

SPACs: Up, up, and...away:

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SPAC Market Update

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SPAC IPO and M&A Activity

2020 – 2021 YTD

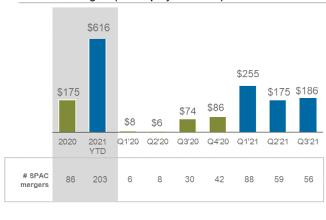
October 7, 2021

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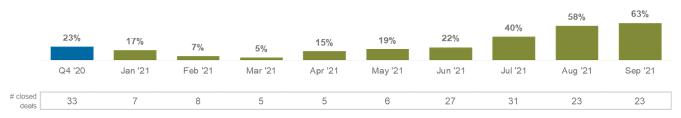




U.S. SPAC mergers (total equity value \$bn)



Redemptions have been increasing in recently completed SPAC mergers



Source: Dealogic as of 10/01/2021 Includes SPAC IPOs ≥\$100mm since 2015

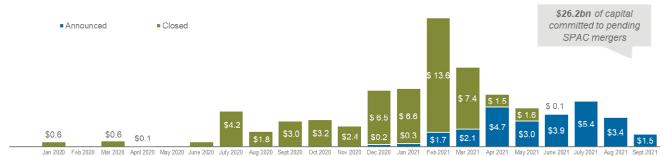
SPAC PIPE Activity

2020 – 2021 YTD

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SPAC PIPE deal volume by ann. month 2020-2021 YTD (\$bn)



Announced pending de-SPAC transactions trading levels



Source: FactSet and Bloomberg

Note: Market data as of 101/121 close. De-SPAC represents Bloomberg
Index for SPAC deals announced but not closed

PrivateRaise as of 101/1/21 includes SPAC deals >550mm; excludes deals
with no pIPE commitment.

Key PIPE headwinds

- Muted after market performance
- Significant capital committed to pending mergers
- Steady increase in redemptions
- Illiquidity of the PIPE

J.P.Morgan

Proceed with caution....

THE WALL STREET JOURNAL.

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

APRII 7 2021

FINANCIAL TIMES

Spac boom under threat as deal funding dries up

APRIL 9 2021

Market Watch

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

APRIL 12 2021



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

MARCH 31 2021

TheStreet

Are we in a SPAC Investment **Bubble Now?**

MARCH 31 2021



SPAC-related SEC developments

December 23, 2020

Division of Corp Fin releases CF Disclosure Guidance Topic No. 11 outlining considerations for issuers in connection with both SPAC IPO registration statements and proxy statements/prospectuses

March 31, 2021

202101

Staff of Division of Corp Fin releases a public statement noting considerations that private companies should take into account before entering into an initial business combination with a SPAC

Office of Chief Accountant releases a statement directed at private companies, boards of directors, and audit committees

April 12, 2021

Acting Director of Division of Corp Fin and Acting Chief Accountant release a statement on accounting and reporting considerations for warrants issued by SPACs

April 8, 2021

Acting Director of Division of Corp Fin comments on securities liability issues and forward-looking statements

July 13, 2021

SEC charges SPAC, sponsor, merger target, and CEOs for misleading disclosures ahead of proposed business combination

July 29, 2021

SEC charges founder of Nikola Corp. with fraud

202103

October 5, 2021

Chair Gensler gives Congressional testimony before the House Financial Services Committee; addresses SPACs

20210

2020Q3

2020Q4

20Q4

September 23, 2020

Division of Corp Fin publishes C&DI Question 115.18, relating to a de-SPACed surviving company's satisfying Form S-3 eligibility requirements after a SPAC business combination

March 10, 2021

Office of Investor Education publishes an Investor Alert concerning celebrity involvement with SPACs

March 12, 2021

Investor Advisory Committee hosts a panel discussion on SPAC-related risks

April 29, 2021

202102

SPAC Act introduced in the Senate

June 11, 2021

SEC announces annual regulatory agenda, including amendments to address SPACs

May 26, 2021

Chair Gensler gives Congressional testimony on IPO and SPAC market

September 9, 2021

Investor Advisory Committee's Investor as Purchaser and Investor as Owner Subcommittees issue draft recommendations to the SEC regarding SPACs

SPACs: They're Not Perfect, But They're Not Investment Companies

Professor Joseph A. GrundfestStanford Law School and
The Rock Center for Corporate Governance



Outline

- Have two nicer law professors ever filed a weaker complaint?
- SPACs have problems, but they are not investment companies.
- The statutory definition: ICA 3(a)(1)
- The economic realities test
- The dictionary definition of "Primarily"
- The Ouestion Presented
- Data Driven Approaches
- Promoter Incentives
- Market Disclosures and Course of Conduct
- Elizabeth Warren
- This is a very incomplete survey of the deep problems with the Investment Company Theory of SPACs.



Investment Company Act Sec. 3(a)(1)

- (a) Definitions
 - (1) When used in this subchapter, "investment company" means any issuer which—
 - (A) is or holds itself out as being **engaged primarily**, or **proposes to engage primarily**, in the business of investing, reinvesting, or trading in securities;
- Obvious questions:
 - 1. What is a SPAC's primary business?
 - Is it primarily "investing, reinvesting, or trading in securities"?
 - 3. Is it primarily finding a merger partner that will be profitable for the promoters/investors?

The Economic Realities Test

- The Supreme Court frequently explains that securities law is interpreted in light of the "economic realities" of the transaction.
- "In discharging our duty, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation." Reves v. Ernst & Young, 494 U.S. 56 (1990) citing Tcherepnin v. Knight, 389 U.S. 332, 336, (1967) ("form should be disregarded for substance and the emphasis should be on economic reality")."
- Securities laws apply in light of "the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties." International Broth. of Teamsters, v. Daniel, 439 U.S. 551 (1979), citing United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 851–852 (1975); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Howey, 328 U.S., at 298, SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 80 (1959) (Brennan, J., concurring) ("[O]ne must apply a test in terms of the purposes of the Federal Acts . . .").

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Defining "Primarily"

- Courts regularly refer to dictionaries when interpreting statutory terms.
- "Primarily" is defined as "first, originally; mainly, principally,"
 - Source: Webster's New World Dictionary of the American Language.
- This is quite distinct from the definition of "solely," which means "only, exclusively."

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The Question Presented

- What is the "economic reality" as to whether SPACs hold themselves out as being engaged primarily, or proposing to engage primarily, in the business of investing, reinvesting, or trading in securities?
- Three approaches to the question:
 - Data-driven
 - Incentive-driven
 - Disclosure-driven



The Data

- Between January 1, 2009 and May 26, 2021, there were 826 completed SPAC transactions: 96.9% of those SPACs representing 98.5% of capital raised, successfully found merger partners.
- Obviously, the overwhelming percentage of SPAC dollars 98.5% are invested in operating companies, not in capital pools of the sort intended to be regulated by the Investment Company Act.
- Only 1.51% of the capital raised for SPACs was not invested in an opco.
- On a deal count basis, only 3.24 % of SPACs failed to find a partner.
- Many of the failed SPACs in this sample came in earlier years (2009 2015) when deal sizes were far smaller.
- Deal count: 26 fails of 803 SPACs launched.
- Proceeds: \$3.561m returned out of \$235.4275m raised.

Source: Kristi Marvin, SPACInsider.com

Promoter Incentives

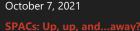
- Promoters gain significant returns only if they find merger partners.
- Absent a merger, the corpus is returned and they lose transaction costs and the opportunity cost of time spent in a failed merger hunt.
- There is an overwhelming incentive to close a deal and not to manage a collection of low-return assets subject to a two-year redemption.
- To assume that promoters start SPACs primarily to manage lowreturn assets on which they earn no fees for two years assumes that promoters are idiots.
- Discovery would demonstrate that promoters are overwhelmingly, not just primarily, in the business of identifying merger partners.
- Incentives to acquire are so strong that concern prevails that promoters recommend bad deals or overpay near sunset to avoid returning capital.

Market Expectations

- The market is aware that the vast majority of SPACs find merger partners.
- The market is aware of promoter incentives.
- SPAC prospectuses emphasize the merger incentive: there is trivial emphasis on the ability to earn returns in the event of sunset.
- Descriptions of management's focus on deal execution and management, not on portfolio management
- The portfolios are managed in a very safe and largely nondiscretionary, low-return manner. Emphasis is on safety, not returns.
- The Commission's staff is well aware of the ICA and of the issues raised by the Two Nice Professors. The Commission has nonetheless allowed hundreds of SPACs to go effective without raising this question.
- Does the Commission not know the law? Is the Staff asleep at the switch? Or is there no violation of the ICA?

Senator Warren

- Senator Warren writes: "SPACs are publicly traded "shell companies that raise money with the sole purpose of buying a private company to take it public.""
 - Source: Letter from Senator Elizabeth Warren to Michael Klein, September 22, 2021, quoting Margot Patrick and Amrith Ramkumar, "Led by 'Mr. SPAC,' Credit Suisse Cashes In on Blank-Check Spree," The Wall Street Journal, February 5, 2021, https://www.wsj.com/articles/led-by-mr-spac-credit-suisse-cashes-in-on-blank-check-spree-11612527389.
- "Sole purpose" is obviously stronger than the statutory "primary purpose."
- Senator Warren seems persuaded that SPACs are not investment companies.
- QED.









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