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GET THE FACTS ON SPACS

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Overview

- History and Current Landscape
- Key Features of SPACs
- SPAC or IPO?
- Key Features of a de-SPAC Transaction
- SEC Filings
- Other Considerations

History and Current Landscape

- A **S**pecial **P**urpose **A**cquisition **C**ompany is a blank check company formed for the purpose of effecting a business combination with one or more businesses
- SPACs are not new, but have increased in prevalence recently
  - In 2020, 160 SPAC IPOs have raised $58.35 billion through October
- SPACs can list on either Nasdaq or NYSE
  - Historically, most SPACs have listed on the Nasdaq because NYSE listing rules were more restrictive, but NYSE rules have recently changed

Key Features of a SPAC

- SPACs are formed to raise capital in an IPO with the purpose of using the proceeds from the IPO to acquire an unspecified business after the IPO.
- SPACs are formed by a **Sponsor** (typically a private equity fund, financial institution or group of investors).
  - The Sponsor makes an initial (pre-IPO) investment of $25,000 in exchange for "founder shares" typically referred to as the "**Promote**".
  - The Promote is a substantial portion of the SPAC's post-IPO equity.
- Capital Structure
  - In its IPO, the SPAC typically issues equity that is structured to include one share of common stock and a warrant to purchase common stock.
  - Simultaneously with the IPO, the Sponsor acquires additional units, shares or warrants in a private placement.
- Trust Account
  - The proceeds of the IPO and a portion of the concurrent private placement proceeds are held in a trust account until released to fund the de-SPAC transaction.

Key Features of a SPAC (Continued)

- A portion of the proceeds of the Sponsor's private placement investment is held outside of the Trust and is available to the SPAC for use in seeking a target for a business combination
- de-SPAC Transaction
  - Following the IPO, the SPAC will seek an opportunity to acquire an operating business (the "**Target**"). This is known as a "**de-SPAC**" or the "**Business Combination**".
  - It allows a private company to become a US public company outside of the typical IPO process
  - Additional PIPE Investors
  - Approvals and Trust Fund
    - The de-SPAC transaction requires approval from the SPAC's stockholders
    - The IPO investors have the option to convert their shares into a pro rata portion of the trust account and keep their warrants ("**Redemptions**").

Key Features of a SPAC (Continued)

  - The portion of the proceeds of the Sponsor's private placement investment deposited into the trust account is used to "gross up" the trust account for the underwriting discount so that the IPO investors receive the IPO price for the units, plus interest, upon redemption.

- As a result of the de-SPAC transaction, the Target becomes a publicly traded company

SPACs or IPOs

- Timing
  - Going public through a SPAC is typically faster than through an underwritten IPO.
  - The fastest IPO will take at least four months.
  - Some SPAC transactions close as quickly as two months following the execution of the de-SPAC merger agreement (though timing is significantly impacted by whether the target has appropriate audited financial statements available).
  - Consider SPAC lifespan.

SPACs or IPOs

- Access to additional funds beyond what the SPAC raised in its IPO
  - de-SPAC transactions often include a private investment in public equity (PIPE) investment
  - The PIPE signs when the de-SPAC merger agreement is signed, and funds when the de-SPAC merger closes
- Confidentiality
  - Traditional IPOs are made public when the company files its registration statement with the SEC
  - If the IPO is not consummated, such as because of market conditions, the company's disclosure remains public knowledge
  - In a de-SPAC transaction, if negotiations breakdown between the Target and the SPAC before signing, the potential de-SPAC transaction remains confidential

Foreign Company Considerations

- A few considerations on foreign SPACS
  - Most SPACs are formed as Delaware corporations, though it is not uncommon for SPACs to be formed in non-U.S. jurisdictions
  - Foreign SPACs may allow for a more efficient de-SPAC structure for a foreign Target
  - Foreign companies interested in going public in the U.S. markets should consider doing so with a SPAC formed outside of a U.S. jurisdiction
  - Foreign SPACs require engaging local counsel for corporate law matters
  - A post-de-SPAC foreign company could qualify as a "**foreign private issuer**" (**FPI**) under SEC rules and be subject to the SEC's foreign filing regime
- **Note:** An offshore structure may present additional tax issues, such as passive foreign investment company issues

Key Features of a de-SPAC Transaction

- Letter of Intent
  - The SPAC and the Target will enter into a letter of intent or term sheet and begin drafting and negotiating a merger agreement
  - The terms will include the consideration to be paid to the sellers of the Target, including the mix of cash and stock of the surviving company
  - Treatment of Promote
  - PIPE
  - Minimum Cash Condition
    - This is a requirement that the SPAC have a minimum amount of cash available at closing, which cash is obtained from the proceeds in the trust account (net of Redemptions) and proceeds of a PIPE transaction, the solicitation and negotiation for which occurs in parallel with the merger agreement
      - SPAC stockholders may redeem their shares in exchange for a pro rata portion of the cash in the SPAC's trust account
    - Backstop from Sponsor or third party.
- The terms also include restrictions on transfers of the founder shares and shares received by the sellers, registration rights for the Sponsor, sellers and PIPE investors, the composition of the post-closing board of directors and other matters

Key Features of a de-SPAC Transaction: PIPE Transaction

- In addition to the cash available in the SPAC trust fund, as part of the de-SPAC Transaction, the SPAC and Target also will seek additional fundraising to fund a portion of the merger consideration and the cash available to the Target after the de-SPAC transaction
- PIPEs: a private placement by a public company exempt from registration
- The SPAC and the Target will work with their financial advisors, often including a placement agent engaged by the SPAC, to prepare an investor presentation
- The investor presentation will be presented to institutional accredited investors who agree to maintain the confidentiality of the information and express interest in investing in the SPAC through a PIPE transaction
- The terms of the confidentiality agreement require that SPAC and Target publicly disclose the investor presentation concurrently with the announcement of the signing of the de-SPAC merger agreement to "cleanse" the PIPE investors from possession of material non-public information and enable them to trade SPAC securities
  - This investor presentation is similar to an IPO roadshow presentation and contains information about the Target's business and the terms of the transaction
  - Unlike an IPO roadshow presentation, it often also includes financial projections
- Simultaneously with the execution of the de-SPAC merger agreement, the PIPE investors and the SPAC will enter into a **subscription agreement** for the PIPE transaction, with funding to occur at the closing of the Business Combination (so closing conditions need to include the closing of the transactions contemplated by the **merger agreement**).

PIPE Transaction (continued)

- The PIPE investors will have registration rights to sell their shares after closing of the de-SPAC transaction.
- Typically, the PIPE investors will negotiate for the ability to obtain liquidity in advance of other stakeholders. Not all PIPE investors will receive the same terms.
- To maintain a clear market for the PIPE investors, the Target's owners and Sponsor typically agree to transfer restrictions (lock-ups) on their shares for a period following the closing. The lock-up period is typically 180 days (like an IPO) but is occasionally tiered based upon trading price milestones.
- Like the de-SPAC merger transaction, the PIPE is only announced once signed.

Corporate Documentation and Corporate Approvals

- A de-SPAC transaction is an IPO for the Target, and a public company M&A transaction for the SPAC
- The SPAC and the Target will enter into a **merger agreement** and other deal documents
  - The merger agreement and other deal documents will look very similar to a public company merger agreement, but with certain key distinctions:
    - Earnout
    - Retained Equity (rollover; Promote; Warrants)
    - Indemnity
    - Limited Recourse
- Board Approvals
  - The merger agreement must be approved by the boards of directors of both the SPAC and the Target
  - The SPAC board must also approve holding the special meeting where SPAC stockholders will vote on whether to approve the de-SPAC transaction

Corporate Documentation and Approvals (continued)

- Stockholder Approvals
  - SPAC Stockholders
    - SPAC stockholders will vote on whether to approve the de-SPAC transaction at a special meeting of stockholders
    - The SPAC and the Target prepare an investor presentation used to market the de-SPAC transaction to the SPAC stockholders in soliciting their approval. This presentation is largely identical to the presentation used in the PIPE transaction.
  - Target Stockholders
- Fairness Opinions
  - Fairness opinions have traditionally been rare for buyers in M&A transactions, including SPACs, but they are becoming increasingly more common. A copy of such fairness opinion and description thereof would be required to be disclosed in the proxy statement seeking approval by the SPAC's stockholders.
- Stockholder Litigation
  - Stockholder litigation has also been rare in SPAC transactions because of the inability of plaintiffs to access the funds held in trust. Such litigation, however, is becoming increasingly more common.

Required SEC Filings: The Signing 8-K

- The SPAC must file a Form 8-K within 4 business days of signing the merger agreement
  - Typically, this "Signing 8-K" is filed on the same day that the merger is announced via press release, and is the first public filing announcing the de-SPAC transaction
  - The 8-K will include disclosures about the merger agreement, any voting agreements, the PIPE subscription agreement (if applicable), and any other material ancillary documents relating to the merger
  - The Signing 8-K will also include the investor presentation that will be used in discussions with investors and analysts
- Issuing the press release announcing the deal allows the SPAC and the Target to engage in discussions with the press, employees, investors, and analysts in compliance with Regulation FD
  - Reg. FD prohibits selective disclosure of material nonpublic information to investors, analysts, and other market professionals

Required SEC Filings: Proxy Statement/Form S-4

- The primary SEC filing relating to the de-SPAC transaction typically will be a **proxy statement**
  - If the transaction is structured as a share exchange, where the SPAC's shares are exchanged for the Target's shares, then a **Form S-4** registration statement will be used, and the S-4 will include a proxy statement/prospectus
  - The disclosure requirements for both the proxy statement and the Form S-4 are similar
- The proxy statement contains the typical disclosure that would be required in any public company M&A transaction requiring stockholder approval and all of the typical disclosures provided in an IPO registration statement on Form S-1
- **Timing:** the parties will want to file the proxy statement (or S-4) as soon as possible after the signing of the merger agreement

Required SEC Filings: Additional Communications

- SEC rules require that any communications relating to the de-SPAC transaction be filed on the date the materials are first published, sent, or distributed to stockholders
  - *Any written communications relating to the de-SPAC transaction must be filed with the SEC on the date of first use*
- This requirement applies regardless of whether the parties filed a proxy statement or a Form S-4

SEC Staff Review

- The SEC staff will conduct a full review of the proxy statement or Form S-4
- Usually, the SEC Staff takes approximately 30 calendar days to issue its first comment letter on the filing
- After receiving SEC comments, the de-SPAC deal team will work quickly to respond to the SEC comment letter by revising the disclosure in the proxy statement or Form S-4, and filing a revised or amended document that addresses the SEC's comments
- Also, the proxy statement or Form S-4 may require other updates to reflect the passage of time, such as updating financial statements or other data for the most recently-completed fiscal quarter
- Once the SPAC responds to the first SEC comment letter, the SEC Staff takes about 10 to 14 calendar days to review the revised or amended filing and respond with additional comments, if any
  - If the SEC Staff submits additional comments, the deal team will again work quickly to respond and revise the filing as necessary
- Once the SEC Staff's comments have all been addressed, the Staff will give the go-ahead to file the definitive proxy statement or will take the Form S-4 effective, as appropriate
- **Note:** In our experience SEC reviews of Form S-4 (which are filed under the Securities Act), typically take a little longer than reviews of a proxy statement (which are filed under the Exchange Act). This is because Form S-4 also covers the issuance of new securities, such as in a share exchange.

Mailing the Proxy Statement and Conducting the Special Meeting

- After the SPAC files the definitive proxy statement or the final proxy statement/prospectus, the document must be printed and mailed to the SPAC stockholders
  - Stockholders will have the opportunity to review the proxy statement before making an informed voting decision on whether to approve the de-SPAC merger

Closing the de-SPAC Transaction and Filing the "Super 8-K"

- Once stockholders approve the de-SPAC transaction and the deal closes, the SPAC must file a Form 8-K with the SEC reporting the voting results of the special meeting and the closing of the transaction
- This "Super 8-K" will contain disclosure about:
  - the completion of the merger;
  - any material agreements entered into in connection with the merger (such as employment agreements for executive officers or a new incentive plan); and
  - the post-combination company information required under Form 10 (much of this disclosure will be incorporated by reference to the proxy statement filed for the special meeting)
- **Note:** If the Super 8-K is filed after the Target's most recently completed fiscal period but does not contain financial statements for that period, such financial statements will need to be included if the financial statements in the proxy statement are "stale" or, if not yet stale, then the Super 8-K will need to be amended after the transaction closes to include updated financial statements for the most recently completed fiscal period (there is no 71 day extension for former SPACs).

Additional SEC Filings Post Closing

- The newly-combined company will still have additional filings related to the de-SPAC after the closing
- The company must file a **resale registration statement** to register the issuance of the shares issuable upon exercise of the warrants issued in the IPO and the resale of the shares held by the Sponsor and sellers, and shares issued in a PIPE
  - This resale registration statement must be filed on Form S-1 instead of Form S-3, because according to the SEC Staff, the post-combination company is not S-3 eligible until it has 12 calendar months of Exchange Act reporting history
- The company must also file a **Form S-8** to register any shares that may be issued under equity plans to the combined company's employees
  - The Form S-8 cannot be filed until 60 days after the filing of the Super 8-K due to the combined company's former status as a shell company
- The SPAC and the Target must file **Forms 3 and 4** for **executive officers and directors** of the post-combination company, as required by Section 16 of the Exchange Act

Remaining Considerations

- The post-combination company will be subject to Rule 144(i), meaning that no resales can be conducted pursuant to Rule 144 for one year from the filing of the Super 8-K
  - This is due to the SPAC's former status as a shell company

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QUESTIONS?

Biography

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Russell Franklin counsels global private and publicly held companies in connection with structuring, and effecting, complex strategic transactions. This includes structuring and negotiating mergers and acquisitions (M&A), minority investments, and joint venture transactions for strategic and financial clients including private equity firms. His practice also includes general stock and asset transactions, and purchases and sales resulting from bankruptcy and out-of-court restructurings.

By focusing on understanding what his clients are looking to achieve, and leveraging his experience, Russell strives to provide creative solutions that allow his clients to meet their business objectives. In some instances, this amounts to Russell providing advice to clients throughout the entire lifecycle of a target including acquiring the asset, managing the asset and, where applicable, ultimately disposing of the asset. His clients can be found in numerous industries including healthcare, life sciences, retail, financial services, and media.

Before joining Morgan Lewis, Russell was a partner in the corporate practice of another global law firm, resident in New York.

Biography

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Andrew Milano's corporate practice focuses on US and cross-border mergers, acquisitions, dispositions, and private equity investments in various industries, including infrastructure, power, media, manufacturing, and technology. He counsels both public and privately held companies in complex strategic transactions including joint ventures, commercial contracts, and general corporate and compliance matters.

Andrew routinely advises clients in acquisition and divestment deals involving a range of assets, from container terminals, power generation facilities, and regulated water and wastewater plants to enterprises in the international energy services sector, various manufacturing industries, and logistics operations.

Biography

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Jeffrey A. Letalien represents domestic and foreign issuers, underwriters, and investors in diverse transactions, including public and private offerings. He regularly represents buyers and sellers, including special purpose acquisition companies (SPACs), in connection with disclosure, filing and other securities law aspects of large and complex business combinations. Jeff regularly counsels public companies with respect to corporate governance, reporting and disclosure obligations and compliance with complex indenture covenant requirements. He is a member of the firm's SPAC Task Force.

Jeff represents public and private companies as issuers of debt and equity securities, including initial public offerings (IPOs), private placements of high-yield, convertible, and investment-grade debt securities under Rule 144A, and public-for-private exchange offers. He represents public companies, including commodity pools and other exchange-traded funds, as well as former SPACs following their business combinations and companies in the retail and consumer products, financial services, transportation and life sciences sectors, in connection with their periodic reporting and other securities law matters, as well as funds and individuals investing in securities of public and private companies with respect to related matters, including Section 13(d) and Section 16 reporting and compliance. He also advises public companies in connection with "going dark" and going private, as well as buyers and sellers in connection with disclosure obligations relating to business combinations, including proxy statements and tender offer materials.

Prior to joining Morgan Lewis, Jeff was a corporate and securities associate with the New York office of an international law firm and with the Stamford, Connecticut, office of another international law firm.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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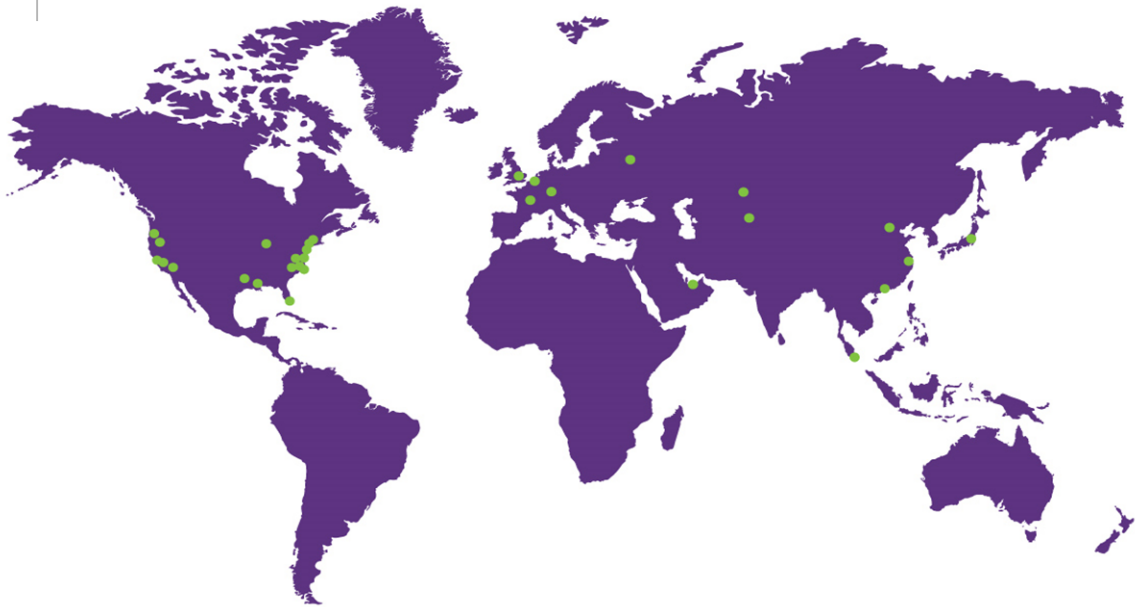
Brussels	Hartford	Moscow	Princeton	Washington, DC
Century City	Hong Kong*	New York	San Francisco	Wilmington



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