

RAISING CAPITAL THROUGH SPACS: SEC ADOPTS NEW RULES TO IMPROVE SPAC INVESTOR PROTECTIONS: DEAL POINTS

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I. Executive Summary

On January 24, 2024, the Securities and Exchange Commission (“SEC”), the U.S. securities regulator, adopted new final rules (the “Final Rules”) intended to enhance investor protections in SPACs (“Special Purpose Acquisition Companies”) by stiffening disclosure requirements in SPAC Initial Public Offerings (“IPOs”) and subsequent SPAC mergers. The Final Rules, which will become effective 125 days after publication in the Federal Register, are available [Here](#). The compliance date for most of the Final Rules is the same as the effective date, so these rules are functionally in effect for all SPACs launched from now on.

SPACs burst into mainstream popularity in 2020 after years of on-again-off-again vogue as an alternative means to traditional IPOs for companies to access the public capital markets. SPACs are “blank check” companies - shell companies without an operating business - formed and taken public in an IPO for the sole purpose of merging with or acquiring an operating business, usually a private company (the “Target Company”), with the IPO proceeds, in a transaction called a “Business Combination” or “De-SPAC Transaction,” thereby allowing the Target Company to succeed to public company status and the IPO proceeds. According to SPAC Insider, in 2020, 248 SPAC IPOs raised \$83.38 billion in 2020, at an average IPO size of \$336.2 million. In 2021, 613 SPAC IPOs raised \$162.5 billion at an average IPO size of \$265.1 million. But in 2022, only 86 SPACs went public, raising a total of \$13.43 billion at an average IPO size of \$156.2 million, and 2023 was even worse: 31 SPACs raised a total of \$3.85 billion at an average IPO size of \$124.1 million.¹

The overall effect of the Final Rules is to align SPAC IPO requirements more closely with traditional IPOs, and it remains to be seen whether the result will be to restore investor confidence in the SPAC market or discourage it by making SPAC IPOs more costly and onerous. Here, we’ll review SPAC fundamentals as a framework to discussion of the Final Rules, which are reviewed in gray text boxes throughout: Section II discusses the SPAC IPO; Section III discusses the SPAC Business Combination. As in our *“Raising Capital through Private Placements: Deal Points”* available at [Kurtin PLLC Raising Capital](#), following the discussion are “Deal Points” in Section IV on important considerations in the SPAC IPO and De-SPAC process and *what at all costs not to do*.

¹ <https://spacinsider.com/stats/>.

Final Rules - Definitions

The Final Rules create a new Subpart 1600 of Regulation S-K, the Securities Act of 1933 (the “Securities Act”) regulation that specifies the qualitative (non-financial) information to be provided by the securities issuing company in IPOs (including traditional, non-SPAC IPOs) and other public filings under the Securities Act and the Securities Exchange Act of 1934 (the “Exchange Act”) (by contrast, Reg. S-X sets out the financial statement information to be provided) to settle formal definitions of terms that had imprecise and often shifting meanings in the marketplace.

The Final Rules define “SPAC” as a company that has indicated that its business plan is to: (i) conduct an IPO of its securities *not* subject to Securities Act Rule 419, which governs securities offerings by blank check companies (*see Section II(b), below*); (ii) then complete a Business Combination with one or more Target Companies within a specified time frame, and (iii) return the remaining IPO proceeds and those of any concurrent offering to its security holders if it does not complete the Business Combination within the specified time frame.

The Final Rules define “SPAC Sponsor” as any entity or person primarily responsible for organizing, directing or managing the SPAC’s business, but excluding officers and directors of the SPAC who are not affiliates of the SPAC Sponsor. The SEC also made clear in guidance that the “primarily responsible” part of the SPAC Sponsor definition is intended to exclude third party service providers such as legal counsel, accountants or other providers of administrative or ministerial activities. Without more, such persons and entities will not be considered part a SPAC Sponsor. On the other hand, a third-party management company primarily responsible for managing the SPAC’s affairs, might be considered a SPAC Sponsor.

The Final Rules define “Target Company” as an operating company, business or assets.

The Final Rules define “De-SPAC Transaction” as a Business Combination, including a merger, consolidation, exchange of securities, asset acquisition, reorganization involving a SPAC and one or more Target Companies (contemporaneously, when more than one Target Company is involved; the SEC provided guidance that after completing a first, non-contemporaneous Business Combination with a Target Company, the SPAC ceases to be a SPAC, and is a normal reporting company under the Exchange Act for any subsequent merger and acquisition (“M&A”) in which it engages, and is not required to comply with the enhanced Reg. S-K SPAC disclosure requirements under new Subpart 1600).

II. The SPAC IPO

a. Structure. SPAC structuring and IPO preparation generally involves the following steps:

- The SPAC must be formed, almost invariably as a Delaware corporation, by the SPAC Sponsor or promoter, with a certificate of incorporation and initial capital structure appropriate for use as the IPO vehicle. The certificate of incorporation may state the specific corporate purpose of the SPAC, down to the industry in which an acquisition is intended or may be open as to corporate purpose. It is also possible to use pre-existing public shell companies, ones that have sold their operating businesses and been de-listed from the securities exchange on which they traded, the NASDAQ, for example. Pre-existing shell companies come with their own problems, however, including potential and often hidden liabilities from the company's operating business days, so we'll focus here on newly created public shells.
- The SPAC, once formed, prepares a registration statement, with itself as registrant-issuer ("Issuer"), usually on SEC Form S-1, the registration statement form usually used for traditional IPOs, with special attention to the rules discussed in subsection (b), below, including the new Final Rules (in September 2020, the SEC explained some unusual circumstances in which a SPAC might register on abbreviated Form S-3, a less time-consuming and costly process; the corresponding foreign Issuer forms are F-1 and F-3).
- The SPAC offering usually consists of units of one share of Class A common stock and one or a fractional Class A warrant to buy additional shares of common stock, usually priced at \$10.00 per unit, a nominal pricing given that the unit valuation is not based on any underlying operating business fundamentals. The warrants function, as warrants ordinarily do, as a "sweetener" to compensate investors for the lock-up of their funds during the post-effective period when the SPAC is searching for its Target Company (*see Section III below*). Effectively, the warrants are futures contracts that are settled in the SPAC's own stock. SPAC warrants typically feature terms like contingencies under which the warrant would be exercisable, including a Business Combination, and anti-dilution and redemption provisions. The common stock and warrants are priced separately, with the warrants priced higher than the stock, usually at \$11.50, "out of the money," so there will not be an incentive to exercise them until the stock price rises to

meet or exceed the exercise price (*but see Section IV(b) below on trading in warrants*). After the IPO goes effective, the units trade for a while, usually one year, and then the stock and warrants trade separately. SPAC securities/unit composition and pricing are in some flux, as the financing dynamics come under competitive pressure and rapidly evolve.

- The SPAC Sponsor usually receives 20% of the SPAC's common stock as founders' compensation for perhaps 4–5% of the IPO proceeds (often syndicated or financed by the SPAC Sponsor) although, again, there are increasing variations on those terms.
 - The SPAC Sponsor's shares are usually subject to a lock-up agreement until the De-SPAC Transaction closes. The SPAC Sponsor may also buy warrants to finance the IPO costs, often in a private placement under Securities Act Reg. D, Rule 506 concurrent with the IPO.
 - Post-filing the registration statement, the SPAC engages in limited roadshow activities (*see subsection (b), below*).
 - Upon closing the IPO, all the IPO proceeds are placed in a trust or escrow account, which cannot be accessed (other than for some expenses) except to complete the Business Combination transaction or, under certain circumstances, redeem IPO investors and return their investments (*see Section III, below*).
 - Once the IPO goes effective, the IPO sponsor proceeds to list the SPAC on a securities exchange, usually the NASDAQ, and must comply with the exchange's listing rules as well as the Exchange Act's sections 13 or 15(d) periodic reporting requirements.
- b. Legal/Regulatory Issues. The IPO is conducted pursuant to Securities Act section 5 and Regulation C (17 CFR Part 230, §§400–498A) rules applicable to registered offerings, including traditional IPOs.
- Rule 419. Prior to the Final Rules, the most important Reg. C rule of special application to SPACs has been Securities Act Rule 419 (17 CFR §230.419), which generally governs securities offerings by blank check companies. Most SPACs structured themselves to be exempt from Rule 419's application (*see below*) but adhered to most of its provisions as a

matter of transaction norms and for prospective investor confidence. Now, the Final Rules define a SPAC as conducting an IPO *not* subject to Rule 419 (*see “Final Rules – Definitions” above*). It remains to be seen to what extent voluntary compliance with Rule 419’s provisions will continue to be a SPAC norm and a marketplace imperative. In anticipation of Rule 419’s continuing relevance to SPAC practice as a voluntary standard, Rule 419’s provisions are worth reviewing here. Rule 419 requires a blank check company’s IPO gross proceeds *and the securities issued in the IPO* to be deposited into an escrow or broker’s trust account, less certain IPO expenses (including underwriting commissions, up to 10% of proceeds for the Issuer-registrant), and not used until paid at closing to the Target Company or returned to shareholders at the end of a maximum 18-month period. Obviously, SPAC practice has been to list and trade the IPO securities immediately after the IPO closing, subject to lockups. By contrast, under both Rule 419 and exempt SPAC practice, the IPO funds are held in escrow for the sole benefit of the IPO securities purchasers and must be invested in government securities or a money market fund that invests only in government securities. The purchasers of the securities have voting rights under the applicable state corporate law.

Rule 419 further provides that the registration statement discloses the terms of the offering, including post-effective amendments containing information on any probable Business Combination acquisition or one for which an acquisition agreement has been signed. Notice must be given to each purchaser, which has at least 20 and no more than 45 business days to notify the issuer-registrant whether it wishes to remain an investor or not. If the purchaser wishes to redeem its investment, or merely does not respond by the 45th business day, the Issuer-registrant SPAC must return the investors *pro rata* share of the investment then held in the escrow or trust account, with interest, within five business days. If no Business Combination is consummated within the required 18-month period, all purchasers’ *pro rata* investments, with interest, must similarly be returned and the trust or escrow fund liquidated.

The Rule 419 requirements are in fact how SPACs have mainly operated as a matter of transaction norms prior to the Final Rules, and they might not be able to raise capital in the IPO if they did not offer that investor protection and opportunity for redemption; because of the escrow of IPO proceeds and redemption opportunity, SPAC IPOs have usually been treated as unusually safe by the investment community. However, most SPACs nevertheless structure themselves to be exempt from Rule 419, since the rule also

requires that there be no trading in the IPO securities until after the Business Combination closes. Exemption from Rule 419 has generally been available to SPACs because the rule limits the definition of blank check companies to those issuing “penny stock” in the meaning of Exchange Act Rule 3a51-1 (17 CFR §240.3a51-1), which excludes from the penny stock definition, among other criteria, the stock of a securities issuer that has been in operation for fewer than three years and which has at least \$5 million in net tangible assets. To be Rule 419-exempt, the SPAC must file a Form 8-K containing an audited balance sheet as soon as practicable after the IPO closes, a requirement generally expressly undertaken in the SPAC’s registration agreement and underwriting agreement, if any. In the result, SPACs as a practical matter have complied with most Rule 419 requirements even if formally exempt, with the major exceptions of (i) allowing trading of first the units and then the unit elements of common stock and warrants separately prior to the closing of the Business Combination transaction; and (ii) allowing 24, rather than 18, months to consummate a Business Combination before being compelled to liquidate the escrow or trust fund and return IPO funds to shareholders.

- Rule 405. SPACs are considered “shell companies” and therefore “ineligible issuers” under Securities Act Rule 405, which refers to include Rule 419’s definition of blank check companies as well as Rule 405’s own definition of shell companies as those with no or nominal operations and no or nominal assets consisting only of cash and cash equivalents. As ineligible issuers, SPACs may not generally use free writing prospectuses (a post-registration statement written communication constituting an offer to sell or solicitation of an offer to buy the securities) and are restricted in their roadshow presentations. Many Regulation C communications “safe harbors” during the IPO process are also restricted.
- Emerging Growth Companies. Securities Act section 2(a)(19) defines a class of “Emerging Growth Companies,” or “EGCs.” The definition includes annual gross revenues of at least \$1.07 billion or a common equity value of at least \$700 million. EGCs have more lenient reporting and disclosure assignments, and SPACs may qualify for EGC status for the first five years after IPO closing.
- Rule 144. SPAC shares are “Restricted Securities” under Securities Act Rule 144. Rule 144 creates a non-exclusive “safe harbor” for resale of securities by non-underwriter purchasers. Under Rule 144, Restricted Securities generally may not be resold unless a

holding period passes (six months for a reporting company and 1 year for a non-reporting company or a company that has been a reporting company for fewer than 90 days) or an exemption is available (*see “Raising Capital through Private Placements,” section I(e)*).

As previously mentioned, SPACS are “shell companies” under Rule 405 even if exempt from Rule 419 for 12 months after becoming a reporting company, completing the Business Combination and filing SEC Form 10 to register the securities for trading on U.S. securities exchanges. Much early SPAC securities trading occurs under Rule 144 exemptions or expiration of the applicable holding period. Resellers may have to file Form 144 for certain sales, including more than 5,000 shares or units or an aggregate sale price of over \$50,000 in a three-month period.

- c. Additional Financing. The SPAC may also, concurrently with the IPO, raise additional capital, including for founders’ expenses, in a PIPE (Private Investment in Public Equity) transaction, usually conducted under the Regulation D, Rule 506 exemption from registration (*see “Raising Capital”*).
- d. Closing. When the IPO closes, the IPO proceeds are deposited into the escrow or trust fund, and the SPAC may commence its search for a Target Company. Meanwhile, the SPAC becomes a public reporting company required to file periodic reports pursuant to the Exchange Act and lists on a securities exchange, usually NASDAQ.

Final Rules – Reg. S-K Disclosures: SPAC Sponsors, Conflicts, Dilution, De-SPACs

The Final Rules require disclosures by the SPAC in its IPO registration statement and subsequent 8-K filings to prospective investors and existing shareholders by the SPAC Sponsors and any promoters in the SPAC IPO and De-SPAC Transaction of, among other items:

- Their experience, material roles and responsibilities, as well as any understanding or agreement with the SPAC, its officers, directors and affiliates with respect to determining whether to proceed with a De-SPAC Transaction or redemption of outstanding securities.
- The controlling persons of the SPAC Sponsor and any persons who have direct or

indirect material interests in the SPAC Sponsor and the nature and amount of those interests, as well as an organizational chart showing those relationships.

- Tabular disclosure of all lock-up agreements between the SPAC Sponsor and its affiliates.
- The nature and amount of all compensation that has or will be awarded to the SPAC Sponsor, its affiliates and any promoters for all services rendered to the SPAC and any affiliates and any promoters, and any compensation to be paid to those parties upon completion of a De-SPAC Transaction. The SEC stated in guidance that any mechanisms such as anti-dilution provisions to keep SPAC Sponsor, affiliate and promoter compensation at a given level would have to be disclosed under Item 1603(a).
- Information relating to any material potential or actual conflicts between SPAC Sponsors, affiliates and promoters with unaffiliated investors' interests, particularly when deciding whether to enter into a De-SPAC Transaction.
- Information relating to dilution (measured by change in tangible book value per share), including whether compensation of the SPAC Sponsor and its affiliates may result in material dilution of investors' equity interests, a description of material potential sources of future dilution, and, with regard to De-SPAC Transactions, whether SPAC Sponsor and affiliates' compensation might result in material dilution of non-redeeming shareholders' equity interests when those shareholders hold the securities until consummation of the De-SPAC Transaction.
- Information relating to dilution from warrants, lock-ups and earnouts.
- Information to be provided in the registration statement prospectus cover page and prospectus summary disclosure.
- The background, material terms and effects of the De-SPAC Transaction, including the reasons for engaging the specific De-SPAC Transaction, material differences in rights of security holders in the De-SPAC Transaction post-closing, material interests in the De-

SPAC transaction or related financing of the SPAC Sponsor, the SPAC officers and directors and interests in, and affiliations with, the Target Company.

- Redemption and appraisal rights of securities holders who object to the De-SPAC Transaction, and any other rights they may have.

III. The SPAC Business Combination or De-SPAC Transaction

a. Structure and Documentation. Once the IPO has closed and gone effective, the SPAC commences the search for its Target Company:

- In general, the SPAC has 24 months to complete its Business Combination or De-SPAC Transaction, although those terms vary (the 24-month period is another deviation permitted when exempt from Rule 419's 18-month period to complete the Business Combination and is also in flux owing to SPAC competitive dynamics. 36 months is the maximum possible under some exchange listing requirements). Some SPACs may have provided in their registration statement for a relatively short-term automatic extension of time to complete the Business Combination provided that a binding Letter of Intent has been entered into by the original deadline; such an extension will usually require shareholder approval.
- No identification or communications with a Business Combination target are permitted until the IPO closes.
- The Business Combination is generally structured as a reverse merger under the state (usually Delaware) corporations statute, meaning that the SPAC technically merges into the Target Company, which becomes the surviving company, but succeeding to the now dissolved-by-merger SPAC's public company status as well as the non-redeemed IPO funds.
- The Business Combination transaction is structured and documented in a merger agreement and supporting documents, schedules and exhibits similar to those in a non-

SPAC merger transaction. Once all regulatory, shareholder and third-party approvals are obtained, the Business Combination closes like any other merger.

b. Legal/Regulatory Issues.

As the SEC made clear in the Final Rules guidance, the De-SPAC Transaction is also functionally the equivalent of the Target Company's IPO and involves disclosure and liability issues associated with both IPOs and M&A transactions involving reporting companies.

- The SPAC will usually need to obtain shareholder approval for the proposed Business Combination, which the shareholders may grant or withhold, usually by proxy statement. There are cases in which the SPAC sponsor itself and its affiliates have enough shareholder votes not to require other shareholders' votes to approve the de-SPACing Business Combination. In those cases, the SPAC will provide shareholders with an information statement prior to closing the De-SPAC Transaction. In other cases, in which the SPAC is not required to furnish shareholders with a proxy statement or information statement, it will generally furnish shareholders with a tender offer statement giving information about the Business Combination and shareholder redemption rights.
- If shareholder approval is not granted, the SPAC may liquidate and return shareholders' investment to them with interest (except for the founder's shares, which are usually not redeemed), or, if there is still time before the expiration of the 24-month deadline, search for another Target Company. As a rule, however, failure to obtain shareholder approval would be expected to result in SPAC liquidation.
- Shareholders will be granted the right to either remain as shareholders of the merged SPAC and Target Company, post De-SPAC Transaction closing, or redeem their shares for their *pro rata* share of the aggregate amount then in the escrow or trust account.
- The De-SPAC Transaction must still obtain any required regulatory approvals that would be required in a non-SPAC merger, ranging from Hart-Scott-Rodino pre-merger notification clearance to any foreign investment, technology export or industry-specific regulatory clearances.

- As with a non-SPAC merger, third party approvals may need to be obtained, such as intellectual property licenses and assignment and consent to the assignment of third-party contracts that require it.
- c. Closing. Once all regulatory and third-party approvals and consents are obtained, the SPAC Business Combination may close, and the SPAC process is complete, with the Target Company, as surviving entity, succeeding to the now-merged SPAC's public reporting company status and non-redeemed IPO funds, and trading on the listed securities exchange.

Final Rules – De-SPAC Transactions

The Final Rules require disclosures by the SPAC of both qualitative and financial disclosures in its IPO registration statement to prospective investors and existing shareholders by the SPAC Sponsors and any promoters in the SPAC IPO and De-SPAC Transaction of, among other items:

- Information required in Form S-4 to be required in an amended Form S-1 (Form F-4 in the case of Form F-1).
- Information from new Reg. S-K Subpart 1600 in Schedule TO (relating to tender offers (*see “M&A XI: Public M&A: Deal Points,” available in [Kurtin PLLC Mergers & Acquisitions](#)*)).
- A new “Minimum Dissemination Period” of 20 calendar days to distribute prospectuses, proxy statements and information statements to security holders in advance of a security holders’ meeting to consider a De-SPAC Transaction (*see “M&A XI: Public M&A: Deal Points”*) or the maximum period permitted by the SPAC’s jurisdiction of incorporation if that period is less than 20 days (the SEC acknowledged in Final Rules guidance that investors in traditional IPOs have only a short period to review prospectuses, but stated that the hybrid conditions of SPACs justified the extra protection).
- The Final Rules make the Target Company a co-registrant, required to sign a Securities Act registration statement, subjecting its officers and directors to potential Securities Act section 11 liability. The SEC stated in Final Rules guidance that the De-SPAC

Transaction is effectively an issuance of the IPO securities by the Target Company, justifying treating it as a co-registrant prior to the De-SPAC Transaction closing. The requirement applies, according to the Final Rules and guidance, even when the De-SPAC is an acquisition of assets, not analogous to a Target Company issuance of securities.

- The Final Rules adds a new Securities Act Rule 145a to address the use of reporting shell companies to enter the U.S. capital markets without Securities Act registration and its disclosures to protect investors. Rule 145a deems a Business Combination to be a sale of securities by the Target Company to the SPAC shareholders requiring disclosures comparable to Securities Act section 5 disclosures.
- Information relating to the financial statements of the SPAC to be provided pursuant to Reg. S-X, involving amendments to Forms S-1 and S-4 (or F-1 and F-4) to better align De-SPAC disclosures with traditional public M&A disclosures.
- The Final Rules also provide that De-SPAC Transactions are excluded from the Private Securities Litigation Reform Act (“PSLRA”) safe harbor for forward-looking statements. The safe harbor protects Issuers from liability for projections and other forward-looking statements when identified as such, explaining the disclaimer for forward-looking statements routinely seen in securities filings. The Final Rules exclude offerings by blank check companies and De-SPAC Transactions from the safe harbor, permitting private civil liability even for forward-looking statements identified as such, a major incentive for SPACs and Target Companies not to pump or overhype their prospects both in the IPO and the De-SPAC Transaction phases.

IV. Deal Points

Deal Point No. 1: Remember that a SPAC is a real registered public offering and results in a real public reporting company. SPAC dynamics are such that the moment the IPO closes, the SPAC promoters or sponsors pivot to the search for a Business Combination target with the clock ticking to the deadline by which they will have to return the escrowed IPO proceeds to investors. Also, SPAC promoters are often entrepreneurs more accustomed to the less regulated world of private equity capital raising and less oriented to, and experienced in, public reporting company governance. Under those

pressures, it is easy for Exchange Act reporting company and NASDAQ or other securities exchange compliance requirements to be relaxed. Don't do it! The Final Rules are in large measure the SEC's response to those abuses, as is the marketplace crash of 2022 and 2023 after the boom of 2020-2021. Lax compliance may poison the shareholder proxy Business Combination approval when the time comes, and even if that is cured, may poison the business combination itself.

Deal Point No. 2: Don't identify or communicate with a specific potential Business Combination target before the IPO closes. As of the closing of the SPAC IPO, no Business Combination Target Company is supposed to have been specifically identified, and no communications with one is supposed to have occurred. While it will often happen that a SPAC's registration statement will identify a class of Business Combination Target Companies small enough that there are a relatively small number of potential Target Companies that savvy investors can identify with reasonable assurance, no specific Target Company identification or communication is supposed to have occurred. To have done so and not to have disclosed it in the IPO registration statement would probably breach regulatory requirements, be a material omission to disclose material facts, would change the dynamics of the SPAC transaction, and might deprive the SPAC of status as a blank check company. Any post-closing disgruntled investor would have ample grounds to seek to recoup its investment, often through use of a nuisance lawsuit designed to force a settlement that would survive a motion to dismiss.

Deal Point No. 3: Respect the permissible allowances from the IPO proceeds escrow fund. The IPO investors are investing in reliance upon the knowledge of the security of the escrow fund in which the IPO proceeds are held pending the Business Combination closing. The escrowed IPO proceeds are not available until that time, other than permissible allowances as set forth in the rules and registration statement, such as underwriters and Issuer-registrant fees and expenses.

Deal Point No. 4: Maintain alignment with IPO investor expectations. The IPO investors invested based on the sponsor's representations in the registration statement. While post-effective amendments are possible, the investors' confidence, good will and lack of buyers' remorse will be critical for obtaining their approval of the business combination as much as two years down the road. Don't deviate from their expectations and, even if the registration statement is relatively unspecific about potential Business Combination targets, maintain good lines of communication with investors.

Deal Point No. 5: Don't commit fraud! This is the same Deal Point as in "*Raising Capital through Private Placements.*" The anti-fraud prohibitions of the Securities Act, Exchange Act and associated rules and regulations apply to any offer and sale of securities, whether exempt from registration or not.

Fraud can occur by the misrepresentation of material facts that a purchaser relies upon to its detriment in its decision to purchase the securities, *or by the omission to state material facts*. Inadvertent technical errors in the securities offering process can often be fixed or excused. Fraud cannot. Don't commit fraud.

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