SEC ADOPTS FINAL RULES REGARDING SPACS AND DE-SPAC TRANSACTIONS TO IMPOSE ADDITIONAL DISCLOSURE AND REPORTING REQUIREMENTS

Date: 31 January 2024

US Corporate Alert

By: Robert S. Matlin, David A. Bartz

On 24 January 2024, the US Securities and Exchange Commission (SEC), by a 3-to-2 vote, adopted the long-awaited final rules regarding special purpose acquisition companies (SPACs), shell companies, and projections. The final rules are intended to enhance investor protections in SPAC initial public offerings (IPOs) and in subsequent business combination transactions between SPACs and private operating companies (de-SPAC transactions). SEC Chairman Gensler reiterated that the SEC feels investors in de-SPAC transactions should have the traditional protections available in an IPO and the adopted rules are designed to largely align with the "time tested" protections available in an IPO. The final rules impose additional disclosure and reporting requirements for both SPAC IPOs and de-SPAC transactions and are summarized below.

The final rules come almost two years after the SEC proposed rules in March 2022. Since then, the activity in both SPAC IPOs and de-SPAC transactions has slowed down considerably, and SPAC market practices have generally evolved in response to the SEC's earlier proposed rules. Even with the SPAC market's current decline, the SEC noted that SPAC activity has become a much larger part of the modern securities markets and that SPAC activity may increase again in the future, and if that does occur, the final rules are designed to more closely align de-SPAC transactions with the traditional protections available in an IPO.

ENHANCED DISCLOSURES AND ENHANCED INVESTOR PROTECTION

- The SEC adopted new Subpart 1600 of Regulation S-K with disclosure requirements applicable to SPACs regarding, among other things:
  - The SPAC sponsor (including its experience, business, roles and responsibilities, and compensation) and any material potential or actual conflicts of interest involving the SPAC sponsor;
  - The dilutive effects of securities held by the SPAC sponsor and transactions entered into in connection with the de-SPAC transaction;
  - The background, material terms, and effects of the de-SPAC transaction;
  - Any transfers or arrangements related to the transfer of SPAC securities by the SPAC sponsor or others and descriptions of any agreement, including any payments, between the SPAC sponsor and unaffiliated security holders of the SPAC regarding redemption;

©2005-2026 K&L Gates LLP. All Rights Reserved.

  - The material terms of any agreements regarding restrictions on when the SPAC sponsor and its affiliates may sell SPAC securities;
  - If the law of the jurisdiction in which the SPAC is organized requires its board of directors to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders, disclosure of that determination and the factors considered in that determination; and
  - Whether the SPAC or SPAC sponsor has received any report, opinion, or appraisal from an outside party or unaffiliated representative relating to the de-SPAC transaction, as well as certain disclosures concerning the report, opinion, or appraisal.
- Under the adopted final rules, a target company in a registered de-SPAC transaction is a co-registrant on the registration statement used for the de-SPAC transaction such that the target company will be subject to liability under Section 11 of the Securities Act of 1933, as amended (Securities Act).
- The final rules require a minimum dissemination period of 20 calendar days (or the maximum period allowable by the SPAC's jurisdiction, if such period is less than 20 calendar days) for prospectuses and proxy or information statements filed in connection with a de-SPAC transaction.
- The final rules also require redetermination of “smaller reporting company” status within 45 days after the consummation of the de-SPAC transaction.

BUSINESS COMBINATIONS INVOLVING SHELL COMPANIES

The SEC adopted new Rule 145a under the Securities Act providing that any business combination of a reporting shell company (that is not a business combination related shell company) involving another entity that is not a shell company is deemed to involve an offer, offer to sell, offer for sale, or sale within the meaning of Section 2(a)(3) of the Securities Act.

The SEC adopted updates to Regulation S-X governing financial statement requirements applicable to transactions involving shell companies and private operating companies to generally align disclosures with those in IPOs.

ENHANCED PROJECTIONS DISCLOSURE

The SEC made the Private Securities Litigation Reform Act of 1995 (PSLRA) safe harbor for forward looking statements unavailable to SPACs (including with respect to projections of target companies seeking to access the public markets through a de-SPAC transaction).

The SEC adopted amendments to Item 10(b) of Regulation S-K that require registrants to (1) clearly distinguish any projected measures that are not based on historical financial results or operational history from projected measures that are based on historical financial results or operational history and (2) present corresponding historical results with equal or greater prominence.

The SEC also adopted new Item 1609 of Regulation S-K, which applies only to de-SPAC transactions and, with respect to any projections contained in the filing, requires disclosure of: (1) the purpose for which the projections were prepared and the party that prepared them; (2) the material bases of the disclosed projections and the

©2005-2026 K&L Gates LLP. All Rights Reserved.

material assumptions underlying them; and (3) whether the disclosed projections reflect the view of the board of directors or management of the SPAC or target company, as applicable, as of the date of the filing.

THE STATUS OF SPACS UNDER THE INVESTMENT COMPANY ACT OF 1940

The SEC provided its views on the facts and circumstances that are relevant to whether a SPAC meets the definition of an investment company under the Investment Company Act of 1940 to assist SPACs in analyzing their status. The SEC noted that, depending on the facts and circumstances, at any stage of its operation, a SPAC could be an investment company.

The SEC noted specific facts that should be considered as part of this analysis include an examination of (1) the nature of SPAC assets and income, (2) management's activities, (3) duration of the SPAC prior to entering into a de-SPAC agreement and closing the de-SPAC, (4) whether the SPAC holds itself out in a manner that suggests investors should invest in its securities primarily to gain exposure to its portfolio of securities prior to the de-SPAC, and (5) whether the SPAC merges with an investment company.

GUIDANCE RELATED TO THE CONCEPT OF "DISTRIBUTION" WITHIN SECTION 2(A)(11), THE STATUTORY DEFINITION OF AN UNDERWRITER

Additionally, the SEC provided guidance regarding potential underwriter status under Section 2(a)(11) of the Securities Act in de-SPAC transactions, stating that "the statutory definition of underwriter, itself, encompasses any person who sells for the issuer or participates in a distribution associated with a de-SPAC transaction" and that it will interpret the terms "distribution" and "underwriter" "broadly and flexibly" in light of the facts and circumstances of a particular transaction.

EFFECTIVE DATE

The final rules, with certain exceptions, will become effective 125 days after publication in the Federal Register.

KEY CONTACTS



ROBERT S. MATLIN
PARTNER

NEW YORK
+1.212.536.4066
ROBERT.MATLIN@KLGATES.COM



DAVID A. BARTZ
PARTNER

NASHVILLE, DALLAS, HOUSTON
+1.615.780.6743
DAVID.BARTZ@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.