

# Transparency, Independence, Fairness Opinions and the SEC

By Ralph Consola, Principal

The Securities and Exchange Commission (SEC) recently proposed new disclosure requirements to improve the quality of information for investors in adviser-led secondary transactions and SPAC / de-SPAC transactions.

The SEC's proposed changes are extensive. This article addresses their recommendations that **increase transparency to potential investors** including requirements for disclosing projected financial performance for the subject investments and potential conflicts of interest of the parties involved with the transaction. It is interesting to note that the **SEC has also recommended independent Fairness Opinions** for both de-SPAC transactions and for adviser-led secondary transactions. Below is a brief overview of Fairness Opinions and the SEC's recommendations.

**Fairness Opinions** are provided as a tool to advise company boards, management, and other fiduciaries on the fairness of a transaction, from a financial point of view, to the investors to whom they have a duty. Fairness Opinions are sought by buy-side and sell-side fiduciaries, but one Fairness Opinion firm does not provide an opinion for both sides of a transaction.

The benefits of a properly prepared independent Fairness Opinion are:

- Documentation of the results of a valuation process and the financial issues that were taken into consideration.
- A written opinion that the value arrived at is fair from a financial point of view to the identified parties.
- Tangible evidence that can be used in litigation to demonstrate that the fiduciaries acted reasonably and on a well-informed basis.
- Transaction insight to fiduciaries from a source that is unbiased by transaction or other performance commission.

It should be clear that Fairness Opinions do not opine that a specific transaction is the best deal available, only that the subject transaction is fair.

## Adviser-led Secondary Transactions

Defined as any transaction initiated by the investment adviser or any of its related persons that offers private fund investors the choice to:

1. Sell all or a portion of their interests in the private fund; or
2. Convert or exchange all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons.

On February 9, the SEC proposed changes to the Investment Advisers Act of 1940 ("Advisers Act"). One of the new rules proposed is requiring an **independent Fairness Opinion** for adviser-led secondary transactions.

*Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, SEC, February 9, 2022, Page 122 ([www.sec.gov/rules/proposed/2022/ia-5955.pdf](http://www.sec.gov/rules/proposed/2022/ia-5955.pdf)):

*"The proposed adviser-led secondaries rule would prohibit an adviser from completing an adviser-led secondary transaction with respect to any private fund, unless the adviser distributes to investors in the private fund, prior to the closing of the transaction, a fairness opinion from an independent opinion provider ..."*

Page 125 goes on to further define **independent opinion provider**:

*"To mitigate the potential influence of the adviser's conflict of interest further, the rule would require these opinions to be issued only by an 'independent opinion provider,' which is one that (i) provides fairness opinions in the ordinary course of its business and (ii) is not a related person of the adviser..."*

### SPAC / de-SPAC Transactions

A **Special Purpose Acquisition Company** ("SPACs") is a company organized and capitalized in support of a plan to acquire a privately-held operating company(ies). The SPAC is taken public through an IPO transaction, but it does not have revenue generating operations until it merges with a business enterprise through a de-SPAC transaction. SPACs are oftentimes referred to as "shell companies" or "blank check companies" because they don't have revenue generating activity when founded. While SPACs have been around for years, they gained great popularity recently, starting in 2019, and began receiving public scrutiny from the SEC in 2021.

Quoting directly from the SEC's *Special Purpose Acquisition Companies, Shell Companies, and Projections*, March 30, 2022, Page 18 ([www.sec.gov/rules/proposed/2022/33-11048.pdf](http://www.sec.gov/rules/proposed/2022/33-11048.pdf))

*"...we (SEC) are proposing to, among other things:*

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



Note that the SEC is also considering that disclosures emphasize the independence, or lack of independence, of the party providing the Fairness Opinion, (*ibid.*, p56, footnote #100):

*"... this disclosure could include whether the compensation for a financial advisor's fairness opinion is conditioned on the completion of the de-SPAC transaction or whether the amount of compensation due the financial advisor may include a bonus or may be increased depending on the ultimate financial terms of the de-SPAC transaction."*

The items listed above are just some of the recommendations of the SEC. The entire document includes proposed changes to the Securities Act of 1933, Securities Exchange Act of 1934, Private Securities Litigation Reform Act of 1995, and Investment Company Act of 1940 : [www.sec.gov/rules/proposed/2022/33-11048.pdf](http://www.sec.gov/rules/proposed/2022/33-11048.pdf).

### The Value of Independence

Marshall & Stevens has always structured its fairness opinion assignments in this light – we are an independent advisor to the board and our compensation is fixed and without any bonus or upside if we ultimately determine that the transaction is fair. We have always believed this is the best way to advise the board on whether to proceed or not with a significant, public or private company transaction. We also believe that an independent Fairness Opinion carries much more weight versus an opinion provided by a party that has compensation reliant upon the closing of a transaction.

Founded in 1932, Marshall & Stevens provides independent Fairness Opinions, Solvency Opinions, and valuations of business enterprises, intangible and tangible assets, debt and equity instruments, and real estate for public and private company transactions.

For more information, please contact us or visit our website at [marshall-stevens.com](http://marshall-stevens.com).



*Ralph Consola has been with Marshall & Stevens since 1999. He works with clients and trusted advisors to provide independent Fairness Opinions, Solvency Opinions and the valuation of businesses, equity, debt, and assets, both tangible and intangible.*

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