OVER-RULED: HOW RULE 145A STRETCHES THE SECURITIES AND EXCHANGE COMMISSION'S AUTHORITY TO REGULATE SPACS

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ABSTRACT

Special Purpose Acquisition Companies (SPACs) are publicly traded shell companies designed to merge with a private operating company, thereby bringing that company into the public market. SPACs were first designed as an alternative to an initial public offering (IPO) and took the United States markets by storm during the COVID-19 pandemic. Under the Biden administration, the Securities and Exchange Commission (Commission) Chair Gary Gensler expressed concerns about SPACs, citing misalignments between SPAC creators and public shareholders. In January of 2024, the SEC finalized a set of rules that would require greater disclosures from SPACs and regulate them similar to IPOs. This paper will analyze the statutory basis behind Rule 145a and one key element of the rule: the Commission's authority to expand the definition of "sale" to include all de-SPACs, regardless of transaction structure. This paper argues that not all SPACs involve a "sale" as defined by Commission, and thus, the Commission does not have the authority to promulgate Rule 145a.

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INTRODUCTION

SPACs present an alternative from the traditional IPO for private firms to go public.[2] They have seen a meteoric rise and fall in the past few years.[3] In 2019, a total of $13.6 billion was invested across 59 SPACs.[4] 2021 saw that number jump to $162.5 billion invested across 613 SPACs.[5] In 2022, that number sharply declined to $13.4 billion across 86 SPACs.[6] The fluctuating popularity of SPACs reflects the tension of innovation and skepticism that SPACs have presented since their inception in the 1980s. While SPACs present an exciting new opportunity for private companies and retail investors alike, the question remains whether SPACs are a viable alternative to traditional IPOs and whether the Commission has the authority to regulate them as such.

A. Background

The traditional method by which a private company goes public is through an IPO.[7] During an IPO, a company conducts a roadshow in which it garners public interest in the company and raises capital through the public markets.[8] The company must also meet the rigorous disclosure requirements of the Commission, including filing an S-1 prospectus which describes the business, risk factors, use of proceeds, management and compensation, ownership structure, and dividend policy.[9] The company must also provide historical financial statements and management's discussion and analysis explaining financial performance, trends, and future expectations.[10] This results in a lot of upfront costs for the company going public through an IPO.[11]

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[2] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14160 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[3] *Id.* at 14161.
[4] *See id.*
[5] *See id.*
[6] *See id.*
[7] *Id.* at 14160.
[8] *See* Jonathan Ponciano, *What a Roadshow Is and How It Creates a Successful IPO*, INVESTOPEDIA (April 17, 2025), https://www.investopedia.com/terms/r/roadshow.asp.
[9] *See* U.S. SEC. AND EXCH. COMM'N, *Form S-1 Registration Statement Under the Securities Act of 1933*, (last accessed May 15, 2025), https://www.sec.gov/files/forms-1.pdf.
[10] Will Kenton, *SEC Form S-1: What It Is, How to File It or Amend It*, Investopedia (Mar. 21, 2022), https://www.investopedia.com/terms/s/sec-form-s-1.asp [https://perma.cc/DEQ6-AMSK].
[11] *Initial Public Offering Process*, LEXISNEXIS, https://plus.lexis.com/api/permalink/477e49c9-8022-4157-bcab-389bcb0581f5/?context=1530671.

SPACs offer an enticing alternative for companies looking to go public while avoiding some of the uncertainty, costs, and regulatory requirements around a traditional IPO. A SPAC differs from a traditional company because it is a shell company with no operations.[12] This means that while they must file an S-1, they don't need to provide historical financials or management's discussion of operations since they do not have any. Consequently, a SPAC S-1 will also be simpler as it will not involve descriptions of business operations, products or services, nor the industry.

B. The Structure of a SPAC

The lifecycle of a SPAC involves two primary steps. The first step involves forming the SPAC, which begins as a shell company and goes public through a traditional IPO. The second step involves the SPAC identifying and merging with a private operating company to bring that private company into the public market.[13] SPACs are initially organized by a sponsor, who puts up capital in order to form the initial entity.[14] The sponsor announces the board of directors while working with an underwriter to take the SPAC public.[15] The standard price for SPAC shares is $10.00 per share.[16] During the IPO, SPACs usually raise anywhere from $40 million to $750 million depending on their investment prospectus and goals.[17] Hedge funds and institutional investors purchase the majority of shares during the initial IPO of the SPAC.[18]

For each share of a SPAC that an IPO investor purchases, that investor may receive a warrant equivalent to anywhere between a quarter and a whole share of that same SPAC.[19] Some warrants give the IPO investor the right to purchase shares at a later date for a specified exercise price known as a "strike price".[20] Typically the strike price is set at $11.50.[21] These warrants can only be exercised after the SPAC completes the second step of merging with a company.[22] Therefore, if SPAC shares are trading above the strike price, the warrant holder is able to make a profit from exercising their warrant.

These warrants are traded separately, and even if investors redeem their shares later, they can keep their warrants for free.[23] These free warrants further incentivize investors to invest in the initial IPO. When the warrants

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[12] Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14160 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[13] *See id.*
[14] *See id.*
[15] Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228, 236 (2022).
[16] *See id; see also* Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, HARVARD BUSINESS REVIEW (July 2021).
[17] Klausner et al., *supra* note 14, at 237.
[18] *See id.* at 241.
[19] *See id.* at 248.
[20] *See id.* at 282.
[21] *See id.* at 236.
[22] *See id.*
[23] *See id.* at 241.

are exercised, the SPAC issues new shares which dilutes the ownership of the existing shareholders.[24]

After creating the SPAC, the sponsors must find a target acquisition, typically within two years of the IPO.[25] If the SPAC fails to find a target or the merger fails to consummate within the specified timeframe, the SPAC is required to liquidate and return the initial investment of $10.00 per share to the shareholders with interest.[26] Between the SPAC IPO and the two-year deadline, the sponsor will search for a target company to merge with.[27] When a SPAC identifies a target company they would like to merge with, they seek out approval from SPAC shareholders.[28] The SPAC and the target may both submit proxy statements where they detail historical financial records and outline forward projections.[29]

From this, shareholders have two decisions to make. The first is whether to redeem their shares for an exercise price of $10.00 per share with interest.[30] The second decision is whether to vote in favor of or against the merger.[31] An investor can make any combination of these two decisions, including redeeming their shares (i.e., cashing out) while still voting for the merger, or opposing the merger and maintaining their shares.[32] Regardless of the redemption rates, the SPAC only needs a majority vote in favor of the merger from the outstanding shareholders.[33] In fact, the majority of early IPO investors redeem their shares right before the merger.[34] If redemption rates are high, SPACs will typically seek additional private investment to replace the lost equity.[35] This is known as private investment in public equity (PIPE), which further dilutes existing shareholders ownership.[36]

A de-SPAC is the business combination between SPACs and private operating companies.[37] A de-SPAC can occur through several different methods. The most common approach is a reverse merger, where a private target company merges into the SPAC, with the target's management

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[24] *See id.* at 246.
[25] *Id.* at 230-246.
[26] *Id.* at 247.
[27] Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACS*, 37 DEL. J. CORP. L. 849, 913 (2012).
[28] *See id.*
[29] *See id.* at 902.
[30] Klausner et al., *supra* note 14, at 230.
[31] Rodrigues & Stegemoller, *supra* note 26, at 906.
[32] *Id.*
[33] *See* Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/ (Explaining that SPAC charter documents typically require the redemption offers to be made to all holders, regardless of how they vote).
[34] Klausner et al., supra note 14, at 232.
[35] *See id.* at 239.
[36] *See id.*
[37] Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14158 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

assuming control.[38] Another method is a SPAC-on-Top merger, in which the SPAC creates a new holding company, which then acquires both the target company and the SPAC itself.[39]

One of the reasons SPACs are an attractive alternative to a traditional IPO is that SPACs will typically provide a higher valuation for the target company.[40] In a traditional IPO, underwriters have an incentive to undervalue a company since they can sell it on the open market for a higher price.[41] This is one of the reasons for the decline in traditional IPOs over the past decade.[42] Comparatively, SPACs may offer a more fair valuation since they largely eliminate the middleman underwriter.[43] Another reason SPACs can be more attractive than a traditional IPO is the level of efficiency to market.[44] SPACs will offer a guaranteed level of capital, whereas in a traditional IPO, there is more speculation as to how the market will react, and whether they will buy the stock. The last major benefit of a SPAC as opposed to a traditional IPO is the less rigorous regulations and requirements due to the SPACs clever use of shell companies and mergers to avoid the SEC's current regulatory regime.[45]

However, SPACs come with their own set of drawbacks. First, sponsor fees, redemptions, and warrants all contribute to higher dilution of shares, the impact of which is borne by shareholders. Second, because of reduced regulatory oversight, SPACs experience higher post-merger volatility. Compared to a traditional IPO, investors commit capital without knowing the target company in advance, relying entirely on the sponsor's investment thesis, industry expertise, and ability to identify a suitable acquisition and negotiate favorable merger terms. Lastly, the de-SPAC process remains largely unregulated because SPACs circumvent the statutory definition of a sale. Under the Securities Act of 1933, any offer or sale of securities is subject to registration requirements. However, since the de-SPAC process does not always constitute a statutory sale, the Commission has sought to broaden the definition of a sale under Rule 145(a) to bring de-SPAC transactions within the scope of the Securities Act of 1933.[46]

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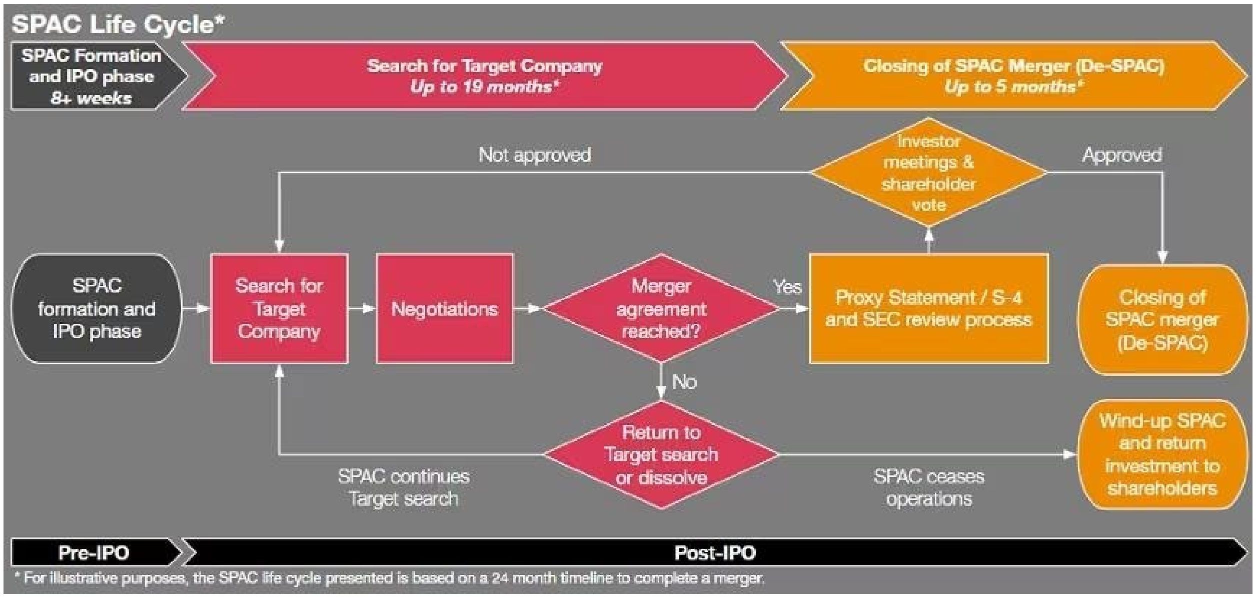
[38] Dan Primack, *DraftKings Going Public via Reverse Merger*, AXIOS (Dec. 23, 2019), https://www.axios.com/2019/12/23/draftkings-going-public-via-reverse-merger.
[39] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14242 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[40] Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, HARVARD BUSINESS REVIEW (July 2021), https://hbr.org/2021/07/spacs-what-you-need-to-know [https://perma.cc/ZLR9-3MLX].
[41] *Id.*
[42] *See id.*
[43] *See id.*; *see also* Nicholas Jasinski, *Why Nikola Decided to Merge with a SPAC. And Why More Such Deals Are Coming*, BARRON'S (Aug. 2, 2020), https://www.barrons.com/articles/why-nikola-decided-to-merge-with-a-spac-and-why-more-such-deals-are-coming-51596369610 [("[W]ith IPOs being so blatantly underpriced, SPACs are now clearly the cheaper alternative.").
[44] *See id.*
[45] *See id.*
[46] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14161 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).



SPAC life cycle from formation through the closing of the SPAC merger (De-SPAC)[47]

C. The Evolution of the Modern SPAC

SPACs evolved from an earlier investment vehicle known as blank check companies.[48] During the 1980's, marketing teams would create shell companies with no assets or operations.[49] They would then use aggressive marketing tactics and call unknowing investors, typically older individuals in retirement, and convince them to invest in a purportedly lucrative company before a supposed merger.[50] The company insiders and brokers knew there was no merger planned but falsely claimed otherwise to generate popularity. These stocks were priced extremely low, sometimes 5 cents per share, for which they were coined "penny stocks."[51] Companies priced stocks this way not only to attract naïve investors but to also avoid the regulatory requirements under established markets and federal securities laws.[52] Corporate insiders and brokers would make a quick profit by promoting these essentially worthless stocks, and by the time the retail investors realized there was no merger, the insiders were gone and the retail investors had no recourse.

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[47] PricewaterhouseCoopers, *How Special Purpose Acquisition Companies (SPACs) Work,* ,PWC (last accessed Apr. 11, 2024), https://www.pwc.com/us/en/services/consulting/deals/library/spac-merger.html [https://perma.cc/2R5E-RHRJ].

[48] *See* Daniel S. Riemer, *Special Purpose Acquisition Companies: SPAC and SPAN, or Blank Check Redux?*, 85 WASH. U. L. REV. 931, 932 (2007); *See also* Derek K. Heyman, *From Blank Check to SPAC: The Regulator's Response to the Market, and the Market's Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531, 531 (2007).

[49] *See* Daniel S. Riemer, *Special Purpose Acquisition Companies: SPAC and SPAN, or Blank Check Redux?*, 85 Wash. U. L. Rev. 931, 956 (2007).

[50] *See id.*

[51] *See id.*

[52] *See* Gerald V. Niesar & David M. Niebauer, *The Small Public Company After the Penny Stock Reform Act of 1990*, 20 SEC. REG. L.J. 227, 237 (1992).

Congress, recognizing the role that blank check companies were playing in defrauding investors, enacted the 1990 Securities Enforcement Remedies and Penny Stock Reform Act (PSRA), which attempted to curb the use of blank check companies for fraud.[53] The Act amended the Securities Act of 1933.[54] In particular, Section 508 of the PSRA defined a "blank check company" and gave the Commission the authority to promulgate rules related to blank check companies, including disclosure requirements, limitations on the use of proceeds and issuance of securities, and a right of rescission to shareholders.[55] The Commission quickly responded with Rule 419, which defined a blank check company as a company that:[56]

> (i) Is a development stage 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; and
> (ii) Is issuing "penny stock," as defined in Rule 3a51-1 under the Securities Exchange Act of 1934.

A penny stock is further defined as an equity security where the issuer does not meet certain criteria such as holding at least five million dollars in stockholders' equity.[57]

More importantly, Rule 419 created a set of requirements and safeguards for blank check companies to protect investors from fraudulent activity.[58] These safeguards, particularly the disclosure requirements, made it extremely difficult for fraudsters to continue to defraud investors.[59] Insiders were forced to place investors' money in a trust, instead of running away with it like they did before.[60] They were required to disclose more information about the investment and merger.[61] Most importantly, investors were now granted a right to be refunded if they did not agree with the merger.[62] This made it virtually impossible to abuse blank check companies in the way that they had been in the 1980's.[63]

In the early 1990's, David Nussbaum created a "hybrid" blank check company which voluntarily adopted all of the safeguards provided in Rule 419, while circumventing the actual statutory definition of blank check

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53 *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990).
54 *See id.*
55 *See id.*
56 17 C.F.R. § 230.419(a) (2025).
57 *See* 17 C.F.R. § 240.3a51-1 (2025).
58 17 C.F.R. § 230.419(b) (2025) (requiring blank check companies to place offering proceeds and securities in escrow, complete a qualifying acquisition within 18 months, file a post-effective amendment, allow investors to approve or reject the acquisition, and limit acquisitions to targets worth at least 80% of escrowed funds).

59 *See* Riemer, *supra* note 48, at 943; *See also* Derek K. Heyman, *From Blank Check to SPAC: The Regulator's Response to the Market, and the Market's Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531, 540 (2007).
60 *See* 17 C.F.R. § 230.419(b) (2025).
61 *See* 17 C.F.R. § 230.419(c) (2025).
62 *See* 17 C.F.R. § 230.419(e) (2025).
63 *See* Riemer, *supra* note 48, at 943-44.

companies.[64] One criteria of a blank check company is that the firm possess less than $5,000,000 in shareholder equity; Nussbaum circumvented the statutory requirements imposed on blank check companies by raising over $5,000,000, thereby creating the first SPAC.[65]

These initial SPACs created by Nussbaum were fairly successful.[66] This is in part due to the voluntary adoption of the Rule 419 safeguards.[67] Nussbaum generated trust within the public markets by adopting safeguards like holding funds in trusts and granting shareholders redemption rights.[68] Furthermore, Nussbaum's SPACs were listed on major exchanges and underwritten by legitimate banks, further garnering public support.[69] Nussbaum's early SPACs were a far stretch from the original fraudulent blank check companies that Congress intended to prohibit.

During the dot com bubble of the late 1990's, there was a lot of hype around nascent internet companies, making it easier for these companies to receive funding, particularly through public markets in an IPO.[70] Nussbaum's first generation of SPACs began to fade away as investors easily raised public capital through other means.[71] Once the dot com bubble burst, SPACs saw a revival from 2003 through the 2008 financial crisis, offering smaller, riskier companies an easier way to obtain funding.[72] While today's SPACs share a lot of similarities with their Nussbaum counterparts, they also differ in certain ways.[73] In recent years, SPACs have lowered voting requirement thresholds and increased conversion thresholds, which set the maximum allowable redemptions before a deal is terminated.[74] Together, these policies have made it easier for deals to go through with minimal shareholder participation.[75]

II. ISSUES

The modern generation of SPACs present two key problems which the Commission has tried to address through its adoption of new rules and amendments in January 2024.[76] The first problem relates to the misalignment of incentives between sponsors and retail shareholders. The second problem relates to the erosion of shareholder rights, which are required under Rule

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[64] *See id.* at 950.
[65] 17 C.F.R. § 230.419(a); *See* Riemer, supra note 48, at 945.
[66] *See* Riemer, *supra* note 48, at 945-47.
[67] *See id.* at 947.
[68] *See id.* at 943.
[69] *See id.* at 946.
[70] *See* Derek K. Heyman, *From Blank Check to SPAC: The Regulator's Response to the Market, and the Market's Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531, 543 (2007).
[71] *See id.* at 544.
[72] Heyman, *supra* note 69, at 544; *see also* Jessica Bai, et al., *Segmented Going-Public Markets and the Demand for SPACs* 4-5 (2021).
[73] Rodrigues & Stegemoller, *supra* note 26, at 909-10.
[74] *See id.*
[75] *See id.* at 854-55.
[76] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14158 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

419 and a prominent feature of early SPACs.[77] One way in which the newly adopted rules address these issues is by classifying the de-SPAC process as a "sale" under securities laws, thereby requiring the transaction to be registered under the Securities Act, and with that, increased transparency, stronger shareholder protections, and reduced incentive for low-quality deals.[78]

A. The Structure of SPACs Results in a Misalignment of Incentives

SPACs provide an efficient path to the public markets for private companies while allowing retail investors to participate in the growth of early-stage companies with theoretically very little downside given their redemption rights and warrants. However, the structure of SPACs can create a misalignment of incentives between the sponsors and retail investors.[79] The misalignment results from two key features of modern SPACs.

First, sponsors are rewarded with a portion of the available outstanding shares, usually around 20%, in exchange for a nominal fee and initial time and monetary investment into creating the SPAC.[80] These shares are called a "promote."[81] These "free shares" effectively dilute the rest of the shareholders' ownership.[82] For example, if a SPAC issues 100 outstanding shares, 80 of the shares are sold to the public market for ten dollars a share while the other 20 are rewarded to the sponsor. The value of each share then becomes ($10 x 80 shares) / 100 shares = $8.00 per share. Public investors are immediately put at a disadvantage by losing two dollars worth of value, while the sponsor makes proportionally greater gains. For the public investor, the merger must result in a share value above ten dollars for their investment to return a profit. The sponsor requires no such threshold since they received their shares for practically zero dollars.

Additionally, SPACs are required to identify a target and complete a merger within a two-year timeframe.[83] If they fail to do so, the SPAC must liquidate and return to investors their principal investment of ten dollars per share plus any interest.[84] This results in the sponsor losing their initial monetary and time investment. However, if the merger goes through, the sponsor will still profit, even if the share price falls below ten dollars, as their shares were acquired at little to no cost.[85] Therefore, sponsors are highly incentivized to complete a merger, even if that merger does not result in a

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[77] 17 C.F.R. § 230.419; *See* Riemer, *supra* note 48, at 945.
[78] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14240 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[79] Klausner et al., *supra* note 14, at 246.
[80] *Id*. at 246-47; *see* Bazerman & Patel, *supra* note 39.
[81] *See* Klausner et al., supra note 14, at 232-33.
[82] *Id.* at 246.
[83] *Id.* at 230; *see also* Bazerman & Patel, supra note 39.
[84] Klausner et al., *supra* note 14, at 230; Bazerman & Patel, *supra* note 39.
[85] Klausner et al., *supra* note 14, at 264-65 (figure 12 shows that "…sponsors tend to do very well even where SPAC investors do quite poorly. For instance, even among SPACs that underperformed against the Nasdaq by at least 30% in post-merger returns, sponsors made an average of $5 million in profits (adjusted against the Nasdaq), and 187% in excess returns on their investments.").

share price above ten dollars. This results in a situation where sponsors can profit at the expense of retail investors' loss.

For SPACs that merged between 2019 and 2020, the mean net cash per share was $4.10.[86] This represents, on average, a loss of $5.90 per share for retail investors and a gain of $4.10 per share for sponsors.[87] Accordingly, mean sponsor returns were measured at 512% on a market-adjusted basis compared with the 19.1% returns of retail investors 12 months after a merger.[88] The discrepancy between sponsor and retail shareholder returns is a direct result of the structure of modern SPACs and imbalance in incentives.

B. Modern SPACs Have Eroded Shareholder Rights

While Nussbaum's SPACs voluntarily adopted many of the Rule 419 safeguards, more recent SPACs have eroded these safeguards, particularly with respect to voting requirements and conversion thresholds.[89] Two key features of the original SPACs created by Nussbaum include the ability for shareholders to vote on the proposed merger and to redeem their shares for their initial value.[90] Mergers require majority support of SPAC shareholders; and, if a significant amount of shareholders (typically more than 20%) elected to redeem their shares, the acquisition also would not move forward.[91] The voting requirement and majority threshold formed two significant shareholder rights during the de-SPAC process. Modern SPACs have eroded shareholder power by removing the majority voting requirement and increasing the conversion threshold to 88% in some cases.[92] This erosion of shareholder rights makes it more difficult for shareholders to halt a transaction they deem unfit.

III. EXISTING SOLUTIONS

A. Earnouts and Sponsor Investment Can Help Balance Incentives but Cannot Completely Solve Misalignment

To better align sponsor and shareholder interests, some SPACs have proposed creating earnout schemes whereby the sponsor only receives their promote fees upon meeting certain benchmarks.[93] While a portion is delivered upon completion of the merger, the rest of the promote is contingent upon the stock price reaching certain threshold markers, typically

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[86] *Id.* at 246.
[87] *See id.*
[88] *Id.* at 256, 263.
[89] Rodrigues & Stegemoller, *supra* note 26, at 856.
[90] Riemer, *supra* note 48, at 954-55 ("Unless a majority of investors affirmatively approve a combination, and less than twenty percent of investors vote against the combination, the fund is dissolved and investors are entitled to a pro rata share of the escrow account.").
[91] This percentage is known as the conversion threshold. *See* Rodrigues & Stegemoller, *supra* note 26, at 856.
[92] This means that that not until over 88% of shareholders redeem their shares will the merger be blocked. *See id.*
[93] *See* Michael Klausner & Michael Ohlrogge, *Is SPAC Sponsor Compensation Evolving? A Sober Look at Earnouts* 6 (Stan. L. and Econ. Olin, Working Paper No. 567, 2022); *see also* Andrew Ross Sorkin, How to Fix SPACs: Keep Their Backers Locked in Longer, N.Y. TIMES (Mar. 31, 2021), https://www.nytimes.com/2021/03/31/business/dealbook/spac-sponsors.html. [https://perma.cc/CCL2-6SYT].

$12.50 and $15.00.[94] These earnout schemes are limited to a certain time frame.[95] Earnout schemes incentivize sponsors to find target companies which will result in positive returns not just for themselves, but for retail investors as well. To further align sponsor and shareholder incentives, sponsors are encouraged to invest their own money into the SPAC to ensure they seek a deal that is beneficial for both parties.[96] That way, any loss in shareholder value will result in a proportional loss to the sponsor based on their personal monetary investment in the SPAC.

Michael Klausner and Michael Ohlrogge published a study analyzing the impact of earnouts on aligning incentives and they found that "[a]t best, a well-structured earnout, when coupled with a substantial investment in a merger by a sponsor, can deter a sponsor from proceeding with a merger that would be a *seriously* bad deal for shareholders…[i]t will not deter a deal that is simply bad"[97] Klausner starts with the proposition that in a vacuum, sponsors and investors both want to find the best possible deal.[98] But, there are deals that are detrimental to investors yet profitable for sponsors, which is where incentives are misaligned —for example, when a merger results in a value of less than ten dollars per share. If the deal goes through, the sponsor profits from their promote fees while the shareholder's investments lose value. If the deal does not go through, the sponsor loses their initial investment while the public shareholders get their initial investment back. Klausner contends that earnout schemes cannot fully prevent sponsors from pursuing a deal unfavorable to shareholders, as they still enable sponsors to profit in a merger that results in a share price below ten dollars.[99]

To illustrate this, suppose a SPAC designs an earnout where the sponsors' promote will be worth $10 million if the merger it proposes is worth ten dollars per share. Additionally, the sponsor commits to invest $10 million of their own money to buy a million shares at ten dollars per share. If the post-merger value of the SPAC shares are $8, not $10, the public shareholders lose $2 on each share they own, and the sponsor loses $2 million dollars on their initial investment. But some sponsors have years to meet the earnout threshold. Based on Klausner's Monte Carlo simulation, those encumbered shares are still valued at greater than $2 million, allowing the sponsor to still profit from a deal unfavorable to retail shareholders.[100] Klausner shows that, even with the most shareholder favorable structure,

[94] *See* Michael Klausner & Michael Ohlrogge, *Is SPAC Sponsor Compensation Evolving? A Sober Look at Earnouts* 18 (Stan. L. and Econ. Olin, Working Paper No. 567, 2022).
[95] *See id.*
[96] *See* Andrew Ross Sorkin, How to Fix SPACs: Keep Their Backers Locked in Longer, N.Y. TIMES (Mar. 31, 2021), https://www.nytimes.com/2021/03/31/business/dealbook/spac-sponsors.html [https://perma.cc/CCL2-6SYT].
[97] *See* Michael Klausner & Michael Ohlrogge, *Is SPAC Sponsor Compensation Evolving? A Sober Look at Earnouts* 1 (Stan. L. and Econ. Olin, Working Paper No. 567, 2022).
[98] *See id.* at 6.
[99] *See id.* at 33.
[100] *See id.* at 26. (Figure 3 shows that with a two-year earnout scheme, earnout threshold of $12.50, and a post-merger share value of $8, the relative value of the encumbered shares only reduces by roughly 25%. With an earnout threshold of $10, the relative value is reduced by even less).

earnout schemes fail to diminish the value of encumbered shares beyond the losses they suffer from a bad deal.[101]

B. The Commission's Amendment of the Definition of Blank Check Company Creates Statutory Inconsistencies.

In the January 2024 SPAC rules, the Commission expanded the definition of "blank check company" in Securities Act Rule 405 and Exchange Act Rule 12b-2 under the Public Securities Litigation Reform Act (PSLRA) to include SPACs, but refused to do the same under Securities Act Rule 419 under the Penny Stock Reform Act (PSRA).[102] This inconsistency creates confusion in the application of securities laws. As discussed, Congress passed the PSRA in 1990 to protect investors from fraud related to penny stock companies.[103] The PSRA's definition of a blank check company includes the requirement that it issues penny stock.[104] Congress later passed the PSLRA in 1995 to curb frivolous lawsuits against public companies by, among many other things, creating a safe harbor for forward-looking statements.[105] However, Congress included an exception for IPOs, blank check companies, and penny stock issuers because each of those categories posed a high risk for investor fraud.[106] Under the PSLRA, Congress gave the Commission the authority to define a "blank check company," in contrast to the PSRA, which previously defined the term. By creating multiple definitions of blank check company, the Commission generated confusion when interpreting securities laws.

C. The Commission's Finalized Rules

On January 24th, 2024, the Commission issued a finalized set of rules regulating SPACs.[107] Section III focused on the newly issued Rule 145a, which "specifies that a sale occurs from the post-transaction company to the existing shareholders of a reporting shell company in situations where a reporting shell company that is not a business combination related shell company enters into a business combination transaction involving another entity that is not a shell company."[108]

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[101] *See id.* at 7.

[102] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14229 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

[103] *See* Kevin C. Bartels, *"Click Here to Buy the Next Microsoft": The Penny Stock Rules, Online Microcap Fraud, and the Unwary Investor*, 75 IND. L. J. 353, 354 (2000); *See* Letter from Virtu Fin., Inc., to Vanessa A. Countryman, Secretary, SEC (July 15, 2024), https://www.sec.gov/files/rules/petitions/2024/petn4-830.pdf. [https://perma.cc/U444-LHCS].

[104] *See* 15 U.S.C. § 77g(b)(3). Pub. L. No. 101-429, 104 Stat. 931, 957.

[105] *See* Jean-Claire Perini, *Don't Get Burned: Why The De-SPAC Transaction Must Be Excluded From The PSLRA's Safe Harbor Provision For Forward-Looking Statements,* 67 VIL. L. REV. 411, 416-17 (2022).

[106] *See id.* at 416-17, 432.

[107] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14158 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

[108] *See id.* at 14240.

Section 5 of the Securities Act requires issuers to file a registration statement for any public offering of securities.[109] Issuers may register securities through any number of forms, most commonly through an S-1, but in the case of mergers, typically through an S-4.[110] Each of these forms requires certain financial and operational disclosures meant to inform shareholders about their investment. SPACs have avoided registration during a de-SPAC because it was unclear whether a de-SPAC involved a "sale" of securities as defined under Section 5 of the Securities Act.[111] Through Rule 145a, the Commission states that a de-SPAC *per se* involves a sale of securities, and thus, the SPAC is subject to the registration requirements under Section 5 of the Securities Act.[112] This imposes higher compliance costs, ongoing reporting obligations, and most importantly, subjects companies to liability under Section 11 of the Securities Act for false or misleading statements, opening up the door for Commission and civil enforcement.[113]

IV. ANALYSIS

A. What Is the Definition of "Sale"?

Section 2(a)(3) of the Securities Act defines a "sale" as every contract of sale or disposition of security, or interest in a security, for value.[114] There are two parts in this definition. First, there must be some sort of "disposition" of a security, and second, there must be some "value" that is accrued to the issuer. A de-SPAC transaction must therefore satisfy both requirements to be deemed a "sale" under with Section 2(a)(3) of the Securities Act. The "for value" provision modifies the "disposition" requirement. Thus, analyzing whether a transaction is "for value" is contingent upon the transaction involving a disposition. A de-SPAC does not inherently involve a disposition, and therefore, does not necessarily confer value upon the issuer. Thus, a de-SPAC does may not satisfy the definition of a statutory sale under Section 2(a)(3) of the Securities Act.

In 1972, the Commission adopted Rule 145, which expanded the definition of "sale" to include the event in which shareholders are presented with an investment decision related to a business combination, in which they may elect to exchange their existing securities for new securities.[115] Rule 145 goes on to list three different business combinations that would give rise to such a "sale": reclassifications, mergers or acquisitions, and transfers of assets.[116] By adopting Rule 145, the Commission intended to expand the

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[109] *See* 15 U.S.C. § 77e.
[110] *See* 17 C.F.R. § 239.25 (2023); *See also Registration Statement*, LEGAL INFO. INST., CORNELL L. SCH. (Jan. 2022), https://www.law.cornell.edu/wex/registration_statement [https://perma.cc/B2W8-LM9X].
[111] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14240 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[112] *See id.*
[113] *See* 15 U.S.C. § 77k.
[114] *See* 15 U.S.C. § 77b(a)(3).
[115] *See* 17 C.F.R. § 230.145.
[116] *See* 17 C.F.R. § 230.145(a).

protections of Section 5 of the Securities Act to persons involved in significant business combinations which required shareholder votes.[117] Rule 145 marks the Commission's introduction of a "constructive sale".

While Rule 145 expands the definition of sale to include certain business combinations, it still maintains three requirements. First, there must be a valid business combination. Second, there must be an exchange between a pre-existing security and a newly issued security. Third, shareholders must be given a decision on whether or not they would like to make such an exchange. The "exchange" and "investment decision" requirements under Rule 145 correspond to the "disposition" and "for value" requirements under Section 2(a)(3).

1. Defining "Disposition" of Securities Under Section 2(a)(3)

Under Section 2(a)(3), a sale must involve a "disposition" of securities.[118] Rule 145 expands upon the "disposition" requirement, clarifying that a sale occurs when shareholders are presented with an investment decision on whether to exchange a pre-existing security for a new security. The investment decision combined with the exchange requirements form the basis for liability under Rule 145. If the purpose of securities laws is to ensure disclosures regarding securities transactions, then disclosure is unnecessary when no material exchange occurs.[119]

Rule 145 states that a "sale shall be deemed to be involved… in which securities of such corporation… will become or be exchanged for securities of any person…"[120] When interpreting rules and statutes, it's important to first look at the plain meaning of the text.[121] Merriam-Webster defines "exchange" as "the act of giving or taking one thing in return for another".[122] "Act" implies that there is an actor, who in this case, would be the existing shareholder. The definition requires the shareholder to give something in return for something tangibly different. If there is no give and take, there is no exchange. Furthermore, if a shareholder does not receiving something materially different from what they already own, there is exchange. This is evident in the treatment of dividend distributions, which do not constitute a sale.[123] In dividend distributions, shareholders are not exchanging value for a security but are simply choosing between two pre-existing rights—receiving the dividend in cash or as a security.[124] Thus, Rule 145 requires there to be a tangible give and take of securities for consideration by the shareholder.

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[117] *See* 17 C.F.R. § 230.145.
[118] *See* 15 U.S.C. § 77b(a)(3).
[119] *See generally* SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953).
[120] *See* 17 C.F.R. § 230.145(a).
[121] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 393 (2024); *See* LINDA D. JELLUM, *The Legislative Process, Statutory Interpretation, and Administrative Agencies* 126 (2d ed. 2021).
[122] *Exchange*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/exchange [https://perma.cc/3QRX-46M6] (last visited Apr. 7, 2025).
[123] *See* Letter of General Counsel Discussing Whether a Sale of a Security is Involved in the Payment of a Dividend, 11 Fed. Reg. 10957-58 (Sep. 27, 1946).
[124] *See id.*

Two cases further clarify that the definition of a sale can encompass a spin-off of securities, in which a public company forms a new, publicly traded independent entity by distributing shares of a subsidiary or division to its existing shareholders.[125] While both a spin-off and a de-SPAC are corporate restructuring methods that create a new publicly traded entity, their structural differences mean that a de-SPAC does not automatically qualify as a sale under Section 2(a)(3) the way a spin-off does.

Under both *SEC v Harwyn Industries Corp.* and *SEC v. Datronics Engineers, Inc.*, the Southern District of New York and the Fourth Circuit held that the spin-off of unregistered securities violates Section 5 of the Securities Act.[126] In both cases, the "spin-off" involved shareholders receiving unregistered securities in a subsidiary in return for existing securities in the parent corporation, thus implicating an exchange.[127]

In *SEC v. Harwyn Industries Corp.*, a publicly traded company engaged in multiple identical transactions to spin-off unregistered securities in its subsidiaries in order to avoid registration fees, effectively creating a publicly traded market for a private company.[128] Harwyn was a publicly traded company which owned four different subsidiaries, none of which engaged in any substantive business.[129] These subsidiaries would acquire assets of other private corporations in exchange for a controlling interest in the subsidiary.[130] The parent, Harwyn, would then spin-off the remaining securities in the newly combined subsidiary to their shareholders in exchange for shareholders' existing securities in the parent, Harwyn.[131] The Southern District of New York found this entire transaction to be in violation of Section 5 of the Securities Act.[132] The defendants argued that the "spin-off" of shares in the subsidiary was simply a dividend distribution of what shareholders already owned, and thus not a sale.[133] The Court disagreed, and found that the exchange of an existing security in Harwyn for a new security in the combined entity represented a statutory sale, and was thus in violation of Section 5 of the Securities Act because the securities were unregistered.[134]

Following the holding in *SEC v. Harwyn Industries Corp.,* the Fourth Circuit found that the appellee in *SEC v. Datronics* violated Section 5 of the Securities Act when they spun-off shares in a subsidiary to their shareholders.[135] Similar to *Harwyn*, Datronics created a new shell

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[125] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973); *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 953 (S.D.N.Y. 1971).
[126] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973); *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 953 (S.D.N.Y. 1971).
[127] *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 953 (S.D.N.Y. 1971); *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973)
[128] *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 948 (S.D.N.Y. 1971).
[129] *See id.* at 946.
[130] *See id.* at 948.
[131] *See id.*
[132] *See id.* at 953.
[133] *See id.* at 954.
[134] *See id.* at 953.
[135] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973).

corporation, or used an existing subsidiary, to merge with a target private operating company.[136] This merger gave the executives of the target company a majority stake in the merged corporation.[137] Datronics would receive a third of the remaining securities for a nominal sum, some of it being paid as compensation for legal and organizational services in the merger.[138] As per the agreement, Datronics distributed the rest of the securities to its public shareholders in the form of a dividend.[139] Similar to the Southern District of New York in *Harwyn*, The Fourth Circuit found this entire scheme to be a violation of Section 5 of the Securities Act because they failed to register the spun-off securities.[140]

Harwyn and *Datronics* illustrate a pattern where a publicly traded corporation uses subsidiaries to merge with a privately operating company.[141] The parent then issues and distributes the new and unregistered securities in the combined entity to its shareholders, typically in exchange for shareholders' existing securities in the parent.[142] This pattern constitutes a statutory sale, and thus, securities from a spin-off must be registered under Section 5 of the Securities Act.

Before the Southern District of New York and the Fourth Circuit decided *Harwyn* and *Datronics*, respectively, the Commission issued a release titled *Spin Offs & Shell Corporations*, clarifying that a sale occurs when subsidiary "issues" shares to a public company for nominal consideration.[143] If and when those shares are distributed to shareholders in a "spin off", the public company may become a statutory underwriter.[144] The Commission's release reaffirms that a sale occurs when there is an issuance and exchange of shares but distinguishes a sale from a dividend distribution. While spin-offs inherently involve an issuance and exchange of shares, de-SPACs do not, allowing them to potentially avoid the Commission's interpretation.

2. For Value

In addition to requiring the disposition of a security to be deemed a statutory sale, Section 2(a)(3) requires the issuer to accrue "value" through such a disposition.[145] Courts have interpreted this standard broadly, identifying value in cases of spin-offs and distributions of "free stock".[146] In these cases, the courts identified value through the creation of a secondary trading market and the subsequent increase in share price held by issuers and

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[136] *See id.*
[137] *See id.*
[138] *See id.*
[139] *See id.*
[140] *See id.*
[141] *See id.*; *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 952 (S.D.N.Y. 1971).
[142] *See Datronics Eng'rs, Inc.*, 490 F.2d at 253; *See Harwyn Indus. Corp.*, 326 F. Supp. at 952-53.
[143] *See* Commodities and Security Exchanges, Spin Offs and Shell Corps, 34 Fed. Reg. 11581, 11581 (Jul. 14, 1969).
[144] *See id.*
[145] *See* Securities Act of 1933 § 2(a)(3), 15 U.S.C. § 77b(a)(3).
[146] *See Datronics Eng'rs, Inc.*, 490 F.2d at 253; *Harwyn Indus. Corp.*, 326 F. Supp. at 953.

underwriters.[147] Additionally, Rule 145 identifies a sale when shareholders make a "new investment decision" by electing to participate in the exchange of securities The "value" in the investment decision is the existing security that the shareholder gives to the issuer.[148]

In *Harwyn*, shareholders were presented with the opportunity to exchange four of their existing shares in Harwyn for one share in the subsidiary.[149] This opportunity was a sale under the investment decision requirement of Rule 145.[150] The price of the newly issued and distributed securities immediately shot up due to the creation of a secondary market, benefitting its owners and the Harwyn insiders.[151] The defendants argued that the shareholders did not provide any "value" in exchange for the shares, and therefore did not meet the statutory definition of a sale.[152] The Court disagreed, noting that value accrued to Harwyn and its insiders through the creation of a trading market in the newly issued securities of its subsidiaries.[153] The Court concluded that this entire scheme constituted a sale of unregistered securities and was thus in violation of Section 5 of the Securities Act.[154]

Similar to the court in *Harwyn*, the Fourth Circuit in *Datronics* identified that value accrued to the appellee through the creation of a new market and the increase in share price based on the subsequent trading.[155] Shareholders in *Datronics* were also presented with a similar investment decision.[156] While the appellees argued that Datronics did not gain any "value" from the distribution of these new securities, the Fourth Circuit argued opined that the "spurious creation of a market whether intentional or incidental" violated the Securities Act.[157] Additionally, the Court found that the issuers of the stock gained value by nature of transitioning from a private to public company.

In both cases, the parent received a significant portion of the newly issued securities in the combined entity for a nominal price.[158] The Parent also does not have any independent business purpose for conducting this merger, other than to "spin-off" the securities of the combined entity.[159] Both

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[147] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14240-41 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

[148] 17 C.F.R. § 230.145 (2025) (preliminary note providing that a sale occurs "when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security.").

[149] *See Harwyn Indus. Corp.*, 326 F. Supp. at 948.

[150] *See* 17 C.F.R. § 230.145 (2015).

[151] *See Harwyn Indus. Corp.*, 326 F. Supp. at 947.

[152] *See id.* at 953-54.

[153] *See id.* at 954.

[154] *See id.* at 954-55.

[155] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253-54 (4th Cir. 1973).

[156] *Compare Harwyn Indus. Corp.*, 326 F. Supp. at 948 *with Datronics Engineers, Inc.*, 490 F.2d at 253.

[157] *See Datronics Eng'rs, Inc.*, 490 F.2d at 254.

[158] *See id.* at 253; *Harwyn Indus. Corp.,* 326 F. Supp. at 953.

[159] *See Datronics Eng'rs, Inc*., 490 F.2d at 253.

courts pointed to the nature of the exchange, the nominal consideration, and the lack of independent business purpose, along with the creation of a secondary market in identifying value accrued to the issuer.[160]

B. A De-SPAC Does Not Neatly Fit the Definition of a Sale

1. A De-SPAC Does Not Always Involve the Disposition of Securities

Some de-SPACs do not involve the issuance of new securities, and thus, the Commission does not have the authority to deem those transactions a statutory sale. De-SPACs can take various forms, with some structured as share exchanges, while others preserving existing securities. Rule 145(a) attempts to apply a blanket definition across all de-SPACs regardless of transaction structure, which is inconsistent with Section 2(a)(3), Rule 145, and *Harwyn* and *Datronics*. Specifically, a SPAC-on-Top transaction structure does not require the issuance or exchange of shares, and thus, should not constitute a statutory sale.[161]

In a SPAC-on-Top merger the SPAC continues as the surviving entity while existing SPAC shareholders maintain their already-issued securities in the SPAC.[162] The SPAC-on-Top merger does not involve the issuance or new securities, nor does it require existing shareholders to make a decision on whether they would like to exchange their existing shares.[163] Because the SPAC-on-Top merger does not require the issuance of shares or a shareholder exchange, it does not satisfy the disposition requirement under Section 2(a)(3). In contrast, *Harwyn* and *Datronics* both involved the issuance of new securities in a combined entity, which were subsequently distributed to the shareholders in the form of a share exchange where shareholders could opt to exchange existing securities for the newly issued ones.[164] The Commission argues that despite there being no tangible exchange in a SPAC-on-Top merger, shareholders' interests in the predecessor "change into interest in the combined company", thus implicating a constructive exchange.[165] However, neither Section 2(a)(3) nor Rule 145 indicate any conception of sale predicated upon a "change in interest," let alone a change of interest that does not involve a tangible exchange of securities.[166] The Commission's application of the definition of a sale to a SPAC-on-Top merger stretches the statutory definition of a sale beyond what is indicated by Congress.

Certain de-SPAC transactions, such as a SPAC-on-Top merger, are better analogized to a traditional reverse merger, which does not involve the

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[160] *See id.* at 253-54; *Harwyn Indus. Corp.,* 326 F. Supp. at 953.
[161] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14242 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[162] *See id.*
[163] *See id.* at 1241-42
[164] *See* Datronics Eng'rs, Inc., 490 F.2d at 253; *See Harwyn Indus. Corp*., 326 F. Supp. at 953-54.
[165] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14242 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[166] 17 C.F.R. § 230.145; Securities Act of 1933 § 2(a)(3), 15 U.S.C. § 77b(a)(3).

distribution of securities and thus does not meet the statutory definition of a sale.[167] In a traditional reverse merger, a private operating company exchanges shares in its own company for a majority stake in a public shell company.[168] Legally, the shell company is the surviving entity, but now operates with the assets and management of the previously private company.[169] Because reverse mergers do not necessitate the issuance or distribution of securities to shareholders, they do not necessarily require registration under the Securities Act of 1933.[170] The only filing requirement for reverse mergers is for shell companies to file a Form 8-K within four business days after closing.[171] Again, the Commission argues that de-SPAC transactions are distinguished from traditional reverse mergers because de-SPACs change the "actual nature of the investment" whereas reverse mergers do not.[172] However, neither Section 2(a)(3) nor Rule 145 define sale or disposition based on a "change in nature."[173] Rather, a disposition of securities involves a tangible distribution of shares to shareholders, as described in *Harwyn* and *Datronics*.[174]

2. A De-SPAC Does Not Always Involve a Shareholder Decision or Result in the Issuer Accruing Value

Since de-SPACs do not necessarily involve the disposition of securities, they do not satisfy the first prong of Section 2(a)(3) and thus do not constitute a statutory sale. However, even if they did constitute a disposition, a de-SPAC would still fall outside Rule 145's "value" provision because a de-SPAC neither involves an investment decision, as required in Rule 145, nor results in the creation of a trading market for new securities leading to a subsequent spike in price.[175] Even if a de-SPAC involves a disposition, it does not necessarily meet the "for value" requirement under Section 2(a)(3) and may not qualify as a sale.

Depending on how the transaction is structured, a de-SPAC may not present a "new investment decision" to shareholders.[176] Usha Rodrigues and Mike Stegemoller point out that the new generation of SPACs have largely

[167] *See* Letter from Jay H. Knight, ABA Comm. on Fed. Regul. Sec. Chair, to Vanessa A. Countryman, Sec. & Exch. Comm'n Sec'y (June 17, 2022) (on file at https://www.sec.gov/comments/s7-13-22/s71322-20131981-302447.pdf) [https://perma.cc/DNE8-B5MH].
[168] *Investor Bulletin: Reverse Mergers*, SEC. & EXCH. COMM'N (June 2011), https://www.sec.gov/investor/alerts/reversemergers.pdf [https://perma.cc/BMC2-4UL4].
[169] *See id.*
[170] *See id.*
[171] *See id.*
[172]*See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14243 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).
[173] 17 C.F.R. § 230.145 (2025););); 15 U.S.C. § 77b(a)(3) (2022).
[174] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973); *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 953-54 (S.D.N.Y. 1971).
[175] 17 C.F.R. § 230.145 (2015); *Datronics Eng'rs, Inc.*, 490 F.2d at 253; *Harwyn Indus. Corp.,* 326 F. Supp. at 953.
[176] 17 C.F.R. § 230.145 (2025).

done away with shareholder voting.[177] Similarly, reverse mergers, which are functionally equivalent to de-SPACs, also do not require a shareholder vote, and thus, are not required to register through an S-4.[178] Because shareholder voting is not required and is largely disappearing from the structure of modern SPACs, de-SPAC transactions do not necessarily involve an investment decision, and thus, fail to satisfy Rule 145 and Section 2(a)(3).[179]

While SPACs may still offer their shareholders a right to redeem, this redemption is not an investment decision.[180] When a shareholder exercises their redemption right, they are not exchanging an old security for a new one , but, instead, are receiving their initial investment back.[181] Thus, redemption rights are not a "new investment decision" under Rule 145, but are instead an exercise of an already existing right.[182] Unlike in *Harwyn* and *Datronics* where shareholders were given the opportunity to trade in their old shares for new ones, shareholders in a SPAC are not presented with such an investment decision, and thus, do not fall under Rule 145.[183]

Finally, de-SPACs do not result in the creation of a new trading market because the trading market for securities in a SPAC already exists before the merger is consummated. Unlike the spin-offs in *Harwyn* and *Datronics*, which utilized a publicly traded parent company to distribute securities of an unregistered entity, a SPAC only distributes its own securities, which represent an already publicly traded and registered company.[184] Unlike *Harwyn* and *Datronics*, there is no "development" of a trading market, and thus, no value accrued to the issuer.[185] Therefore, de-SPACs fail to satisfy Rule 145 and the second prong of Section 2(a)(3), and thus, do not constitute a statutory sale.

IV. CONCLUSION

SPACs are a promising investment vehicle that offer a new avenue for private companies to go public and the opportunity for retail investors to invest in a potentially lucrative business. While some SPACs may present the potential for misaligned incentives between sponsors and retail investors, expanding the definition of a "sale" to include all de-SPACs is inconsistent with the statutory definition of a sale and falls outside of the scope of the Commission's authority. Furthermore, *Loper Bright* establishes that administrative agencies, like the Commission, no longer have the authority to interpret ambiguous statutes.[186] As a result, the Commission's adoption of

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[177] *See* Rodrigues & Stegemoller, *supra* note 26, at 927.
[178] SEC. & EXCH. COMM'N, *supra* note 167.
[179] 17 C.F.R. § 230.145 (2025).
[180] *See* Knight, *supra* note 166.
[181] *See id.*
[182] *See id.*
[183] *See* Sec. & Exch. Comm'n v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973); *See* Sec. & Exch. Comm'n v. Harwyn Indus. Corp., 326 F. Supp. 943, 953 (S.D.N.Y. 1971).
[184] *See Datronics Eng'rs, Inc.,* 490 F.2d at 253; *Harwyn Indus. Corp.,* 326 F. Supp. at 945.
[185] *See Datronics Eng'rs, Inc.*, 490 F.2d at 255; *See Harwyn Indus. Corp.*, 326 F. Supp. at 946.
[186] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412-13 (2024).

Rule 145(a) will likely face heightened scrutiny, as it extends the definition of "sale" beyond Congress's original intent.

Expanding the statutory definition of a sale beyond Congressional constraints could lead to unintended consequences of overregulating transactions which do not involve the disposition of securities or a shareholder investment decision. These two requirements are key components of the definition under Section 2(a)(3) and Rule 145, and should not be ignored simply to target SPACs or for ease of enforcement.[187] Instead of applying a blanket definition, the Commission should enforce registration requirements on a case-by-case basis. Because the definition of a sale has been clearly established by Congress and previous rules, the Commission should defer to such interpretations before expanding the definition.

Furthermore, the issue of misaligned incentives can be mitigated through a variety of other ways, including more robust disclosures.[188] For example, the Commission's amendment of the definition of "blank check company" in Securities Act Rule 405 and Exchange Act Rule 12b-2 under the PSLRA would remove the safe harbor provision from SPACs, and expose them to potential liability for forward-looking statements.[189] This will encourage SPACs to be more honest and forthcoming in their disclosures, thereby better informing shareholders. Additionally, self-regulation and free market forces can lead to self-correction and more effectively aligned SPACs. As shareholders become more informed about the misalignment, SPACs will be forced to find ways to differentiate themselves to win investment, including increasing sponsor stakeholders and implementing more rigorous earnout schemes.

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[187] 17 C.F.R. § 230.145 (2025); Securities Act of 1933 § 2(a)(3), 15 U.S.C. § 77b(a)(3).
[188] *See* Klausner & Ohlrogge, *supra* note 93, at 38.
[189] *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, Special Purpose Acquisition Companies, Shell Companies, and Projections, 89 Fed. Reg. 14158, 14223 (Feb. 26, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).