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Apres Moi le De-SPAC

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Thursday, August 19, 2021

Introductions

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Why De-SPACs, Why Now?

The Age of the De-SPAC

- Massive increase in SPAC IPOs
  - 2019 → 59 SPAC IPOs
  - 2020 → 325 SPAC IPOs
  - 2021 to date → Over 630 SPAC IPOs
- Every SPAC IPO means at least one or two de-SPAC attempts
- PIPE market tighter, but likely function of so many SPACs
- Pace in 2021 has slowed, but still way above historical levels (e.g. Q2 2021 saw 2x the number of SPAC IPOs as all of 2019)

Why Important?

- Has become a key method of accessing public markets (together with traditional IPO and direct listings)
- Higher profile participants
- Interesting mix between M&A and IPO
- Regulatory focus on the risks and benefits
- An evolving area for both finance and law
- Not going away, but likely will change

Basic SPAC structure and process

- Sponsor Formation: Sponsor forms the SPAC with their at-risk-capital and purchases private warrants.
- SPAC IPO: SPAC raises a pool of cash in an IPO through offering of units (consisting of shares and public warrants), then deposits the cash proceeds into a trust account.
  - Trust Account Cash: Uses this cash to acquire a private operating company (the de-SPAC target).
  - Sponsor Holdings: Sponsor holds founder shares (typically 20% of post-IPO entity) and private placement warrants.
- PIPE: The Sponsor secures a PIPE investment when de-SPAC agreements are signed.
- The De-SPAC: Business combination transaction (this is the de-SPAC) must be completed by the SPAC's pre-agreed deadline, usually 18-24 months from IPO, or SPAC must liquidate. The PIPE funds in connection with the de-SPAC closing.
- Redemptions: SPAC shareholders have the option to redeem their shares for cash at the closing (depleting the trust account that holds the IPO proceeds).
- Post-Closing Company: Post-merger, target is essentially the public company (although the pubco entity could be the target, SPAC, or a new holdco).

De-SPAC Timeline

- **Preparation:** timing varies
- **LOI Negotiations:** 1 month
- **Definitive Agreements:** 1 to 2 months
- **Post BCA, pre-SEC Filing:** 1 to 3 months
- **SEC Review Period:** 1 to 2 months
- **Closing:** 1 month

Preparation - *Key Considerations and Issues*

- Rights of Current Target Shareholders:
  - *Key Shareholders* – Any special rights that need to continue or be addressed?
  - *Convertible Securities* – Are there conversion triggers; how will they be resolved/converted?
  - *Outstanding Debt* – Consider consent requirements, credit facilities, any needed continuing liquidity from debt post-closing?
  - *Incentive Plans/Awards* – Any acceleration triggers, treatment in a merger, all equity accounted for?
- Board Composition: How will board look after de-SPAC? Consider independence. Any major shareholders that need seats? Remember seat for SPAC and possibly PIPE.
- Financial Statements: PCAOB financials required (GAAP or IFRS).
- Structuring: Engage tax early to understand desired structure. Consider FPI rules and jurisdiction of pubco and target.
- Projections and Presentations: Be very careful around the creation and dissemination of projections. Any produced may need to be disclosed.
- Background of the Merger in Proxy/Prospectus: Prepare for this now

Negotiating the LOI - *Key Considerations and Issues*

- Initial Draft: Prepare the initial "form of" LOI with investment bankers and legal counsel
- SPAC Approaches: Financial advisor will help identify potential partners
  - "Teaser" and a more fulsome presentation
  - Non-disclosure agreement
- Negotiate LOI with SPAC:
  - Structure of transaction
  - Price and consideration
    - stock vs. mixed
    - possible earnout for sponsor shares
  - Sponsor backstop/forfeiture
  - Minimum cash condition (PIPE+)
  - Confidentiality and exclusivity (relatively short)
  - Lock-up and registration rights (key shareholders)
  - Board of directors of Pubco and other governance considerations
- Publicity: Remember that publicity restrictions under securities rules still apply, and some exemptions are unavailable to SPACs or companies with SPAC predecessors.

LOI to BCA - *Key Considerations and Issues*

- Secure PIPE: SPAC locates and signs up PIPE when BCA is signed. Target should be involved.
- Due Diligence: SPAC diligences the target and target prepares disclosure schedules.
- Shareholder Consents: Target should try to obtain all consents prior to signing. Anything left outstanding as a closing condition creates uncertainty.
- Finalize Projections: Preparation of the projections – "These things must be done… *delicately*."
  - Less is more, pick up the phone, too many cooks
  - Be consistent (board book, investor deck, and S-4)
  - Assumptions are critical
- Financial Statements: Finalize financial statements and auditor report.
  - This is the longest lead time item with the most uncertainty. If left until after BCA execution, it can drastically extend the time between announcement and filing with the SEC
- Business Combination Agreement: Negotiate and execute BCA and ancillary agreements
- Deal Announcement: Will need a press release, likely an investor presentation, and 425 filings. Consistency is key.

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LOI to BCA – *Deal Points and Pitfalls (1)*

- DD Impact to Valuation: The valuation may change between LOI and BCA due to diligence
- Deal Terms for the BCA:
  - ❑ *Minimum cash condition* – Usually higher than PIPE, SPAC wants as low as possible
  - ❑ *PIPE* – Single provider vs. broader group, consider if oversubscription contemplated
  - ❑ *Merger consideration* – If cash component, need cash condition
  - ❑ *Control of Sponsor Promote* – Forfeitures of founder shares or warrants, sliding scale, thresholds?
  - ❑ *Treatment of equity and warrants* – Create an excel file to track how all equity is treated, acceleration of awards, replacement awards, convertible notes, options, warrants, etc.?
  - ❑ *Risk allocation* - Indemnity/survival of representations and warranties – Usually no survival, sometimes RWI or share holdback is included.
  - ❑ *Drop dead date* – Impacted by SPAC deadline, regulatory approvals, SEC process
  - ❑ *Executive compensation arrangements* – Any employment agreements or CoC or QEF payments?
  - ❑ *Transaction expenses* – Impact on minimum cash condition (pre/post), cap on Sponsor expenses?

LOI to BCA – *Deal Points and Pitfalls (2)*

- Ancillary Agreements:
  - Voting and support agreements
  - Lock-up agreements
  - Registration rights agreements
  - PIPE subscription agreement
- Anticipate SEC Filing Diligence
  - Identify material agreements
  - Begin director and officer questionnaire process
  - Identify required regulatory approvals
  - Begin preparing box, business section, and MD&A
- Changing Landscape – SPACs may start requiring more on their side to execute the deal. Potential for special committees, fairness opinions, etc. Evolving area.

Preparing SEC Filing - *Key Considerations and Issues*

- Manage client expectations – Business team needs to be focused on disclosure, **like in an IPO**
- Prepare Proxy Statement/Prospectus: Will be on Form S-4 (F-4 if foreign private issuer)
  - *Financial statements* - Need SPAC and target – 2 years, sometimes 3 years @ PCAOB
  - *Pro-formas* – Will need pro formas compliant with GAAP
  - *Acquired businesses* – May need financials of recently acquired businesses
  - *Risk Factors* – Make them fulsome and meaningful, they are your best friend
  - *Business section* – Tell the story like it was an IPO
  - *Management and structure post-combination* – Describe team and cap. structure
  - *MD&A for SPAC and target* – Tied to financials, don't forget trends and risks
  - *Background of the merger* – Play-by-play of deal, area of plaintiff interest
  - *SPAC's reasons for merger* – Likely increasingly important, growing plaintiff interest
  - *Projections* – Call your lawyer
- Consider DRS: Draft Registration Statement filing option is available.

Preparing SEC Filing – *Other reminders*

- Listing applications - Initiate stock exchange listing application.
- Governing Docs - Create governing documents for Pubco, if new entity, or amended ones if it is an existing entity.
- Merger Control Issues - Create and file required merger filings in applicable jurisdictions.
- Local Law - Check local law requirements (if a foreign target).
- Diligence – Consider what diligence is needed related to the registration statement
- No Circle Up – There is no comfort letter process, but need to keep the auditor engaged and reviewing the proxy statement/prospectus.
- No Underwriter Style Opinions – The only opinions delivered are the 5.1 opinion and 8.1 opinion
- Remind Clients on Publicity – Purchase duct tape if needed.

SEC Review Period - *Key Considerations and Issues*

- Manage Expectations: You will get SEC comments, likely multiple rounds.
- Proxy solicitor: Hire proxy solicitor if vote not very close to being locked up through support agreements.
- Projections: SEC's heightened scrutiny of projections.
- Accounting Questions: Keep the accountants engaged to answer these questions in the SEC comment letters.
- Listing Application: Work through exchange listing process.
- Governance: Finalize pubco governing documents and committee charters.
- Waivers: If certain closing conditions are looking unlikely to be met at closing.

Closing - *Key Considerations and Issues*

- Shareholder vote: SPAC holds shareholder meeting
- Redemptions:
  - May have high redemption levels – pre-game how that will impact you
  - Potentially renegotiate or terminate agreement
  - Sponsor can forfeit founder's shares or purchase shares to backstop
  - Target can waive minimum cash consideration or accept equity instead of cash
- Closing conditions: Inability to meet closing conditions, PIPE / alternative financing
- Closing deliverables: Finalize all closing deliverable, execute ancillary agreements
- Closing: PIPE proceeds and SPAC trust assets made available to pubco
- Super 8-K: File special Form 8-K with required information, must contain information required in a Form 10 registration statement

Questions?