# Mortgage Market Developments and Becoming a Public Company

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# Agenda

- The new dynamic: Three- or four-track approach to public markets
- IPO market
- Up-C IPO for companies organized as partnerships or LLCs
- Going public by merging with a SPAC
- Direct listings

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# The new three-track (or four-track) approach to the public markets

Once upon a time…

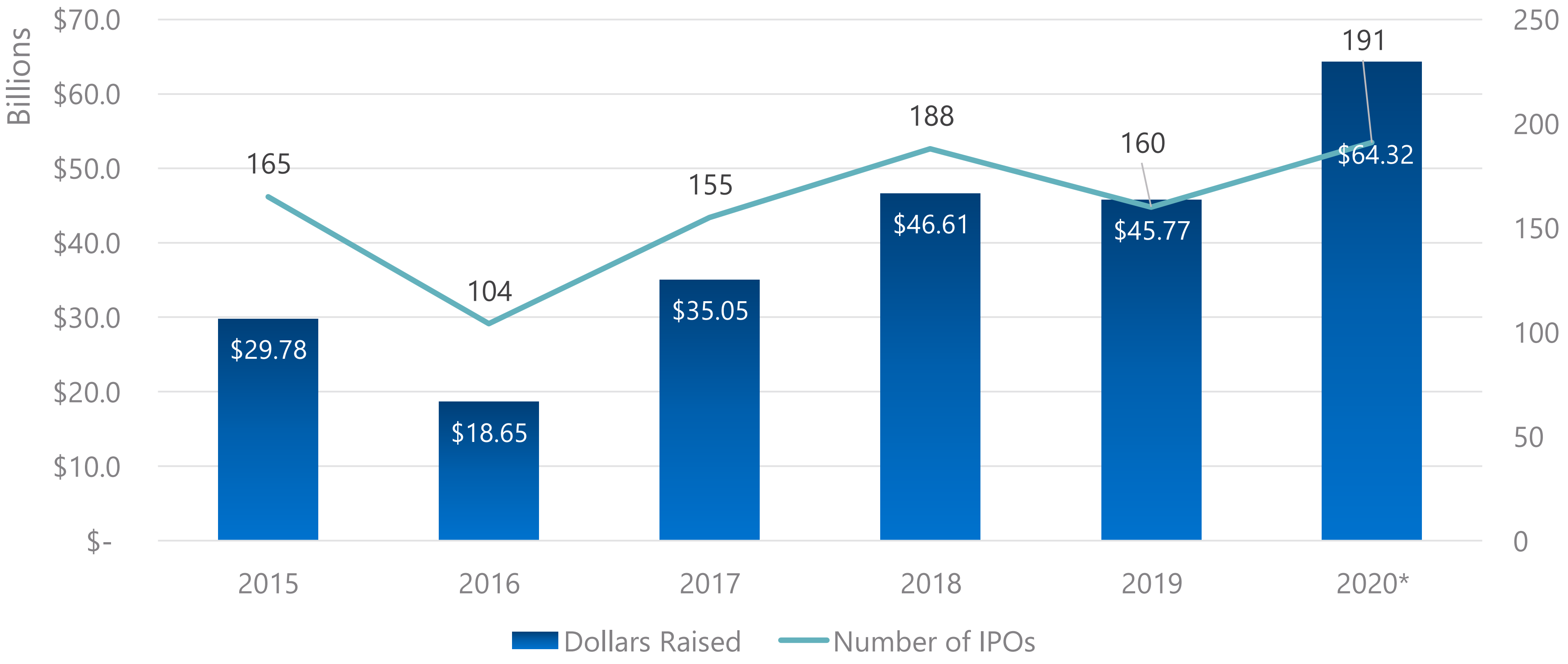
- When companies considered going public, they weighed the costs and benefits associated with being a public company
- In recent years, being a public company has fallen out of favor.  The private markets have become incredibly robust, yielding billions of dollars in private placements and leading to the rise of unicorns
- Legislators and regulators have lamented the decline in the number of US public companies and have taken steps to encourage more companies to go public, through measures like the JOBS Act, and by making it less burdensome to be public
- The public markets also have undergone significant changes
- An IPO is no longer the only choice

# The new three-track (or four-track) approach to the public markets

- Now, almost every client thinking about a liquidity opportunity considers:
  - An IPO,
  - A merger with a SPAC,
  - A direct listing, or
  - An outright sale/merger

# The IPO market

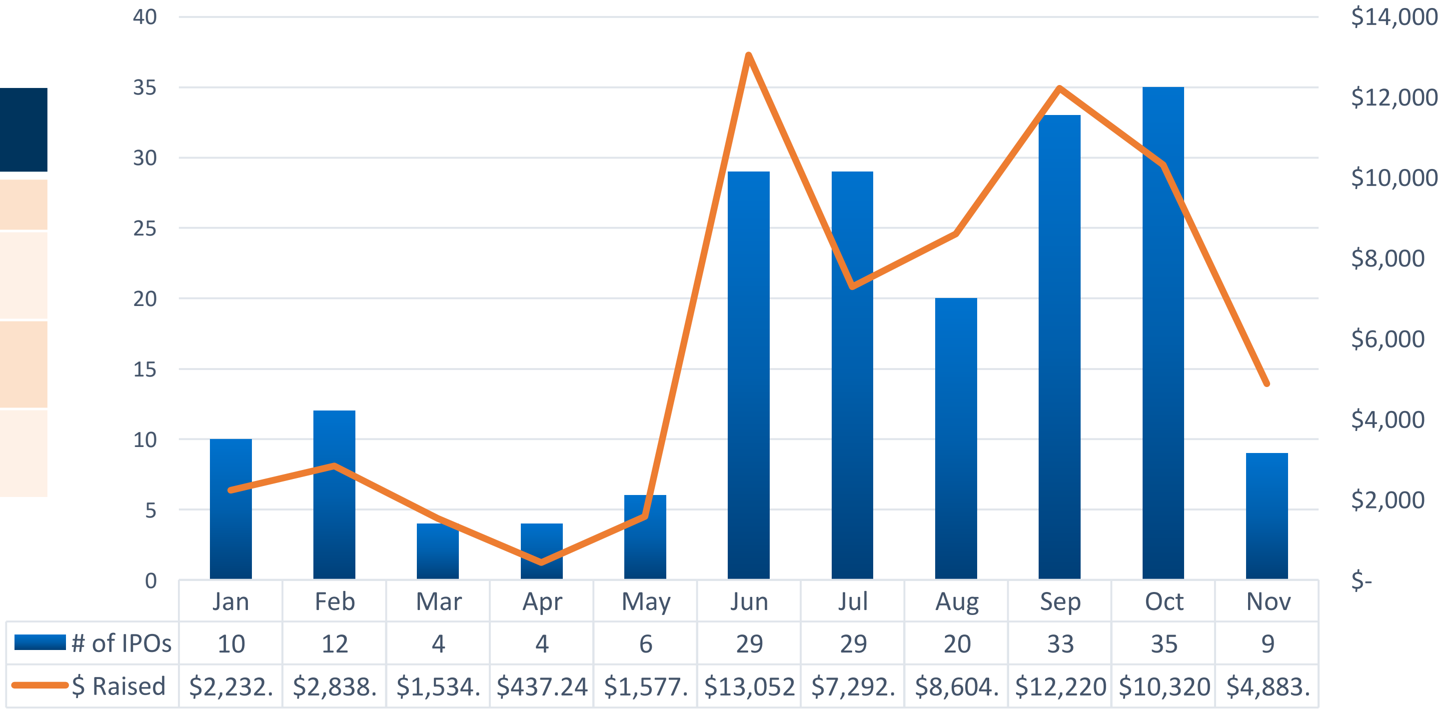
# The IPO market over the years




Source: Wolters Kluwer IPO Vital Signs; Data excludes SPAC IPOs
*Through November 30, 2020

# IPOs in 2020*

| Issuer Market Cap in 2020 | % of IPOs |
|---|---|
| $1 billion + | 38% |
| $500 million-$1 billion | 30% |
| $100 million-$500 million | 23% |
| Below $100 million | 9% |

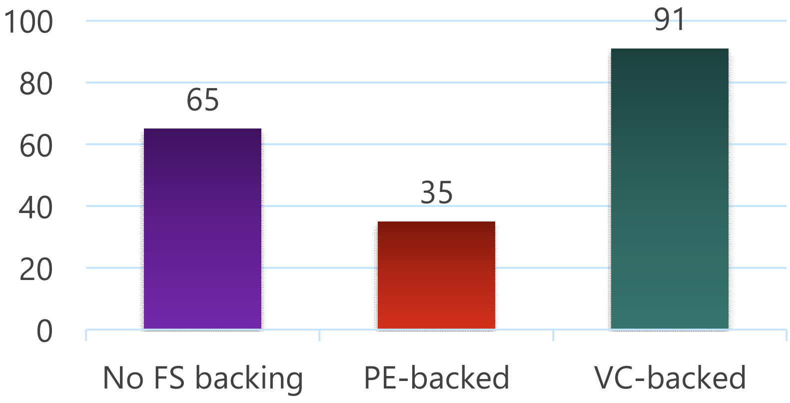


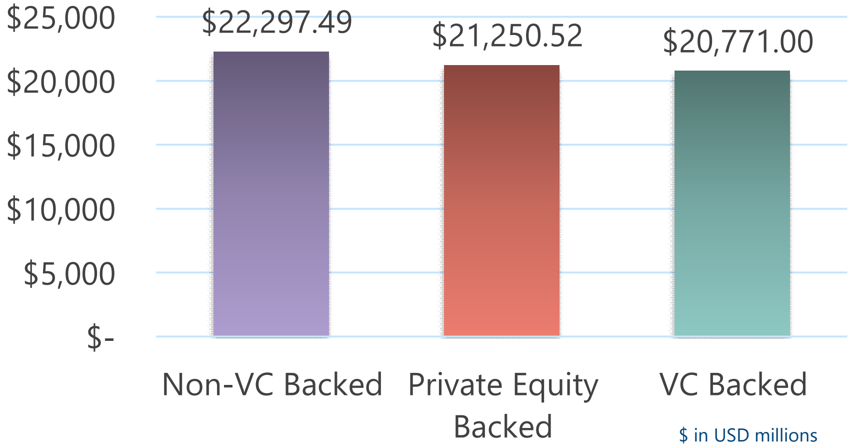

$ in USD millions

Source: Wolters Kluwer IPO Vital Signs; Data excludes SPAC IPOs
*Through November 30, 2020

# Financial sponsor-backed IPOs

- 67% of IPOs, to date, have been VC- or PE-backed, with 48% having venture backing and 18% having private equity backing.
- The average VC-backed IPO raised approx. $228 million, while PE-backed IPO raised approx. $607 million.

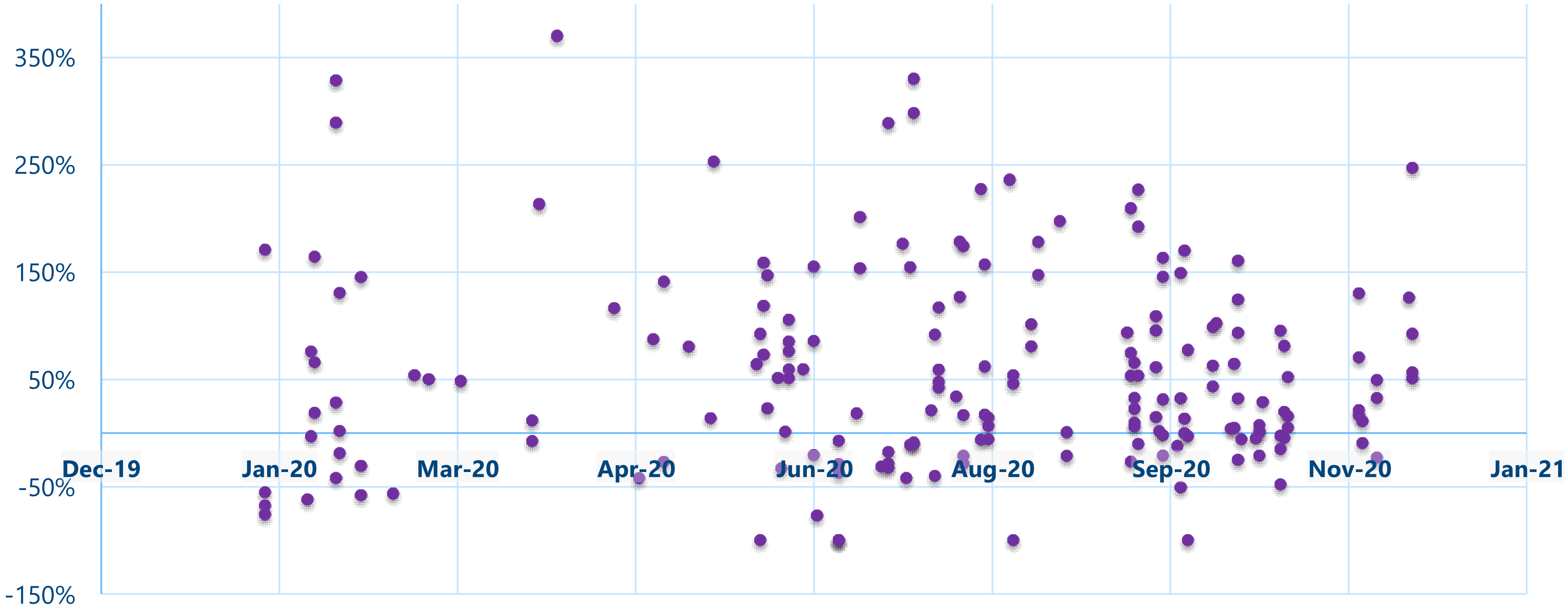



Source: Wolters Kluwer IPO Vital Signs; Data excludes SPAC IPOs;
*Through November 30, 2020

# Aftermarket performance

(% change price at open vs November 30, 2020)




Source: Wolters Kluwer IPO Vital Signs; Excludes GLSI (+893.00% change) and CVAC (+751.77% change)

# Example of a traditional IPO

**NYSE: Rocket Companies, Inc. (RKT)**

**IPO date: August 6, 2020**

Largest U.S. Retail Mortgage Lender (serves 9.2% of an over $2.0 trillion annual market)

Estimated revenues between $6.3 billion and $6.5 billion in the first half of 2020, up from $1.6 billion over the same period in 2019

Reported a $991 million decline in the fair value of its mortgage servicing rights

Initial target IPO price range was 150 million shares at $20 to $22 per share

Downsized IPO sold 100 million shares at $18 per share

Market cap at IPO: $1.8 billion

Third largest U.S. IPO in 2020 at the time

Multi-tiered stock structure (Dan Gilbert has 79% control of voting shares)

# Example of a traditional IPO

Guild mortgage

**NYSE: Guild Holdings Company (GHLD)**

**IPO date: October 22, 2020**

Guild Mortgage is primarily a branch retail mortgage lender and servicer

During the first half of 2020, Guild reported a profit of $110.8 million, up from a $47 million loss in the first half of 2019

All of the offered IPO shares were sold by Guild’s stockholders

Initial target IPO price range was 8.5 million shares at $17 to $19 per share; downsized IPO sold 6.5 million shares at $15 per share

Market cap at IPO: $98 million

Multi-tiered stock structure (McCarthy Partners controls 95% of voting shares)

Consummated an internal reorganization prior to IPO to simplify the corporate structure

# Emerging growth companies (EGCs)

# IPO accommodations for EGCs

| Available Accommodations | An EGC | An EGC FPI | A Non-EGC | A Non-EGC FPI |
|---|---|---|---|---|
| **CONFIDENTIAL SUBMISSION?** | **Yes**, an EGC may submit its IPO registration statement to the SEC for confidential review as a result of JOBS Act provisions.<br><br>Confidentiality is established by statute. *Securities Act Section 6(e)(2).* | | New policy allows a non-EGC to submit its registration statement to the SEC for confidential review.<br><br>A non-EGC must request confidential treatment for its submission under Rule 83. | Certain FPIs, even non-EGCs, are permitted to submit their IPO registration statements for confidential review. The new SEC policy extends this to FPIs beyond those identified in 2011/2012.[1]<br><br>A non-EGC FPI other than those addressed in SEC guidance would have to request confidential treatment for its submission under Rule 83. |
| **WHEN MUST REGISTRATION BE FILED PUBLICLY?** | **15 days prior** to commencement of a traditional roadshow. | | | If relying on new SEC policy, 15 days prior to commencement of a traditional roadshow.<br><br>Other FPIs do not have a deadline for public filing.[1] |
| **TEST-THE-WATERS?** | **Yes** | | | |

[1] See Non-Public Submissions from Foreign Private Issuers, December 8, 2011, amended May 30, 2012, at: https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm

# IPO accommodations for EGCs

| Available Accommodations | An EGC | An EGC FPI | A Non-EGC | A Non-EGC FPI |
|---|---|---|---|---|
| DISCLOSURE ACCOMODATIONS? | Yes | Yes. Certain accommodations available to FPIs. | No | Yes. Certain accommodations available to FPIs. |
| FINANCIAL INFORMATION THAT MAY BE OMITTED? | Confidential submissions may omit annual and interim financial statements that will not be required to be presented at the time of the offering. | | In reliance on new guidance, confidential submissions may omit annual and interim financial statements that will not be required to be presented at the time of the first public filing. | |
| GOVERNANCE & OTHER SOX-RELATED ACCOMMODATIONS? | Yes | An EGC FPI benefits from the accommodations available to EGCs and those available under the securities rules and the regulations of the national securities exchanges for FPIs. | No | An FPI will benefit from the accommodations available to FPIs under the securities rules and the regulations of the national securities exchanges. |



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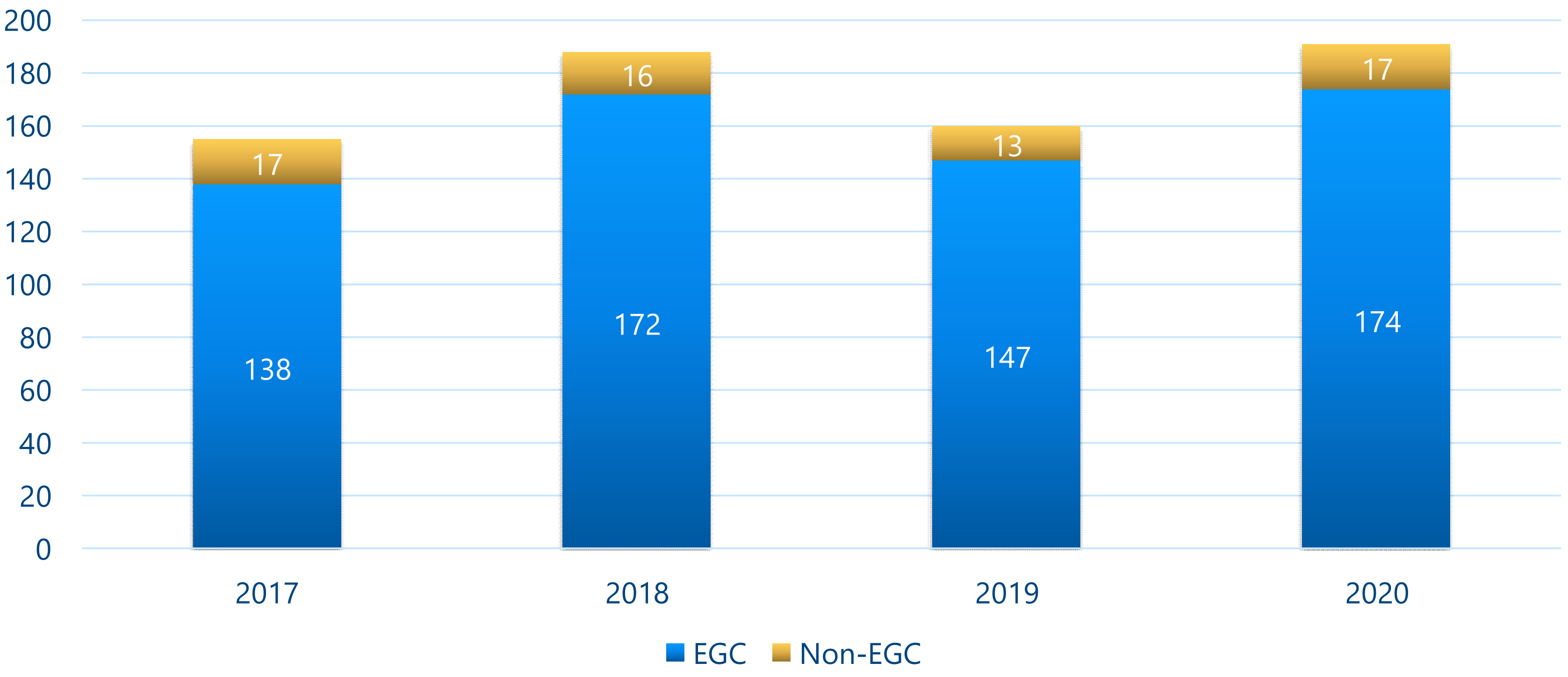
# EGC vs. Non-EGC IPOs




Source: Wolters Kluwer IPO Vital Signs; Data excludes SPAC IPOs;
*Through November 30, 2020



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# Measures to make being public less burdensome

# Expanded ability to engage in test the waters communications

- In September 2019, the SEC extended the ability to "test the waters" to all issuers by adopting new Rule 163B.  Prior to Rule 163B, the ability to test the waters was limited to EGCs.
- Testing the waters communications may solicit nonbinding indications of interest but may not solicit a binding commitment or customer order.
- Testing the waters communications can be oral or written and may occur either prior to or following the date of filing of a registration statement.

# Expanded ability to engage in test the waters communications *(cont'd)*

- Under Rule 163B, any issuer, or person authorized to act on behalf of the issuer (including an underwriter), may engage in exempt oral or written communications with potential investors that are, or are reasonably believed to be, qualified institutional buyers ("QIBs") or institutional accredited investors ("IAIs") to determine whether such investors might have an interest in a contemplated registered securities offering.
  - QIB definition: Any institutional investor that qualifies as an accredited investor under Rule 501 of Regulation D under the Securities Act of 1933 (the "Securities Act"), acting for its own account or the accounts of other QIBs, that owns and invests on a discretionary basis at least $100 million in securities of unaffiliated issuers. Banks and certain other specified financial institutions must also have a net worth of at least $25 million. A registered broker-dealer is a QIB when it owns and invests on a discretionary basis at least $10 million in securities.
  - IAI definition: Any institutional investor that qualifies as an accredited investor under Rule 501 of Regulation D under the Securities Act (generally, an entity with total assets in excess of $5 million).

# Expanded ability to engage in test the waters communications *(cont'd)*

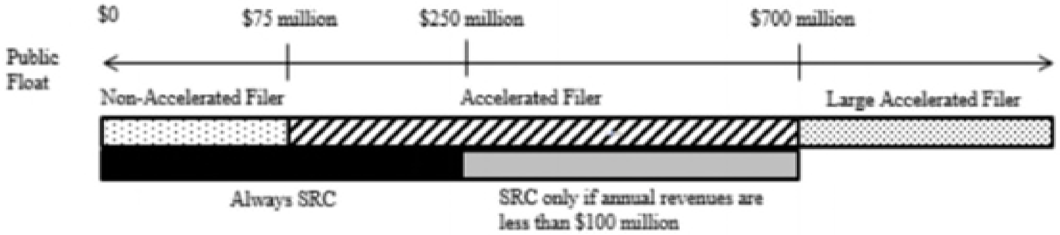
- The rule is non-exclusive and issuers may rely concurrently on other Securities Act communications rules or exemptions when determining how, when, and what to communicate in relation to a contemplated securities offering.
- The rule is also available to registered investment companies and business development companies ("BDCs").
- Rule 163B contains no legend or filing requirements, but does require that testing the waters communications not conflict with information in the registration statement for the related offering.
  - Statements made in any Rule 163B communications must not contain material misstatements or omissions at the time such statements are made.

# Expanded confidential review of registration statements

- In June 2017, the SEC announced that all issuers would be permitted to submit draft registration statements for SEC review on a nonpublic basis (previously only applicable to EGCs)
- Includes initial public offering registration statements and registration statements for an offering within a year of the effectiveness of the company's initial registration statement
  - For follow-on offering registrations, the SEC will only review the first draft submission confidentially, not subsequent amendments
- Company conducting a follow-on offering must publicly file its registration statement and its non-public draft submission of the registration statement no later than 48 hours prior to any requested effective date and time
- Draft registration statements must be substantially complete when submitted, however, an issuer may omit financial information that it reasonably believes will not be required at the time the registration statement is publicly filed

# Amendments to definitions of certain issuers

- The SEC amended the definition of “accelerated filer” and “large accelerated filer”
- Definitions prior to amendments:




- Now: If a registrant has less than $100 million in revenue and less than $700 million in public float, it is a non-accelerated filer
- Effects: (i) no longer required to obtain attestation of their ICFR from their auditor and (ii) more generous reporting deadlines

# Disclosure requirements for acquired business

- To simplify the requirements, the SEC amended the “significance” test to determine when additional historical financial information and pro forma information about an acquired business is required
  - Investment test compares investment to market value of acquirer’s equity (as opposed to total assets)
  - Income test now requires both income (pre-tax) and revenue of target to be at least 20% of acquirer’s
- The SEC also modified the requirements relating to the number of years of financial statements required, and to otherwise rationalize the requirements for separate financial statements and for pro forma financial information

# Modernization of Regulation S-K

- Throughout the last few years, the SEC has amended the disclosure requirements under Regulation S-K to:
  - Eliminate duplicative requirements
  - Eliminate disclosures already required by GAAP/IFRS to be addressed in the notes to financial statements
  - Modernize the disclosures of Business, Risk Factors and Legal Proceedings
  - Modernize the requirements for MD&A

# Recent IPO trends

# Pre-IPO private placements

- For companies that are 12 to 24 months away from an IPO, pre-IPO private placements have become an important stepping stone
  - The pre-IPO round not only serves to provide much-needed capital but more importantly provides validation from sector investors
  - Also, the understanding is that pre-IPO crossover fund investors will be anchor investors in the IPO
- IPO companies that complete at least one crossover round with public institutional investors tend to perform better at pricing and in the aftermarket

# Larger syndicates

- One of the principal purposes of going public is to have a liquid stock—to provide liquidity to existing stockholders, to incentivize employees who receive stock-based compensation awards, and to use as acquisition currency for stock deals. Having broad and meaningful equity research coverage and effective market making is central to liquidity.
- As a result, underwriting syndicates have gotten larger and larger
- The dynamics and pecking order within syndicates (joint books, sole books, passive books, stabilizing manager, etc.) have gotten more complex, as have compensation considerations
- Consider syndicate decisions and compensation decisions and incentives closely

# Acceptance of multiple share classes

- Given that many independent mortgage banking companies are family-owned or closely controlled, going public may raise concerns about losing control
- Undoubtedly, with becoming a public company, there will be increased public scrutiny, and more focus on short-term, quarterly results; however, investors have become increasingly comfortable with dual and multiple share class structures that allow insiders to retain voting control

# Variation in lock-up releases

- Yes, the 180-day lock-up remains the rule; however…
- There are more exceptions to the rule
- Staggered releases
  - For different classes of holders, with, for example, earlier releases for employees
  - For all lock up parties if stock has achieved certain price target
  - For all lock up parties to allow sales if the lock up would run into the first earnings blackout

Learn more about lock-ups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Market Trends 2019/20: Lock-Up Agreements

A Lexis Practice Advisor® Practice Note by
Anna T. Pinedo and Georgia Nicole Veru, Mayer Brown LLP

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Length of Lock-Up Period

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# Compressed virtual roadshows

We're in Zoom-land

- Test the waters meetings and roadshows are now virtual
- Engagement by institutional investors has been good; however, bankers have been condensing roadshows to four- and five-day periods
- The expectation is that this trend will continue

# Modified Dutch auction pricing

- The traditional IPO model is under attack from Silicon Valley and the VC community; prominent VCs favor direct listings, criticize the 7% spread, and question the value of underwriters
- In recent IPOs, underwriters have tried to introduce greater transparency by relying on Dutch auction style pricing into the order book. This was used in the Unity Software deal in the summer, and more recently in Airbnb and DoorDash

December 8, 2020

**"Airbnb and DoorDash IPOs Will Use a 'Hybrid Auction.' What That Means—and Why It Matters"**
*Barron's*

December 9, 2020

**"Both DoorDash and Airbnb plan to use a new type of 'hybrid auction' system to list their shares to prevent a share price 'pop' on their first day of trading"**
*The New York Times*

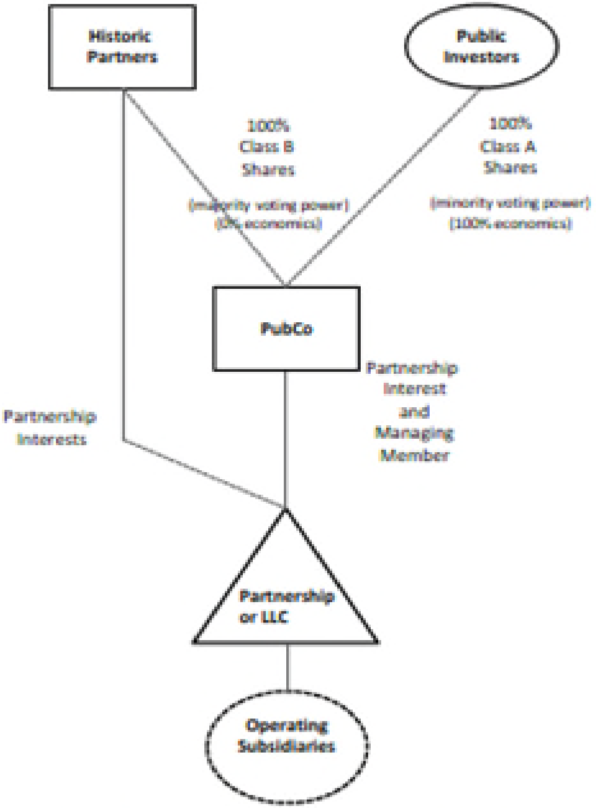
# Up-C IPOs

# Up-C IPOs

- The Up-C structure has become increasingly common for IPOs of companies that have historically operated as LLCs or partnerships
- Independent mortgage banking companies often are family owned and may be structured as LLCs or as partnerships.  The Up-C structure may be something to consider under these circumstances
- The Up-C structure derives its name from the UPREIT structure. Essentially, a newly formed corporation ("PubCo") will be the entity that undertakes the IPO. PubCo will sit above an existing limited liability company (the "LLC")

# Up-C structure overview

- PubCo will be a holding company and will have as its subsidiary the LLC. The principal assets/operating business will continue to be at (or below) the LLC level
- PubCo has two classes of common stock, Class A (held by public investors) and Class B (voting power but no economic interest; held by historic partners)
- PubCo will receive the IPO proceeds and downstream the IPO proceeds to the LLC
- Historic partners may exchange their LLC interests for PubCo Class A common shares (PubCo may settle in cash) thereby obtaining liquidity
- Historic partners and PubCo enter into a "tax receivable agreement" ("TRA")
- The Up-C structure provides a range of options for making strategic acquisitions and compensating employees (*e.g.*, PubCo stock, PubCo options, and partnership units)




Up-C Structure Final State



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# Tax receivable agreement

- When the historic partners sell partnership interests to PubCo (rather than stock, as in a traditional IPO structure), PubCo receives a "step-up" in the tax basis of its assets
- This tax basis step-up is allocated to PubCo's share of the historic partnership's assets (step-up allocable to intangible assets is amortizable on a straight-line basis over 15 years)
- Through a TRA the historic partners effectively capture the majority of the value associated with the PubCo's tax basis step-up
- Under the terms of the TRA, PubCo is obligated to pay the historic partners in cash an amount equal to a portion of PubCo's tax savings generated by the tax basis step-up (typically 85% of such savings)
- Payments under the TRA are effectively treated as additional purchase price paid by PubCo for its interest in the historic partnership
- TRAs often include provisions accelerating payments upon a change of control

**<u>Illustration of Potential TRA Economics</u>**

| • | **Amount of PubCo Tax Basis Step-Up*** | **$300 million** |
|---|---|---|
| • | Amortization Period | 15 years |
| • | Annual Amortization | $20 million |
| • | PubCo Tax Rate (Federal & State) | 25% |
| • | PubCo Annual Savings | $5 million |
| • | TRA Payout Ratio | 85% |
| • | Annual Payment to Historic Partners** | $4.25 million |
| • | Total Payments to Historic Partners | $63.75 million |

* Any future exchanges of partnership units for Class A shares of PubCo also may give rise to additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time)

** Payments under the TRA also give rise to additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time)

# Additional considerations related to Up-C structure

- The Up-C structure maintains continuing pass-thru treatment (single level taxation) for the historic partners with respect to their proportionate share of net income realized by the partnership
- PubCo becomes the managing member of the historic partnership and the historic partners retain voting control through Class B PubCo shares
- PubCo consolidates the historic partnership for financial statement purposes

# Securities disclosures

- The IPO prospectus will contain additional disclosures related to the Up-C structure
  - Cover page will highlight dual class of stock
  - Offering summary box usually will contain a structure diagram
  - Risk factors will highlight certain aspects of the structure
    - Only material asset of PubCo will be interest in the LLC
    - Payments to pre-IPO owners for certain tax benefits
    - Risks associated with dual class of stock and often risks associated with a controlled company
  - Formation transaction or organization description
  - Description of exchange agreement
  - Description of tax receivable agreement
- Often there may be other agreements entered into in connection with the IPO, such as a voting agreement and a management agreement

# Controlled company status

- For the securities exchanges, a controlled company is one in which more than 50% of the voting power for the election of directors is held by a group
- Often the PE or VC sponsors in an Up-C structure will remain the control group
- A controlled company may rely on certain exemptions from the corporate governance requirements of the exchanges

# SEC interpretive guidance

- In 2016, the Staff of the SEC's Division of Corporation Finance provided guidance regarding the application of Rule 144 in the context of the Up-C structure
- The Rule 144 holding period is deemed to commence when the holder has fully paid for its LLC interest to the extent that the exchange agreement allows LLC holders to exchange for PubCo shares with no additional consideration

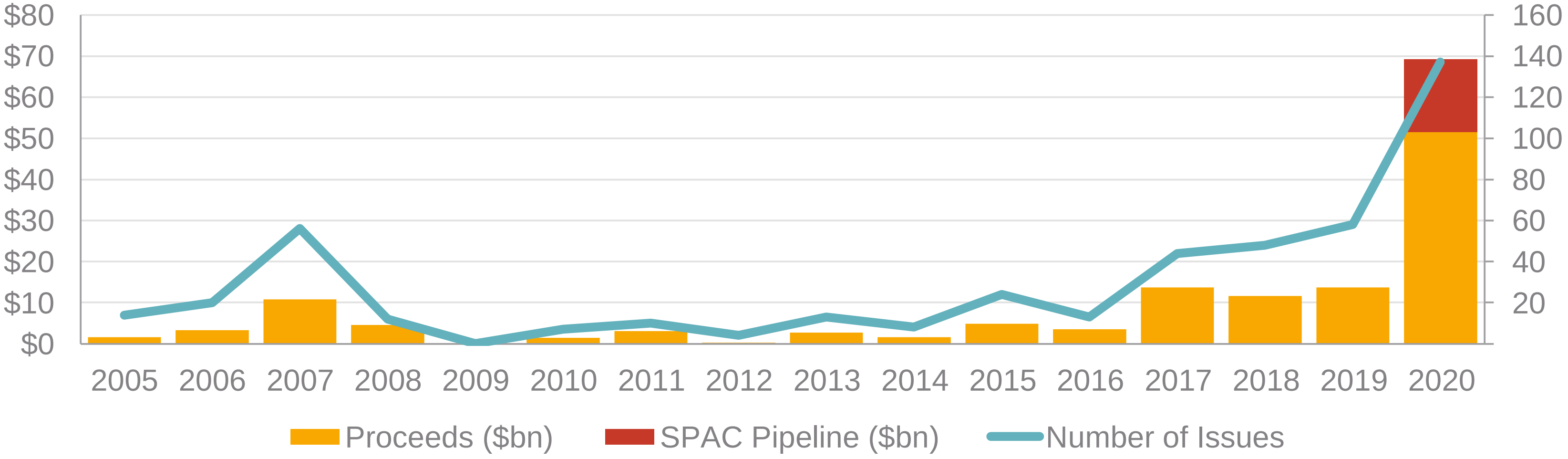
# The SPAC alternative

# SPAC introduction

- What is a Special Purpose Acquisition Company ("SPAC")?
  - Newly formed company with no assets or operations
  - Registers with 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 of $51.5 billion

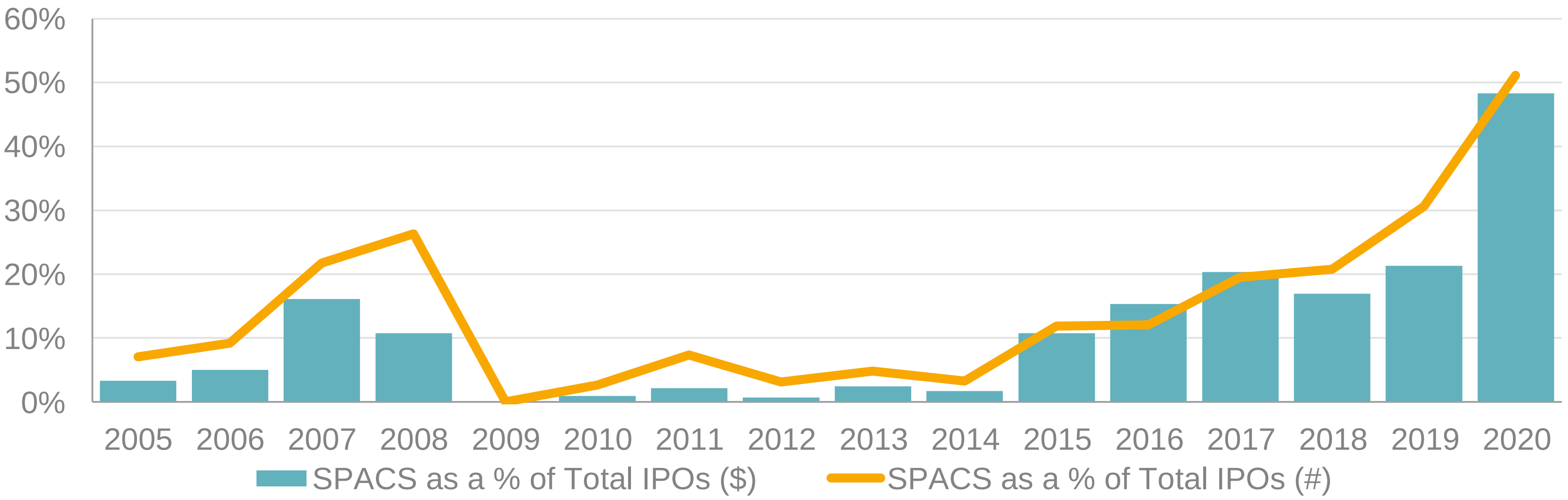



*Excludes deals less than $50m in proceeds

*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*



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# Example of a SPAC merger: Opendoor

Opendoor

**Public Announcement:**
**September 15, 2020**

Opendoor is an on-demand digital experience to buy and sell a home; Opendoor's revenues declined in 2020 and are not projected to exceed 2019 revenues until at least 2022

Transaction between SPAC Social Capital Hedosophia Corp II (NYSE: IPOB) and Opendoor, valuing Opendoor at $4.8 billion (combined company will have over $1 billion in cash proceeds)

PIPE of $600 million includes $200 million from insiders and $100 million from Chamath Palihapitiya

Transaction values the company at 1x 2019 revenue of $4.7 billion and 0.5x estimated 2023 revenue of $9.8 billion

Transferring listed shares from the NYSE-listed SPAC to Nasdaq

Shareholder vote scheduled for December 17 to officially approve the SPAC merger

# Example of a SPAC merger: United Wholesale Mortgage

**Public Announcement: September 23, 2020**

Largest U.S. wholesale mortgage originator

Transaction between SPAC Gores Holdings IV (Nasdaq: GHIV) and United Wholesale Mortgage, valuing United Wholesale Mortgage at $16.1 billion (largest SPAC transaction so far)

On pace to underwrite nearly $200 billion worth of mortgages in 2020, up from $108 billion in 2019

Concurrent PIPE of $500 million adds to $425 million of cash in the SPAC's trust

Valuation is 9.5 times UWM's estimated 2021 adjusted net income of approximately $1.7 billion

UWM shareholders will retain approximately 94% ownership of the combined company

Combined company will be renamed UWM Corp and trade under the ticker symbol UWMC

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# Example of a SPAC merger: Finance of America

**Public Announcement:**
**October 13, 2020**

Finance of America is an end-to-end consumer lending and services platform which connects borrowers with investors

Transaction between SPAC Replay Acquisition Corp. (NYSE: RPLA) and Finance of America, valuing Finance of America at $1.9 billion

From 2018 to 2020, reported a 41% revenue CAGR and a 188% GAAP pre-tax income CAGR

Concurrent PIPE of $250 million adds to $288 million of cash in the SPAC's trust

Funds managed by Blackstone Tactical Opportunities and FOA's management/founder will retain 70% equity ownership after transaction's close; PIPE investors and SPAC stockholders will own 13% and 15%, respectively

Combined company expects to launch a $350M high yield debt offering in near term

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# How does a SPAC work?


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

# How does a SPAC work? *(cont'd)*

- Not all SPACs are the same
  - Some are focused on a particular geography or industry
  - Others have no such mandate
- Post IPO, SPACs place 100% of IPO proceeds in an interest-bearing trust account
  - Complete an acquisition (an "initial business combination")
  - Redeem investors under certain conditions
- To compensate for illiquidity, SPACs offer investors units
  - Units consist of common stock and whole or fractional warrants
  - Warrants typically priced "out of the money" (*i.e.*, higher than IPO price)
  - Shortly following IPO, common stock and warrants trade separately

# How does a SPAC work? *(cont'd)*

- Sponsor often receives 20% of SPAC's common stock as compensation
  - This 20% is commonly referred to as the "founder's shares"
  - Sponsor receives founder's shares for nominal consideration
  - Nominal consideration not placed in the interest-bearing trust account
  - Founder's shares are locked up for one year following the merger
- Sponsor purchases warrants to fund IPO costs in private placement
  - This is commonly referred to as the "at risk capital"
  - Occurs in conjunction with IPO
- Sponsor generally receives management fees after initial business combination
- SPACs must acquire target within specified timeframe
- Timeframe is typically 18-24 months
- Some SPACs may include an option to extend this deadline

# How does a SPAC work? *(cont'd)*

- If SPACs do not complete initial business combination before deadline:
  - Must liquidate their trusts
  - Redeem their investors (plus interest)
  - Founder's shares not redeemed for cash upon liquidation
- Therefore, sponsors incentivized to find suitable target
- Process of acquiring private company target is called "**de-SPACing**"
- Investors may redeem regardless of vote for or against transaction
- Investors may hold warrants even if they redeem common stock
- Unlike traditional mergers, reverse break-up fees are rare
- After merger, target operating company is surviving public company

# How does a SPAC work? *(cont'd)*

- Post-merger, the target operating company is the surviving entity, and will be a public company
  - The operating company must therefore be prepared to comply with the rules applicable to US public companies, including the corporate governance, ownership reporting, and related rules
  - The operating company usually will use the period during which the proxy statement is being reviewed to undertake all necessary corporate housekeeping

# Merging into a SPAC

# What are the advantages of merging with a SPAC?

- Merging with and into a SPAC may be faster than a traditional IPO
  - However, that will depend on:
    - Nature of negotiations between SPAC and operating company target
    - Shareholder approval process
  - Will also require significant management time and resources
  - Entails negotiation of merger agreement and related ancillary documents
  - Operating company will also be required to prepare required proxy or proxy/prospectus disclosures (similar to what is required for a traditional IPO)
- Going public via SPAC may provide greater certainty than IPO
  - Merger consideration and valuation set when merger agreement executed
  - Repricing may be possible due to market volatility or other reasons
  - A SPAC may be willing to undertake a transaction with a company that is earlier stage than the typical IPO candidate
- May provide flexibility regarding content and timing of communication
  - Fewer restrictions on business combination discussions than IPO discussions

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# What are some disadvantages of merging with a SPAC?

- Historically, concern with SPAC sponsor-stockholder interest alignment
- Sponsors typically receive founder's shares for nominal consideration
  - Sponsors may profit even if future acquisition proves unsuccessful
  - Recently, some changes in SPAC structure; for example, Bill Ackman foregoing all founder's shares
- SPACs create short-term arbitrage opportunities
  - SPACs allow investors to keep warrants even if they redeem shares
  - May impede long-term investing
  - SPACs traditionally attract hedge fund investors
- Redemption rights create inherent uncertainty about available funds
  - May mitigate this via issuing additional equity or equity-linked securities
  - Capital-raising transaction may also provide additional capital to grow

# What are some disadvantages of merging with a SPAC? *(cont'd)*

- The market may not like the proposed initial business combination
  - Post-merger, over 50% of SPACs experienced poor aftermarket performance
  - Over time, this trend may reverse itself, especially with better sponsors
- SPACs may lack investment bank and institutional investor relationships
  - This may hinder equity research coverage and market making of securities
  - Investor outreach may not translate into institutional investor familiarity
  - IPOs (and private placements pre-IPO) usually create such relationships
- SPACs incur significant costs and the process for the operating company is no cheaper than an IPO

# De-SPACing

# De-SPACing

- Process of SPAC acquiring a private company target called "de-SPACing"
- In many respects, similar requirements and processes to a public company merger
  - Letter of Intent ("LoI")
  - Due diligence
  - Merger agreement
- However, there are key differences, such as:
  - Shareholder approval required through proxy statement or proxy/prospectus
  - Redemption opportunity for SPAC shareholders, potentially through tender offer
  - Restrictions post-merger on SPAC holders under securities laws and regulations
  - Greater flexibility (and uncertainty) in purchase consideration
  - Limited recourse if de-SPACing fails

# Process overview

- The process from announcement of a definitive agreement (and proxy filing) to close, with multiple rounds of investor outreach, may take between two and five months (*not all that different from an IPO process*)

**Step 1:** Preparation

- Negotiate LoI
- Draft merger agreement
- Develop investor outreach plan
- Wall cross investors
- Conduct testing the waters
- Initiate private investment in public equity ("PIPE") *(if applicable)*
- Begin proxy preparation

**Step 2:** Public process

- Execute merger agreement and announce transaction
- Conduct announcement conference call and investor meetings
- File proxy statement with audited financials

**Step 3:** SEC review and marketing

- Receive and respond to SEC comments
- Continue selective (or broad) investor outreach
- Hold analyst day
- Retain proxy solicitor
- Set shareholder record and vote date
- Mail final proxy (~3 weeks prior to vote)

**Step 4:** Closing process

- Conduct final roadshow
- Regular calls with underwriters and advisors to track large shareholders
- Tabulate redemption requests (two days prior to vote)
- Hold vote
- Close transaction

# Process overview *(cont'd)*

- Timing will depend on the preparation of the proxy statement, the SEC review of the proxy statement, and the response to those comments
- Best practice is to file proxy statement and release investor presentation as soon as possible after announcing the entry into the definitive agreement
- IPO-style roadshow, including the target company's management

# Deal terms

- Because of possible shareholder redemptions, amount available to the SPAC is uncertain
  - Therefore, transaction agreement usually provides flexibility in terms of consideration
  - Purchase price generally calculated on "cash free/debt free" basis with post-closing true-up, rather than fixed purchase price per share
  - Escrow arrangements and earnouts are also common
- Target shareholder consideration usually is a combination of cash and "rollover" equity
  - SPAC sponsors often negotiate for greater "rollover" equity to hedge against cash shortfall due to redemptions
  - Target typically requires "minimum cash" condition and committed additional financing

# Deal terms *(cont'd)*

- SPAC transaction agreements generally do not have "fiduciary out" if board of directors changes its recommendation
- Market practice varies with respect to post-closing survival of representations and warranties
  - Some do not survive closing, similar to public company transactions
  - Some deals provide for survival periods for some or all representations and warranties, with recourse to an escrow
  - Representation and warranty insurance becoming more common
- Very limited deal protection
  - Reverse break-up fee from SPAC rare
  - Reimbursement of target's fees and expenses inconsistent

# Proxy statement or proxy/prospectus

- SPAC must file proxy statement on Schedule 14A
  - If SPAC intends to register new securities as part of transaction, SPAC must also file a proxy/prospectus on Form S-4 (or F-4)
  - The continuing company may be able to qualify as a foreign private issuer (FPI)
- Proxy statement or proxy/prospectus statement must contain:
  - Financial statements of SPAC, target, and any businesses, if any, acquired by target
  - Description of post-transaction company and its management, directors, governance structure, and material contracts
  - Pro forma financial information reflecting proposed business combination
  - Management's discussion and analysis for the SPAC and for target
  - Selected historical data of SPAC and target, including pro forma financial data
  - Comparative per share information, including pro forma per share data

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# Proxy statement or proxy/prospectus *(cont'd)*

- The type of information that is required of a target company is the same as what would be required if target company were to do an IPO
- The SEC review of the proxy statement and the comment letter process also will be similar to that of an IPO
- 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.

# Proxy statement or proxy/prospectus *(cont'd)*

- 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 projections should be diligenced; the projections usually also will be shared in a data room or in investor materials with PIPE investors

# Indicative timeline: SPAC merger vs. a traditional IPO

| | Weeks 1-4 | Weeks 5-7 | Weeks 8-10 | Weeks 11-12 | Weeks 13-16 | Weeks 17-19 |
|---|---|---|---|---|---|---|
| | | | **SPAC merger completed** *(week 10)* | | | **Traditional IPO completed** *(week 19)* |
| **SPAC Merger** | • Finalize diligence and negotiations of identified target<br>• Draft merger proxy document<br>• Announce transaction<br>• Conduct deal announcement investor presentation<br>• Finalize merger proxy<br>• File proxy/prospectus with SEC<br>• Valuation established | • Obtain initial investor feedback<br>• Monitor trading dynamics<br>• Receive and respond to SEC comments<br>• Determine transaction timeline<br>• Develop marketing plan | • Perform detailed investor targeting<br>• Begin roadshow<br>• Set record date for shareholder vote<br>• Complete SEC review<br>• Continue investor roadshow<br>• Mail definitive proxy and hold shareholder vote<br>• Tabulate votes and redemption requests<br>• Complete SPAC merger | | | |
| **Traditional IPO** | • Hold org. meeting<br>• Prepare due diligence presentations<br>• Conduct due diligence<br>• Begin S-1/F-1 drafting<br>• Distribute draft legal documents and S-1/F-1<br>• Draft legal documents | • File S-1/F-1 confidentially with FYE financials<br>• Begin drafting roadshow, analyst presentation and analyst financial model<br>• Finalize legal documents for first filing | • Receive first round SEC comments<br>• Continue drafting roadshow and analyst financial model<br>• Invite bookrunners and co-managers<br>• Host research analyst due diligence session<br>• Bookrunner and co-manager due diligence (with projections)<br>• Refile S-1/F-1 confidentially | • Receive second round SEC comments<br>• Refile S-1/F-1 confidentially<br>• Analysts draft IPO model<br>• Continue drafting roadshow presentation | • Receive third round SEC comments<br>• Finalize S-1F-1/legal documents<br>• Refile S-1/F-1 publicly 15 days prior to launch<br>• Research analyst provides final models<br>• Continue drafting roadshow presentation | • Evaluate market conditions/filing range<br>• Finalize roadshow<br>• Receive SEC clearance and file/print preliminary prospectus<br>• Launch transaction and roadshow<br>• Continue roadshow<br>• Valuation established<br>• Price offering<br>• Closing and settlement |



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# Are you ready to be a public company?

- In connection with the SPAC process, the management team will need to devote substantial resources to:
  - Negotiating an M&A deal;
  - Diligence related to the SPAC process;
  - Diligence related to the PIPE transaction;
  - Preparing an investor roadshow and doing roadshow meetings for the PIPE first and for the SPAC investors after;
  - Preparing SEC disclosures and financial statements; and
  - Preparing to be a public company
- Immediately upon completion of the SPAC merger, the target will be an SEC-reporting company subject to periodic reporting and corporate governance requirements
  - This means that the target must give thought to corporate governance matters (*i.e.*, composition of board of directors, committees of the board, policies and procedures appropriate for a public company)

# Are you going to get the benefits associated with being a public company?

- The target should consider whether it has undertaken all of the corporate "housekeeping" that is desirable before becoming an SEC-reporting company (*i.e.*, adoption of an adequate stock option plan, formalizing employment agreements, etc.)
- Finally, if the continuing company qualifies as an FPI, it should consider whether it will rely on home country accommodations available to FPIs

• Consider life post-SPAC
  - Will company have the capital it needs?
  - Can you absorb the costs associated with being a US public company?
  - Is SPAC large enough or is PIPE large enough that the stock will be liquid?
  - Will there be research coverage?
  - The SPAC will have commitments to register the resale of the stock underlying the public warrants, the founder's warrants, the PIPE holders' stock and potentially stock received by target holders. How will it control the volume of stock coming to market?
  - Are you prepared to comply with periodic reporting requirements?

# Special securities issues unique to SPACs should be understood at the outset

- A SPAC and a former SPAC will be a shell company for three years post merger
  - Not entitled to use a free writing prospectus
  - Not able to rely on SEC communications safe harbors
  - Not entitled to rely on research safe harbors
  - Not eligible to qualify as a WKSI
  - Stockholders cannot rely on Rule 144 for one year following merger

# PIPE Transactions

# Investor outreach

- More often than not, the de-SPAC PIPE transaction will be marketed to prospective investors while the M&A transaction is being negotiated so that both the M&A and PIPE transactions can be announced together
- How will prospective PIPE investors be wall crossed?
  - The "usual" PIPE transaction wall cross script will need to be revised
    - Consider whether the target has any shares that trade, including shares trading on any foreign market or any private secondary market
    - Consider whether trading needs to be restricted in the securities of both the SPAC and the target
    - Consider the length of confidentiality obligation
  - What information will be used to market the deal?
  - Will a cleansing release ever be required?

# Investor outreach *(cont'd)*

- Usually, the PIPE transaction will be marketed using an investor presentation that will contain information about the SPAC, information about the proposed M&A transaction and information about target
  - It is essential to consider whether the information that is included in the investor presentation will be either in the proxy/prospectus or whether the investor presentation (or some version of it) will be included in a Form 8-K when the M&A deal is announced
  - Specifically, consider the projections shared in the investor presentation versus the projections disclosure that will be included in the proxy/prospectus

# Direct Listings

# Highly publicized direct listings

**Apr 3, 2018**

**"Spotify valued at nearly $30 billion in unusual Wall Street debut"** *CNN*

**Jun 20, 2019**

**"Slack shares surge 48% over reference price in market debut"** *CNBC*

**Sep 30, 2020**

**"Palantir Grabs $21 Billion Valuation, but Debut Comes With a Hiccup"** *WSJ*

**Sep 30, 2020**

**"Asana valued at $5.5 billion after direct listing debut"** *LA Times*

**Oct 1, 2020**

**"Thryv Holdings hits Nasdaq with direct listing; valuation reaches above $350 million"** *Dallas Business Journal*

# Why a direct listing?

1. List Without Selling Shares
2. Liquidity for All Shareholders
3. No Lock-ups
4. Auction-Based Price Discovery
5. Equal Access for All Buyers and Sellers
6. Transparency/ Financial Guidance

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# Definition

- **Direct Listing:** The listing of a company's shares for public trading on a stock exchange without conducting an underwritten IPO, spin-off or transfer of the listing from another stock exchange
- The company thereafter becomes subject to the periodic reporting requirements under the Exchange Act and the corporate governance requirements of the applicable stock exchange without any new shares being issued by the company to the public.
- As part of the direct listing, the company is required to file with the SEC a resale shelf registration statement solely for the purpose of allowing the company's existing shareholders to sell their shares on the stock exchange.

# Comparison to a traditional IPO

- Unlike a traditional IPO, the primary purpose of a direct listing is to provide a liquidity event for the company's existing shareholders who purchased their shares in the private capital markets (no new capital is raised by the company).
- Similar to a traditional IPO, a company conducting a direct listing will need to demonstrate compliance with all applicable stock exchange requirements.
- The requirement to have a registration statement in a direct listing results in a substantially similar SEC staff review process with respect to the disclosure required and timing of the regulatory approval.
- A direct listing does not have the typical IPO safeguards to prevent volatile trading (such as the traditional book-building process to assess interest, inclusion of key institutional investors, selling a fixed number of shares into the market, the underwriter's overallotment option and customary underwriter stabilization activities).

# Comparison to a traditional IPO *(cont'd)*

- The company's management plays a very limited role in determining the direct listing's initial reference price as compared to a traditional IPO.
- In a traditional IPO, the shares sold by the company would normally be held through Cede & Co., which acts as the nominee for the Depository Trust Company ("DTC"); however, in a direct listing, for the shares to be eligible for trading on the applicable exchange, a stockholder interested in selling shares must transfer such shares from being held directly as a stockholder of record to being held in "street name" through DTC.
- The company has more flexibility in the day that it chooses for its shares to commence trading on the applicable stock exchange as compared to a traditional IPO.

# Advantages

- No dilution to existing shareholders as no new shares are issued by the company
- Permits registered resales of shares by affiliates without complying with the volume limitations and holding period conditions that would typically apply
- Existing shareholders can take advantage of the market-based pricing that is available on a public stock exchange as compared to a private resale platform
- Limited or no lock-up requirement as compared to a traditional IPO
- Allows the company to avoid underwriting fees and legal costs associated with a traditional IPO
  - Companies instead incur adviser fees associated with the direct listing
- Potential to lessen impact of Section 11 claims which imposes strict liability for material misstatements or omissions in registration statements

# Liquidity for existing shareholders

- Existing shareholders of the company may benefit from the company having become a reporting company
- The existing shareholders now have a "mark" for their securities (for example, a venture or private equity holder can now mark the securities in its portfolio based on the trading price of the issuer's stock)
- The existing shareholders will have an easier time selling under Rule 144 (the holding period for a non-reporting company is longer than for a reporting company)

# Proof of concept

- In the past, direct listings generally involved small-and mid-cap companies.
- A unicorn that undertakes a direct listing with assistance from investment banks acting as financial advisers may be able to avoid the pitfalls that have been associated with direct listings in the past and may lead to a new path to the public markets.
  - Recent high profile examples include the direct listings of Spotify and Slack.
- Considerations for the issuer:
  - The company can work with the financial advisers on a financial model, projections and a valuation
  - If there are direct comps, this process may be simpler
  - The financial advisers may provide research coverage
  - Depending on the company's size, there may well be other banks that are prepared to provide research coverage, even without having participated in a traditional IPO
  - The financial advisers may conduct non-deal roadshow type meetings with investors in advance of the listing

# Rationales for direct listings

- Besides raising capital, why would you want to become a "public" company?
  - Having a class of equity securities that is listed on an exchange may be important for recruitment and retention purposes; employees may need liquidity and private secondary markets may be insufficient
  - Existing security holders may want liquidity or may simply want a "quoted" market price for their securities
  - Your company may want to undertake acquisitions and having a class of securities listed on an exchange provides an acquisition currency


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# Role of financial advisers

- Financial advisers in a direct listing can provide assistance with respect to the registration statement and in preparing presentations and other public communications.
- Financial advisers should not engage in any book-building activities, participate in investor meetings or provide any price support or stabilization activities.
- Financial advisers should not conduct price discovery activities; however, can consult with the company's designated market maker.
- Exchange rules require that a designated market maker consult with one or more financial advisers to effect a fair and orderly opening of trading without coordination with the company and assist with setting a reference price.

# Resale registration statement

- The issuer must have declared effective a registration statement covering the resale of shares held by the Company's existing shareholders.
- This registration statement will be on a Form S-1 for domestic issuers or on a Form F-1 for foreign private issuers.
- The issuer must also file a Form 8-A for Exchange Act purposes.
- Existing shareholders must deposit their shares through DTC after the effectiveness of the resale registration statement in order to resell their shares on the stock exchange.
- A resale registration on Form S-1/F-1 will contain substantially similar information to that contained in a primary S-1/F-1 (or IPO S-1)
  - A few items will differ such as the price range, the plan of distribution and related selling stockholder disclosures

# Resale registration statement *(cont'd)*

- As a result, the drafting process, the diligence process, and the process with the auditors in connection with financial statement preparation will be similar.
- The SEC review process also can be expected to be similar to the process undertaken in connection with an IPO registration statement.
- Once the registration statement is declared effective, the issuer becomes subject to the Exchange Act reporting requirements as well as corporate governance requirements.

# Research coverage

- An issuer who completes a direct listing may not be necessarily benefit from research coverage.
- After a traditional IPO, there is greater likelihood of research coverage because you have a syndicate of banks that have some continued investment in the company.

# Listing on an exchange

- In parallel with the resale registration statement process with the SEC, the issuer and its counsel must also review the listing requirements for the applicable stock exchange.
- The issuer can pursue an exchange listing (filing the traditional exchange listing application) provided that it meets the objective listing criteria for the exchange.
- The issuer also will have to contact at least three investment banks that are willing to be "market makers" in the security once it is listed.
  - Each market maker will have to submit a letter to the exchange certifying that it is prepared to make a market
- Listing on an exchange, without having done an underwritten IPO and having had the securities placed with investors, may not result in a liquid trading market for the issuer's securities; and there may not be any banks committed to facilitating trading in the stock.

# NYSE direct listing standards

- The New York Stock Exchange ("NYSE") requirements are as follows:
  - A company must demonstrate an aggregate market value of publicly-held shares of $40,000,000 for companies that:
    - List either at the time of their IPO; or
    - List as a result of spin-offs or under the Affiliated Company standard, or
    - List at the time of their Initial Firm Commitment Underwritten Public Offering.
    - $100,000,000 for other companies.
  - A company must have a closing price or, if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, an IPO or Initial Firm Commitment Underwritten Public Offering price per share of at least $4 at the time of initial listing.
- Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off

# NYSE direct listing standards *(cont'd)*

- The Exchange will, on a case by case basis, exercise discretion to list companies whose stock is not previously registered under the Exchange Act.
- In exercising this discretion, the Exchange will determine that such company has met the $100,000,000 aggregate market value of publicly-held shares requirement based on a combination of both:
  - An independent third-party valuation; and
  - Assessment of most recent trading price for company's common stock in a trading system for unregistered securities.
- Alternatively, in the absence of any recent trading in a private placement market, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the company provides a valuation evidencing a market value of publicly-held shares of at least $250,000.000.

# NYSE direct listing standards *(cont'd)*

- Initial Listing Regulatory Halt—The Exchange may declare a regulatory halt in a security that is the subject of an initial pricing on the Exchange of a security that has not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing.
- If a company is relying on a valuation, the valuation agent must be "independent."
- A valuation agent will not be considered "independent" if:
  - At the time it provides the valuation, the valuation agent or any affiliated person beneficially owns more than five percent of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days;
  - The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the valuation; or
  - The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.

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# NYSE direct listing standards *(cont'd)*

- A company also must comply with the other NYSE listing requirements including:
  - At least 400 beneficial owners of round lots of 100 shares
  - At least 1,100,000 publicly held shares
  - A minimum $4.00 share price
  - Satisfaction of either the "earnings" of the "global market capitalization test"
  - Compliance with the applicable corporate governance requirements

# Our mortgage expertise

- We have distinctive mortgage industry expertise. We bring to bear regulatory experience, as well as capital markets and restructuring expertise.
- We are one of the few firms in the United States with dedicated, wide-ranging expertise in regulatory, transactional, restructuring and capital raising components of retail and wholesale financial services.

*Chambers USA ranks us as a leading firm for Financial Services Regulatory: Consumer Finance*

*The Legal 500 US ranks us as a leading firm for Real Estate: REITs and for Financial Services Regulatory*

"A further source comments: 'Mayer Brown is a really good firm. They are excellent in the mortgage space and it speaks to the strength of their practice.'"
***Chambers USA***

"Mayer Brown caters to a sizeable client base of public, private and mortgage REITs, financial advisors, pension funds and other institutional real estate investors."
***The Legal 500 US***

"...exceptional reputation in the consumer finance space, notably excelling in its provision of compliance advice to clients in the mortgage industry."
***Chambers USA***

Clients told the ***Legal 500 US*** that we have a "'[v]ery strong mortgage regulatory practice.'"



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# What others say about our capital markets practice…

**Chambers Global** – Leading firm for Capital Markets: Structured Finance, Securitisation and Derivatives (Europe-wide, Global-wide, UK, and US); Capital Markets & Finance (Cross-Border and International) (US, UK)

**IFLR1000** – Leading firm in the United States for Capital Markets, ranked in the Debt, Equity, Derivatives, Structured Finance and Securitisation categories.

**IFLR Americas Awards** – Structured Finance and Securitisation Team of the Year, 2016, 2017

**Chambers UK** – Leading London firm for Capital Markets: Debt, Securitisation, Structured Finance & Derivatives

**Chambers USA** – Individuals ranked for Capital Markets: Debt & Equity. Leading firm for Capital Markets: Derivatives, and Securitisation

**The Legal 500** – Ranked for Capital Markets: Debt, Equity, and Global Offerings categories for our advice to issuers and underwriters in the US.

Also ranked for Structured Finance: Derivatives & Structured Products, and Securitization. Ranked for Financial Products Tax. Ranked for Equity and Debt Capital Markets; Derivatives and Structured Products; and Securitisation in the UK.

**U.S. News/Best Lawyers' *Best Law Firms*** – Ranked for Derivatives and Futures Law; Securities/Capital Markets Law; Securitization/Structured Finance Law

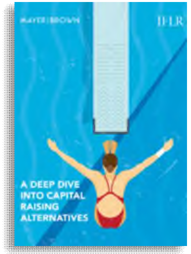
**GlobalCapital Americas Derivatives Awards** – Americas Law Firm of the Year 2019, 2018; US Law Firm of the Year—Regulatory, 2017, 2016

**GlobalCapital Global Derivatives Awards** – Global Law Firm of the Year—Overall, 2019; European Law Firm of the Year—Transactional, 2017, 2016

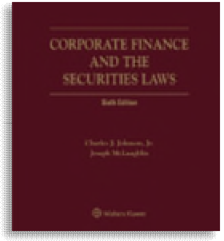
*IFLR1000 US* notes that Mayer Brown exhibits "…constant firm growth… and consistent work on large and creative transactions."

"The 'experienced and responsive' team at Mayer Brown provides a 'committed and client-oriented service.'" *The Legal 500 US*

*Our lawyers are authors of various books & treatises, including:*




**A DEEP DIVE INTO CAPITAL RAISING ALTERNATIVES**
*International Financial Law Review* (2020)




**CORPORATE FINANCE AND THE SECURITIES LAW**
*Wolters Kluwer* (6th ed., updated 2020)


**EXEMPT & HYBRID SECURITIES OFFERINGS**
*Practising Law Institute* (3rd ed.)

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# Additional resources

***Click below to read more:***

- SEC Report Underscores the Interconnectedness of the US Residential Mortgage Credit Markets
- Treating a Nonbank Like a Bank: New Proposed Prudential Standards for Nonbank Mortgage Servicers
- On Point. - Real Estate Investment Trusts (REITs)
- SEC Adopts Significant Changes to MD&A and Related Disclosures

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