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De-SPACing: Overview, Securities Law & Financial Statement Considerations; Derisking with a PIPE Transaction

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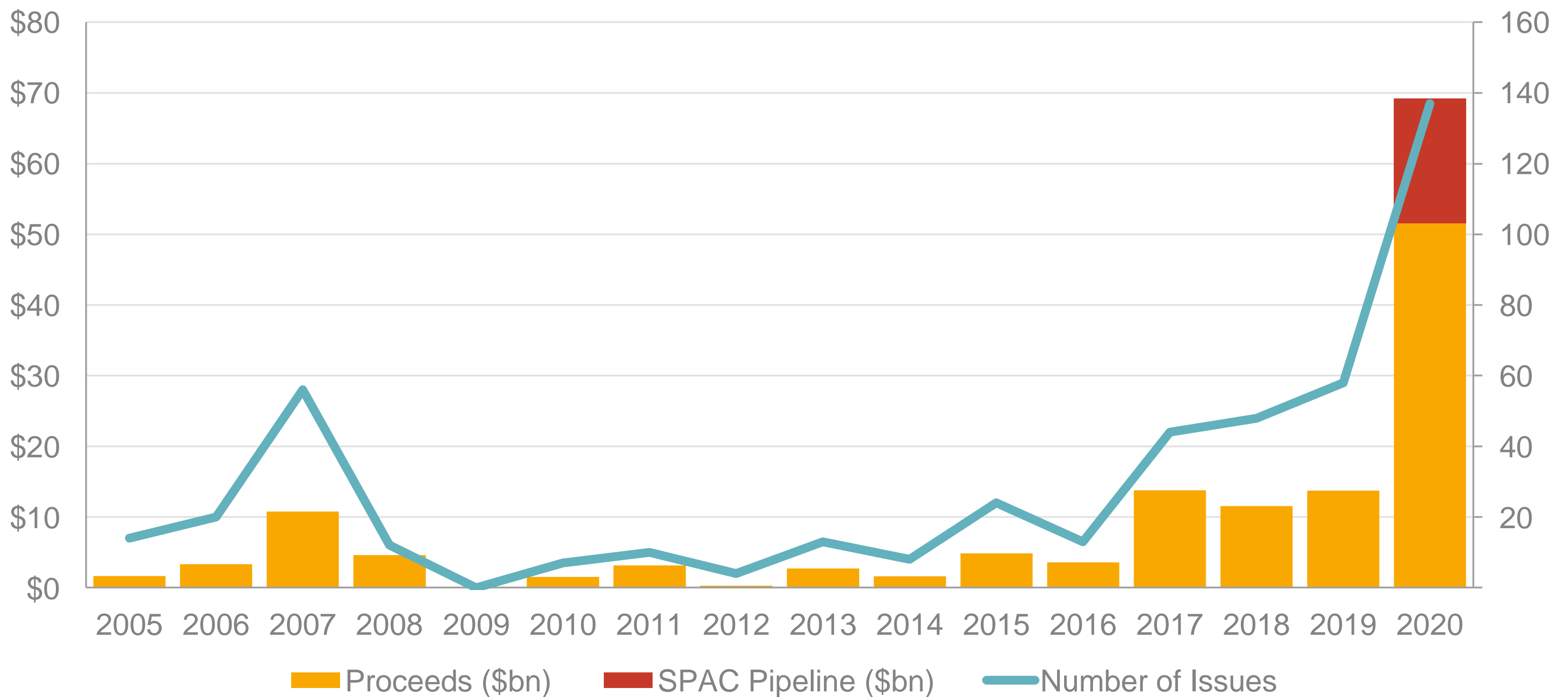
January 27, 2021

Introduction

- What is a special purpose acquisition company ("SPAC")?
  - Newly formed company with no assets or operations
  - Registers with U.S. Securities and Exchange Commission ("SEC") the offer and sale of stock and warrants
  - **Business plan: To find an operating company to buy using IPO proceeds**
    - New "trend" to use SPAC subsidiary for spin-off
  - May or may not specify an industry or a 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 rose 275% year over year to all-time high of $51.5 billion in 2020

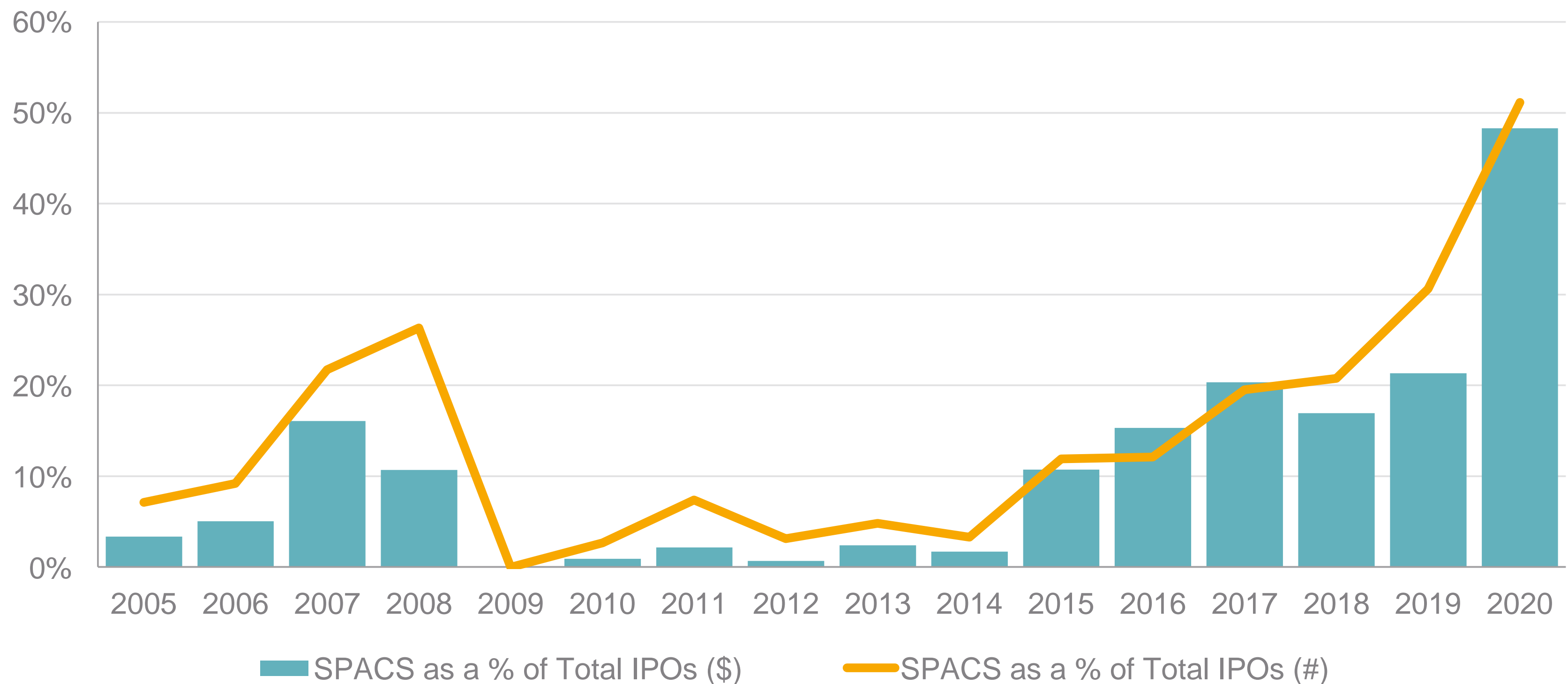


*Excludes deals less than $50m in proceeds

Data from Refinitiv

US-listed SPAC IPO activity

By volume, US-listed SPAC IPOs accounted for more than half of overall US-listed IPOs in 2020 and 48% of proceeds raised



*Excludes deals less than $50m in proceeds

Data from Refinitiv

SPAC activity continues in 2021

Social Finance, Inc. ("SoFi"), founded in 2011, is a one-stop shop for financial services, including loan refinancing, mortgages, personal loans, credit cards, insurance, investing and deposit accounts.

- Expected to go public through the SPAC route in the first quarter of 2021
- The SPAC raised approximately $800 million in an IPO in 2020
- Transaction values SoFi at an equity value of $8.65 billion post-money and is expected to provide up to $2.4 billion in cash proceeds, including a fully committed PIPE of $1.2 billion

Press release

Sources: Sofi; buisinesswire; The Motley Fool

BARK, founded in 2012, has a subscription service for dogs, BarkBox, providing toys, treats, home products and health services to 6.5 million customers, with 1.1 million active subscriptions.

- Expected to go public through the SPAC route in the second quarter of 2021
- For the fiscal year ending March 31, 2021, the company projects revenue of approximately $365 million and gross profit of approximately $221 million
- Transaction values BARK at an enterprise value of approximately $1.6 billion

Source: PR Newswire

AppHarvest

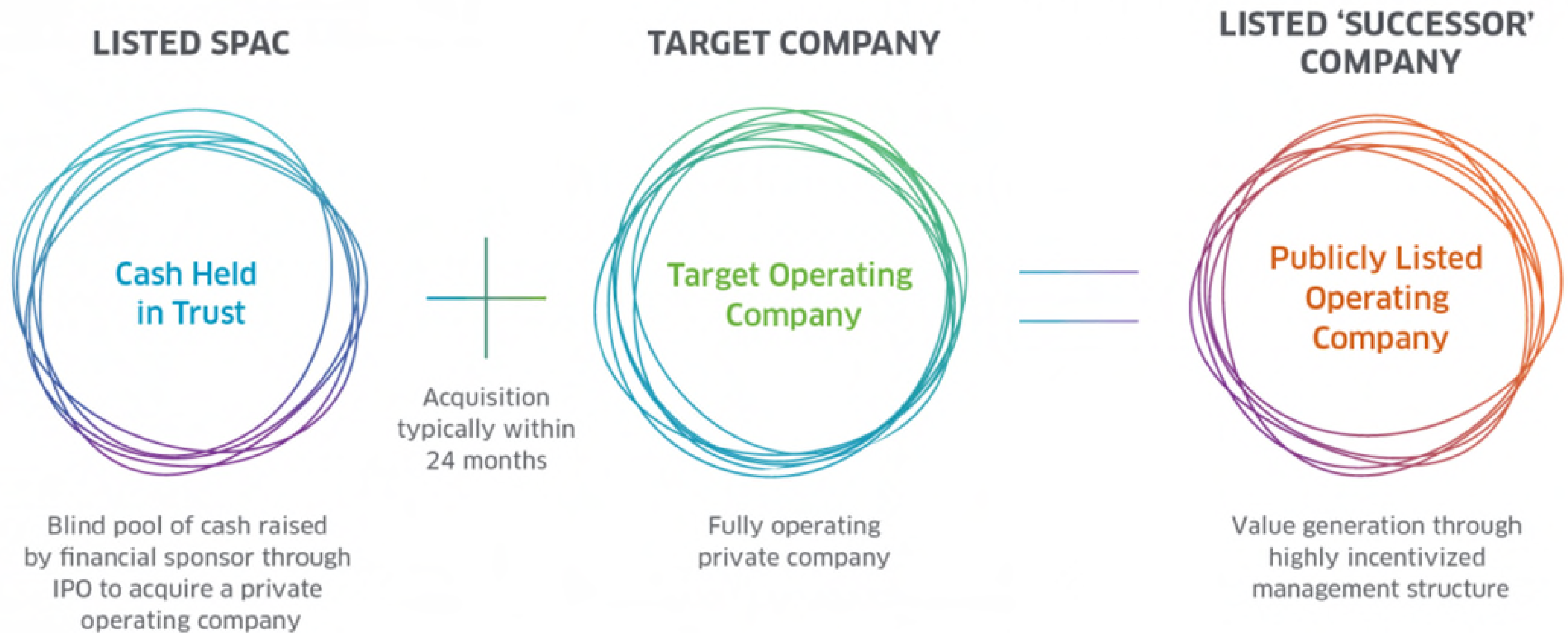
Appharvest, founded in 2017, is a US-based agricultural technology that runs high-tech indoor farms.

- Expected to go public through the SPAC route in the first quarter of 2021
- AppHarvest decided to go public through a merger with a SPAC to raise $475 million in funding
- Will value the company at $1 billion based on a price of $10 per share for its stock, since the company expects the proceeds from private investment in valued equity transactions worth $375 million from new and existing investors

Source: Market Realist

SPAC Basics

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 industry or geography, while others have no such mandate
- Post IPO, SPACs place 100% of their IPO proceeds in an interest-bearing trust account
  - Objective is to complete an acquisition (an "initial business combination")
  - Obligation to redeem investors under certain circumstances
- To compensate for illiquidity, SPACs offer investors units
  - Units consist of common stock and whole or fractional warrants
  - Warrants typically are 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, usually 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 completing the initial business combination with the private company target called "de-SPACing"
- Investors may redeem regardless of vote for or against transaction
- Investors may hold warrants even if they redeem common stock
- 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 applicable to public companies
  - The operating company usually will use the period during which the proxy statement or S-4 is being reviewed to undertake all necessary corporate housekeeping tasks

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
    - Regulatory approvals
  - Requires 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 through a 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

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

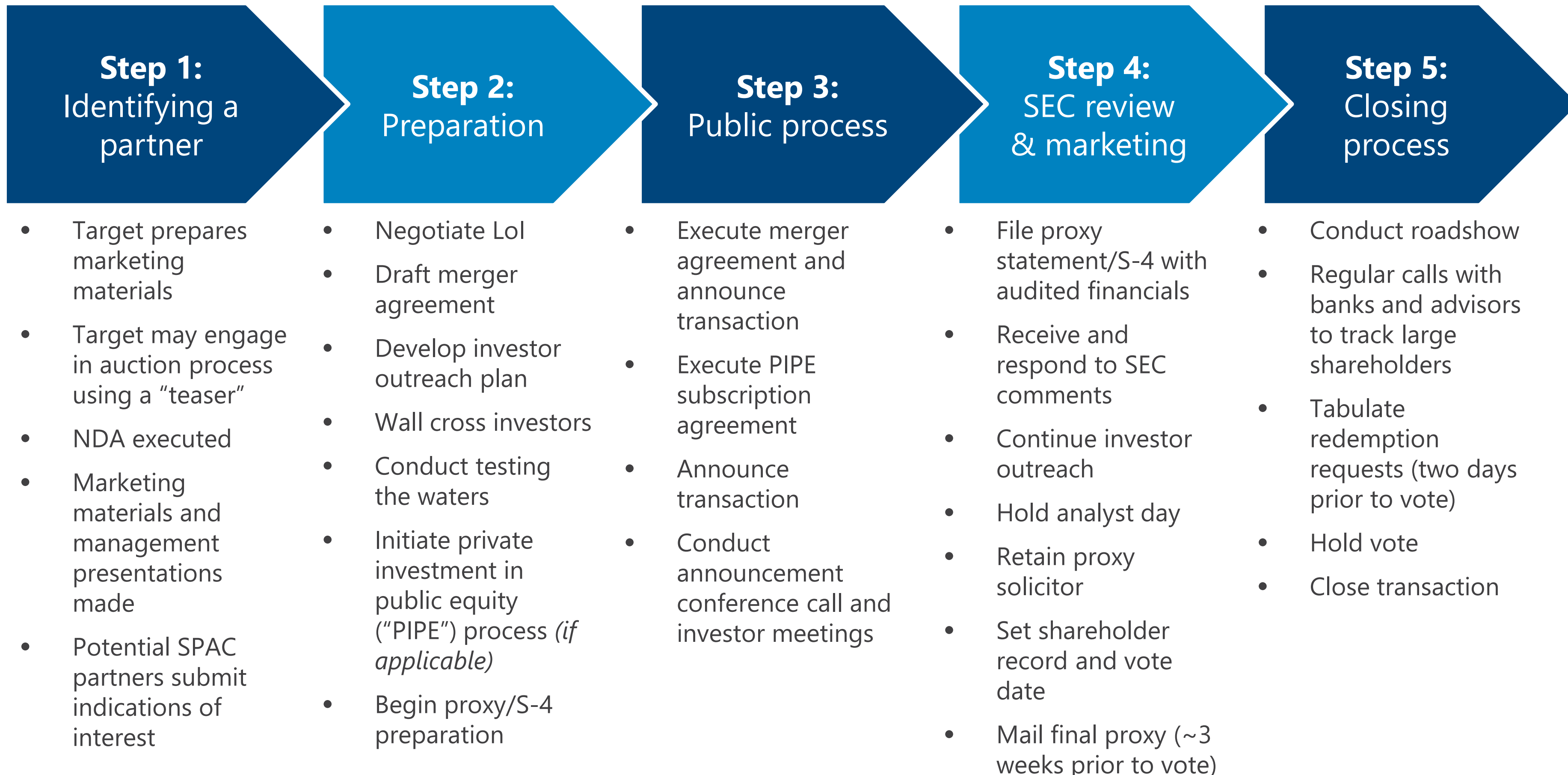
De-SPACing

De-SPACing

- Process of SPAC acquiring a private company target called "de-SPACing"
- In many respects, similar requirements and process 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 stockholders 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/S-4 filing) to close may take between two and five months (*not all that different from an IPO process*)



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

Identifying a Partner

Identifying a Partner

- SPACs typically identify prospective partners through:
  - Personal contacts that the sponsor, management and/or directors have
    - By "privately" identifying a target, SPAC may be able to avoid auction process
  - Investment bank, especially the IPO underwriter, introductions
- Private companies typically identify prospective partners through:
  - Personal contacts
  - Engaging an investment bank to either make limited introductions or conduct an auction process
- A target will typically prepare marketing materials, including a short "teaser" and a more fulsome presentation
- In an auction, the investment bank may circulate the teaser (without naming the target) or may orally invite SPACs into the process

Identifying a Partner *(cont'd)*

- Target and SPAC(s) will negotiate a non-disclosure agreement
  - SPACs require unique "trust waiver" language
- Target will share its written marketing materials with SPAC(s)
- Management will make oral presentations to SPAC(s)
- Due diligence materials may be made available to SPAC(s)
- SPAC(s) will submit indications of interest, including pricing and other material terms

Negotiating the LoI and Key Considerations in Connection with the Business Combination Agreement

Letter of Intent

- Once SPAC partner is identified, next step is typically letter of intent
- The LoI describes the most important elements of the transaction, including:
  - The structure of transaction
  - Price and consideration (earn out or not)
  - Confidentiality and exclusivity provisions
- The LoI is non-binding, but will include some binding terms, such as:
  - Exclusivity agreements, in which the seller agrees not to negotiate a sale with third parties for an agreed period of time
  - Confidentiality agreements
  - Agreements that each party will be responsible for its own transaction expenses

Letter of Intent *(cont'd)*

- **Structure of the transaction**: generally will be set out in the LoI and more often than not if it involves US entities will be structured so that the target merges into a subsidiary of the SPAC. With foreign entities, there may be a new entity formed in order to address tax concerns. We also are seeing more complex structures, including up-C structures (typically used for targets formed as LLCs) emerge.
- **Consideration**:
  - Involves coming to agreement on an overall valuation for target
  - Consideration can be comprised of stock, or stock/cash (allows for existing target stockholders to effectively obtain some immediate liquidity and sometimes referred to as a "secondary" component)
  - There may be an earn out
- **Minimum Cash Condition**: a requirement that the SPAC have specified minimum amount of cash at closing, which could come from the trust account, proceeds from a PIPE transaction, proceeds from forward purchase agreements, or any combination of these

Letter of Intent *(cont'd)*

- **Forfeiture or deferral of sponsor's equity**: sponsor may be asked to forfeit or defer some portion of their shares or their warrants in order to bridge valuation gaps
- **Lock-up agreem**ents: generally the SPAC sponsor and affiliates will already be subject to a lock-up; depending on whether a proxy statement or an S-4 is used (affecting the transferability of the securities), the target stockholders will be subject to a contractual lock-up with a term to be negotiated
- **Registration rights**: to the extent a proxy is to be used, the target stockholders may want registration rights
- **Board of directors**: generally, the SPAC sponsor and affiliates will have minority representation on the board of the continuing company

Due diligence

- After LoI, detailed or confirmatory (depending on pre-LoI process) due diligence begins, including but not limited to:
  - Valuation
  - Accounting
  - Legal
  - Tax
- Similar to any acquisition, buyer (*i.e.*, SPAC) usually conducts more due diligence
- Target company should also conduct due diligence on SPAC's sponsor, investors, and potential management structure post-merger

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 earn outs 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
- SPAC transaction agreements generally do not have "fiduciary out" if board of directors changes its recommendation

Deal terms *(cont'd)*

- 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
- The definitive agreement will be accompanied by various ancillary agreements, which may include:
  - Voting agreements
  - Support agreements
  - Lock-up agreements

Renegotiation of deal terms

- Despite flexibility of SPAC transaction agreements, closing conditions may not be met. This may occur due to:
  - High redemption levels
  - Inability to obtain alternative financing within permitted parameters
- Parties have two choices in this situation:
  - Terminate agreement
  - Renegotiate transaction terms
- Because SPAC sponsors have a strong incentive to complete deals, renegotiation is more common
- Transaction renegotiation generally takes two forms:
  - Deal made more attractive to certain or all public shareholders to decrease redemptions
    - *Example*: Sponsor may agree to forfeit some founder's shares
  - Target company may agree to waive minimum cash closing condition or accept equity instead of cash, in exchange for target-friendly amendment

Proxy Statement/Registration Statement on Form S-4

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
- 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

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

- The SEC review of the proxy statement or S-4/proxy 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:
  - When will a proxy statement be used?
  - Generally, if target's stock is closely held, and the holders are accredited investors, the SPAC will use a proxy statement instead of a registration statement on Form S-4
  - However, if a proxy statement is used, the securities received by target stockholders will be "restricted securities," and their resale will be limited to resales under Rule 144 (one-year holding period for a SPAC) or resales pursuant to a resale registration statement
  - By contrast, securities issued to target stockholders pursuant to a registration statement on Form S-4 will be freely transferable (unless held by affiliates or control persons)

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
    - The investor materials used in connection with marketing the PIPE transaction will be made public at the announcement of the entry into the definitive initial business combination and the PIPE transaction
  - While the SPAC is a public company and forward-looking statements will benefit from the safe harbor, careful consideration should be given to the forecasts for the target

Financial Statement and Financial Disclosures

Financial statement and financial disclosures

- Financial statements of the SPAC and the target
  - At least the two most recent fiscal years (or since inception if shorter)
  - Unaudited interim financial statements if required based on age of financial statements
- Has the SPAC filed a Form 10-K already?
  - If the target would qualify as an EGC if target were doing an IPO, and the SPAC is an EGC, and if the SPAC has not yet filed a Form 10-K, then, two (rather than three) years of target audited financial statements.
  - If SPAC has filed a Form 10-K, then three years of target audited financial statements, unless target is a smaller reporting company
- Unaudited pro forma financial information reflecting the proposed acquisition
- Management's Discussion & Analysis for the SPAC and the target
- Selected financial information for the SPAC and the target
- Comparative per share information

Financial statement and financial disclosures

- Although target company is a privately held company, the financial statements must comply with Regulation S-X and US GAAP requirements and be prepared in compliance with PCAOB standards
- Excerpt from Financial Reporting Manual:
  - 2200.7 Form S-4 Audit Requirements – *Target is a non-reporting company* (whether or not the issuer's shareholders are voting) – The requirement to audit depends on whether or not the Form S-4 is to be used for resales by persons considered underwriters under Securities Act Rule 145(c). See Item 17(b) of Form S-4.

Financial statement and financial disclosures
(cont'd)

- In transactions where the registrant is a SPAC, the target's financial statements become those of the registrant upon consummation of the merger. In light of this fact and the staff considers the transaction to be equivalent to an initial public offering of the target, the staff would expect the financial statements of the target to be audited in accordance with the standards of the PCAOB. *(Last updated: 10/30/2020)*

S-4 to be used for resales	S-4 not to be used for resales
Required to be audited for the periods specified in S-X 3-05(b)(2) or S-X 8-04(b), as applicable.	Latest Fiscal Year Need be audited only if practicable to do so. To determine whether an audit is practicable, consider the feasibility of completing the audit on a timely basis. Since the target's audited financial statements will be required to be included in a Form 8-K filed 71 calendar days after the 4th business day following consummation of the acquisition, the registrant should be able to explain why audited financial statements cannot be completed in time for the Form S-4, but can be completed in time to meet the Form 8-K requirements. Fiscal years before the latest fiscal year Need not be audited if they were not previously audited.

Financial statement and financial disclosures *(cont'd)*

- The proxy or S-4 will be required to include pro forma financial information. Preparation of pro formas will require determination of the accounting acquirer, which will depend on:
  - Relative voting rights in the combined company
  - Board composition
  - Composition of management of the combined entity
  - Relative size of the combinging entities
  - Terms of the exchange of equity interests

Pro forma financial information

- Pro forma financial information must reflect closing of the transaction
  - Historical information of the SPAC
  - Historical information for the target
  - Pro forma adjustments
  - Pro forma totals

Super 8-K filing

- Within four days of the SPAC merger, the combined company must file the super 8-K that includes:
  - Item 2.01 Completion of Acquisition or Disposition of Assets
  - Item 5.01 Changes in Control of Registrant
  - Item 5.06 Change in Shell Company Status
  - Item 9.01 Financial Statements and Exhibits
- Essentially require all Form 10 registration statement information, which may require updating (due to age requirements) financial statements and requires updated pro forma financial information

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

Securities Considerations Specific to SPACs and Former SPACs

Shell company status and ineligible issuer status

- SPACs constitute “shell companies” as defined in Rule 405.
  - 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, in connection with any PIPE transaction, as well as for the combined company going forward in connection with any follow-on offering
  - Holders of the SPAC’s (combined company’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
  - We discuss each of these in more detail

Availability of Rule 144

- Rule 144 requires that the company: (1) has ceased to be a shell company; (2) is an SEC-reporting company, (3) has filed all reports required to be filed with the SEC for the preceding 12 months, and (4) has filed current Form 10 information with the SEC, reflecting that the company is no longer a shell company and that at least one year has elapsed from the filing of the Form 10 information
- ***Practical effect?***
- Target holders should be aware, especially if a proxy statement was used, or if they are directors, officers, or affiliates, of the Rule 144 issue
- Target holders may want to insist on a resale registration in that instance
- PIPE investors may be insistent on the issuer maintaining the effectiveness of the resale registration statement for a longer time period
- Counsel may not want to remove the restricted legend for securities of a former SPAC regardless of the holding period making it impossible to hold in a brokerage account

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 30th (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
- Will the combined company continue to qualify as an EGC?
  - For purposes of assessing the gross revenues, it will depend on the structure of the merger
  - Forward or reverse merger?

Roadshows

- Under Rule 433, any roadshow that is a "written communication" is a free writing prospectus
- SPACs are not able to use free writing prospectuses as ineligible issuers
- Therefore, it's important that SPAC roadshow presentations are conducted to avoid being a written communication
  - Under Rule 455, a "communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means," does not constitute a written communication
- The inability to use FWPs also affects the company going forward in connection with future financings

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 <u>three years</u> after the initial business combination is completed and the super 8-K is filed

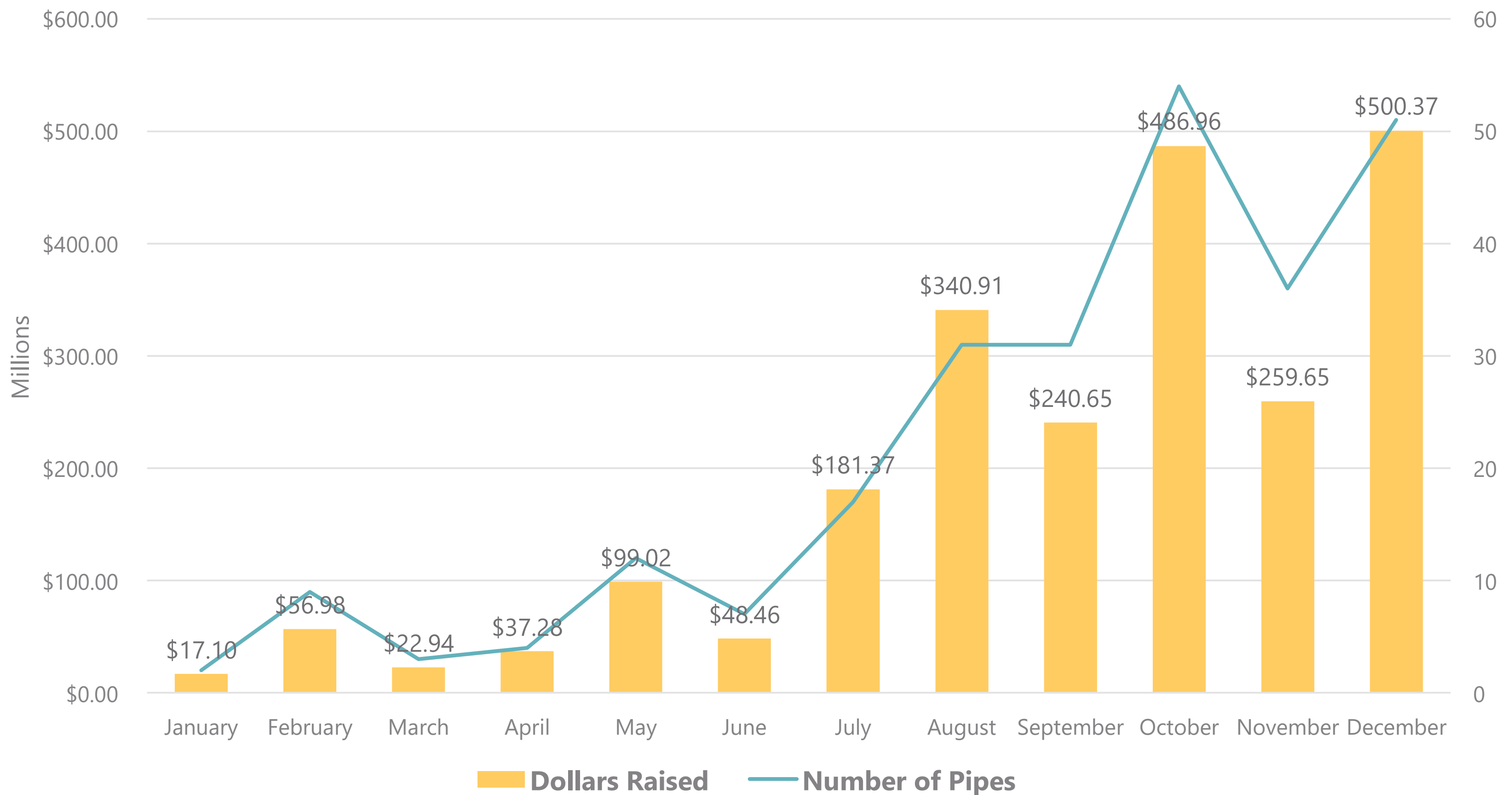
Form S-3 eligibility

- SEC Staff Guidance in the form of Compliance & Disclosure Interpretations
- **Question** 115.18: Following the merger of a private operating company or companies with or into a reporting shell company (for example, a special purpose acquisition company), may the resulting combined entity rely on the reporting shell company's pre-combination reporting history to satisfy the eligibility requirements of Form S-3 during the 12 calendar months following the business combination?
- **Answer**: If the registrant is a new entity following the business combination transaction with a shell company, the registrant would need 12 calendar months of Exchange Act reporting history following the business combination transaction in order to satisfy General Instruction I.A.3 before Form S-3 would become available. If the registrant is a "successor registrant," General Instruction I.A.6(a) would not be available because the succession was not primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company. General Instruction I.A.6(b) also would not be available because the private operating company or companies would not have met the registrant requirements to use Form S-3 prior to the succession. Where the registrant is not a new entity or a "successor registrant," the combined entity would have less than 12 calendar months of post-combination Exchange Act reporting history. Form S-3 is premised on the widespread dissemination to the marketplace of an issuer's Exchange Act reports over at least a 12-month period. Accordingly, in situations where the combined entity lacks a 12-month history of Exchange Act reporting, the staff is unlikely to be able to accelerate effectiveness under Section 8(a) of the Securities Act, which requires the staff, among other things, to give "due regard to the adequacy of the information respecting the issuer theretofore available to the public,...and to the public interest and the protection of investors." [September 21, 2020]

PIPE Transactions

PIPEs issued by SPACs

In **2020**, there were at least 257 PIPE transactions that have raised over $2.2 billion in aggregate.



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
- PIPE investors will enter into subscription agreements with the SPAC. The subscription agreement will contain representations and warranties made by the SPAC, as issuer, at the time of execution, which will be brought down at the time of closing.
- PIPE investors generally expect that at closing the representations will be made as to the combined company.

Supplemental materials

Click below to access the materials

- What's the Deal?: SPACs

This guide provides an overview on what special purpose acquisition companies (SPACs) are, their structure, why they are popular, and more.

- Traditional IPO vs. Merging with a SPAC

This chart differentiates many aspects of the IPO and SPAC merger process.

- Top 10 Practice Tips: PIPE Transactions by SPACs

This practice note discusses ten practice points that can help you, as counsel to a SPAC or its placement agent, execute a private investment in public equity (PIPE) transaction alongside a SPAC business combination transaction.

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