by the board of directors in recommending approval of the transaction to shareholders. As proposed, the SEC would have required every SPAC (meaning its board of directors) to provide a statement as to whether it believes the deSPAC transaction and any related financing transaction are fair or unfair to the SPAC's unaffiliated shareholders. As noted earlier, many SPACs are not incorporated in the United States, and findings of fairness may not necessarily be a typical part of the corporate law landscape in acquisition transactions in these jurisdictions. In addressing this proposal, many commenters noted the proposed requirement was tantamount to requiring a SPAC, and its board of directors, to provide a fairness opinion for the transaction, which was not required under local law. In a change from the proposal, the new disclosure requirement under Item 1606(a) of Regulation S-K focuses on when a determination as to the advisability of the deSPAC transaction is required by the place of incorporation of the SPAC.[17] As a result, an FPI or other non-US SPAC is not required by the SEC to make a fairness determination if not required to do so under applicable foreign corporate law.

Likewise, the SEC had proposed that each SPAC disclose the material factors upon which the fairness determination was based, including a mandatory list of factors to be addressed in the disclosure document. Again, in the adopting release, the SEC recognized that fiduciary duties of directors in connection with approving deSPAC transactions are not uniform across jurisdictions and that boards may look at a wide range of factors in their deliberations consistent with local corporate law. As a result, as adopted, new Item 1606(b) of Regulation S-K clarifies that listed factors must be addressed in a disclosure document only to the extent considered. This clarification should accommodate the corporate law process of FPIs and other non-US SPACs for boards to follow appropriate home country practice in considering a deSPAC transaction and to craft disclosure accordingly.

Private Operating Company as a Co-Registrant

As noted earlier, deSPAC transactions may take many forms. While in some cases the private target company would formally register securities to be issued to SPAC shareholders in the deSPAC transaction, in other cases the target would not be an issuer of securities, such as when the SPAC acquires the private target company and is the surviving company, and when a new holding company acquires both the SPAC and the private target.[18] The SEC expressed its view that a target company is an issuer of securities under Section 2(a)(4) of the Securities Act and should always be a registrant under the Securities Act regardless of transaction structure. As a result, the target company as a registrant, and individuals associated with the private target company who are required to sign a registration statement, would become subject to liability under the Securities Act. To implement this approach, the SEC amended Form F-4 and S-4 to adopt a co-registrant requirement. The target company, along with its required officers and directors, must sign a registration statement even if the company is not legally issuing securities.[19]

In applying this co-registrant approach, the FPI status of the target should be determined in accordance with the practice for initial registrants as set forth under Securities Act Rule 405: FPI status is determined as of any date within 30 days of the public filing of the registration statement. Registration statements that combine normally distinct forms, such as a joint Form S-

[17] The SEC noted that the corporate law of Delaware requires a board to declare the advisability of subject transactions.

[18] These are the classic and double-dummy structures described earlier.

[19] A non-US issuer must also have the registration statement signed by its duly authorized representative in the United States.

4 and Form F-4, may become more common as a result of this new requirement. Notwithstanding being included on such a joint registration statement, an FPI should be able to use the disclosures permitted for FPIs with respect to its business, operations, employees, financial statements, and other matters even though a co-registrant on the same registration statement does not qualify as an FPI.

Tender Offer Matters

As part of their IPOs, SPACs usually issue shares that are redeemable at the election of a shareholder at the time of a deSPAC transaction or in the event of an extension of the timeframe to complete a deSPAC transaction. In the adopting release, the SEC noted that redemption rights in connection with a deSPAC transaction or an extension of the timeframe to complete a deSPAC transaction generally have indicia of a being a tender offer. The SEC Staff, however, generally allows a SPAC to avoid complying with the SEC's tender offer rules when the SPAC files a proxy statement or information statement under Schedule 14A or 14C in connection with the transaction. In the Staff's view, which has largely been endorsed by the SEC, the SEC's proxy rules provide procedural protections and elicit substantially similar disclosures to the SEC's tender offer rules so that compliance with these rules, including the filing of a Schedule TO, is not necessary.

SPACs that are FPIs are exempt from the SEC's proxy rules and do not file a Schedule 14A proxy statement or a Schedule 14C information statement. As a consequence, these SPACs will be required to comply with the tender offer rules, including filing a Schedule TO that will include disclosure under new Item 1608 of Regulation S-K (i.e., disclosure about the target company that normally would be required under the proxy rules) when a redemption right is triggered. The SEC expressly declined to allow an FPI to avoid compliance with the tender offer rules if it voluntarily prepares a proxy or information statement that purported to comply with Schedule 14A or 14C, as suggested by a commenter. The SEC noted that a proxy or information statement prepared by an FPI would still not be subject to the proxy rules or the liability provisions thereunder. This view is consistent with the Staff's historical position that an FPI is not permitted to file a proxy or information statement that purports to comply with the proxy rules.[20]

Minimum Dissemination Period of Shareholder Materials

The SEC adopted rule and form amendments under which prospectuses and proxy and information statements for a deSPAC transaction must be distributed to shareholders for a minimum of 20 days before a shareholder meeting (or earliest date of action by consent) to approve the transaction. Although in general there is no minimum time period under SEC rules for the dissemination of shareholder materials for business combination transactions, the SEC stated that deSPAC transactions are sufficiently unique to warrant such a requirement.[21]

The SEC acknowledged that a SPAC's jurisdiction of incorporation could mandate a maximum period of dissemination that was shorter than the 20-day minimum, although the SEC noted that the Staff was not aware of any such situation for the 50 US states. Nonetheless, if a jurisdiction of incorporation, including a non-US jurisdiction of an FPI or a non-US SPAC, mandates a shorter period than 20 days, the local law maximum period would apply.[22]

New Rule 145a – Deemed Offer and Sale of Securities

One of the more novel aspects of the new rules is the SEC's adoption of Rule 145a under the Securities Act. The SEC expressed its concern that shareholders in the SPAC would not necessarily receive disclosures and the other protections under the Securities Act in connectionwith a deSPAC transaction. In the view of the SEC, a deSPAC transaction represents a fundamental change in the nature of an investment in a SPAC and therefore should be treated in the same manner as an exchange of securities.[23] To address this, the SEC adopted new Rule 145a to deem a deSPAC transaction to involve an offer and sale of securities even when there is no actual exchange of shares. As a result, many deSPAC transactions will now involve a registration

[20] SEC no-action letter *Proxy Materials of Foreign Private Issuers* (March 10. 1992), although the SEC did not cite this letter in the adopting release for the SPAC rules.

[21] When documents are incorporated by references into a Form F-4 or S-4 registration statement, there is a minimum 20-business day dissemination period.

[22] General Instruction I.3 of Form F-4.

[23] In the classic structure described earlier, SPAC shareholders continue to hold the same securities in the same corporation before and after the deSPAC transaction. There is no actual exchange of securities and therefore no offer and sale that would require registration under the Securities Act.

statement under the Securities Act where previously one was not required.

The SEC explained that Rule 145a would not prevent or prohibit the use of a valid exemption from registration if one were available, although the SEC expressly noted that the exemption under Securities Act Section 3(a)(9) for an exchange of securities of the same issuer would not be available. For an FPI and other non-US SPACs, an open question could arise on the availability of the Section 3(a)(10) exemption. Whether a non-US court would feel it was competent to address the fairness of a deemed exchange of securities, when an exchange was not actually taking place, is a question that would need to be addressed. A further question would be whether the SEC Staff would consider the fairness determination of a non-US court on the deemed exchange to satisfy the conditions of the exemption.

CONCLUSION

Although overall SPAC activity is diminished since the SEC first proposed its rules, deSPAC transactions remain an attractive alternative for SPAC sponsors and private target companies. As the new rules come into effect, market participants and the SEC Staff will adapt disclosures and market practices to the new requirements. FPIs may find that the new rules raise some unique issues that will need attention and interpretation. Overall, though, FPIs should find the new SEC rules to be manageable to achieve a successful transaction result. ■