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GLOBAL PUBLIC COMPANY ACADEMY

GOING PUBLIC THROUGH A SPAC: CURRENT ISSUES FOR SPAC SPONSORS AND PRIVATE COMPANIES

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Overview

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- Advantages of SPACs over traditional IPOs
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Background: How did we get here?

- SPACs have been around for decades, but have grown in size, as well as the prominence of the Sponsors and underwriters, in recent years
- SPACs became more popular starting in 2017, when 34 SPAC IPOs raised over $10 billion
  - Before 2017, the most SPAC IPOs in one year since 2009 had been 20, raising an aggregate $3.9 billion
- In 2020, 237 SPAC IPOs raised approximately $80 billion[1]
  - 2019: 59 SPAC IPOs raised $13.5 billion[2]
- 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

1. Source: “2020 Has Been the Year of SPAC IPOs: Here Are the Prominent 4, ” NASDAQ (December 28, 2020)
2. Source: Tomio Geron, “SPACs Offer Quick Exits for Venture Firms, but Potential Perils as Well,” The Wall Street Journal (Oct. 30, 2020).

Background: What is a SPAC and how does it work?

- 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 (such as a merger or share exchange)
- 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
- Most SPACs are formed by a private equity fund, financial institution or group of investors whose investment vehicle is known as the **Sponsor**. The Sponsor makes an initial (pre-IPO) investment of $25,000 for "founder shares" that are worth a substantial portion of the post-IPO equity. The founder shares are also known as the "**Promote**."
- In its IPO, the SPAC typically issues units consisting of one share of common stock and a warrant to purchase common stock. The Sponsor acquires additional units, shares or warrants in a concurrent private placement.
- The net SPAC IPO proceeds, a portion of the underwriting discount and a portion of the concurrent private placement proceeds are held in a trust account until released to fund the business combination.

Background: What is a SPAC and how does it work? (Continued)

- The remaining proceeds of the Sponsor's private placement investment are available for the SPAC to use to fund its expenses in seeking a target for a business combination
- After the IPO, the SPAC will pursue an acquisition opportunity and negotiate a merger to acquire an operating business (the "**Target**")
  - This transaction is known as a "**de-SPAC**" or the "**Business Combination**"
- The de-SPAC transaction must be approved by the SPAC's stockholders at a meeting of stockholders
- In the de-SPAC transaction, the IPO investors have the option to convert their shares into a pro rata portion of the trust account and keep their warrants ("**Redemptions**"). 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

Advantages of SPACs Over Traditional IPOs

- Speed of execution
  - Going public through a SPAC is typically faster than through an underwritten IPO
  - In some transactions, the Target becomes public less than two months after signing the de-SPAC merger agreement
  - In a best case scenario, a traditional IPO takes at least four months
- Access to additional funds beyond what the SPAC raised in its IPO
  - De-SPAC transactions can include a private investment in public equity (PIPE)
  - The PIPE signs when the de-SPAC merger agreement is signed, and funds when the de-SPAC merger closes
- Deal is not public until signed
  - Traditional IPOs are made public when the company files its registration statement with the SEC
  - If the IPO falls through, such as because of market conditions, the company's disclosure remains public knowledge
  - In a de-SPAC, if negotiations breakdown between the Target and the SPAC before signing, the potential de-SPAC transaction is not made public

Considerations for Foreign Companies

- Although most SPACs are formed as Delaware corporations, several have been formed in foreign jurisdictions
  - Cayman Islands is most common, followed by British Virgin Islands
- A foreign SPAC may allow for a more efficient de-SPAC structure for a foreign Target
- Therefore, foreign companies interested in going public through a SPAC transaction should consider doing so with a SPAC formed outside of a U.S. jurisdiction, such as the Cayman Islands
- 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
  - For example, FPIs may file annual and current disclosure reports on Forms 20-F and 6-K
- **Note:** An offshore structure may present additional tax issues, such as passive foreign investment company issues

Recent SEC Pronouncements

- On April 12, the SEC's 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 deSPAC companies with outstanding warrants, by indicating that two common features of warrants, one of which provides for cashless exercise of private placement warrants unless transferred to an unaffiliated third party and the other of which provides anti-dilution adjustments in connection with tender offers, may prevent the warrants from qualifying as equity instruments and required classifying as liabilities for accounting purposes.
  - Such statement led most SPACs and deSPAC companies to restate their financial statements to account for the warrants as liabilities. Most such restatements are now complete. However, such process led to a slowdown in SPAC transactions in late April and May.
  - Accounting firms continue to assess whether changes to the form of warrant agreement used for new SPACs would enable accounting for the warrants as equity.

Recent SEC Pronouncements (Continued)

- On April 8, the SEC's Acting Director of the Division of Corporation Finance also 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 initial public offerings as it was intended to encourage existing public companies to provide forward-looking information to the market. The Acting Director contends that, since the deSPAC 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 has come to expect that the target will provide projected financial information to the SPAC and to the PIPE investors and we expect such practice to continue. We note that the bespeaks caution doctrine would continue to be available in the absence of the safe harbor.

Key Transaction Terms and Financing

- 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.
- The terms will often include a **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.
- 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.

PIPE Transaction

- While the SPAC and the Target prepare and negotiate the merger agreement, the SPAC and Target will also begin a fundraising process to fund a portion of the merger consideration and the cash available to the Target after the de-SPAC transaction
- PIPE in a nutshell: 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 in a PIPE transaction. The terms of the confidentiality agreement will require that the investor presentation be disclosed publicly concurrently with the announcement of the signing of the merger agreement in order 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, but, unlike an IPO roadshow presentation, often also includes financial projections.
- The PIPE investors and the SPAC will enter into a **subscription agreement** for the PIPE transaction that are signed concurrently with the merger agreement. Funding occurs at closing.

PIPE Transaction (continued)

- The PIPE investors will have registration rights to sell their shares after closing of the business combination.
- The PIPE investors will negotiate for the ability to obtain liquidity in advance of other stakeholders. In order to provide a clear market for the PIPE investors, the sellers and Sponsor will 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, the PIPE is only announced once signed.

Corporate Documentation and Board 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**
- 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
- As the buyer, the SPAC board's decision to acquire the Target will likely be subject to the deferential business judgment rule (assuming the SPAC is a Delaware corporation)
- Nonetheless, board members should make sure they were duly informed about the transaction, and outside counsel should help the SPAC conduct a process that will withstand legal challenge

Corporate Documentation and Board Approvals (continued)

- Although fairness opinions have traditionally been rare for buyers in M&A transactions, including SPACs, they are becoming increasingly 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 has also been rare in SPAC transactions because of the inability of plaintiffs to access the funds held in trust. However, such litigation is becoming increasingly common, as we will discuss in more detail when discussing the Proxy Statement later in this presentation.

Shareholder Approvals Required – SPAC Stockholders

- The de-SPAC transaction requires stockholder approval from the SPAC and the Target
- SPAC stockholders will vote on whether to approve the de-SPAC transaction at a special meeting of stockholders

Shareholder Approvals Required – Target Stockholders

- Target stockholders must also approve the de-SPAC transaction
  - Prior to signing the merger agreement, the parties should make sure that certain Target stockholders will vote in favor of the merger through **voting/lock-up agreements** (not to be confused with the lock-up agreements entered into by the sellers and Sponsor at closing to agree not to transfer their shares for six months after closing)
  - **Note:** Lock-up agreements, which involve a commitment to vote in favor of the merger, are permissible, but, if the de-SPAC is structured as a share exchange, since the vote is considered to be an investment decision and must occur after receipt of a prospectus contained in an effective registration statement, actual votes or consents from the Target's stockholders cannot be obtained in advance.
  - SEC Staff does not object to lock-up agreements in the S-4 context in the following circumstances:
    - the lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the Target;
    - the persons signing the lock-up agreements collectively own less than 100% of the voting equity of the Target; and
    - votes will be solicited from shareholders of the Target who have not signed the lock-up agreements and would be ineligible to purchase in a private offering

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 disclosure 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 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 resale of the shares and warrants issued in the SPAC's IPO, and any 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

QUESTIONS?

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Biography

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Howard A. Kenny focuses on capital market offerings of all kinds, public company disclosure and governance, and various business transactions, including public company M&A and Special Purpose Acquisition Company (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.

Howard has represented a large number of public and private companies, both US and foreign, in connection with debt offerings of all types, including high-yield debt, convertible debt, and commercial paper.

He also acts as securities disclosure and corporate governance counsel to publicly traded companies. In addition, he advises non-US companies on securities regulation and stock exchange listings in the United States.

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.

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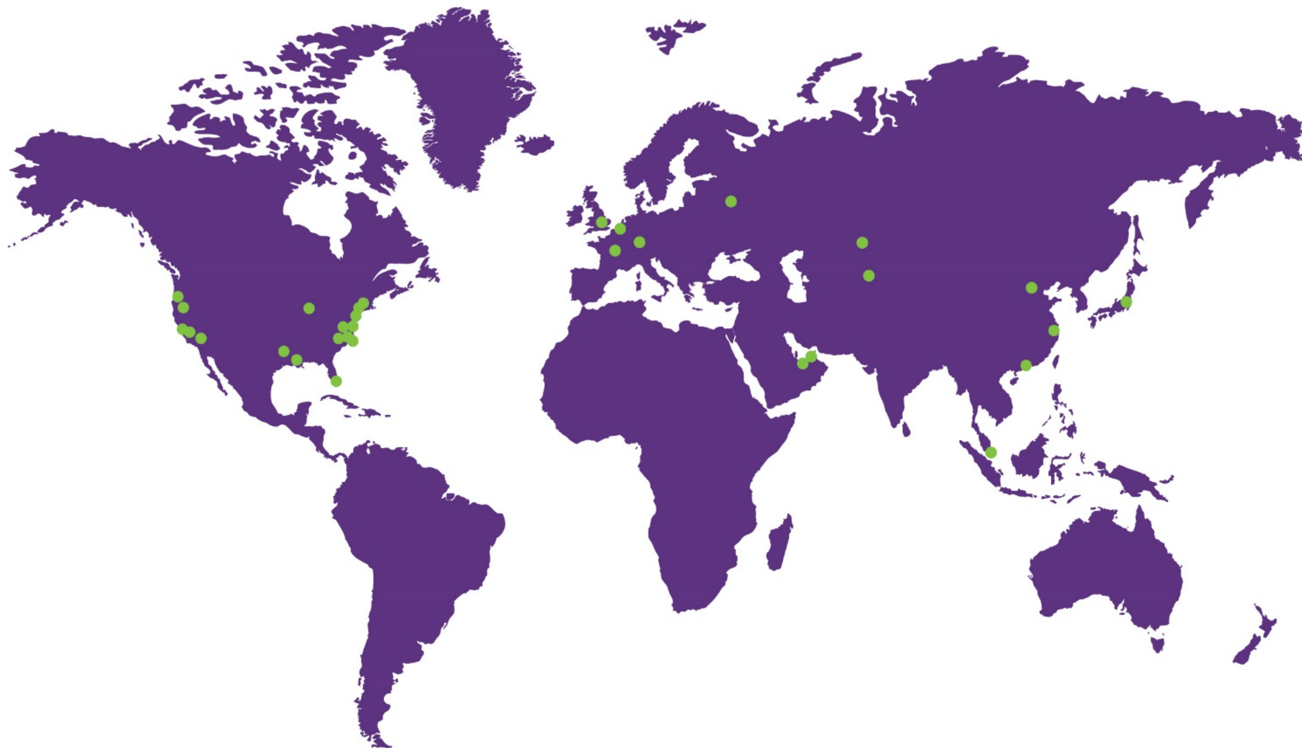

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