

## New SEC Guidance: Clawback Checkbox Compliance and De-SPAC Disclosures

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On April 11, 2025, the U.S. Securities and Exchange Commission's Division of Corporation Finance issued six new Compliance and Disclosure Interpretations (C&DIs). These updates clarify:

- When and how to complete clawback-related checkboxes on the cover page of Form 10-K; and
- Disclosure obligations under Item 402(w)(2) of Regulation S-K.

In addition, the SEC staff issued one C&DI addressing when target companies in de-SPAC transactions may suspend their Section 15(d) reporting obligations following the closing of the transaction. The full C&DIs can be found here: [Link](#)

### EXCHANGE ACT FORMS – CLAWBACK CHECKBOXES (C&DIS 104.20 – 104.25)

#### 104.20

When an issuer reports a change to its previously issued financial statements in an annual report, the issuer should determine whether “the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements” by looking to guidance under generally accepted accounting principles applicable to its financial statements. When the financial statements of the registrant included in the filing have been revised to reflect the correction of an error to previously issued financial statements, regardless of whether those restatements are required or not, the listed issuer must mark the checkbox. A required restatement includes “Big R restatements” and “little r restatements.” The correction of an immaterial prior-period error that is recorded in the current year (commonly referred to as an “out-of-period adjustment”) does not require the listed issuer to mark the checkbox because the previously issued financial statements are not revised.

#### 104.21

Issuers must mark the checkbox on the cover of an amended annual report to indicate that the restatement “required a recovery analysis of the incentive-based compensation received by any of the registrant’s executive officers during the relevant recovery period” pursuant to Exchange Act Rule 10D-1(b) and must explain in that amended report why application of the recovery policy resulted in no recovery. This includes circumstances in which (1) no incentive-based compensation was received by any executive officers during the relevant time frame or

(2) incentive-based compensation was received by an issuer's executive officers during the relevant time frame, but that incentive-based compensation was not based on a financial reporting measure impacted by the restatement. Further, the listed issuer should explain briefly why application of its recovery policy resulted in no recovery.

#### **QUESTION 104.22**

After filing an amended 20X3 annual report, an issuer should include the same restated financial statements in its 20X4 annual report. Assuming there are no additional restatements, the staff will not object to the checkboxes remaining unmarked on the cover page of the listed issuer's 20X4 annual report.

However, when an issuer files its proxy or information statement during 20X5 that includes 20X4 executive compensation information pursuant to Item 402 of Regulation S-K, it must also include the disclosure required by Item 402(w)(2) of Regulation S-K. Accordingly, because the restatement took place during 20X4 and Item 402(w)(2) applies to restatements "during or after [the issuer's] last completed fiscal year," the issuer's proxy or information statement filed during 20X5 must include Item 402(w)(2) disclosure, to the extent that Item 402 applies to such proxy or information statement. This is the case even if the issuer included in the amended 20X3 annual report information explaining why application of the issuer's recovery policy resulted in no recovery. This is also the case if the required disclosure is (1) provided in the annual report (and not incorporated by reference from a proxy or information statement) or (2) made pursuant to the applicable requirements of Form 20-F or Form 40-F.

#### **QUESTION 104.23**

If in 20X5 (prior to filing the 20X4 annual report), an issuer discovers an error in its previously issued 20X3 financial restatements, and (1) applies its recovery policy pursuant to Exchange Act Rule 10D-1(b), (2) determines that no recovery of erroneously awarded compensation is required, (3) checks both boxes on its 20X4 annual report (which is filed in 20X5), and (4) provides Item 402(w)(2) disclosure in the proxy or information statement incorporated by reference in that 20X4 report, the staff will not object if the issuer does not include or incorporate by reference Item 402(w)(2) disclosure in its 20X5 annual report.

The staff will similarly not object if a foreign private issuer that has previously provided the applicable disclosure pursuant to Item 6.F(2) of Form 20-F or Instruction (B)(19)(c) to Form 40-F omits the disclosure in its subsequent annual report.

#### **QUESTION 104.24**

If an issuer initially reports a restatement of its annual financial statements in a form that omits a checkbox requirement on the cover page for indicating that the financial statements included therein reflect the correction of an error to previously issued financial statements (for example, a Form 8-K or a Securities Act registration statement), and subsequently presents said annual period in financial statements included in its next annual report, then the issuer must mark the checkbox on the cover page of that annual report.

#### **QUESTION 104.25**

If an issuer determines in the fourth quarter of its fiscal year that it is required to prepare restatements of its financial statements for the first, second, and third quarters of that year, the issuer is not required to check the boxes discussed in 104.21 on the cover page of its annual report because the restatements do not impact the annual periods in the issuer's financial statements included in that annual report. This is true even if the issuer includes disclosures about the interim restatements in a footnote to the annual-period financial statements pursuant to Item 302(a) of Regulation S-K.

However, the listed issuer is required to include or incorporate by reference from its proxy or information statement disclosure pursuant to Item 402(w) of Regulation S-K in the annual report filed in the immediately following fiscal year, because the issuer determined during the fiscal year for which the restatement is required that it needed to prepare an accounting restatement. For purposes of that disclosure, an accounting restatement is not limited to an accounting restatement that impacts annual periods, but it also includes an accounting restatement that impacts interim periods only. This position also applies to disclosure pursuant to Item 6.F of Form 20-F or Instruction (B)(19) to Form 40-F filed in the subsequent fiscal year.

## TARGET COMPANIES IN DE-SPAC TRANSACTIONS – SECTION 15(D) SUSPENSION (C&DI 253.03)

Section 253.03 of the SEC staff’s C&DIs addresses the ability of target companies in de-SPAC transactions to suspend their Section 15(d) reporting obligation after the de-SPAC transaction has closed.

The SEC staff confirmed that, following a de-SPAC transaction, a target company that becomes a co-registrant may suspend its Section 15(d) reporting obligations, *subject to certain conditions*.

As we have previously reported, under the SEC’s January 24, 2024 final rules, a target company in a de-SPAC transaction must be a co-registrant with the SPAC in the registration statement and assumes Section 15(d) reporting responsibilities upon effectiveness. However, the staff will not object to the target company filing a Form 15 to suspend those obligations if:

1. The target company becomes wholly owned by the combined public company; and
2. The target remains current in its reporting obligations through the date that it files Form 15.

### KEY TAKEAWAYS

- **Checkbox Compliance is Broader Than Expected:** Issuers must mark clawback-related checkboxes even for *non-required* restatements (e.g., little “r” restatements). Immaterial out-of-period adjustments are the key exception.
- **Explain the Absence of Recovery:** If a clawback policy is triggered but no recovery occurs, issuers must still mark the box and briefly explain why, regardless of the reason.
- **Restatement Timing Drives 402(w) Disclosure:** Even if no clawback occurs, a restatement during or after the most recently completed fiscal year triggers Item 402(w)(2) disclosure in the following year’s proxy statement or Form 10-K.
- **Interim Restatements Still Count:** Clawback boxes only apply to restatements of annual periods, but interim-only restatements still require Item 402(w) disclosure the following year.
- **De-SPAC Co-Registrants Can Exit 15(d):** A de-SPAC target company that becomes a co-registrant can file a Form 15 to suspend its reporting obligations if it is wholly owned post-closing and current in its filings.

Winston’s Capital Markets & Securities Law Watch will continue to monitor developments on SEC guidance and C&DIs, and we will provide our readers with additional updates as they become available.

For more information, or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

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