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GLOBAL PUBLIC COMPANY ACADEMY

Recent Developments in SPACs and IPOs

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Agenda

1. Recap of special purpose acquisition company (SPAC) deal activity in 2021
2. Regulatory issues affecting SPACs in 2021
3. Securities and Exchange Commission (SEC) SPAC Proposing Release (March 2022)

Recap: SPACs in 2021

- 613 SPAC initial public offerings (IPOs) in 2021 (~60% of all US IPOs)
  - 248 SPAC IPOs in 2020, 59 in 2019
- Average time to completion (from IPO date):
  - 2021: 6-8 months
  - 2020: 9-12 months
  - 2019: ~18 months

Regulatory Issues in 2021

- April 2021: Acting Director of the Division of Corporation Finance issued a statement casting doubt on the availability of the safe harbor under the Private Securities Litigation Reform Act for forward-looking statements in SPAC merger proxy statements.
- Such safe harbor is unavailable for statements in IPOs as it was intended to encourage existing public companies to provide forward-looking information to the market.
- The Acting Director contended that, since the de-SPAC is the functional equivalent of an IPO through a different process, the safe harbor should be unavailable for the merger proxy statement.
- However, the market had come to expect that the target will provide projected financial information to the SPAC and to the PIPE investors.

Regulatory Issues in 2021 (continued)

- April 2021: Acting Director of the Division of Corporation Finance and Acting Chief Accountant issued a statement that caused widespread disruption for SPAC IPOs, business combinations, and de-SPAC companies with outstanding warrants, by indicating that two common features of warrants could prevent the warrants from qualifying as equity instruments and required classifying as liabilities for accounting purposes.
  - The features in question related to providing for a cashless exercise of private-placement warrants unless transferred to an unaffiliated third party, and providing for anti-dilution adjustments in connection with tender offers.
- Result: Led to most SPACs and de-SPAC companies to restate their financial statements to account for the warrants as liabilities. This led to a slowdown in SPAC transactions in late April and May.

Regulatory Issues in 2021 (continued)

- September 2021: Change in equity accounting

1. SEC informally advised major SPAC auditing firms of its view that SPAC equity accounting should change.
2. Because the publicly held Class A Common Stock is redeemable in connection with a business combination, SPACs had traditionally included all but $5.0 million as “mezzanine” equity and $5.0 million as permanent equity.
3. The reason for this is that SPAC charters typically provide that a business combination cannot be completed if redemptions would result in net tangible asset being less than $5.0 million.
4. Under new approach, all Class A Common Stock would be classified as mezzanine
5. This led to a further round of restatements.
6. This also impacted SPACs’ ability to list on Nasdaq Capital Market – which has a $5.0 million minimum equity condition.

SEC Proposing Release No. 33-11048 (Mar. 30, 2022)

- 1. Enhanced Disclosure Requirements through New Subpart 1600 of Regulation S-K
- 2. Aligning De-SPAC Transactions with IPOs
- 3. Business Combinations Involving Shell Companies
- 4. Status of SPACs Under the Investment Company Act of 1940

1. Enhanced Disclosure Requirements (New Subpart 1600 of Reg. S-K)

- SPAC sponsors, conflicts of interest, and dilution
  - Require additional disclosures regarding the experience, roles, responsibilities, and material interests of the SPAC sponsor and affiliates and the relationships between such parties
  - Disclosure relating to compensation earned by or paid to the sponsor and its affiliates
  - Discussion of the conflicts of interest, including the potential benefits, risks, and effects for investors, as well as potential benefits for SPAC sponsors and other affiliates
  - Potential for dilution in the SPAC IPO and de-SPAC transaction, the sources of dilution, and the possible disproportionate impact on nonredeeming shareholders
- Fairness of the de-SPAC transaction to the SPAC investors
  - State whether the SPAC reasonably believes that the de-SPAC transaction and any related financing transactions are fair or unfair to the SPAC's unaffiliated security holders
  - Provide a description of the bases for this statement
  - May seek a fairness opinion from a financial advisor to substantiate their "reasonable belief"

2. Aligning De-SPAC Transactions with IPOs

- Require that the target company be a co-registrant when a SPAC files a registration statement on Form S-4 or Form F-4 for a de-SPAC transaction
- Redetermination of smaller reporting company status within four days following the consummation of a de-SPAC transaction
  - public float measured as of a date within four business days following completion of a de-SPAC transaction
- Eliminate the safe harbor in the Private Securities Litigation Reform Act of 1995 (PSLRA) for forward-looking statements, such as projections, in filings by SPACs and certain other blank check companies
- Underwriters in a SPAC IPO to be deemed underwriters in a subsequent de-SPAC transaction when certain conditions are met
- Require that SPAC stockholders have adequate time to consider the information presented in a de-SPAC transaction

3. Business Combinations Involving Shell Companies

- A business combination transaction involving a reporting shell company and another entity that is not a shell company would be deemed to constitute a sale of securities to the reporting shell company's stockholders for purposes of the Securities Act
  - Proposed Rule 145a would require the filing of a registration statement for business combinations between a reporting shell company and a company that is not a shell company
- Align the required financial statements of private operating companies in transactions involving shell companies with those required in registration statements for IPOs
  - Predecessor to a shell company will be required to be audited by an independent accountant in accordance with the PCAOB to the same extent that a registrant would be audited for an IPO

4. Status of SPACs Under the Investment Company Act

- Proposed Rule 3a-10 would provide a safe harbor from the definition of "investment company" under the Investment Company Act of 1940, subject to each of the following conditions:
  - Maintain assets comprising only cash items, government securities, and certain money market funds
  - Seek to complete a de-SPAC transaction after which the surviving entity will be primarily engaged in the business of the target company
  - Enter into an agreement with a target company to engage in a de-SPAC transaction within 18 months after its IPO and complete its de-SPAC transaction within 24 months after its IPO
- SPACs would not be required to comply with the safe harbor, and failure to meet the safe harbor would not result in an automatic determination of investment company status

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**.

If you would like to receive a daily digest of all updates to the page, please visit the resource page to **subscribe**.

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Biography

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Howard focuses on capital market offerings of all kinds, public company disclosure and governance, and various business transactions, including public company M&A and SPAC related transactions. He counsels clients in a wide variety of industries, including media, retail, financial services, and food. He assists clients in IPOs, follow-on and secondary stock offerings, public and 144A note offerings, tender and exchange offers, and acquisitions and sales of businesses. He is a member of the firm's SPAC Task Force.

Biography

Brian V. Soares
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Brian draws on his experience as a former attorney-adviser with the SEC's Division of Corporation Finance to counsel public companies and their Boards of Directors on securities regulation, capital markets transactions, corporate governance and ESG matters, and shareholder engagement. He advises clients on periodic SEC reporting and compliance with Nasdaq and NYSE listing standards, and in registered offerings of debt and equity securities. Brian is a native Portuguese speaker.

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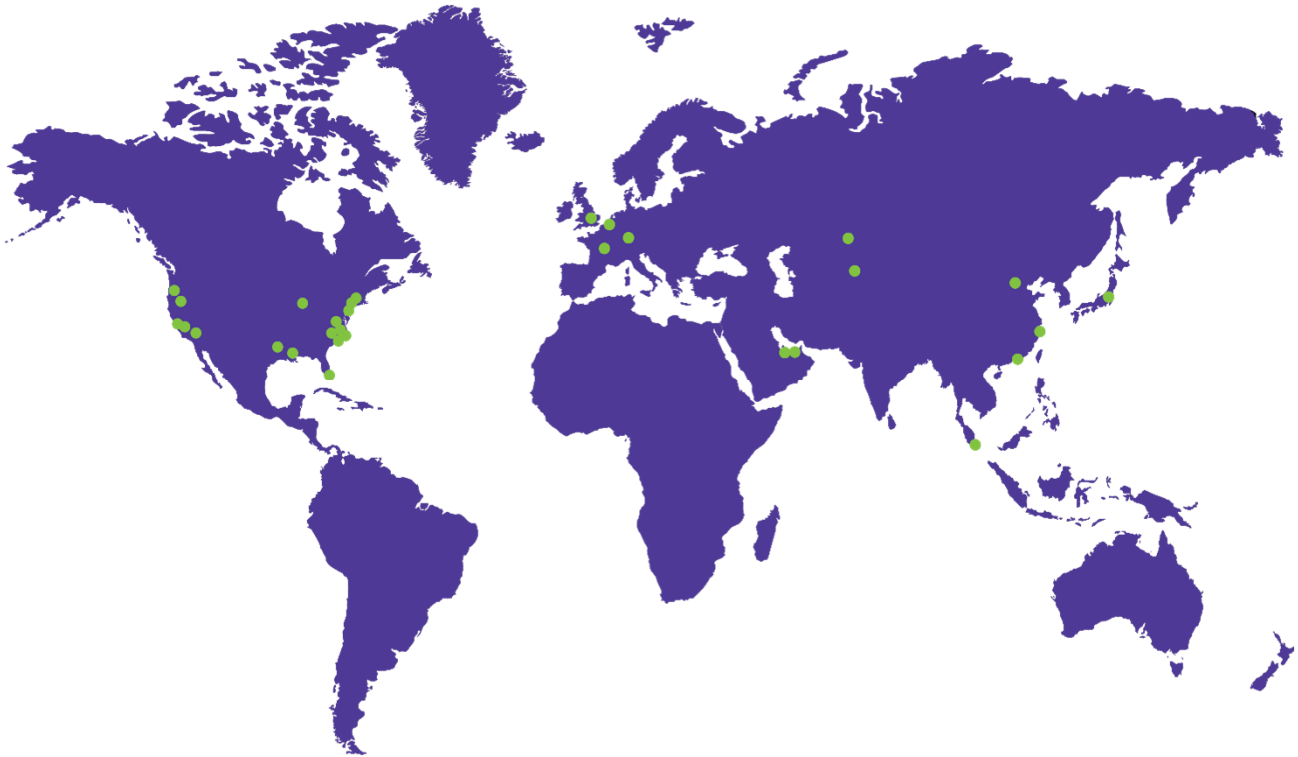

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