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SEC Issues Final Rule Related to SPACs, Shell Companies, and Projections

Background

On January 24, 2024, the SEC issued a final rule[1] on financial reporting and disclosures for special-purpose acquisition companies (SPACs). The final rule aims to (1) "enhance investor protections in initial public offerings [IPOs] by [SPACs] and in subsequent business combination transactions between SPACs and private operating companies [also known as de-SPAC transactions]" and (2) "more closely align the treatment of private operating companies [target companies] entering the public markets through de-SPAC transactions with that of companies conducting traditional IPOs." In a statement on the final rule, SEC Chair Gary Gensler noted that although the volume of SPAC and de-SPAC transactions has been declining over the past couple of years, "[m]arkets ebb and flow, and there could be a change in the future."

The issuance of the final rule marks the latest step in the SEC's effort to monitor financial reporting and disclosure practices related to SPAC IPOs and de-SPAC transactions in light of risks that have evolved in recent years. In December 2020, the SEC issued interpretive guidance[2] on its views on disclosure obligations under existing SEC rules related to SPAC sponsors, directors, officers, and affiliates; conflicts of interest; differing economic interests among shareholders; and other compensation-related matters. In March 2021, the SEC issued a statement[3] discussing additional financial reporting and governance matters that registrants should consider when undertaking a de-SPAC transaction, and in March 2022, it issued the proposed rule.[4]

[1] SEC Final Rule Release No. 33-11265, *Special Purpose Acquisition Companies, Shell Companies, and Projections*.
[2] CF Disclosure Guidance Topic No. 11, "Special Purpose Acquisition Companies."
[3] Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies.
[4] SEC Proposed Rule Release No. 33-11048, *Special Purpose Acquisition Companies, Shell Companies, and Projections*.

In summary, the final rule:

- Provides new requirements related to a SPAC's IPO registration statement and its subsequent de-SPAC registration/proxy statement, such as additional disclosure requirements related to the SPAC sponsor and financial projections.
- Addresses certain liability matters by requiring the target company in a de-SPAC transaction to be a co-registrant with the SPAC in the de-SPAC registration/proxy statement.
- Codifies, through new Article 15 of Regulation S-X,[5] various requirements related to the financial statements included in SPAC IPO registration statements and de-SPAC registration/proxy statements as well as filings made after the de-SPAC transaction.

These updates are further described below.

Changes From the Proposed Rule

Although the final rule is largely unchanged from the proposed rule, there are substantive differences with regard to the following:

- The SEC abandoned proposed Rule 140a under the Securities Act of 1933 ("Securities Act"), which was intended to clarify when an underwriter involved in a SPAC IPO would be deemed to be an underwriter in a subsequent de-SPAC transaction. In lieu of a rule, the SEC provides guidance in the final rule on underwriter status in de-SPAC transactions.
- The SEC similarly withdrew proposed Rule 3a-10 under the Investment Company Act of 1940, which would have provided a safe harbor for a SPAC that, upon meeting certain conditions, would not be considered an investment company (and therefore would not be subject to the Investment Company Act of 1940). Rather, the SEC provides guidance in the final rule to help SPACs determine whether they meet the definition of an investment company.

New Disclosure Requirements, Expansion of Liability, and Incremental Disclosures Regarding Financial Projections

The final rule introduces new Subpart 1600[6] to Regulation S-K, which sets forth specific disclosure requirements for SPACs related to both their own IPOs and the de-SPAC registration/proxy statement; some of those disclosures must be made on the cover page of the IPO registration statement and the de-SPAC registration/proxy statement. Among other things, the final rule includes new requirements for disclosure of the following in SPAC and de-SPAC transactions:

- The role of the SPAC sponsor, its affiliates, and promoters, including but not limited to, their experience in organizing SPACs and any involvement with other SPACs; their roles and responsibilities in managing the SPAC; any agreements or understandings with the SPAC with respect to determining whether to proceed with a de-SPAC transaction; and the nature and amounts of compensation that has been or will be payable.
- Actual or potential material conflicts of interest that could arise regarding (1) "whether to proceed with a de-SPAC transaction" or (2) "the manner in which the [SPAC] compensates a SPAC sponsor, officers, or directors or the manner in which a SPAC sponsor compensates its officers and directors."

[5] SEC Regulation S-X, Article 15, "Acquisitions of Businesses by a Shell Company (Other Than a Business Combination Related Shell Company)."
[6] SEC Regulation S-K, Subpart 1600, "Special Purpose Acquisition Companies."

- Details related to potential sources of dilution, including material probable or consummated transactions such as shareholder redemptions, compensation of the SPAC sponsor, warrants, convertible securities, and private investment in public equity (PIPE) financings.

Connecting the Dots

At the 2023 AICPA & CIMA Conference on Current SEC and PCAOB Developments, SEC Associate Chief Accountant Carlton Tartar observed that more recently, there has been an increase in the use of a financing vehicle commonly referred to as a backstop arrangement. In such an arrangement, an issuer would prepay an amount to a counterparty to purchase a stated (or maximum) number of shares that the counterparty holds and vote in favor of the business combination or merger. The counterparty has the right to (1) deliver the shares to the issuer at a later date for a stated amount per share or (2) retain the shares and return the prepayment.

Registrants should be aware of any such arrangements, in addition to other potential dilutive arrangements, and be prepared to disclose the nature, timing, and amount of the transactions in their IPO registration statement and de-SPAC registration/proxy statement, including their impact on potential dilution. See Deloitte's December 10, 2023, *Heads Up* for further discussion on SPAC backstop arrangements.

In addition, the final rule includes new requirements for disclosure of the following in de-SPAC transactions specifically:

- The background of and reasons for the transaction as well as the material terms and effects of the transaction, including any related financing transactions.
- If required by applicable law of the jurisdiction of the SPAC's organization, a determination by the SPAC's board of directors (or similar governing body) of whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders along with the factors it considered in making such a determination. If an outside opinion, report, or appraisal related to the fairness of the de-SPAC transaction was received, it must also be provided as part of the de-SPAC registration/proxy statement.

As part of the final rule, the SEC is adopting new Rule 145a under the Securities Act. Rule 145a stipulates that a de-SPAC transaction is deemed to be a sale of target company securities to SPAC shareholders; consequently, the target company (including its principal executive officers and directors) becomes a co-registrant in the de-SPAC registration/proxy statement, resulting in liability under Sections 11 and 12 of the Securities Act (related to untrue statements or material omissions) for the target company and its officers and directors.

In addition, the final rule amends the definition of a "blank check company"[7] with respect to the application of the Private Securities Litigation Reform Act of 1995 (PSLRA). As a result, the safe harbor in the PSLRA for forward-looking statements, such as projections, will be unavailable in filings by SPACs and certain other blank check companies, thereby aligning the treatment of projections in de-SPAC transactions with that in traditional IPOs. The final rule also expands and updates the SEC's guidance on the presentation of projections. For example, registrants are required to do the following when making certain statements or disclosures in a SPAC's IPO registration statement or de-SPAC registration/proxy statement:

[7] The SEC, through its final rule, adopts the following definition of a "blank check company" to be used with respect to the PSLRA: "a 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."

- Clearly distinguish projected measures that are not based on historical financial results or operational history from those that are.
- Present historical measures or operational history with equal or greater prominence than projections that are based on such information.
- Clearly define non-GAAP measures used in projections, describe the most directly comparable GAAP measure, and explain why a non-GAAP measure was used instead of a GAAP measure.
- For de-SPAC transactions, disclose (1) the purpose of the projections and who prepared them, (2) the material bases and assumptions underlying the projections (including any material factors that may cause the assumptions to change), and (3) whether the projections reflect the view of the SPAC's or target company's board of directors or management as of the date of the de-SPAC registration/proxy statement.

The final rule also includes, but is not limited to, the following provisions and guidance:

- The de-SPAC registration/proxy statement must be distributed at least 20 calendar days in advance of the meeting with security holders.
- The post-de-SPAC transaction registrant must redetermine its smaller reporting company (SRC) status within four business days after consummating the de-SPAC transaction and reflect this redetermination in any periodic reports filed more than 45 days after completing the de-SPAC transaction (other than the Form 8-K related to the consummation of the de-SPAC transaction, often referred to as a "Super 8-K"). When making this redetermination, the registrant should use the annual revenues of the target company for its most recently completed fiscal year reported in the Super 8-K; public float can be measured on any date within the four-day period following the de-SPAC transaction. However, the registrant would not make a redetermination regarding its post-de-SPAC transaction status as a large accelerated filer, an accelerated filer, an emerging growth company (EGC), or a foreign private issuer (FPI).
- For de-SPAC transactions, if the target company is not already subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, nonfinancial disclosures related to certain items in Regulation S-K (or equivalent for FPIs) must be provided in the de-SPAC registration statement, which aligns with similar disclosures for companies pursuing traditional IPOs. For example, registrants must provide the following nonfinancial disclosures in accordance with Regulation S-K:
  - "Item 101 (description of business)."
  - "Item 102 (description of property)."
  - "Item 103 (legal proceedings)."
  - "Item 304 (changes in and disagreements with accountants on accounting and financial disclosure)."
  - "Item 403 (security ownership of certain beneficial owners and management, assuming the completion of the de-SPAC transaction and any related financing transaction)."
  - "Item 701 (recent sales of unregistered securities)."
- In a de-SPAC transaction involving a foreign target company, a domestic SPAC must file a Form S-4 (rather than a Form F-4) because a U.S. issuer cannot qualify as an FPI. As a result, the target company's financial statements included in the de-SPAC registration/proxy statement must be presented in conformity with U.S. GAAP. Form F-4 may be used if (1) the SPAC qualifies as an FPI within 30 days before the filing of the de-SPAC registration/proxy statement, (2) the target company qualifies as an

FPI, and (3) the post-combination registrant is expected to be an FPI at the time the de-SPAC transaction is consummated.

- After the close of the de-SPAC transaction, if the SPAC has previously filed its first Form 10-K, the combined company must be prepared to evaluate the effectiveness of internal control over financial reporting (ICFR) on an annual basis. Depending on its filing status (if the combined company is neither an EGC nor a nonaccelerated filer), the combined company may need to provide its auditor's attestation report on the combined company's ICFR on an annual basis. However, as noted in Section 215.02 of the Compliance and Disclosure Interpretations (C&DIs) on Regulation S-K, the SEC may not object to the exclusion of management's report on ICFR (and, therefore, an auditor's attestation report on ICFR as well) in the first Form 10-K after the close of the transaction. Because of the complexity involved in assessing these requirements, we recommend consultation with accounting and legal advisers.

Accounting and Financial Reporting Requirements

New Article 15 of Regulation S-X adds a number of requirements related to financial statements included in de-SPAC registration/proxy statements, such as:

- *PCAOB audit requirement* — Financial statements of a target company identified as the predecessor that are included in a de-SPAC registration/proxy statement must be audited in accordance with PCAOB standards. However, the financial statements of a nonpredecessor may be audited in accordance with either PCAOB or AICPA standards (provided that the opinion is rendered by a PCAOB-registered public accounting firm).
- *Financial statement periods* — If both the SPAC and the target company qualify as EGCs, the target company may report two years of financial statements in a de-SPAC registration/proxy statement. Further, under the SEC's amendments to Form 8-K, Item 2.01(f), if the target company (as the predecessor) meets the conditions of an EGC at the time the Super 8-K is filed, "the registrant need not present audited financial statements for the predecessor for any period prior to the earliest audited period presented in its financial statements included in a [de-SPAC registration/proxy statement]." Therefore, only two years of audited financial statements would be required in the Super 8-K or a subsequent registration statement filed by the post-combination registrant regardless of whether the SPAC had previously filed an annual report.
- *Financial statement staleness* — The age of financial statements of a target company in a de-SPAC registration/proxy statement should be the same as if the target company was completing its own traditional IPO.
- *Acquired or to be acquired businesses* — Target companies that are determined to be the predecessor(s) in a de-SPAC transaction must apply Regulation S-X, Rule 3-05 or Rule 8-04,[8] for SRCs to an acquired or to be acquired business (other than a predecessor) (or, for real estate operations, Regulation S-X, Rule 3-14 or Rule 8-06,[9] for SRCs). Further, significance test calculations should be performed by using the financial information of the predecessor (rather than the SPAC) in the denominator. New Regulation S-X, Rule 15-01(d),[10] prescribes the financial statements required for significant acquired or to be acquired businesses; the number of years of financial statements required, which would be based on the significance test calculations, would be two years or less.

[8] SEC Regulation S-X, Rule 3-05, "Financial Statements of Businesses Acquired or to Be Acquired," and Rule 8-04, "Financial Statements of Businesses Acquired or to Be Acquired."
[9] SEC Regulation S-X, Rule 3-14, "Special Instructions for Financial Statements of Real Estate Operations Acquired or to Be Acquired," and Rule 8-06, "Real Estate Operations Acquired or to Be Acquired."
[10] SEC Regulation S-X, Rule 15-01(d), "Acquisition of a Business or Real Estate Operation by a Predecessor."

- *SPAC financial statement requirements after a de-SPAC transaction* — The precombination financial statements of the SPAC may be excluded from subsequent filings once (1) the predecessor's financial statements have been filed for all required periods through the acquisition date and (2) the post-combination registrant's financial statements include the period in which the acquisition was consummated. Accordingly, SPAC financial statements may continue to be required in filings after the de-SPAC transaction, such as in the Super 8-K and registration statement (typically on Form S-1) filed to register the resale shares associated with the issuance of a PIPE.

Effective Date and Transition Provisions

The final rule will become effective 125 days after publication in the *Federal Register*. Registrants must begin tagging disclosures in Inline XBRL beginning 490 days after publication of the final rule in the *Federal Register* (i.e., one year after the effective date of the final rule).

Ongoing SPAC and de-SPAC transactions that have not yet been completed will be required to adhere to the new requirements under the final rule once it is effective.

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