M&A Hot Topics (Part 2): SPACs and Litigation Hot Topics

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Welcome!

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Agenda

1. What is a SPAC?
2. Key Statistics and Current Trends
3. Key Features
4. De-SPAC Transactions
5. Advantages / Disadvantages
6. Evolving Product / Structure
7. Litigation / Enforcement Efforts

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What is a SPAC?

What is a SPAC?

What?

- A Special Purpose Acquisition Company
- Newly formed public shell company
- "Blank check" company / "blind pool"
- No operating business or revenues

Purpose

- Raise capital through IPO
- Identify an acquisition target
- Acquire company, business or operating assets
- Result is a listing of target company

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Key Statistics and Current Trends

Key Statistics – IPOs and SPAC IPOs

Number of IPOs and amount of money raised in US in 2020 compared to 2019*

- 2020: 450 total IPOs raised a total of $179.4 billion
- 2019: 213 total IPOs raised a total of $72.2 billion

Number of SPAC IPOs in US and amount raised in 2020 compared to 2019*

- 2020: 248 total SPAC IPOs raised a total of $83.4 billion
- 2019: 59 total SPAC IPOs raised a total of $13.6 billion

Number of De-SPAC transactions in 2020

- 64 De-SPAC transactions closed in 2020
- 78% of the De-SPACs listed Delaware as the jurisdiction, 8% listed Cayman and 14% were listed as other (includes Canada, Ireland, Singapore, Switzerland, Netherlands, BVI, Nevada, Bermuda and Mexico)

Number of IPOs and SPAC IPOs in 2021 to date and value raised*

- As of 9/13/2021, IPOs: 678 total IPOs raised a total of $280 billion
- As of 9/13/2021: SPAC IPOs: 428 total SPAC IPOs raised a total of $124 billion

*Source: SPAC Analytics, as of September 13, 2021

SPAC and US IPOs Transactions by Year

Year	SPAC IPOs	US IPOs	SPAC %	SPAC Proceeds $M	US IPO Proceeds $M	SPAC %
2021	428	678	63%	124,356	280,132	44%
2020	248	450	55%	83,386	179,389	46%
2019	59	213	28%	13,600	72,200	19%
2018	46	225	20%	10,750	63,890	17%
2017	34	189	18%	10,048	50,268	20%
2016	13	111	12%	3,499	25,779	14%
2015	20	173	12%	3,902	39,232	10%
2014	12	258	5%	1,750	93,040	2%
2013	10	220	5%	1,447	70,777	2%
2012	9	147	6%	490	50,131	1%
2011	16	144	11%	1,110	43,240	3%
2010	7	166	4%	503	50,583	1%
2009	1	70	1%	36	21,676	0%
2008	17	47	36%	3,842	30,092	13%
2007	66	299	22%	12,094	87,204	14%
2006	37	214	17%	3,384	55,754	6%
2005	28	252	11%	2,113	61,893	3%
2004	12	268	4%	485	72,865	1%
2003	1	127	1%	24	49,954	0%
Total	1,064			276,820		

*IPOs greater than $40M, excludes direct listings.

Source: SPAC Analytics, as of September 13, 2021

Current Trends

Hundreds of SPACs Wait for Business Combination

- There are hundreds of SPACs that are waiting to go public, according to PrivateRaise, The Deal's proprietary data service that tracks US SPAC activity.
- As of the middle of August, PrivateRaise counted 300 SPACs waiting to go public and 500 SPACs that had already gone public. One of the reasons noted for all of these SPACs waiting to go public is not being able to find favorable terms to price the IPO.
- One other reason that some SPACs may be waiting to go public is more aggressive scrutiny by the SEC of business combinations with SPACs. Given the SEC's recent actions in the Stable Road Acquisition Corp / Momentus business combination, SPAC sponsors could be waiting to go public until their management is more fully prepared on the vetting side.[1]

Significant Slowdown of SPAC IPO Activity During Q2 2021

- The number of SPAC IPOs significantly declined during Q2 2021, as compared to activity during Q1 2021.
- According to FactSet, there were thirty-nine SPACs that raised $6.8 billion during the second quarter of 2021, which represents an 87% decline from the first quarter's activity. During Q1 2021, there were 292 SPAC IPOs that raised $92.3 billion.
- The decline in activity has been attributed to greater enforcement of SPACs by the SEC, which has been focusing on inadequate and incomplete disclosures by SPACs and greater protection for investors.
- A memo released by SEC staff accountants in April that said that warrants attached to SPAC shares should be treated as liabilities rather than as equity has also been attributed to the drop in SPAC IPOs.[2]

[1] The Deal, Bill Meagher: SPACs Hurry Up and Wait, 16 August 2021.
[2] CFO Dive, Jim Tyson: SPAC IPOs plunged 87% during Q2 amid tougher SEC scrutiny, September 2, 2021.

Current Trends

SEC Urged to Improve SPAC Disclosure

- Two advisory subcommittees of the Securities and Exchange Commission issued a memo to the regulator asking it to take more aggressive action to protect investors in SPACs.
- The subcommittees recommended that the SEC demand that SPAC filings provide more disclosure and that the regulator be more diligent in reviewing SPAC registrations.
- Some of the recommendations include: (i) the registration documents should more completely explain the sponsor's expertise and financial contributions as well as possible conflicts between its financial interests and those of retail investors; (ii) the SEC should require registrations to include a clear description of the mechanics and timelines pertaining to the SPAC process and how the shareholder deal approval process takes place; (iii) the SEC should require sponsors to discuss how they will prepare targets to become public companies; and (iv) the SEC should analyze the various players in the SPAC, their compensation and what drives decisions.[3]

49 Law Firms United and Push Back on Recent SPAC Litigation

- 49 law firms, including Baker McKenzie, signed a memo arguing that SPACs aren't investment companies under the Investment Company Act of 1940 and, as such, shouldn't be regulated as one.
- The opposition comes in response to a litigation against Bill Ackman's SPAC and two others that claim that SPACs are investment companies because proceeds from their initial public offerings are invested in short-term treasuries and qualifying money market funds.
- The law firms argue that "the assertion that SPACs are investment companies as without factual or legal basis and believe that a SPAC is not an investment company under the 1940 Act if it (i) follows its stated business plan of seeking to identify and engage in a business combination with one or more operating companies within a specified period of time and (ii) holds short-term treasuries and qualifying money market funds in its trust account pending completion of its initial business combination."[4]

[3] The Deal, Bill Meagher: SEC Urged to Improve SPAC Disclosure, 30 August 2021.
[4] SPAC Insider, Kristi Marvin: 49 Law Firms United and Push Back on Recent SPAC Litigation, 27 August 2021.

Significant Offerings – Top Transactions by Sponsors and Asset Managers, US Targets

Date Announced	Deal Status	Target	Target Industry	Target Nation	Acquiror Name	Acquiror Nation	Ranking Value inc. Net Debt of Target (USD m)
12 Jul 2021	Pending	MSP Recovery LLC	Financials	USA	Lionheart Acquisition Corp II	USA	32,500
11 May 2021	Pending	Ginkgo Bioworks Inc	Healthcare	USA	Soaring Eagle Acquisition Corp	USA	16,582
23 Sep 2021	Completed	United Wholesale Mortgage LLC	Financials	USA	Gores Holdings IV Inc	USA	16,237
22 Feb 2021	Completed	Lucid Motors USA Inc	Industrials	USA	Churchill Capital Corp IV	USA	11,750
15 Jul 2021	Pending	Aurora Innovation Inc	Industrials	USA	Reinvent Technology Partners Y	USA	10,400
26 Mar 2021	Pending	WeWork Cos Inc	Real Estate	USA	BowX Acquisition Corp	USA	9,908
09 July 2021	Pending	Bullish Inc	Financials	USA	Far Peak Acquisition Corp	USA	8,127
02 Dec 2021	Completed	Dyal Capital Partners LP	Financials	USA	Altimar Acquisition Corp	USA	6,683
11 May 2021	Pending	Better Holdco Inc	High Technology	USA	Aurora Acquisition Corp	UK	6,626
07 Jan 2021	Completed	Social Finance Inc	Financials	USA	Social Capital Hedosophia Holdings Corp V	USA	6,570

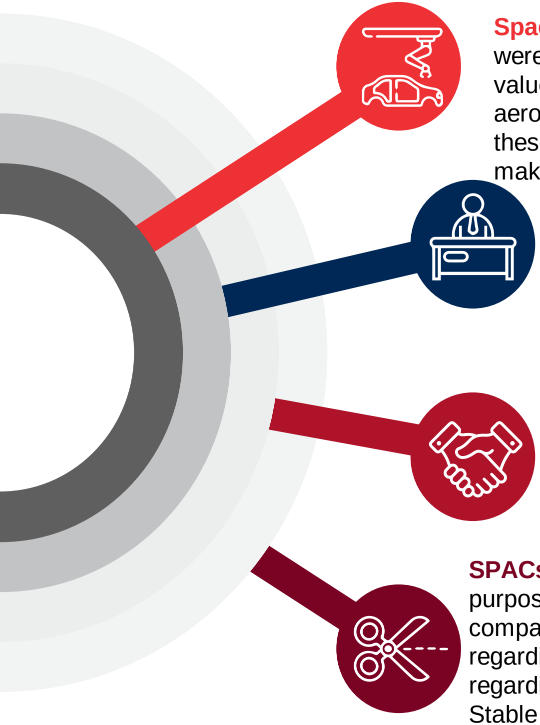
[5] Top acquisitions by publicly-listed SPACs in 2020 Sep – 2021 YTD. Data taken from Refinitiv.

Significant Offerings – Top Transactions by Sponsors and Asset Managers, Non-US Targets

Announced Date	Deal Status	Target	Target Industry	Target Nation	Acquiror Name	Acquiror Nation	Ranking Value inc. Net Debt of Target (USD m)
13 Apr 2021	Pending	Grab Holdings Inc	High Technology	Singapore	Altimeter Growth Corp	USA	31,104
16 Mar 2021	Pending	eToro Group Ltd	Financials	Israel	Fintech Acquisition Corp V	USA	10,366
21 Mar 2021	Completed	Ironsource Ltd	High Technology	Israel	Thoma Bravo Advantage	USA	10,000
23 Feb 2021	Completed	Ardagh Metal Packaging SA	Materials	Luxembourg	Gores Holdings V Inc	USA	9,460
17 May 2021	Pending	Giga Energy Inc	Energy & Power	China	Yunhong International	China	7,354
29 Mar 2021	Completed	Cazoo Ltd	Retail	UK	AJAX I Acquisition Corp	USA	6,380
07 Dec 2020	Completed	Paysafe Group PLC	Financials	UK	Foley Trasimene Acquisition Corp II	USA	5,614
18 Nov 2020	Completed	Arrival SARL	Industrials	Luxembourg	CIIG Merger Corp	USA	5,338
25 Apr 2021	Pending	Renew Power Pvt Ltd	Energy & Power	India	RMG Acquisition Corp II	USA	3,586
03 Jun 2021	Pending	Babylon Holdings Ltd	High Technology	UK	Alkuri Global Acquisition Corp	USA	3,515

[6] Top acquisitions by publicly-listed SPACs in 2020 Sep – 2021 YTD. Data taken from Refinitiv.

Recent Key Developments



Space SPACS Take Off. The latest hot sector for SPACs looking for deals is space ventures. As of August 26, 2021, there were nine pending business combinations between space-based companies and SPACs carrying an aggregate $15.5 billion value. There are also half a dozen SPACs that have gone public that have a stated intent to pursue a company in the aerospace and defense sector. One of the reasons for the popularity of A&D companies as SPAC deal partners is because these companies have been founded on technologies that have yet to be successfully commercialized on a large scale, making them more difficult candidates for a traditional IPO. (August 2021)[7]

Bill Ackman's SPAC sued. Investors filed a lawsuit against Pershing Square Tontine Holdings Ltd., the SPAC run by hedge-fund investor Bill Ackman, asking a federal court to declare that the SPAC is an investment company and not an operating company and, as such, should be regulated by the Investment Company Act of 1940. The lawsuit also asked the court to declare that Ackman's hedge fund, Pershing Square Capital Management, is acting as the SPACs investment adviser. The complaint alleged that "defendants' decision to avoid registering the company as an investment company has allowed them to use positions of control to extract compensation from PSTH in forms that violate federal law." (August 2021)[8]

Tailwind / Qomplx combination terminates. SPAC Tailwind Acquisition Corp. and risk analytics company Qomplx Inc. called off their $1.1 billion business combination that they announced in March, citing "market conditions" that "prevent[ed] certain of the closing conditions from being satisfied." Given the termination of the Qomplx business combination, Tailwind now has a little more than a year to complete a transaction. (March 2021)[9]

SPACs Settle with the SEC. The SEC obtained over $8 million in civil monetary penalties, along with other relief, from special purpose acquisition company Stable Road Acquisition Co., its sponsor SRC-NI Holdings LLC, the CEO of SRAC, the target company, and the target company's former CEO. The SEC alleged that the companies made false representations to investors regarding target company's technology and omitted from Stable Road's registration statement concerns that CFIUS expressed regarding target company's CEO. As such, the SEC charged both the target company and Stable Road with fraud and charged Stable Road with reporting violations under the Securities Exchange Act of 1934. (August 2021)[10]

[7] The Deal, Bill Meagher: Space SPACs Take Off, 26 August 2021.
[8] Law360, Tom Zanki: Investors Allege Ackman's SPAC Dodged Registration Rules, 17 August 2021.
[9] The Deal, Bill Meagher: Tailwind Acquisition, Qomplx Call It Quits, 17 August 2021.
[10] Bloomberg Law, Perrie Weiner, David Sverdlov and Desirée Hunter-Reay: SEC Rattles SPAC Market With Novel Enforcement Action, 18 August 2021.

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Key Features

Key Features of SPAC IPOs

- Formed by sponsor / management team
- Purpose to raise capital via IPO
- Management team of SPAC
  - receives significant minority interest (the "promote") (20%) for nominal consideration (usually $25k) – known as "founder shares"
  - purchases warrants in private placement
- No target at time of investment
- Pursue acquisition:
  - in particular industry
  - in particular market
  - in particular geographic region
  - with no focus

Key Features of SPAC IPOs

SPAC sells units in IPO:

- one ordinary share
- one (or half or third) warrant to purchase ordinary share at an exercise price of $11.50 per share
- typically $10 per unit

Substantially all IPO proceeds placed in interest bearing trust account:

- used to (i) redeem public shares and (ii) fund de-SPAC
- upfront underwriting discount, working capital and any other expenses paid by sponsor

Must consummate acquisition within a specified period of time:

- typically 18-24 months (may be extended if letter of intent entered into)

Types of investor:

- institutional investors
- family offices
- retail

Details of SPAC IPOs

NASDAQ rules require 90% of cash raised in the IPO to be deposited in interest-bearing trust account

Investors typically receive units comprising one share of common stock and a fraction of a warrant:

- Units typically priced at $10; warrants typically have an $11.50 exercise price per share
- Warrant is upside / incentive for investing in blind pool
- Warrants typically exercisable later of 30 days after business combination transaction and 12 months after IPO
- Separate trading of shares and warrants post-IPO (usually after 52 days)

Redemption if no business combination within a specified time or if shareholder votes against the transaction

Sponsors typically invest nominal amount in SPAC, retain 20% interest after IPO transaction and hold a different class of shares (called founder shares):

- Founder shares automatically convert to shares of the new entity after completion of business combination transaction
- Founder also typically purchases warrants at IPO
- Sponsors sometimes enter into forward purchase agreement allowing them to invest additional equity in business combination transaction

Underwriters' discount:

- Typically is 5.5%
- 3.5% is deferred / contingent on completion of de-SPAC transaction
- Upfront portion of discount / commission funded by sponsor

Challenges for Structuring SPACs

Choosing a stock exchange and meeting listing and corporate governance requirements

Structuring "promote" / founder shares to make more investor-friendly

Ensuring deal certainty at time of de-SPAC

- Sufficient funds
- PIPE / forward purchase agreement
- Creating an incentive not to redeem shares at time of vote, e.g. Pershing Square

High quality sponsor / management team

- Industry experience and track record
- Attract investors and provide confidence that SPAC can execute a successful business combination

Where to incorporate SPAC

- Typically in Delaware, if US target
- Cayman Islands popular if de-SPAC will target non-US companies
- Foreign private issuer (FPI) considerations for a foreign company post-business combination

Responsibilities of Underwriters

SPAC IPO

- Typical underwriter responsibilities

Post-IPO

- Various activities in relation to target search and completion of business combination:
  - Act as capital markets advisor
  - Wall crossing to discuss potential transactions
  - Meetings and presentation materials

Underwriter considerations

- Portion of initial underwriting discount / commission typically deferred until completion of de-SPAC creates potential conflict of interest in relation to de-SPAC services:
  - Notify SPAC board of directors
  - Enter into separate engagement letter for PIPE or M&A advisory work and disclose deferred consideration in letter

Traditional IPO | Sample Timeline

Planning Phase (1st to 3rd month)

- Engage counsel and auditors
- Select directors
- Draft preliminary prospectus
- Initial filing with SEC
  (if confidential review process)
- Respond to comments from SEC
- File preliminary prospectus
  on EDGAR
- Preparation of marketing documents / roadshow presentation

Ongoing Legal Work (1st to 6th month)

- Auditors work on financial statements and comfort letter
- Due diligence by underwriters, including review sessions with management, counsel and auditors
- Prepare governance and other legal documents

Finalize Offering (4th to 6th month)

- Investor presentations
- Meetings with institutional and other investors
- Pricing, closing, listing and settlement
- Possible exercise of underwriters' overallotment option

Life of SPAC | Sample Timeline

IPO Phase (8+ weeks)

- Engage counsel and auditors
- Incorporate SPAC and issue founder shares
- Prepare and file Form S-1
- Respond to SEC comments
- Negotiate underwriting and ancillary agreements
- Roadshow, pricing and closing of IPO

Identify Target Business (up to ~19 months)

- Regular SEC filings
- Identify target business
- Conduct due diligence and negotiate acquisition agreement
- Arrange committed PIPE or debt financing
- Sign acquisition agreement and financing commitments (if any)
- Prepare proxy statement / tender offer document

Complete Merger or Business Acquisition Transaction (3-5+ months)

- Announce acquisition agreement
- File proxy statement / tender offer document
- Discuss transaction with SPAC investors
- Obtain shareholder approval (if required)
- Redeem public shares of electing holders
- Close transaction
- File Super 8-K

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De-SPAC Transactions

Key Features of De-SPACing Transaction

A SPAC acquisition (a de-SPACing transaction) is a hybrid between a back-door IPO and an acquisition

- SPAC offers a combination of cash (raised by its IPO) and newly issued SPAC shares to target shareholders
- Any cash not used for deal consideration remains on company balance sheet
- SPAC entity remains publicly traded vehicle, with target usually held as an operating subsidiary
- Ownership of *pro forma* publicly listed company usually split between SPAC investors, target shareholders and SPAC sponsors
  - Higher valuation (if paid in stock) = more ownership by target shareholders

Key Features of De-SPACing Transaction

Key transaction terms to be negotiated

- Both headline valuation and split between cash / stock
    - Target valuation usually must be at least 80% of trust account assets
- Typical M&A terms (reps/warranties, closing conditions, indemnities, etc.)
- Relationship between de-SPAC closing and any PIPE offering for further fundraising
- Minimum proceeds / maximum redemption condition
    - Shareholders can elect to redeem their shares, even if they vote to approve transaction
- Post-closing governance, allocated between target management and SPAC sponsors
- Lock-up periods post de-SPACing transaction

Transaction expenses can be significant for both sides of transaction

- M&A deal costs + SEC filing costs + original SPAC IPO underwriter costs

Process Considerations of De-SPACing Transaction

Shareholder approval typically required

- Pursuant to charter
- NASDAQ shareholder approval - 20% or more equity is issued as consideration

Shareholder redemption right for shareholders not in favor of transaction

Transaction structure

- Merger or tender offer

Typically includes PIPE financing transaction

Form S-4 (proxy statement / registration statement)

Subject to SEC review

Financial statements

- Limited financial statements of SPAC
- Two or three years audited financial statements of target
- Interim financial statements
- *Pro forma* financial statements

Key Features of SPAC Liquidations

If SPAC is unsuccessful, liquidate trust account and return amounts to public shareholders

- Time limit expires
- Shareholders vote against acquisition (and no time remaining to search for new target)
- Redemption threshold breached

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Advantages / Disadvantages

Sponsor / Management

Advantages

- Easier to raise capital?
- Incentivised by "promote" (founder shares)
- Potential upside from warrants
- Greater flexibility in structuring compared to IPO
- Pursue targets and industries that fund documents may prohibit
- Broader base of potential investors vs private vehicle

Disadvantages

- Timeline may be too short
- Regulatory burden
- Available cash uncertain

IPO Investors

Advantages

- Liquidity
- Redemption
- Potentially significant upside
- Experienced management team
- Arbitrage by hedge funds
- Warrants included in the IPO units

Disadvantages

- No revenues
- No target identified
- Dilution due to "promote"
- Some initial investment may be lost
- Founder economic / voting power
- Post-acquisition operational risk / management performance

Target Company / Seller

Advantages

- Access to capital / public markets
- Exit strategy
- Public company at lower cost
- Backdoor listing
- New management expertise
- List during period of market volatility

Disadvantages

- Limited time frame
- Execution risk
- Transaction costs
- Additional burden of being a public company

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Evolving Product / Structure

Historical Changes to Structure

Requirement for shareholders' vote on acquisition

- Previously: no vote required to redeem shares
- Now: vote "Yes" and retain redemption option

Tender offer option

Increase redemption / conversion threshold

- Limit on individual redemptions

Increase "strike price" of warrants to be above IPO price instead of below – Reduces dilutive effect

Recent Developments

Nasdaq Listing Rules Amendments

August 2019

- To improve liquidity: When closing a business combination SPACs need (i) at least 1 million unrestricted publicly held shares (with a value of either $15 million or $5 million, depending on which listing standard is used) that are (ii) not subject to contractual lock-up restrictions and that are (iii) held by at least 300 "round lot" holders (at least 50% holding unrestricted securities valued at least $2,500)*

September 2020

- Nasdaq proposal to allow SPAC 15 calendar days after transaction closes to demonstrate it satisfied round lot shareholder requirement

December 2020

- SEC issues disclosure guidance for SPACs and business combinations due to concerns about conflicts of interest
- Guidance directs SPACs to consider disclosure around potential conflicts of interests, financial incentives around the business combination and other compensation-related matters

*On 26 January 2021, the SEC approved NASDAQ's proposed rule change to exclude SPACs from requirement that at least 50% of company's round lot holders each hold unrestricted securities with a market value of at least $2,500

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Litigation / Enforcement Efforts

SEC Investigations and Class Action Litigation Targeting SPACs

Recent SEC enforcement actions and shareholder class-action lawsuits indicate that scrutiny of SPACs is increasing

- Fifteen shareholder lawsuits against post-merger SPACs were filed in the first half of 2021, which is triple the five that were filed in 2020 and the two filed in 2019.
- For the first time, the SEC brought an enforcement action against a SPAC, its sponsor, and the target company before a shareholder vote on the merger.
- The SEC continues to make public statements and issue public reports indicating that the SEC's Enforcement division is examining certain aspects of SPAC transactions.

Implications for SPACs from SEC Investigations and Class Action Litigation

SEC settlements likely will become more aggressive for the following reasons:

- Respondents have recently been harshly penalized despite the SEC's acknowledgment that respondents cooperated.
- Respondents have faced significant penalties, even during the preliminary proxy stage of a merger and before a shareholder vote on the merger.
- The SEC has required that a SPAC sponsor forfeit founders' shares and give PIPE investors an opportunity to terminate their subscriptions.
- The SEC has indicated that SPAC sponsors can no longer rely solely on a target company's representations.

Shareholder class action lawsuits have focused on breach of fiduciary duty and inaccurate disclosures made in connection with business combinations.

Preventative Measures for Market Participants

Due Diligence. SPAC sponsors should hire reputable third-party investigators and top notch audit firms, implement fairness opinions, and use extreme caution when relying on unverified statements from proposed merger targets.

Accounting. SPACs must prepare their internal accounting controls, so that the post-merger publicly-traded company will meet the SEC's reporting demands.

Litigation Preparation. Market participants should ask experienced litigation counsel, rather than relying solely on their usual corporate counsel, for input on the documents being prepared, as well as for crafting a strategic approach in managing litigation risk.

Conflicts. SPACs must consider potential conflicts of interests and whether their public disclosures adequately disclose them. SPACs must be particularly cognizant of conflicts with the ultimate de-SPAC M&A targets and misaligned incentives with sponsors.

Questions

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