

# Life Sciences Reverse Mergers into Listed Operating Companies

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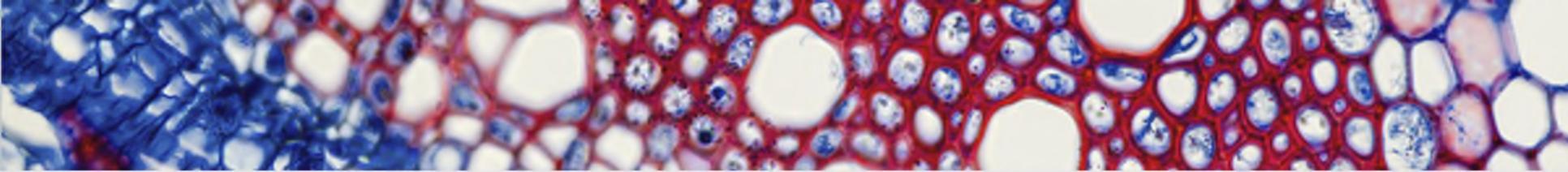
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# Market Overview

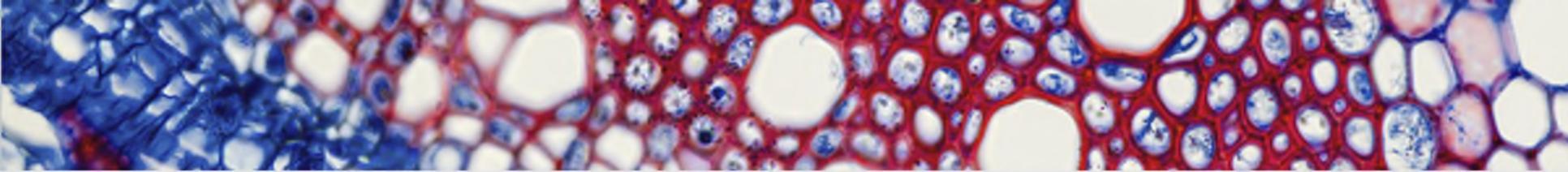
# Current market conditions

- While the number of IPOs declined in the first few months of the COVID-19 pandemic through May, beginning in June IPOs bounced back.
- 147 IPOs raised approximately \$50 billion for the first nine months of 2020, a considerable increase over the \$40 billion in IPO proceeds for the first nine months of 2019.
- The healthcare sector accounted for 48% of IPOs, by number of IPOs, with 70 IPOs raising \$15.1 billion through Q3 2020.
- Interest in life sciences companies activity remains high; however, the IPO market, especially for life sciences companies, is always challenging and subject to “opening” and “closing”.

Source: IPO Vital Signs

# Merger alternative

- Smaller and mid-cap biotech companies typically rely on dedicated sector investors and insiders and frequently go public in order to raise substantial amounts of capital, given the limited availability of attractive private placement financing for small and mid-sized companies.
- As a result of the difficulty and cost associated with properly executing an IPO, a number of biotech IPO candidates have considered other alternatives, including a merger with and into an already public biotech company that previously raised public capital to fund its clinical programs, but which has failed clinical trials and is subject to liquidation.
- Instead of liquidating and distributing its capital to stockholders, these companies may be interested in considering reverse merger opportunities.
- A private company that has already commenced its IPO preparations but has found that its IPO has been delayed may consider a reverse merger into the already public company.
- Unlike the “reverse mergers” into shell companies, which raise a number of concerns, a reverse merger into an operating company can be a worthwhile alternative.



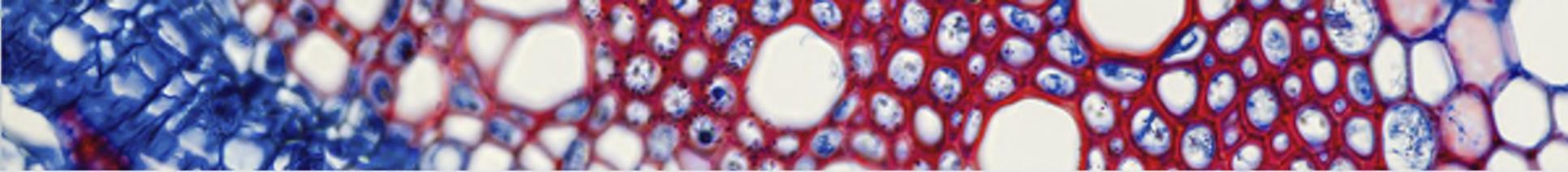
# Not a Merger into a Shell

# Distinguishing among “reverse mergers”

- Historically, some companies considered “backdoor IPOs,” which included reverse mergers into public shell companies, or more recently, mergers with SPACs.
- Reverse mergers into public shell companies raise a number of very significant concerns (not raised by merging into an operating company), including:
  - Most public shell companies were formed by sponsors or promoters that have undisclosed financial interests.
  - Shell companies often have contingent liabilities.
  - Shell companies usually are listed only on the OTC Bulletin Board, which is of limited utility.
  - Shell companies are subject to very onerous requirements under the Securities Act of 1933, which have the result of creating a “stigma” for shell companies. For example, a “shell company” is generally limited in its use of certain communications (it cannot use free writing prospectuses) and in its ability to rely on the Rule 144 exemption for resales of its securities.

# Distinguishing among “reverse mergers” *(contd.)*

- A merger into a public biotech company can be distinguished from a reverse merger into a shell company. For example:
  - The public biotech company will have undertaken a traditional IPO and will have been an SEC reporting company. It would not be considered a “shell company” for SEC purposes.
  - The public biotech company will likely have a class of securities listed on the Nasdaq (not OTC Bulletin Board), which will inherently make it easier for the combined company’s securities to be admitted to trading on the Nasdaq.
  - Given that the public biotech company is already an SEC reporting company, there will be greater transparency and it will be easier to conduct thorough due diligence.
  - Market perception: Although there are a limited number of reverse mergers into public biotech companies, the market perception of such transactions is different from the negative perceptions of reverse mergers into public shell companies.

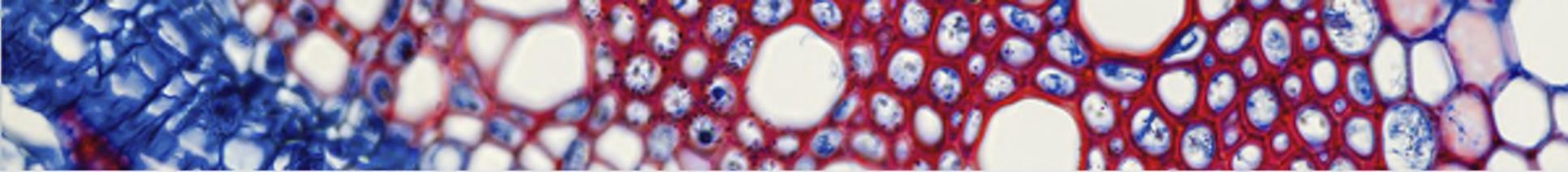


# Rationale

# Life Sciences Reverse Mergers and Alternatives IPOs

## Reasons a Private Company May Choose to Pursue a Reverse Merger

- Access to a sizeable cash balance
- Public attention vs. staying truly private
- Ability to set your “starting” public valuation via the merger exchange ratio
- Investor considerations
- Ability to access the public markets at an earlier point in time than a traditional IPO process



# Structural Considerations

# Life Sciences Reverse Mergers and Alternatives IPOs

## Key Structural Considerations

- Exchange ratio
  - Fixed vs sliding scale
  - Adjustments at closing
- Board/employee/HQ matters
- Merger agreement
  - Support agreements
  - Insider lock-ups
- Concurrent financings
- Downstream CVRs of legacy programs

# Life Sciences Reverse Mergers and Alternatives IPOs

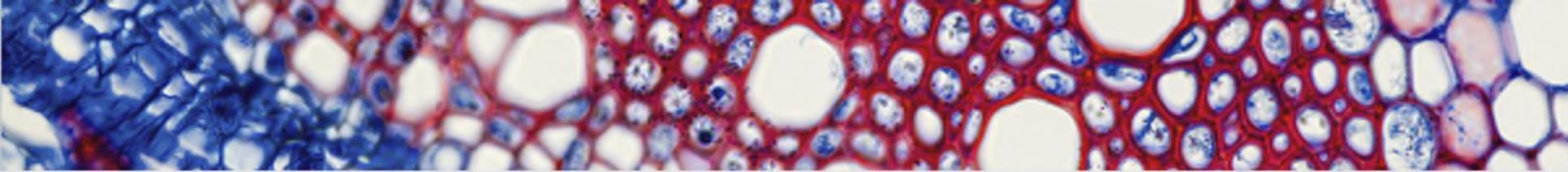
## Key Process Considerations

- Preparation checklist
- Process expectations
- Valuing the public company
- Handling assets of the public company
- Exclusivity during negotiations

# Life Sciences Reverse Mergers and Alternatives IPOs

## Ideal Attributes of a Public Counterparty

- Sizable net cash balance
- Pre-merger shareholder considerations
  - Securing of shareholder “yes” votes easier if investor ownership is concentrated
  - Support from “sector specialists” very validating to new investors
- Status of clinical operations/programs
- Management reputation



# Legal Considerations

# Basic structuring options

- Generally, two alternatives:
  - Merger with and into existing public company; existing public company will issue stock in a private placement transaction to Private Co holders in exchange for their existing Private Co stock; combined company will change its name to Private Co; and application will be made to Nasdaq (Nasdaq generally requires new listing).
    - This alternative would require a proxy or information statement to be prepared and filed by the existing public company and the existing public company will seek shareholder approval for the transaction. An information statement may be less time-consuming to produce than an S-4 proxy/prospectus.
  - Newco subsidiary is formed and merged with and into existing public company; newco subsidiary files a proxy/prospectus on Form S-4 and securities are issued in the merger transaction pursuant to the proxy/prospectus.
    - Existing public company will seek shareholder approval for the transaction.

# Some precedent transactions

- Merger between Tokai Pharmaceuticals, Inc. (public acquiror) and Otic Pharma, Ltd. (private target) pursuant to which each holder of Otic shares sold all of their outstanding shares of Otic in exchange for 60% of the outstanding common stock of Tokai
  - Proxy: <https://www.sec.gov/Archives/edgar/data/1404281/000119312517114795/d307733ddefm14a.htm>
  - Tokai assumed the outstanding stock option awards of Otic and outstanding warrants of Otic, each of which were adjusted to reflect the merger's exchange ratio
  - Otic shareholders entered into 180-day lock-ups in connection with the merger
  - Share Purchase Agreement included a \$1.0 million to \$1.5 million termination fee
  - Four persons identified by Otic elected to the seven person Board
  - \$7.0 million of new capital invested into combined company concurrently with the merger
- Merger between Bidel Inc. (public acquiror) and Albireo Limited (private target) pursuant to which each holder of Albireo shares or notes convertible into Albireo shares sold all of their outstanding shares of Albireo in exchange for newly issued shares of Bidel common stock
  - Proxy: <https://www.sec.gov/Archives/edgar/data/1322505/000119312516713520/d222208ddefm14a.htm>
  - Equity plan provides for acceleration of unvested equity awards upon Bidel's change of control
  - Merger triggered transaction bonuses under severance agreements with former Bidel executives
  - Each of the Bidel officers and directors entered into 180-day lock-ups in connection with the merger
  - New equity incentive plan adopted in connection with the merger for use by Albireo (replacing Bidel version); all stock options outstanding under the Bidel Plan remained in-force pursuant to their terms

# Some precedent transactions *(contd.)*

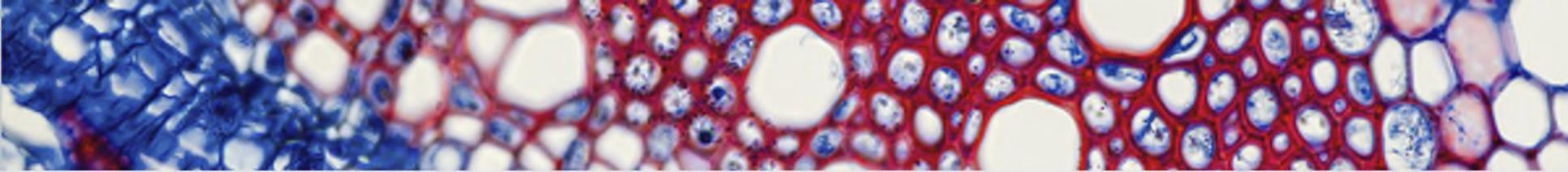
- Merger between Macrocare Ltd. (public acquiror) and Leap Therapeutics, Inc. (private target) pursuant to which Macrocare shareholders exchanged their Macrocare shares for newly issued shares of Leap common stock, Macrocare became a wholly-owned subsidiary of Leap and Leap became a public company
  - Form S-4: <https://www.sec.gov/Archives/edgar/data/1509745/000104746916015711/a2229626zs-4.htm>
  - Leap assumed Macrocare's 2008 and 2013 Share Incentive Plans and all obligations thereunder
  - Each outstanding option and warrant, whether or not vested, to purchase Macrocare ordinary shares unexercised prior to the consummation of the merger converted into an option or warrant, as applicable, to purchase Leap common stock
- Merger between Synta Pharmaceuticals Corp. (public acquiror) and Madrigal Pharmaceuticals, Inc. (private target) pursuant to which a wholly-owned subsidiary of Synta merged with and into Madrigal, with Madrigal surviving as a wholly-owned subsidiary of Synta
  - Proxy: <https://www.sec.gov/Archives/edgar/data/1157601/000104746916013711/a2228864zdefm14a.htm>
  - All securityholders of Madrigal were parties to a 180-day lock-up in connection with the merger
  - In connection with the merger, stock plan increased the number of shares available for issuance by 40 million shares (previously 5,815,641 shares were available for grant)
  - Synta stock options and other equity awards that were outstanding immediately prior to the effective time of the merger remained outstanding and unaffected by the merger

# Some precedent transactions *(contd.)*

- Merger between Celsus Therapeutics Plc (public acquiror) and Volution Immuno Pharmaceuticals SA (private target) pursuant to which Celsus purchased all of the capital stock of Volution from RPC, Volution's sole shareholder, in exchange for ordinary shares of Celsus
  - Proxy: [https://www.sec.gov/Archives/edgar/data/1541157/000114420415045881/v416463\\_defm14a.htm](https://www.sec.gov/Archives/edgar/data/1541157/000114420415045881/v416463_defm14a.htm)
  - In connection with the merger and pursuant to his employment agreement, the Celsus CEO's stock options were accelerated
  - RPC, Volution's sole shareholder, agreed to a 180-day lock-up in connection with the merger
  - Equity incentive plan was amended to increase the number of shares available for grant by 135 million shares to an aggregate of 141 million shares
  - Each option and warrant to purchase Celsus shares continued according to its normal terms following the merger, subject to adjustments contained in certain Celsus warrants
- Merger between Regado Biosciences, Inc. (public acquiror) and Tobira Therapeutics, Inc. (private target) pursuant to which Landmark Merger Sub Inc., a wholly-owned subsidiary of Regado, merged with and into Tobira, with Tobira surviving as a wholly-owned subsidiary of Regado
  - Proxy: <https://www.sec.gov/Archives/edgar/data/1311596/000119312515103256/d852929ddefm14a.htm>
  - Merger entitled Regado's CEO to a one-time performance bonus in lieu of his annual target bonus pursuant to his employment agreement
  - Certain Regado securityholders and Tobira securityholders and their affiliates agreed to 90-day lock-ups
  - No change to stock options to purchase Regado common stock, subject to reverse stock split adjustments

# Structural considerations

- In connection with considering a merger into a public biotech company, additional factors to consider include:
  - Incurrence of transaction costs (production of either an information statement or a proxy/prospectus, which will require pro forma financials and other SEC disclosures), although these costs should be weighed against the costs associated with an IPO and may be minimized if the private company already has SEC disclosures prepared because it had been planning for an IPO.
  - Private Company will have to factor in the costs of being a public company and will have to be prepared to address public reporting requirements immediately following the consummation of the merger.
  - New public company will not have gone through a traditional IPO and, therefore, will not have the investment bank sponsorship that follows an IPO (research and analyst coverage and market making) and its stock may be volatile as a result.
  - *Distraction*: Depending on whether the public company has any remaining viable clinical programs, management of the combined company may be distracted from concentrating solely on the private company's product pipeline.



# Other Considerations

# Diligence matters

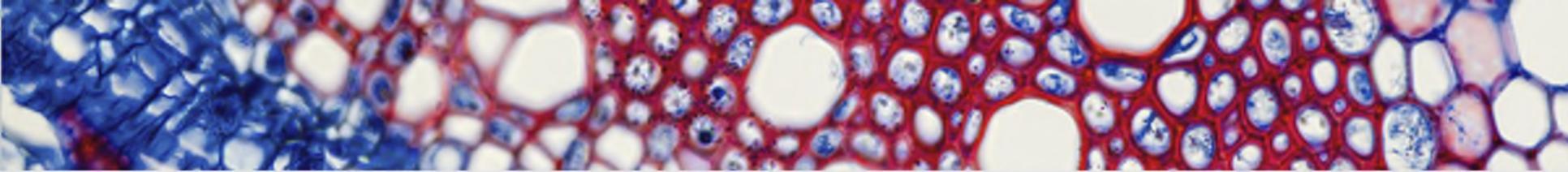
- For Private Company, consideration should be given to how the proposed transaction will impact:
  - Existing employment agreements – will any change of control payments be triggered? Will any grants be vested? Will any severance payments come due?
  - Option and other comp plans
    - Is a new option plan needed? How should it be put in place? Does it need to be added to the proxy statement?
    - Are any retention agreements needed?
  - Lease agreements and other commercial arrangements
  - Financing agreements, such as bank lending arrangements or outstanding venture debt
  - Warrants and other convertible, exchangeable or equity-linked securities
  - License or collaboration agreements
  - Net operating losses

# Diligence matters *(cont'd)*

- For Private Company, diligence of the Public Company will take into account:
  - Public Company assets
  - Public Company contractual commitments
  - Public Company liabilities triggered as a result of the proposed transaction
  - Public Company litigation
  - Public Company D&O insurance

# Merger agreement related matters

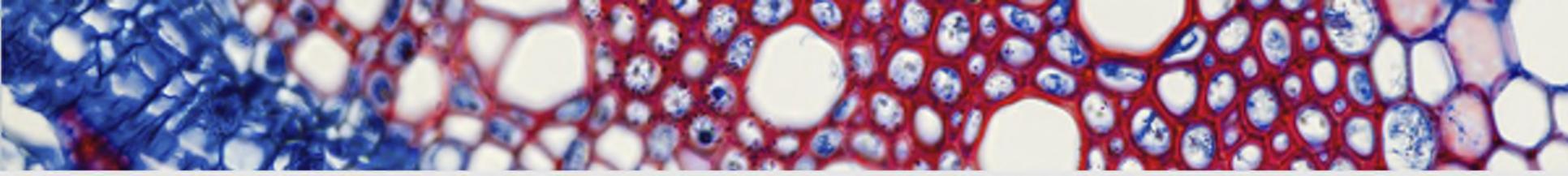
- Public Company will expect robust representations and warranties from Private Company
- Does Private Company have multiple series of outstanding preferred stock? Do holders have different interests? Will holders benefit or be diluted? Any outstanding dividend rights?
- Does Private Company have audited and interim financial statements available? This will affect timing.
- As with other M&A transactions, the parties will focus on:
  - The definition of Material Adverse Effect
  - Knowledge qualifiers and persons at company that are identified as having knowledge
  - Fundamental representations and survival of such representations
  - Conditions to close
  - Regulatory approvals
  - Non-solicitation provisions
  - Termination rights
  - Break-up fees



# Concurrent Financings

# Concurrent and subsequent financings

- Following its merger with Otic Pharma, Novus Therapeutics (formerly Tokai Pharmaceuticals) entered into an equity distribution agreement with Piper Jaffray (August 2017) to sell its common stock in at-the-market offerings having an aggregate offering price of \$8.5 million.
- Following its merger with MacroCure, Leap Therapeutics sold its common stock and warrants in a PIPE transaction raising proceeds of \$18.0 million (November 2017) and separately sold its common stock in a registered offering raising proceeds of \$14.0 million (March 2018).
- Following the announcement of the Celsus/Volution merger, the combined company (Akari Therapeutics, Plc) successfully marketed a PIPE transaction led by Deerfield for \$75 million with Venrock, Vivo Capital, Foresite Capital, NEA, QVT Financial, RA Capital and other institutional investors participating; the closing of the PIPE and the merger were consummated concurrently.
- Concurrent with the Regado/Tobira merger, the combined company completed a PIPE transaction which issued \$40 million of common stock allowing the combined company to be fully funded for the next 18 months.
- Understanding a concurrent or a subsequent financing will require considering the availability of required financial information, as well as a number of issues related to how investors are contacted, at what point investors are contacted, information that can be shared with investors, and related matters.



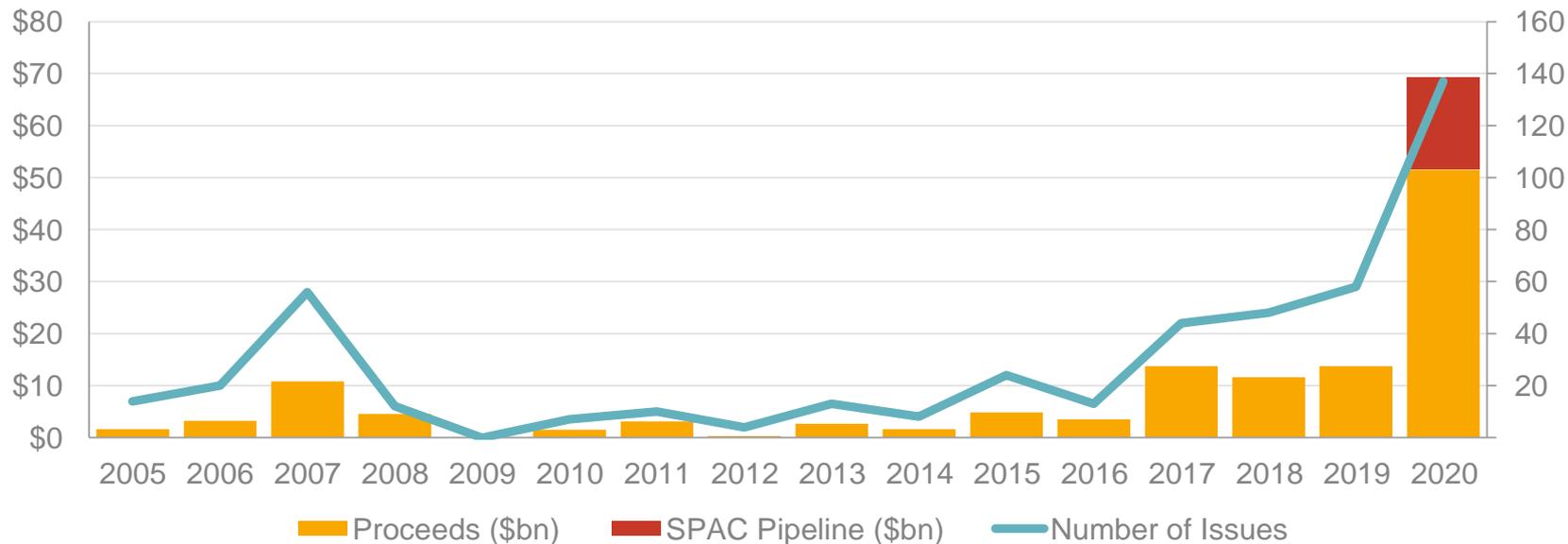
# SPACs, Merging or Combining with a SPAC, and Differences

# SPAC introduction

- What is a SPAC?
  - A newly formed company with no assets or operations
  - Registers with the U.S. Securities & Exchange Commission (“SEC”) the offer and sale of stock and warrants
  - **Business plan: find an operating company to buy using IPO proceeds**
  - May or may not specify industry or geographic focus
  - Must identify a target company to acquire within a specified time frame
- For an operating company, merging with and into a SPAC is an alternative to a traditional IPO
- SPACs have existed for many years, but there has been a recent surge in popularity—this may be explained by several changes:
  - Higher quality sponsors
  - More blue chip investors
  - Bulge bracket underwriters
  - Better sponsor-investors alignment structures

# SPACs surge

US-listed SPAC volumes rise 275% YOY to all-time high \$51.5bn

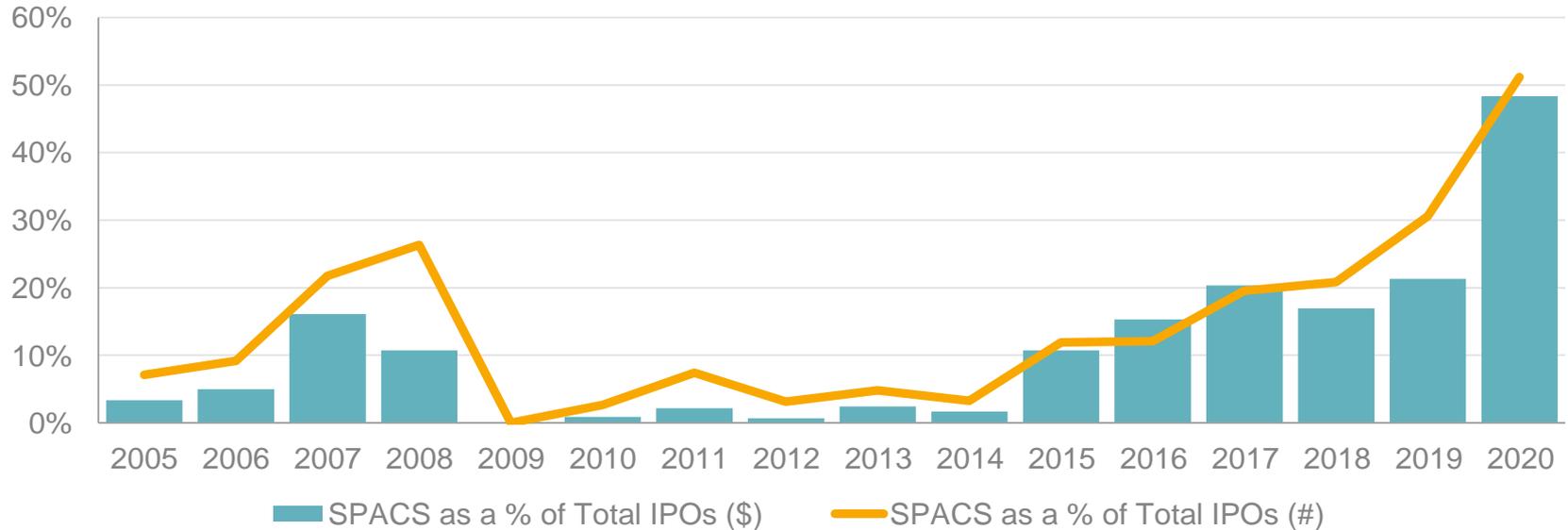


\*Excludes deals less than \$50m in proceeds

Data from Refinitiv

# US Listed SPAC IPO Activity

By volume, US-listed SPAC IPOs account for more than half of overall US-listed IPOs this year and 48% of proceeds raised



\*Excludes deals less than \$50m in proceeds

Data from Refinitiv

# How Does a SPAC Work?

## How Does a SPAC Work?



SPACs: Special Purpose Acquisition Companies Listing a SPAC on Nasdaq, Nasdaq (June 2020)

# Shareholder vote

- After the definitive merger agreement reached and announced, a SPAC shareholder vote on the proposed transaction is usually required
  - Shareholders also have right to redeem their shares
- The SPAC must file a proxy statement on Schedule 14A
  - If the SPAC intends to register new securities as part of the transaction, the SPAC must also file a proxy/prospectus on Form S-4
- The proxy statement or proxy/prospectus statement must contain:
  - Financial statements of the SPAC and the target, and any businesses acquired by the target
  - A description of the post-transaction company and its management, directors, governance structure and material contracts (including debt financing agreements related to the de-SPACing transaction)
  - Pro forma financial information reflecting the proposed acquisition
  - Management's discussion and analysis for the SPAC and the target
  - Selected historical financial data of SPAC and target, including pro-forma financial data
  - Comparative per share information, including pro forma per share data

# Shareholder vote *(cont'd)*

- There are several aspects of the proxy/prospectus that require close review:
  - The financial presentation for the SPAC target. Often, ascertaining the financial statement presentation requirements may involve judgment, as it may be possible that the target is deemed the predecessor company
  - For pro forma financials, an assessment also will be required as to which entity is the acquirer, which also requires analysis and judgment.
- The proxy/prospectus will usually contain a discussion of the background of the merger
  - Among other things, this section will provide a discussion of valuation for the target
  - In presenting the valuation, projections will be included
    - These should be diligenced; the projections usually also will be shared in a data room or in investor materials with PIPE investors

# Shell company status and ineligible issuer status

- SPACs constitute “shell companies” as defined in Rule 405. Therefore:
  - A SPAC is an “ineligible issuer” and may not use free writing prospectuses
    - Without free writing prospectuses, roadshows are subject to additional limits
    - This is important to consider in connection with the SPAC IPO and also in connection with any PIPE transaction
  - Holders of the SPAC’s securities may not rely on Rule 144 for resales until:
    - One year after the SPAC has completed its initial business combination and filed its super 8-K
    - The SPAC files Form 10 information in the super 8-K
    - The SPAC files periodic reports required by Section 13 or 15(d) for the prior 12 months
  - A SPAC cannot become a well-known seasoned issuer (WKSI) until three years have passed since its initial business combination

# Communications Safe Harbors

- As a shell company and an ineligible issuer, the following communications safe harbors are unavailable for SPACs:
  - Research report safe harbors (Rules 137, 138 and 139)
  - Communications more than 30 days before registration statement is on file (Rule 163A)
- Restrictions expire three years after the initial the business combination is completed and the super 8-K is filed
- Legal and compliance terms must have a process in place to vet any SPAC-related research reports
- **Importantly, SPACs are permitted to rely on Rule 134 for communications announcing an offering**

# Emerging Growth Company (“EGC”) status

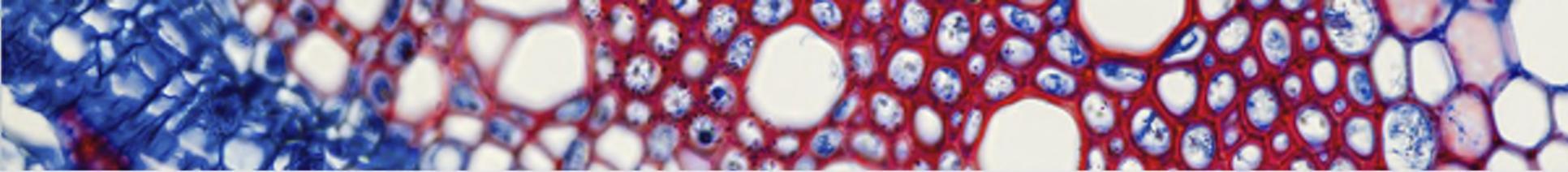
- A SPAC generally will be an EGC as defined in Section 2(a)(19)
- It will remain an EGC until the earlier of:
  - The last day of the fiscal year
    - Following the fifth anniversary of the IPO completion,
    - In which the SPAC has total annual gross revenue of at least \$1.07 billion, or
    - In which the market value of common equity held by non-affiliates exceeds \$700 million as of the prior June 30<sup>th</sup>  
(or second fiscal quarter-end if not a December 31 fiscal year-end company)
  - Date on which the SPAC has issued more than \$1 billion in non-convertible debt securities during the prior three-year period,
- If following the initial business combination, the SPAC continues to comply with the above criteria, the SPAC will continue to benefit from EGC status.
- It’s important to consider that the private company merging with the SPAC will “lose” some of its time as an EGC by virtue of the SPAC merger since the five-year period will count from the SPAC IPO date.

# Comparing a Reverse Merger and a SPAC Business

	RM	SPAC
Diligence	Private Co will need to undertake rigorous diligence of Pub Co	Diligence of SPAC will be quite limited given SPAC has no operating business
Contingent Liabilities	Private Co will need to consider any Pub Co litigation, threatened litigation or similar claims	Unlikely for there to be any litigation or other similar concerns
Management and Employee Matters	Private Co may need to address legacy employees, handle reduction in force or severance arrangements, as well as navigate board transitions	Usually there will be a very limited SPAC team. Management of Private Co will comprise the leadership of combined company. SPAC sponsor will want some minority representation on board for some time.
Documentation and Disclosures	M&A agreement with disclosure schedules.  Proxy or S-4 required. Disclosure will be similar.	M&A agreement with disclosure schedules. Process likely simpler. Proxy or S-4 will be required. Disclosure similar.

# Comparing a Reverse Merger and a SPAC Business *(cont'd)*

	RM	SPAC
Cash Balance	No redemption risk; may be supplemented by a PIPE.	Redemption risk. Redemption risk may be mitigated by agreements between SPAC and affiliates agreeing not to redeem and to support deal and by a PIPE.
Perception	More historical successes	Shorter history/track record for life sciences



# Annex

