

Check Please! SEC Serves up Fresh Guidance on Restatement Check Boxes and Related Disclosure (and Clarifies when De-SPAC Co-Registrants May Dine and Dash)

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The staff (the “Staff”) of the Division of Corporation Finance of the Securities and Exchange Commission (the “SEC”) issued [six new](#) Compliance and Disclosure Interpretations (“CDIs”) on April 11, 2025, providing clarifications on disclosure requirements for financial restatement check boxes and the related clawback recovery analysis contained in forms filed pursuant to the Securities Exchange Act of 1934, as amended (the “Exchange Act”). On the same day, the Staff issued [a new](#) CDI clarifying its interpretation of Rule 12h-3 under the Exchange Act as it applies to de-SPAC co-registrants.

Restatements and Clawback Recovery Analysis

In early 2023, in connection with new rules requiring national securities exchanges to require listed companies to adopt clawback policies and new Item 402(w) of Regulation S-K requiring certain clawback disclosures, the SEC began requiring annual reports (Forms 10-K, 20-F or 40-F) to include two new cover page check boxes. The first box is to be checked when the financial statements included in the annual report reflect the correction of an error to previously issued financial statements, and the second box is to be checked when the error required a clawback recovery analysis under Rule 10D-1(b) of the Exchange Act. A number of questions had been raised about when registrants are required to “check the box” which have now been addressed by the new CDIs.

Financial Statement Error Check Box

CDI 104.20 clarifies when companies must mark the check box on the cover page of annual reports indicating the correction of an error in previously issued financial statements. Companies should follow generally accepted accounting principles to determine whether a change represents an error correction. The guidance explicitly states that a restatement to correct an error that is material to previously issued financial statements (known as a “Big R” restatement) and a restatement to correct an error that is immaterial to previously issued financial statements but would be material if corrected in the current period financial statements or left uncorrected (known as a “little r” restatement) require that companies mark the first check box.

Immaterial prior period errors that are corrected in the current period financial statements (known as “out-of-period adjustments”) do not trigger this requirement, as these corrections are not considered to be revisions to previously issued financial statements under generally accepted accounting principles.

Clawback Recovery Analysis Check Box

The new CDIs also address when companies must mark the check box on the cover page of annual reports indicating that a clawback analysis was required as a result of the correction of an error in previously issued financial statements. When a company reports a “Big R” or “little r” restatement, CDI 104.21 confirms that the company must mark the second check box—even if the clawback analysis determines that no recovery is necessary. Companies must also provide a brief explanation as to why no recovery is necessary, such as when (1) no incentive-based compensation was received by executive officers during the relevant clawback period or (2) the compensation received was not based on financial reporting measures affected by the restatement.

Ongoing Disclosure Requirements

CDIs 104.22, 104.23 and 104.24 address the timing and requirements for continuing disclosure after a company reports a restatement. Under CDI 104.24, a company that initially reports a restatement of annual financial statements in a form that does not include the restatement and clawback check boxes (e.g., a Form 8-K or Form S-1) must mark the check boxes on the cover page of the next annual report that includes such financial statements. Once a company restates its previously issued financial statements and marks the related check boxes on the cover page of its annual report, the company does not need to mark the check boxes for subsequent annual reports that contain the previously restated financial statements.

A company may be required, however, to continue to include the disclosure required by Item 402(w)(2) of Regulation S-K¹ in the annual report (or proxy or information statement) filed in the year following the restatement, since Item 402(w)(2) disclosure applies to restatements “during or after the last completed fiscal year.” CDI 104.22 states that,

¹ The guidance in the CDIs also applies to disclosure pursuant to Item 6.F of Form 20-F and Instruction (B)(19) to Form 40-F.

similar to other executive compensation information, the purpose of Item 402(w)(2) disclosure is to aid investors in their voting decisions and evaluation of the company.

CDIs 104.22 and 104.23 provide examples for a company with a calendar fiscal year:

Example 1

2025	2026	2027
Company files Form 10-K for FY24 Company discovers errors in FY24 later in 2025 and files Amended Form 10-K for FY24 with “Big R” restatement for FY24, including <input checked="" type="checkbox"/> Marked check boxes <input checked="" type="checkbox"/> Item 402(w)(2) disclosure	Company files Form 10-K for FY25, including <input type="checkbox"/> Un marked check boxes <input checked="" type="checkbox"/> Item 402(w)(2) disclosure ²	Company files Form 10-K for FY26, including <input type="checkbox"/> Un marked check boxes <input type="checkbox"/> No Item 402(w)(2) disclosure

Example 2

2025	2026	2027
Company files Form 10-K for FY24	Company discovers errors in FY24 early in 2026 and files Form 10-K for FY25 with “little r” restatement for FY24, including <input checked="" type="checkbox"/> Marked check boxes <input checked="" type="checkbox"/> Item 402(w)(2) disclosure ²	Company files Form 10-K for FY26, including <input type="checkbox"/> Un marked check boxes <input type="checkbox"/> No Item 402(w)(2) disclosure

Interim Period Restatements

Finally, CDI 104.25 provides clarification on restatements of quarterly period information. When a company restates quarterly financial statements within a fiscal year, the company is not required to mark the check boxes on the cover page of the annual report for that fiscal year. However, the company must provide the disclosure required by Item 402(w)(2) of Regulation S-K in such annual report (or proxy or information statement) because the disclosure is not limited to restatements of annual financial statements.

Suspension of Reporting Requirements for De-SPAC Co-Registrants

In January 2024, the SEC **adopted** a series of new procedural and disclosure requirements for initial public offerings by special purpose acquisition companies (“SPACs”) and in business combination transactions involving SPACs (commonly referred to as “de-SPAC” transactions). One of the new rules requires the target company in a de-SPAC transaction to be a co-registrant with the SPAC and therefore assume responsibility, together with the target’s

² May be incorporated by reference from the proxy or information statement filed within 120 days after the end of FY25.

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directors and officers required to sign the registration statement filed pursuant to the Securities Act of 1933, as amended, for the disclosures in the registration statement filed in connection with the de-SPAC transaction.

In a de-SPAC transaction where the target company is included as a co-registrant on an effective registration statement, the target company is obligated to file periodic reports with the SEC pursuant to Section 15(d) of the Exchange Act. Typically, the target company merges with a subsidiary of the SPAC and is a wholly-owned subsidiary of the then-public SPAC. CDI 253.03 provides relief from these reporting requirements for the target company by clarifying that the target company may rely on Rule 12h-3 under the Exchange Act to suspend its reporting obligations by filing a Form 15 once the de-SPAC transaction has closed as long as the target company is wholly-owned by the combined company and is current in its reporting obligations through the filing date of the Form 15.

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