Grant Thornton

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SEC enhances SPAC and shell company disclosures

Contents

On Jan. 24, the SEC issued a Final Rule, *Special Purpose Acquisition Companies, Shell Companies, and Projections*, which enhances disclosures in both a special purpose acquisition company's (SPAC's) initial public offering (IPO) and in a subsequent business combination between a SPAC and a private operating target (de-SPAC transaction). The Final Rule aims to enhance the comparability and completeness of disclosures provided by SPACs in their IPOs and by SPACs and their target companies in de-SPAC transactions, while also affording investors similar protections that are available under a traditional IPO.

The Final Rule will become effective 125 days following publication in the *Federal Register*, except for the XBRL tagging requirements, which will be effective 490 days from the date of publication.

Regulation S-K, Subpart 1600

The Final Rule adds Items 1600 to 1610 to Regulation S-K, which, among other things, require disclosures related to the SPAC sponsor, potential conflicts of interest, and dilution, including certain disclosures on the prospectus cover page and in the prospectus summary. The Final Rule also amends registration statement forms and schedules filed in connection with de-SPAC transactions to require information set forth in the new Subpart 1600 of Regulation S-K. Several of the disclosures in new Subpart 1600 codify existing practices and are noted in the table below.

Topic	Highlights
Definitions	• S-K Item 1601 defines the terms SPAC, SPAC sponsor, target company, and de-SPAC transaction.
Information related to the SPAC sponsor, its affiliates, and promoters	• S-K Item 1603 requires disclosure of information related to the SPAC sponsor and others, including (1) names, (2) form of organization, (3) controlling persons, (4) experience, and (5) material roles and responsibilities. • S-K Item 1603 also requires disclosure of the rights and interests of the SPAC sponsor and others, including their compensation as well as any arrangement with respect to determining whether to proceed with the de-SPAC transaction and the redemption of outstanding securities.
Conflicts of interest	• S-K Items 1603 and 1604 require disclosure of actual or potential material conflicts of interest between (1) unaffiliated shareholders of the SPAC, and (2) the SPAC sponsor and its affiliates; the SPAC's officers, directors, and promoters; or the target company's officers or directors. Such conflicts include those arising from determining whether to proceed with the de-SPAC transaction or how the SPAC sponsor and others are being, or will be, compensated.
Dilution	• S-K Items 1602 and 1604 enhance the disclosures related to dilution for SPAC IPOs and de-SPAC transactions, including those arising from compensation or issuance of securities to the SPAC sponsor and others. • S-K Item 1604 also includes instructions on how to compute the SPAC's net tangible book value per share for determining dilution to shareholders.
Description of the de-SPAC transaction	• S-K Item 1605 requires disclosure of the summary and background of the de-SPAC transaction, including the (1) reasons for entering into the agreement, (2) material terms of the transaction, (3) accounting treatment, and (4) tax consequences. • S-K Item 1605 also requires disclosure of (1) any material interests held by the SPAC sponsor or the SPAC's or target company's officers and directors in the de-SPAC transaction or related financing, (2) material differences in the rights of the SPAC's and the target company's shareholders compared to security holders in the combined company, and (3) benefits and detriments of

Topic	Highlights
	the de-SPAC transaction to the SPAC, the SPAC sponsor, the target company, and unaffiliated shareholders of the SPAC.
Board determination related to the de-SPAC transaction	• S-K Item 1606 requires the following disclosures: – The SPAC's board of directors' determination of whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its securities holders, as well as the material factors that were considered if such a determination was made; – Whether the de-SPAC transaction has been approved by a majority of the directors who are not employees of the SPAC; and – The directors who voted against or abstained from voting on the approval of the de-SPAC transaction and, if known, the reasons for their decision.
Reports, opinions, appraisals, and negotiations	• If the SPAC or SPAC sponsor has received any report, an opinion (other than an opinion from counsel), or an appraisal from an outside party materially related to the de-SPAC transaction, S-K Item 1607 requires such report to be included in the filing. • S-K Item 1607 also requires disclosure regarding the identity and qualifications of the outside party, the method of selecting the outside party, whether the outside party had certain prior relationships with the SPAC or its sponsor and affiliates, as well as a summary describing the findings and recommendations and any limitations on the scope of the report, opinion, or appraisal. • The adopting release clarifies that there is no requirement to obtain a fairness opinion from a third party in connection with a de-SPAC transaction.
Projections [1][2]	• If projections are included in the filing, S-K Item 1609 requires disclosure of the material bases and assumptions of such projections as well as material factors underlying the key assumptions used to prepare those projections. • For projections related to the target company, S-K Item 1609 requires disclosure of whether the target company or its board of directors have affirmed that such projections still reflect their views (as of the most recent practicable date) about the future performance of the target company. If not, disclosure is required of the reasons for including such projections in the filing and management's or the board of directors' continued reliance on them.
Prominence of certain disclosures	• S-K Items 1602 and 1604 require disclosure of certain information related to dilution, material conflicts of interest, and compensation paid or to be paid to the sponsors on the prospectus cover page and/or in the prospectus summary.

[1] The Final Rule amends the definition of a "blank check company," thereby eliminating certain safe harbor protections for SPACs related to forward-looking information and projections.

[2] S-K Item 10 was amended to require any projected measures that are not based on historical financial results or operational history to be clearly distinguished from projected measures that are based on historical financial results or operational history. Further, S-K Item 10 indicates that it will ordinarily be misleading to present projected measures based on historical information without presenting the related historical information with equal or greater prominence. When projections include a non-GAAP measure, such measure also needs to be described along with its disclosure as to the most directly comparable GAAP measure and why the non-GAAP measure was selected instead of the GAAP measure.

Target company as a co-registrant

The Final Rule adopts Securities Act of 1933 (Securities Act) Rule 145a, which recognizes that a de-SPAC transaction involves a sale of securities of the combined company to the SPAC's shareholders. Further, Forms S-4 and F-4 were amended to require the target company in a de-SPAC transaction to be identified as a co-registrant. As a result, the target company and its required officers and directors must now sign the Securities Act registration statement filed by a SPAC or another shell company for a de-SPAC transaction and is subject to the liability provisions under Section 11 of the Securities Act. Similar amendments were made to Forms S-1 and F-1 and now apply when these forms are used for a de-SPAC transaction. If a target company is not a legal entity and consists of a business or assets, the seller will be deemed the registrant under the new rules.

As a registrant, the target company is subject to reporting requirements under the Securities Exchange Act of 1934 (Exchange Act) upon the effectiveness of the Securities Act registration statement, until the target company terminates or suspends the Exchange Act reporting obligations.

Financial statement requirements

The Final Rule adds new Article 15 to Regulation S-X along with related amendments to codify certain existing SEC staff interpretive guidance and to more closely align the related financial statement reporting and audit requirements for de-SPAC transactions with those for a traditional IPO. These new rules are summarized below.

Topic	Highlights
Financial statements of the target company included a registration statement or proxy statement	• The financial statements of a target company are required to be presented in accordance with Regulation S-X as if the filing were a Securities Act registration statement for an equity IPO of the target company. A target company that qualifies as an emerging growth company (EGC) is allowed to present only two years of audited financial statements. • A target company that qualifies as a smaller reporting company (SRC) based on the revenue for the most recently completed fiscal year for which financial statements are available may file financial statements pursuant to S-X Article 8.

Topic	Highlights
Audit requirements	• The financial statements of a target company that is or will be the predecessor to the SPAC must be audited in accordance with PCAOB standards. • The financial statements of other target companies may be audited in accordance with PCAOB standards or U.S. GAAS.
Age requirements	• Financial statements must comply with age requirements under S-X Rule 3-12 (or with S-X Rule 8-08 when the target qualifies as an SRC) as if it were an initial registration statement.
Acquisition of a business or real estate operation by predecessor	• The financial statements of an acquired business or a real estate operation by a predecessor are required to be presented in accordance with S-X Rules 3-05 or 8-04, as applicable. • The predecessor's consolidated financial statements must be used to determine significance instead of the financial statements of the shell company registrant.
Financial statements of shell company	• Financial statements of the shell company may be excluded from any filing after the merger transaction is consummated and the financial statements of the predecessor are filed for all required periods through the acquisition date, and those financial statements include the period in which the merger transaction was consummated. Shell company financial statements may be omitted irrespective of the accounting treatment for the transaction.

Post-merger reporting

Redetermination of SRC status

The Final Rule amends existing rules to require the post-merger registrant to redetermine its SRC status using (1) its public float as of a date within four business days after the consummation of the de-SPAC transaction and (2) the annual revenues of the target company as of the most recently completed fiscal year reported in Form 8-K filed with Form 10 information (Super 8-K). If the post-merger registrant loses SRC status upon the redetermination, it must reflect the non-SRC status in filings beginning 45 days after the consummation of the de-SPAC transaction, and it would no longer be able to avail itself of the scaled-disclosure requirements applicable to an SRC in that filing, including any amendment to the Super 8-K.

Financial statements of target company in Super 8-K

The Final Rule also amends Form 8-K to note that if the predecessor meets the conditions of an EGC at the time of filing that form, the registrant is not required to include their financial statements for any period earlier than the financial statement periods included in the registration statement or proxy statement for the de-SPAC transaction.

Other nonfinancial disclosures

The Final Rule also amends registration statement forms and schedules filed in connection with de-SPAC transactions to require disclosures for the target company pursuant to certain existing items of Regulation S-K, in order to codify current practice and align such disclosures more closely with those for a traditional IPO. These required disclosures include

- Item 101 (description of business);
- Item 102 (description of property);
- Item 103 (legal proceedings);
- Item 304 (changes in and disagreements with accountants and accounting and financial disclosures);
- Item 403 (security ownership of certain beneficial owners and management, assuming the completion of the de-SPAC transaction and any related financing transaction); and
- Item 701 (recent sales of unregistered securities).

Minimum dissemination period

The Final Rule amends Exchange Act rules and related forms to allow security holders a minimum time to consider proxy statements and other disclosures surrounding de-SPAC transactions. The amendments require prospectuses as well as proxy and information statements to be distributed to security holders at least 20 calendar days in advance of the date when the security holder meeting will be held or action will be taken in connection with the de-SPAC transaction.

Additional guidance

The Final Rule does not amend any provisions related to the definition of “underwriter” in Section 2(a)(11) of the Securities Act as it relates to de-SPAC transactions. However, in the adopting release, the SEC provides general guidance regarding statutory underwriter status, stating that the SEC intends to follow the existing practice of applying the statutory terms “distribution” and “underwriter” broadly and flexibly, as the facts and circumstances of any transaction may warrant.

Further, the SEC did not adopt the proposal to provide a safe harbor for SPACs from the definition of an “investment company” under Section 3(a)(1)(A) of the Investment Company Act. However, in the adopting release, the SEC provides views on facts and circumstances that are relevant to determining whether a SPAC meets the definition of an investment company.

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