

# Merging with a SPAC & preparing for life as a public company

May 18, 2021

**Daniel Klausner**

Managing Director, PwC

+1 646 818 6885

[daniel.h.klausner@pwc.com](mailto:daniel.h.klausner@pwc.com)

**Richard Sola**

Partner, PwC

+1 646 306 7572

[richard.f.sola@pwc.com](mailto:richard.f.sola@pwc.com)

**Anna Pinedo**

Partner, Mayer Brown

+1 212 506 2275

[apinedo@mayerbrown.com](mailto:apinedo@mayerbrown.com)

# Agenda

- The SPAC market
- Recent SEC Staff statements on SPACs
- Timing and process for SPAC initial business combination
- Timing and process for public company readiness assessment
- Corporate governance best practices and other compliance considerations
- Expectations regarding disclosure controls and internal control over financial reporting
- Planning ahead for timely earnings reports and periodic filings



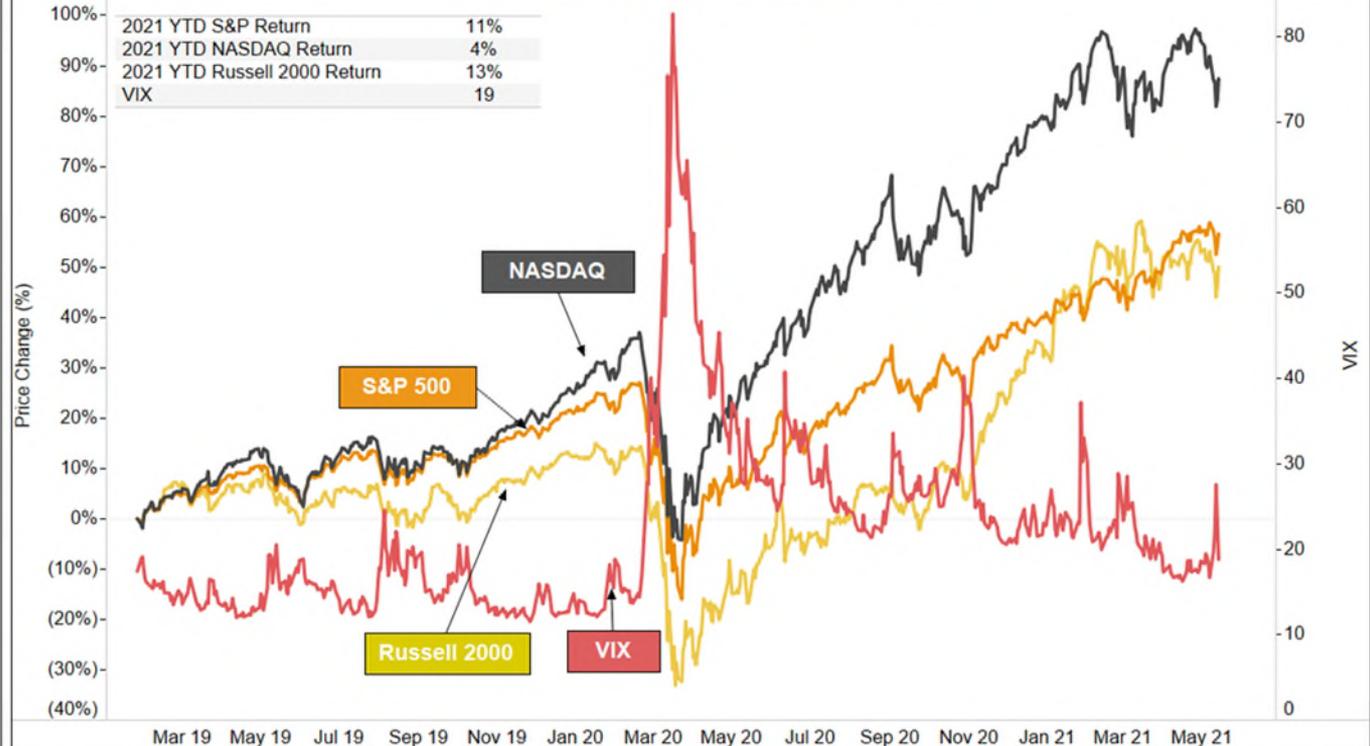
# SPAC & SPAC Merger Capital Markets Overview

# Broader markets rally despite pandemic challenges

## Key Takeaways

- Inflation, CPI, PPI and commodity prices have increased
- Hiring slowed in April, with nonfarm payrolls increasing by 266k
- Inflation rose 0.8% in April and 4.2% on an annual basis, the highest spike since 2008 driven by an increase in used car and truck prices and food
- Q1 2021 IPOs surpassed all previous quarters in terms of proceeds raised with 389 IPOs raising \$125bn
- M&A volumes underpinning the equity market - Q1 2021 at \$1.1tn which is the best start since 1998
- Unemployment rate rose to 6.1% in April amid shortage of available workers
- Q1 GDP increased by 6.4% reflecting both continued economic recovery and the ongoing impact of the COVID-19 pandemic
- Challenges
  - Inflation
  - COVID-19
  - Domestic economic / political environment
  - Challenged global growth
  - Earnings, guidance
  - Treasury yields

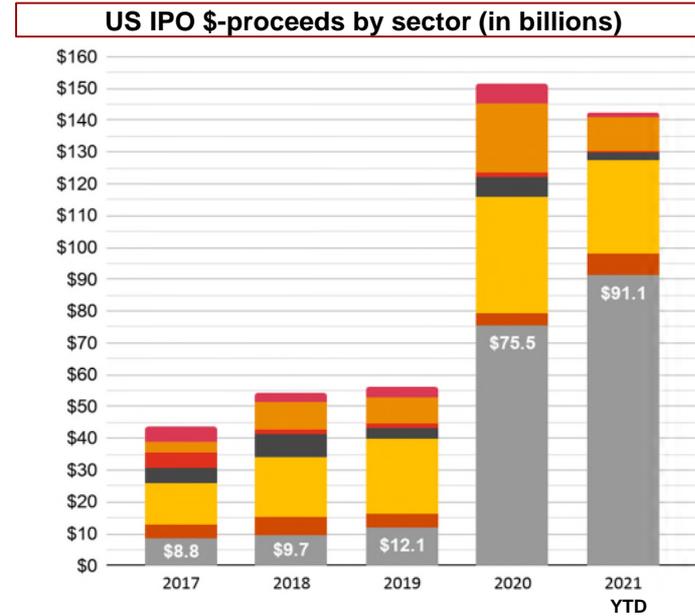
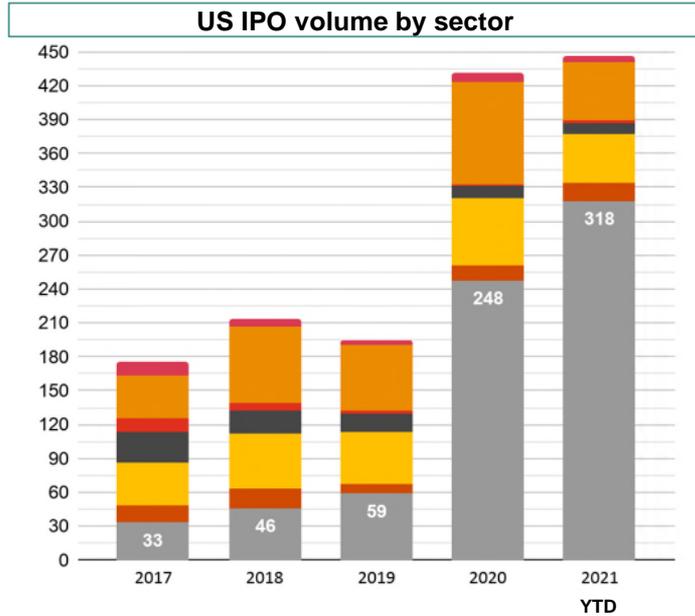
## S&P 500, Russell 2000 and NASDAQ vs the VIX



Source: S&P Capital IQ, Bureau of Labor Statistics and Department of Commerce. As of 5/14/2021.

# SPACs: no longer shunned on Wall Street

Having reemerged from the shadows, SPACs are expected to continue their rise in the coming years.



*\*Source: Dealogic as of 5/14/21. Excludes non-US offerings, non-SEC registrants, SPVs, closed-end funds, offerings less than \$25 million, and offerings that took place on OTC or pink sheet exchanges. All dual listed IPOs include the US portion only for deal value.*

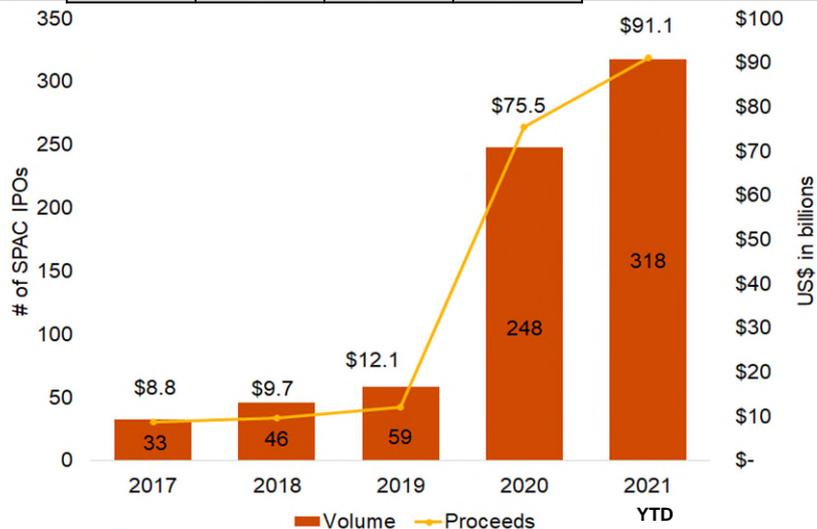
- Financial Services
- Industrial Products
- TMT
- Health Services
- Consumer Markets
- Energy, Utilities & Mining
- SPAC

# SPAC IPOs have slowed down considerably since March

2021 YTD: 318 SPAC IPOs have raised about \$91.1bn

Month	Volume	SPAC Proceeds (bn)	% of IPO Proceeds
May-20	7	\$1.34	43%
Apr-21	13	\$2.79	21%
Mar-21	109	\$32.84	66%
Feb-21	98	\$31.28	79%
Jan-21	91	\$22.90	63%
Dec-20	47	\$11.74	50%
Nov-20	32	\$6.26	56%

May-21 slows pace after record monthly highs in Feb-21 for both SPAC IPO volume and proceeds



## Recent SPAC IPOs

Pricing Date	SPAC	Proceeds (\$mm)	Proposed M&A Industry Target(s)
May 13	Artisan Acquisition Corp	\$300	Consumer Markets
May 13	Osiris Acquisition Corp	\$230	TMT
May 12	Orion Biotech Opportunities Corp	\$200	Not specified
May 7	B Riley Principal 250 Merger Corp	\$150	Not specified
May 6	Data Knights Acquisition Corp	\$100	TMT
May 4	Maquia Capital Acquisition Corp	\$160	TMT
May 3	Valor Latitude Acquisition Corp	\$200	TMT
Apr 29	ION Acquisition Corp 3 Ltd	\$220	TMT
Apr 28	Big Sky Growth Partners Inc	\$300	Not specified
Apr 28	TradeUP Global Corp	\$40	Not specified
Apr 13	TCV Acquisition Corp	\$350	Not specified
Apr 13	TPG Pace Beneficial II Corp	\$350	Not specified
Apr 8	Aldel Financial Inc	\$100	Financial Services
Apr 8	Global SPAC Partners Co	\$160	Energy, Utilities & Mining
Apr 8	Tio Tech A	\$300	Not specified
Apr 8	TPG Pace Solutions Corp	\$250	Not specified
Apr 7	Model Performance Acquisition Corp	\$50	Not specified
Apr 6	CM Life Sciences III Inc	\$480	Health Services
Apr 6	Panacea Acquisition Corp II	\$150	TMT
Apr 5	Ace Global Business Acquisition Ltd	\$40	TMT

# SPAC investment thesis

The investment thesis helps focus a SPAC's identification of a Target company and complete a merger.

While some SPACs choose to be “generalists”, most SPACs tend to focus on specific industries or geographic regions that highlight the specialized experience of founders and management teams

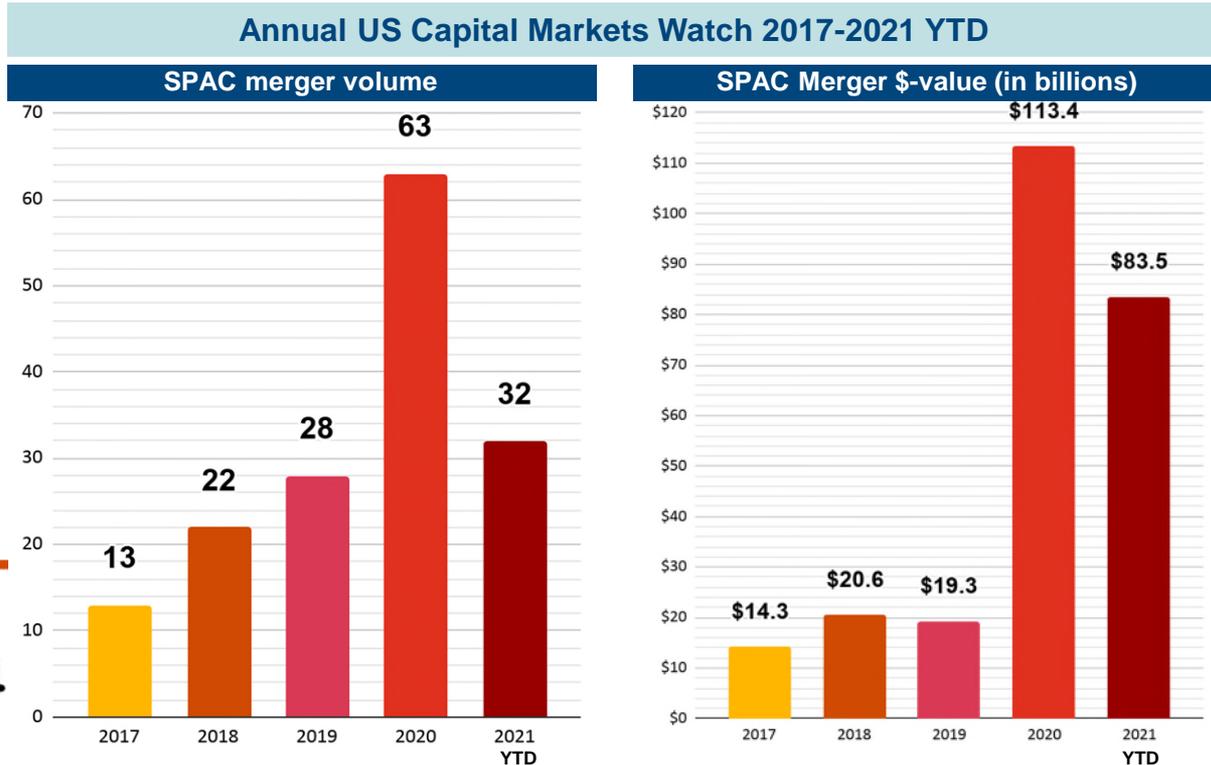
SPAC IPOs from 2012 to May 2021 YTD



**SPACs typically do not engage with Target companies prior to their SPAC IPO** as doing so could require additional disclosures of the Target company (e.g. financials)

# Capital raised through SPAC mergers

Operating companies are increasingly looking to SPACs as a source of liquidity.



# Tech and Industrial lead de-SPAC activity

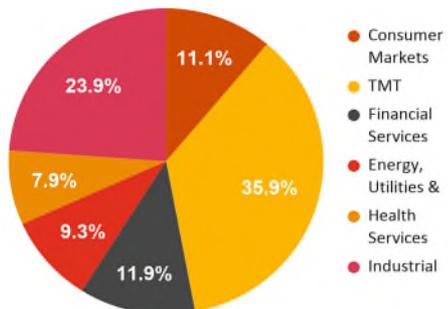
## 2017-2021 YTD: 158 SPACs have completed acquisitions



## Selected 2021 de-SPACs: sector diversity among SPAC M&A

Close Date	SPAC	M&A Target Name	M&A Target Industry
May 7	Experience Investment Corp	Blade Urban Air Mobility Inc	Consumer Markets
May 6	GigCapital3 Inc	Lightning Systems Inc	Industrial Products
May 5	Vesper Healthcare Acquisition Corp	Edge Systems LLC	Health Services
Apr 28	Star Peak Energy Transition Corp	Stem Inc	TMT
Apr 20	dMY Technology Group Inc II	Genius Sports Group Ltd	TMT
Apr 6	New Providence Acquisition Corp	AST & Science LLC	TMT
Apr 5	Collective Growth Corp	Innoviz Technologies Ltd	TMT
Apr 1	Replay Acquisition Corp	Finance of America Holdings LLC	Financial Services
Mar 30	Foley Trasimene Acquisition Corp II	Paysafe Group Ltd	TMT
Mar 25	CIIG Merger Corp	Arrival Ltd	Industrial Products
Mar 22	Longevity Acquisition Corp	Longevity Acquisition Corp	SPAC
Mar 22	Newborn Acquisition Corp	Nuvve Corp	TMT
Mar 18	Roth CH Acquisition I Co	PureCycle Technologies LLC	Industrial Products
Mar 12	Colonnade Acquisition Corp	Ouster Inc (pre-2021)	TMT
Mar 12	InterPrivate Acquisition Corp	Aeva Inc	TMT
Mar 8	CF Finance Acquisition Corp II	View Inc (pre-2021)	Consumer Markets
Feb 26	Switchback Energy Acquisition Corp	ChargePoint Inc	Energy, Utilities & Mining
Feb 16	Longview Acquisition Corp	Butterfly Network Inc (pre-2021)	Health Services
Feb 10	Mountain Crest Acquisition Corp	Playboy Enterprises Inc	TMT
Feb 10	Panacea Acquisition Corp	Nuvation Bio Inc (pre-2021)	Health Services
Feb 9	INSU Acquisition Corp II	Metromile Inc (pre-2021)	TMT
Feb 8	FS Development Corp	Gemini Therapeutics Inc (pre-2021)	Health Services
Feb 5	CC Neuberger Principal Holdings I	E2open LLC	TMT
Feb 4	AMCI Acquisition Corp	Advent Technologies Inc (MA)	TMT

## 2017-2021 YTD: Tech & Industrial Products lead de-SPAC activity



Source: Dealogic as of 5/14/21. Excludes non-US offerings, non-SEC registrants, SPVs, closed-end funds, offerings less than \$25 million, and offerings that took place on OTC or pink sheet exchanges. All dual listed POs include the US portion only for deal value.

# SPAC merger highlights

SPAC mergers in recent years have shifted towards high profile “disruptor” Target companies.

- Closing date: **April 28, 2021**
- Closing trust account: **\$350 million**
- PIPE investment: **\$225 million**
- Investments by **Activate Capital, Constellation Technology Partners, GE Ventures**
- **Stem Inc**: AI clean energy storage

**Star Peak Energy Transition Corp merged with Stem Inc (completed)**

**Foley Trasimene Acquisition Corp II merged with Paysafe (completed)**

- Closing date: **March 30, 2021**
- Closing trust account: **\$1.3 billion**
- PIPE investment: **\$2 billion**
- Investments by **Blackstone**
- **Paysafe**: payment platform specializing in digital wallets

- Closing date: **February 26, 2021**
- Closing trust account: **\$275 million**
- PIPE investment: **\$225 million**
- Investments by **Neuberger Berman**
- **Chargepoint**: electric vehicle charging stations

**Switchback Energy Acquisition Corp merged with Chargepoint (completed)**

**Longview Acquisition Corp merged with Butterfly Network (completed)**

- Closing date: **February 16, 2021**
- Closing trust account: **\$414.1 million**
- PIPE investment: **\$175 billion**
- Investments by **Fidelity, Glenview, Ridgeback, Wellington**
- **Butterfly Network**: digital health company

- Closing date: **January 7, 2021**
- Closing trust account: **\$828.1 billion**
- PIPE investment: **\$700 million**
- Investments by **SCH, Hedosophia Sequoia**
- **Clover Health**: healthcare insurance provider

**Social Capital Hedosophia Holdings Corp III merged with Clover Health (completed)**

# Recent SEC statements on SPACs

# Proceed with caution...

THE WALL STREET JOURNAL. APRIL 7 2021

## SEC Official Warns on Growth of Blank-Check Firms

Special-purpose acquisition companies have significant, undiscovered issues, says the acting director of the SEC's Corporation Finance division



U.S. SEC official warns Wall Street of risks associated with blank-check companies MARCH 31 2021

FINANCIAL TIMES

## Spac boom under threat as deal funding dries up

Hundreds of blank-cheque companies face uncertainty after investors balk at high valuations

APRIL 9 2021

MarketWatch

APRIL 12 2021

## SPAC investors worry about a 'stigma' after SEC warnings, surge in lawsuits



TheStreet. MARCH 31 2021

## Are We in a SPAC Investment Bubble Now?

Is the SPAC market dangerously overheated now, or does it still have room to grow? We looked at the evidence and talked to some experts.

CNBC

APRIL 9 2021

## SEC is scrutinizing SPAC projections, seeks clearer disclosures

# SEC Staff statements on SPACs

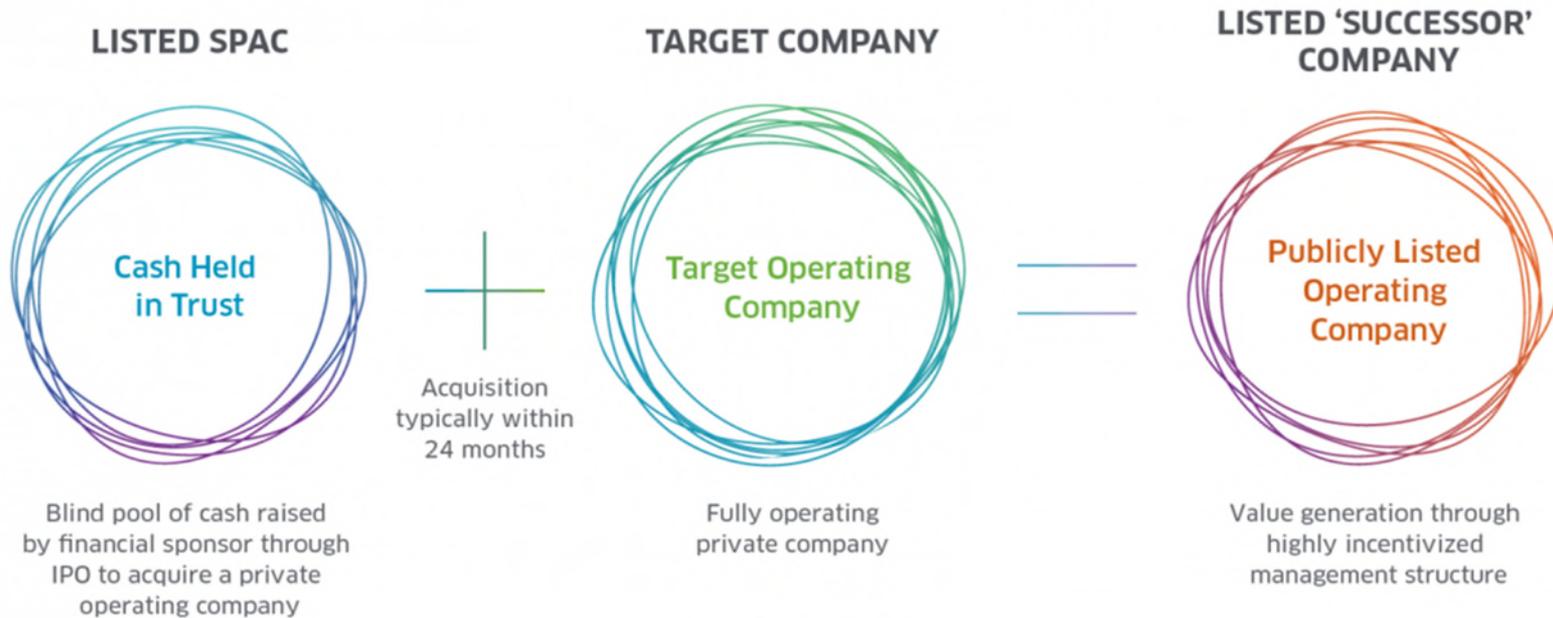
- In recent weeks, various SEC Staff members have commented publicly on SPACs, cautioning private companies:
  - That SPACs are “shell companies,” and, therefore, “ineligible issuers,” subject to a number of special securities law rules that should be well understood before proceeding with a business combination with a SPAC
  - Emphasizing that the disclosure requirements and financial statement requirements associated with the proxy or proxy/prospectus required in connection with a business combination with a SPAC is subject to securities liability
  - Noting that once a private company completes its combination with a SPAC it must be prepared to comply with all of the corporate governance, periodic reporting, and financial reporting (including disclosure controls and procedures and internal control over financial reporting) requirements applicable to public companies
  - Will there be more to come with the new administration at the SEC?

# SEC Staff guidance relating to SPAC warrants

- Statement from SEC Office of Chief Accountant on the accounting treatment of SPAC warrants, and whether warrants containing certain provisions should be treated as a liability for accounting purposes instead as equity
  - Does warrant contain provisions that provide for potential changes to the settlement amounts that depend upon the characteristics of the holder? This may be true of certain private placement warrants issued by SPACs
  - Many SPAC public warrants contain provisions relating to adjustments in the case of tender offers or exchange offers, allowing warrant holders to elect to receive cash for their warrants (this would be outside of the issuer's control)—because of this provision, the SEC Staff believes that the warrants should be treated as a liability measured at fair value, with changes in fair value reported each period in earnings
- What does this mean? For some issuers, it may require a restatement, or additional disclosure, and it will be a speed bump

# Timing and process for SPAC initial business combination

# How does a SPAC work?



# 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)*

- 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 hold warrants even if they redeem common stock

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

- Post-business combination, 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

# What are the advantages of combining with a SPAC?

- Combining with and into a SPAC may be faster than undertaking 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 business combination 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)

# What are the advantages of combining with a SPAC? *(cont'd)*

- Going public through a business combination transaction with a SPAC may provide greater certainty than IPO
  - Consideration and valuation set when business combination 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

# 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)



# Proxy statement or proxy/prospectus process

- SPAC must file a 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)
- Generally, the filing is made as soon as possible following the announcement of the transaction
- The timing of filing is not driven by any regulatory requirement; however, the market will want additional information about the transaction beyond the information that was made public in the Form 8-K filed to announce the entry into the definitive agreement.
- Similarly, PIPE investors will want to see the filing made promptly. Often the definitive agreement will stipulate a timetable
- Proxy statement or proxy/prospectus statement will contain substantially the same type of information that is required were the target company to do an IPO
- The SEC review of the proxy statement or proxy/prospectus will be similar to that for a traditional IPO filing

# Basic requirements for an S-4/F-4

- Letter to Stockholders
- Notice of Special Meeting
- Summary Term Sheet
- Questions and Answers
- Summary of the Proxy Statement/Prospectus
- Selected Historical Financial and Operating Data of Target Company
- Non-GAAP Financial Measures
- Selected Historical Financial Information of SPAC
- Cautionary Note Regarding Forward-Looking Statements
- Risk Factors
- Unaudited Pro Forma Condensed Combined Financial Information
- Comparative Share Information
- Capitalization of Combined Entity
- Special Meeting of SPAC Stockholders
- Proposal No. 1 — The Business Combination Proposal
- [Additional Proposals]
- Proposal No. [●] — The Adjournment Proposal
- Unaudited Pro Forma Financial Statements
- Management's Discussion and Analysis of Financial Condition and Results of Operations of Target Company
- Business of Target Company
- Management's Discussion and Analysis of Financial Condition and Results of Operations of SPAC
- Information About SPAC
- Executive Compensation
- Management After the Business Combination

# Basic requirements for an S-4/F-4 *(cont'd)*

- Description of Securities
- Comparison of Rights of Securityholders
- Beneficial Ownership of Securities
- Prior Sales
- Certain Relationships and Related Party Transactions
- Independent Registered Accounting Firm
- Householding Information
- Transfer Agent and Registrar of Post Business Combination Company
- Submission of Stockholder Proposals
- Future Stockholder Proposals
- Enforceability of Civil Liabilities Under U.S. Securities Laws
- Where You Can Find Additional Information
- Index to Financial Statements (both SPAC and Target)

# 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

*(cont'd)*

- 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 <u>not</u> to be used for resales
<b>Required to be audited for the periods specified in S-X 3-05(b)(2) or S-X 8-04(b), as applicable.</b>	<p><u>Latest Fiscal Year</u> 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 4<sup>th</sup> 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.</p> <p><u>Fiscal years before the latest fiscal year</u> Need not be audited if they were not previously audited.</p>

# 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 combining 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

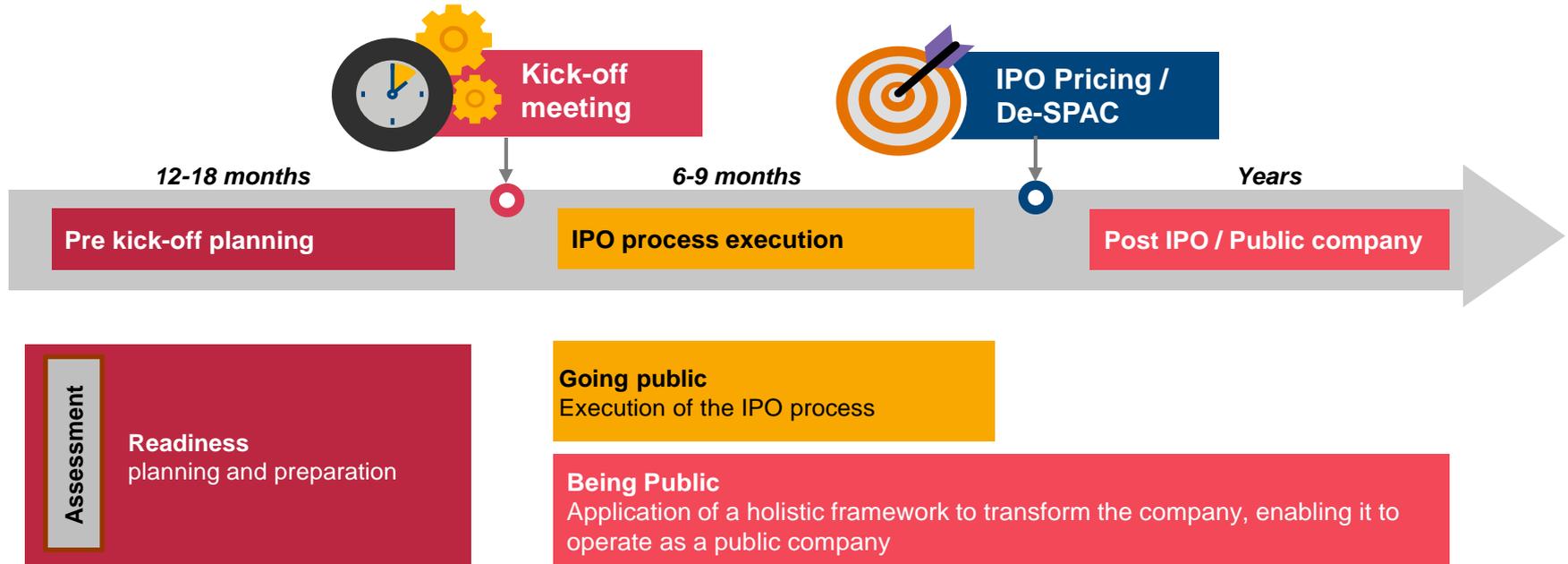
# Super 8-K filing

- 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

# Timing and process for public company readiness assessment

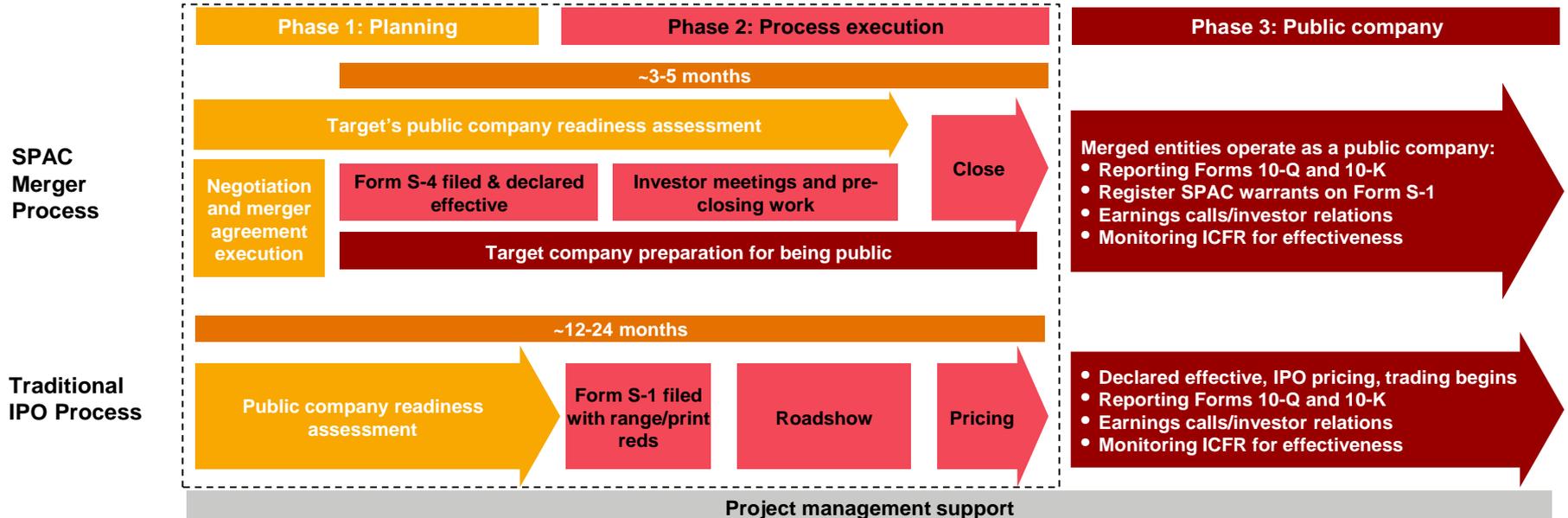
# Overview of the going public process

The better prepared a company is, the more efficient and less costly the process may be.



# Traditional IPO timelines differ from SPAC timelines

Management of the target company may consider implementing a 'three-phase' project plan similar to the preparation of a traditional IPO except in a much shorter timeline with the **readiness process typically being done in ~3-5+ months instead of ~12-18+ months.**



- Governance and communication between internal and external stakeholders
- Monitoring of project plans and milestones
- Tracking and resolving issues

# A proven public company readiness framework

An integrated solution to evaluate your organization across major functions

Our **readiness framework identifies critical functional areas** that may need to be assessed and created or enhanced by you prior to being a public company.



# Corporate governance best practices and other compliance considerations

# Corporate governance

Before SPAC Merger Agreement Finalized	Before S-4 Finalized	Through to Shareholder Vote	Through Post-Merger
<p><b>Stock Exchange Requirements</b></p> <ul style="list-style-type: none"> <li>Review of board composition and structure (controlled company/ majority independent)</li> <li>Adopt committee charters for:               <ul style="list-style-type: none"> <li>Audit committee</li> <li>Compensation committee</li> <li>Nominating and governance committee</li> </ul> </li> <li>Code of business ethics</li> <li>Adopt policies regarding:               <ul style="list-style-type: none"> <li>Whistleblower</li> <li>Regulation FD and communications</li> <li>Insider trading and blackout</li> <li>Related person transaction</li> <li>Stockholder recommendations of director nominees</li> </ul> </li> <li>Stockholder communications with board of directors</li> </ul>	<ul style="list-style-type: none"> <li>Vet/recruit directors</li> <li>Vet/recruit additional exec officers</li> <li>Obtain additional directors and officers ("D&amp;O") questionnaires</li> <li>Adopt new certificate of incorporation for public company</li> <li>Adopt new bylaws</li> <li>Enter into director indemnification agreements</li> <li>Enter into D&amp;O policy</li> </ul>	<ul style="list-style-type: none"> <li>Prepare Section 16 filings</li> </ul>	

# Compensation plans

Before SPAC Merger Agreement Finalized	Before S-4 Finalized	Through to Shareholder Vote	Through Post-Merger
	<ul style="list-style-type: none"><li>• Finalize a new option plan for company</li><li>• Finalize a director comp plan or policy</li><li>• Award initial grants</li></ul>	<ul style="list-style-type: none"><li>• Vet/discuss any 409A valuation</li><li>• Formalize employment agreements</li><li>• Formalize any consulting agreements</li><li>• Formalize/verify non-disclosure agreements ("NDAs") for employees</li><li>• Employee handbook/manual</li><li>• Other human resources &amp; benefits review</li></ul>	

# Risk management assessment/compliance policies

Before SPAC Merger Agreement Finalized	Before S-4 Finalized	Through to Shareholder Vote	Through Post-Merger
	<ul style="list-style-type: none"> <li>• Privacy policy</li> <li>• Document and records retention policy</li> <li>• Cybersecurity risk analysis</li> <li>• Intellectual property assessment, including assessing use of any open source software (if relevant)</li> <li>• Insurance (ensure that insurance policies are in place; adequate)</li> <li>• Vendor management program</li> <li>• Foreign Corrupt Practices Act ("FCPA") review (if relevant)</li> <li>• Anti-money laundering policy</li> <li>• Tax review/review prior to S-4 being finalized any tax issues</li> <li>• Business continuity policy</li> </ul>		

# Ongoing public company reporting

Before SPAC Merger Agreement Finalized	Before S-4 Finalized	Through to Shareholder Vote	Through Post-Merger
		<ul style="list-style-type: none"><li>• Auditor pre-approval policy</li><li>• Audit committee checklist</li><li>• Audit committee assessment</li><li>• Nominating &amp; governance committee checklist</li><li>• Nominating &amp; governance committee assessment</li><li>• Compensation committee checklist</li><li>• Compensation committee assessment</li><li>• Disclosure committee charter</li><li>• Put in place upward certification process</li><li>• Website review</li><li>• Investor relations website (to comply with securities exchange requirements)</li><li>• 34 Act reporting calendar, with schedule for earnings calls, 10-Qs, and 10-Ks</li><li>• Required 8-K checklist</li><li>• Quarterly blackout calendar</li><li>• Signature authority policy/matrix</li></ul>	

# Ongoing public company reporting *(cont'd)*

Before SPAC Merger Agreement Finalized	Before S-4 Finalized	Through to Shareholder Vote	Through Post-Merger
			<ul style="list-style-type: none"> <li>• Work with audit firm/consultant/accounting/finance:               <ul style="list-style-type: none"> <li>• Ensure PCAOB financial statement availability</li> <li>• Assess accounting systems and confirm sufficiency for reporting purposes</li> <li>• Begin process of establishing internal controls for accounting and reporting purposes</li> <li>• Determine key metrics to be disclosed to investors quarterly</li> <li>• Determine non-GAAP measures to be reported</li> <li>• Establish process for month-end and quarterly financial close process with a financial close process task list</li> <li>• Produce template for earnings release</li> <li>• Evaluate need for an internal audit function (internal or outsourced)</li> </ul> </li> <li>• Investor Relations               <ul style="list-style-type: none"> <li>• Communications/Reg FD training</li> <li>• Retain public relations firm/investor relations firm/consultant</li> </ul> </li> <li>• Establish process for managing press releases and other communications (formalize review, approval, dissemination process, etc.)</li> </ul>

# Expectations Regarding Disclosure Controls and Internal Control Over Financial Reporting

# Public company compliance requirements

## Forms 10-K, 10-Q

The **periodic report states** that financial information complies with the Exchange Act and fairly presents the financial condition and results of the operations

## Form 10-K

**404(a) - Management's attestation** on internal controls over financial reporting

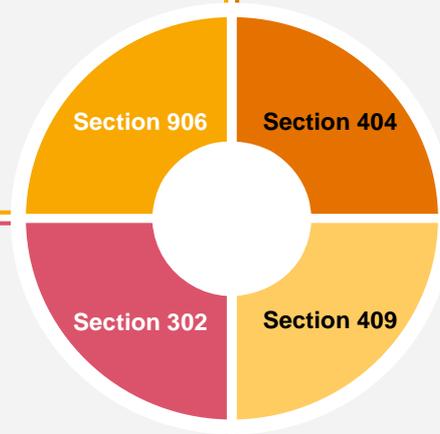
**404(b) - Auditor's attestation** on internal controls over financial reporting

## Form 10-Q, 10-K

**Quarterly management certification** of financial statements and effectiveness of disclosure controls

## Form 8-K

Disclosure made to the public on a **"rapid and current basis"** of **material changes** to financial condition or results of operations



# Illustrative SOX readiness timeline

Years leading up to becoming a public	IPO year First partial year as a public company		Future years as a public company
SOX readiness	Preliminary SOX	Remediation and SOX testing	First 404 opinion and ongoing SOX maintenance
<p><b>SOX readiness</b></p> <ul style="list-style-type: none"> <li>• <b>Set up Disclosure Committee</b> and process supporting Section 302 &amp; 906 certifications</li> <li>• Establish documentation and gap assessment, and Internal Audit</li> </ul>	<p><b>IPO year</b></p> <ul style="list-style-type: none"> <li>• <b>Disclose known material weaknesses</b> in Form S-1 - appropriate risk factor</li> <li>• Continue documentation efforts</li> <li>• <b>Complete initial testing</b> and focus on remediation activities</li> <li>• File 10-Qs, including Section 302 &amp; 906 certifications</li> </ul>	<p><b>First 10-K filing</b></p> <ul style="list-style-type: none"> <li>• File first 10-K, continue filing 10-Qs, including Section 302 &amp; 906 certifications</li> <li>• Complete documentation and remediation by mid-year of all control gaps</li> <li>• <b>Enhance level of management testing</b></li> <li>• <b>Optimize controls structure;</b> increase controls reliance further for financial audit</li> </ul>	<p><b>First and ongoing 404 opinions</b></p> <ul style="list-style-type: none"> <li>• Continue filing public financial reports, including Section 302 &amp; 906 certifications</li> <li>• Management's report on the effectiveness of internal controls over financial reporting is due in the Form 10-K (404(a))</li> <li>• <b>Auditor opinion on the effectiveness of ICFR</b> is due once company no longer qualifies as EGC (404(b))</li> <li>• <b>Optimize controls structure;</b> increase controls reliance further for financial audit</li> </ul>

# Planning ahead for timely earnings reports and periodic filings

# Operating as a public company

- As a publicly traded company with a class of securities listed on the NYSE or Nasdaq, the company will be required to comply with the following:
  - The Securities Act of 1933 (the “Securities Act”),
  - The Securities Exchange Act of 1934 (the “Exchange Act”),
  - The Dodd-Frank Wall Street Reform and Consumer Act (“Dodd-Frank”),
  - The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”), and
  - The NYSE corporate governance requirements.

# Operating as a public company *(cont'd)*

- The Sarbanes-Oxley and the Dodd-Frank Acts implemented changes, either directly or through rules adopted by the national securities exchanges, to public company governance and disclosure requirements to enhance independent auditing, make directors more independent, empower shareholders, and provide increased transparency, primarily as it relates to executive pay and accounting matters.
- Some of these requirements that the company will be subject to include:
  - Audit committee requirements;
  - Nominating and governance committee requirements;
  - Compensation committee requirements;
  - Whistleblower protections; and
  - Code of ethics disclosures.

# Sarbanes-Oxley

- **Compliance**

- Sarbanes-Oxley requires that the management team of public companies assess the effectiveness of the internal controls over financial reporting (“ICFR”). Under Sarbanes-Oxley, the company is required to submit an annual assessment of the effectiveness of the company’s ICFR to the SEC. Additionally, among other things, Sarbanes-Oxley requires all financial reports to include an internal controls report.
- The company must establish a financial accounting framework that can generate financial reports that are readily verifiable with traceable source data. These source data must remain intact and cannot undergo undocumented revisions. In addition, any revisions to financial or accounting software must be fully documented as to what was changed, why, by whom and when.

# Sarbanes-Oxley *(cont'd)*

- **404(b) Exemption**

- For so long as the company remains an EGC, the company is exempt from Section 404(b), which requires a publicly held company's auditor to attest to, and report on, management's assessment of its internal controls.

- **Violations**

- In addition to potential lawsuits and negative publicity, a company officer who does not comply or submits an inaccurate certification is subject to a fine of up to \$1 million and ten years in prison, even if done mistakenly. If a wrong certification was submitted purposely, the fine can be up to \$5 million and 20 years in prison.

# Exchange Act reporting

- The Securities Act and the Exchange Act set forth requirements for periodic and current reports (see below) with the SEC that are also made public in order to keep stockholders informed, prohibit insider trading and restrict certain resales of company securities.
- The Exchange Act contains ongoing disclosure requirements designed to keep investors informed on a rapid and current basis of information concerning material changes in the financial condition or operations of the company:
  - Annual Report on Form 10-K;
  - Quarterly Reports on Form 10-Q; and
  - Current Reports on Form 8-K.
- Missing, late or delinquent Exchange Act reporting could be subject to statutory fines and penalties on the company and its officers and directors.

# Exchange Act reporting *(cont'd)*

- **Annual Report on Form 10-K**

- The company will submit a Form 10-K to the SEC as the annual report for the company's preceding fiscal year.
- The company's fiscal year will end December 31.
- Primary contents of the Form 10-K include:
  - Audited financial data for the covered time period;
  - Description of the company's business;
  - Certain information on management and principal stockholders; and
  - Analysis of the company's financial results of operations and liquidity.
- The due date for Form 10-K will initially be within 90 calendar days after the end of the company's fiscal year, but as the company grows, it may drop to 60 calendar days.

# Exchange Act reporting *(cont'd)*

- **Quarterly Report on Form 10-Q:**
  - The company must submit quarterly reports after each of the first, second and third quarters to the SEC on Form 10-Q. The fourth quarter is covered by the annual report on Form 10-K.
  - Primary contents of the Form 10-Q include:
    - Unaudited financial data;
    - Analysis of the company's financial results of operations and liquidity for the last quarter; and
    - Descriptions of significant nonrecurring events which occurred during the quarter, such as the commencement of significant litigation or the submission of matters to a vote of stockholders.
  - The due date for Form 10-Q initially will be within 45 calendar days of the end of each quarter (other than the company's fourth quarter), but as the company grows, it may drop to 40 calendar days.

# Exchange Act reporting *(cont'd)*

- **Current Reports on Form 8-K**

- In addition to the periodic reporting requirements, the company must disclose on a current basis (within 4 business days) the occurrence of significant corporate events on Form 8-K. This acts as an update to stockholders to previously filed quarterly and/or annual reports.
- Significant events include, without limitation:
  - Changes in control of the company;
  - Bankruptcy;
  - Material acquisitions or dispositions;
  - Change in outside auditor;
  - Entry into material agreements;
  - Resignation of any director and executive officers;
  - Material news release or data presentation;
  - Appointment of directors and officers; and
  - The creation of a material direct financial obligation or a material financial obligation under an off-balance sheet arrangement, etc.

# CEO and CFO certifications

- Once public, the company's chief executive officer and chief financial officer must evaluate the company's internal controls and disclosure controls on a quarterly basis and certify the company's periodic reports that contain financial statements (Form 10-K and Form 10-Qs).
- The Exchange Act rules require the company's chief Executive officer and chief financial officer to include certifications in periodic reports filed with the SEC that address:
  - The accuracy, completeness and fair presentation of the report's disclosure;
  - The establishment and maintenance of "disclosure controls and procedures";
  - Deficiencies in, and material changes to, internal controls over financial reporting;
  - Compliance with the Exchange Act; and
  - That information contained in the periodic report fairly presents the financial condition of the company.
- The company must adopt disclosure controls and procedures to be able to satisfy these requirements (see next slide).
- Criminal penalties can be levied against the chief executive officer and/or the chief financial officer personally, which could result in significant fines.

# Disclosure controls and procedures

- “Disclosure controls and procedures” are controls and other procedures designed by companies to ensure that the information required to be disclosed in the reports filed by them under the Exchange Act, on a timely basis, is:
  - Recorded,
  - Processed,
  - Summarized, and
  - Reported.
- Disclosure controls and procedures include, but are not limited to, the controls and procedures designed to ensure that information required to be disclosed by a company in its Exchange Act reports is appropriately accumulated and communicated to the company’s management, including its principal executive and financial officers, to allow timely decisions regarding required disclosure.
- **Note:** It is important to have an “up-the-chain” process of reporting from lower managers to the company’s chief executive officer and chief financial officer.

# Accuracy of financial reports

- Every report filed with the SEC pursuant to the Exchange Act (i.e., Forms 10-K, 10-Q and 8-K) that contains financial statements which are required to be prepared in accordance with (or reconciled to) generally accepted accounting principles (“GAAP”) must reflect all material correcting adjustments that have been identified by the company’s independent auditor in accordance with GAAP and applicable SEC rules and regulations.
- Every public disclosure (including SEC filings and press releases) by the company that contains pro forma financial information must be presented in a manner that:
  - Does not contain an untrue statement of material fact or omit to state a material fact necessary to make the pro forma financial information, in light of the circumstances under which it is presented, not misleading, and
  - Reconciles the pro forma presentation with the company’s GAAP results.

# FREE WRITINGS + *Perspectives*

The **Free Writings & Perspectives** (FW&Ps) blog provides news and views on securities regulation and capital formation. The blog provides up to the minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or “late state” private placements, PIPE transactions, IPOs and the IPO market, new financial products, and any other securities related topics that pique our and our readers’ interest.



Scan here with your phone's camera to visit [www.freewritings.law](http://www.freewritings.law) and subscribe to our posts!



Also scan here to go directly to our dedicated **SPACs & SPAC Transactions Resource Page!**

# FREE WRITINGS + *Perspectives*

In our **SPACs & SPAC Transactions Resource** page, you will find additional presentations, charts, podcasts and other resources, including:

- [What's the Deal? – SPACs](#) 
- [Chart: Traditional IPO vs. Merging with a SPAC](#)
- [Top 10 Practice Tips: PIPE Transactions by SPACs](#) (Lexis Nexis)
- [An Overview of SPACs](#) (A)
- [PIPE Transactions in Connection with SPAC Business Combinations](#) (A)
- [Special Securities Law Considerations for SPACs & SPAC Transactions](#) (A)



Scan here with your phone's camera to visit [www.freewritings.law](http://www.freewritings.law) and subscribe to our posts!



Also scan here to go directly to our dedicated **SPACs & SPAC Transactions Resource Page!**

## Disclaimer

These materials are provided by Mayer Brown and reflect information as of the date of presentation.

The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.

You may not copy or modify the materials or use them for any purpose without our express prior written permission.