No. 2024-01
25 January 2024

To the Point

SEC — final rule

SEC rules require new SPAC disclosures and clarify reporting requirements for shell companies

[The final rule] will help ensure that the rules for SPACs are substantially aligned with those of traditional IPOs, enhancing investor protection through [...] disclosure, use of projections, and issuer obligations.

— Gary Gensler, SEC Chair

What you need to know

- The SEC adopted rules requiring a SPAC to disclose the role of its sponsor, conflicts of interest, dilution and whether its board determined that the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders.
- The rules align financial statement requirements in de-SPAC transactions with those of traditional IPOs and require a redetermination of smaller reporting company status after a de-SPAC transaction. SPAC targets are deemed co-registrants, subjecting them to liability for untrue material statements or material omissions.
- The rules expand disclosures about future performance projections in SEC filings and amend the definition of a "blank check company" to make the safe harbor from liability for forward-looking statements unavailable to SPACs.
- The Commission also provided guidance, but did not amend existing rules, related to assessing when a SPAC may meet the definition of an investment company and on statutory underwriter status in connection with a de-SPAC transaction.
- The final rules are effective 125 days after publication in the Federal Register.

Overview

The Securities and Exchange Commission (SEC or Commission) **adopted** new and amended rules requiring new disclosures when a special purpose acquisition company (SPAC) conducts an initial public offering (IPO) and when it combines with a private operating company in what is known as a de-SPAC transaction, among other related changes.[1] The rules are intended to

EY
Building a better working world

more closely align the disclosure requirements and legal obligations of parties involved in de-SPAC transactions with those in traditional IPOs. SPACs are shell companies that raise money to acquire operating companies and offer private companies a way to go public without conducting a traditional IPO.[2]

The SEC said that the rules are intended to address investor protection concerns following the surge in SPAC activity in 2020 through 2022, when more than half of the IPOs in the US were conducted by SPACs.

Key considerations

New required disclosures

The rules add new Subpart 1600 to Regulation S-K to provide disclosure requirements for SPAC IPOs and de-SPAC transactions addressing, among other things:

- Disclosures about the SPAC sponsor (e.g., its experience, rights, interests, compensation), the target entity, and potential or actual material conflicts of interest
- Disclosures of the potential impact of dilutive events that may occur over the SPAC's lifespan (e.g., shareholder redemptions, sponsor compensation, financings)
- A determination by the board of directors (or similar governing body) on whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders (when required by the law of the jurisdiction in which the SPAC is organized) and disclosure of that determination along with a discussion of the factors considered, including whether it has received an outside report, opinion or appraisal *materially* relating to the approval or fairness of the transaction (if so, it is included or filed as an exhibit)
- Certain disclosures, including features related to the SPAC offering or de-SPAC transaction and the potential associated risks, on the prospectus cover page and in the prospectus summary.

Expansion of liability

The rules amend Forms S-1, S-4, F-1 and F-4 to reflect that a private operating company (i.e., the target company) is deemed a co-registrant when a SPAC or another shell company files a registration statement for a de-SPAC transaction. As signatories to the registration statement, the private company and its signing persons (e.g., principal executive, financial and accounting officers, board members) are subject to liability for untrue material statements and material omissions under Section 11 of the Securities Act, in addition to the SPAC or holding company and its officers and directors.

The rules also amend the definition of a blank check company under the Private Securities Litigation Reform Act to include SPACs and certain other companies so that the safe harbor from liability for forward-looking statements, such as projections of operating performance, is unavailable to these entities, similar to a traditional IPO.

The SEC did not finalize the proposal to deem an underwriter in a SPAC IPO to be an underwriter in a de-SPAC transaction. Instead, the SEC provided general guidance related to de-SPAC transactions, indicating that the transaction's facts and circumstances need to be evaluated, and when there is an underwriter and a distribution of the combined operating company's interests, the party acting as underwriter will need to perform the necessary due diligence to benefit from the due diligence defense under the Securities Act of 1933.

How we see it

The SEC's guidance on the role of an underwriter in a de-SPAC transaction continues to underscore the SEC's view of the critical role of underwriters in the securities offering process. While the SEC did not deem the underwriter in a SPAC IPO to be an underwriter in a de-SPAC transaction, we have observed the level of due diligence for those involved in de-SPAC transactions increasing since the SEC issued its proposal.

Nonfinancial statement disclosures and minimum dissemination period

The rules more closely align the nonfinancial statement disclosure requirements related to the private operating company in a de-SPAC transaction with those in a traditional IPO. For example, certain disclosures (e.g., description of the business, legal proceedings, recent sales of unregistered securities) will now be required in the Form S-4 or Form F-4 (or proxy), which will provide shareholders with this information before they make voting, investment or redemption decisions. The rules also require that disclosure documents for de-SPAC transactions generally be disseminated to investors at least 20 calendar days before shareholders vote to approve the transactions.

The financial statement requirements are primarily based on existing staff guidance for transactions involving shell companies.

Financial statement requirements

The rules add new Article 15 of Regulation S-X and related amendments to more closely align the financial statement reporting requirements in business combinations involving a shell company registrant (including SPACs) and a private operating company with the requirements in traditional IPOs. These rules primarily codify existing SEC staff guidance on the financial statement requirements for certain business combinations involving shell companies, including clarifying the age of financial statements for a business that will be acquired by a shell company and the application of Regulation S-X provisions to acquisitions of businesses by a shell company or its operating company predecessor (e.g., applying the significance tests in Rule 1-02(w)).

The rules also:

- Require the financial statements of the predecessor entity in a shell company transaction (including a private operating company) to be audited in accordance with the standards of the Public Company Accounting Oversight Board
- Permit target companies to report two years of financial statements when both the shell company and target company would qualify as emerging growth companies (EGCs)
- Allow a registrant to exclude the financial statements of a shell company, including a SPAC, for periods before the acquisition from filings made after the business combination once the predecessor's financial statements have been filed for all required periods through the acquisition date and the registrant's financial statements include the period in which the acquisition was completed
- Clarify that if a registrant will acquire or has acquired a shell company, that company's financial statements must be included in any filing requiring the registrant's financial statements, unless they include the period in which the acquisition was completed

Smaller reporting company determination

The rules require a redetermination of smaller reporting company (SRC) status after the de-SPAC transaction but before the first SEC filing (excluding the Super 8-K). The redetermination is based on public float measured within four business days after the de-SPAC transaction. A registrant does not need to reflect non-SRC status in any filing (including an amendment to the Super 8-K)

due in the 45-day period following the transaction. The rule does not include redetermination requirements for accelerated filer status, EGC status or foreign private issuer status.[3]

How we see it

Companies that expect to file a new registration statement on Form S-1 or Form F-1 after the 45-day grace period but before the next annual report is filed, will need to be prepared to provide more disclosures and/or financial statement periods as compared to those presented in the de-SPAC filing.

Enhanced disclosures about projections

The rules amend Item 10(b) of Regulation S-K, which allows management to present projected financial information that has a reasonable basis in SEC filings, to require registrants to "clearly distinguish" projected measures that are not based on historical financial results from those that are and to present corresponding historical results with equal or greater prominence. When projections include a non-GAAP financial measure, additional disclosures are required (e.g., an explanation of why the non-GAAP measure was used instead of a GAAP measure).

In addition, new Item 1609 of Regulation S-K, which applies only to de-SPAC transactions, requires disclosure of the purpose for which projections were prepared and the party that prepared the projections, material bases and assumptions underlying the projections (including any material factors affecting such assumptions). It also requires disclosure of whether the projections reflect the views of the SPAC or the target company's management or board of directors as of the most recent practicable date before the date the disclosure document is required to be disseminated to security holders. Such disclosure requirements also apply to any Form 8-K report or exhibit that relates to a de-SPAC transaction and includes performance projections of the SPAC or target company.

Status of SPACs under the Investment Company Act of 1940

The SEC did not finalize the proposal to provide a safe harbor from the definition of investment company under Section 3(a)(1)(A) of the Investment Company Act for certain SPACs. Instead, the adopting release provides views, through examples, on SPAC activities that would raise concerns about a SPAC's status as an investment company.

Effective date

The rules are effective 125 days after publication in the Federal Register, except for the structured data requirements (i.e., tagging the information disclosed as required under new subpart 1600 of Regulation S-K in Inline XBRL), which are effective 490 days after publication.

Endnotes:

---

1 "SPAC" and "de-SPAC transaction" are defined in new Items 1601(b) and 1601(a) of Regulation S-K, respectively.

2 See our **Technical Line, *Navigating the requirements for merging with a special purpose acquisition company***.

3 See our **Technical Line, *Reminders on reporting and filer status considerations for SEC registrants*.**

EY | Building a better working world

© 2024 Ernst & Young LLP.
All Rights Reserved.

SCORE No. 22242-241US

ey.com/en_us/assurance/accountinglink

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

Ernst & Young LLP is a client-serving member firm of Ernst & Young Global Limited operating in the US.

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax or other professional advice. Please refer to your advisors for specific advice.