# Top Ten Securities Law Issues for De-SPAC Companies

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## TOP TEN ISSUES FOR DE-SPAC COMPANIES

1. A private company that goes public through a SPAC (a "de-SPAC company") has to file a "Super 8-K" within four business days of closing the de-SPAC transaction and include in such filing the information required by Form 10. The "Form 10 information" is typically incorporated by reference from the de-SPAC Form S-4/F-4 or merger proxy.

2. If the de-SPAC transaction closes after quarter-end, the Form 10-Q or 10-K for that quarter will reflect the financial statements and MD&A of the SPAC. The Super 8-K will need to be amended to include the financial statements and MD&A of the de-SPAC company and such amendment will need to be filed the same day as the 10-Q or 10-K.

3. Because the de-SPAC company is considered a former "shell" company, Rule 144 is not available for resales of "restricted securities" or "control securities" for one year from the date of filing of the "Form 10 information" in the Super 8-K due to the applicability of Rule 144(i).

4. Partially as a consequence of Rule 144 not being available, the de-SPAC company will file a resale shelf registration statement on Form S-1 for any shares issued in previously completed private placements, including any PIPE transaction, and may also include therein certain control securities.

5. The resale registration statement has to be filed on Form S-1. The SEC Staff will not permit a de-SPAC company to count the SPAC's reporting history toward the twelve-month reporting history requirement of Form S-3. Accordingly, a de-SPAC company will not be S-3 eligible for one-year post-closing.

6. As a result of the resale registration statement being on Form S-1, a de-SPAC company will need to file a 424 prospectus to "sticker" the Form S-1 for any Exchange Act filings. This is because General Instruction VII.D of Form S-1 does not permit a former "shell" company to incorporate any Exchange Act filings by reference for three years. If the de-SPAC company has a "fundamental change", a Section 10(a)(3) update, or a material change in the plan of distribution, it will have to file a post-effective amendment to the S-1 and suspend sales under the registration statement pending effectiveness of the post-effective amendment.

7. SEC rules provide that a de-SPAC company is a successor for Exchange Act reporting purposes such that the de-SPAC Company shall consider the SPAC's reporting history for determination of "accelerated" and "large accelerated" filer status.

8. The inapplicability of Rule 144 makes it difficult for "affiliates" to resell shares during the first year post de-SPAC under a Rule 10b5-1 plan, even if such shares are registered on a resale registration statement. Most banks will not agree to be a counterparty to a Rule 10b5-1 plan when Rule 144 is not available, although a handful of banks may agree to this.

9. Another issue springing from the inability to resell shares under Rule 144 is that during the one-year period following the filing of the Super 8-K "affiliates" effectively cannot execute a "sell-to-cover" for shares they receive pursuant to the vesting of RSUs (broker-assisted sale of shares to satisfy withholding tax requirements), even if such shares were registered

on Form S-8. A de-SPAC company may choose to file an S-8 “reoffer prospectus” to cover these resales.

10. Regarding Form S-8, due to the de-SPAC company’s former “shell” status, a Form S-8 cannot be filed until 60 days after filing of the “Form 10 information”. This means that equity grants made at closing of a de-SPAC transaction are typically granted contingent upon effectiveness of a Form S-8.

*Note that the above analysis assumes that the traditional de-SPAC structure is used where the SPAC issues securities to the equity owners of the target business and survives the business combination as a renamed publicly-traded parent company of the target business. There are various other de-SPAC structures that could potentially change some of the items above.*