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Is a De-SPAC Right for Your Company?

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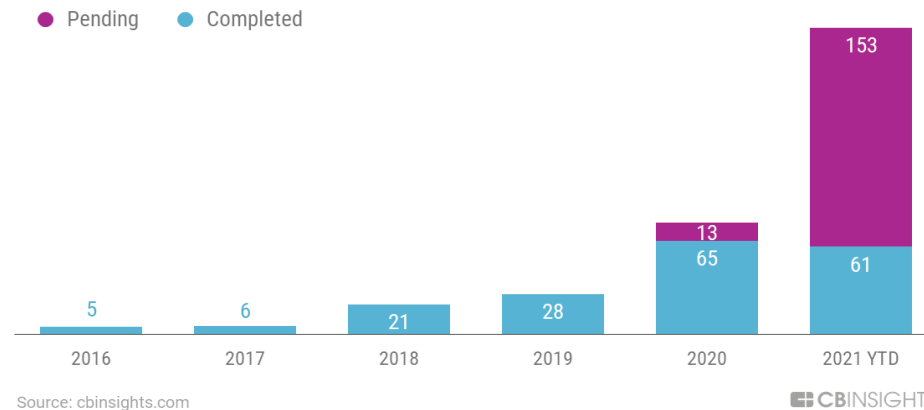


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What is the Current State of the de-SPAC Market?

2021's SPAC merger count has already more than doubled from last year

Number of SPAC mergers (pending and completed), 2016 – 2021 YTD (as of Q2'21)



- Recent SEC Actions and Guidance from the SEC
- SPAC warrants in the news
 - Impact on de-SPAC transactions

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Why do a de-SPAC transaction instead of other types of transactions?

Pros

- High premium being paid by SPACs
- **Potentially** shorter lead time than an IPO
- Current shareholders of the target may be able to cash-out some of their equity interests
- Upfront pricing (subject to changing economics)
- Strategic partnership with sponsors

Cons

- Equity given to SPAC sponsors
- PIPE investors with preferential pricing
- Potential uncertainty due to redemptions and failed PIPE transactions
- Higher costs for professional fees than in traditional M&A transactions
- Costs and time to run the Company as a public company after the transaction

What are the major legal differences between de-SPAC and traditional sale?

- Sellers typically have no or limited recourse against the SPAC for a failed deal
- Sellers typically do not have post-closing liability under the purchase agreement (no indemnity; no survival of reps and warranties)
- Closing conditions often include minimum cash requirements and stockholder approval, and may include forfeiture of sponsor equity
- Provisions relating to the PIPE if there will be one
- A covenant to deliver PCAOB financial statements if the seller does not already have them
- Provisions relating to the SEC process—preparation and filing of the S-4 or proxy statement, stockholder meeting if required
- May include covenants and/or conditions relating to management and governance post-closing

What are the accounting considerations for a de-SPAC transaction?

- IPO vs. de-SPAC transaction accounting considerations
 - Identification of the accounting acquirer (SPAC or target)
 - Preparation of pro formas to present the accounting for the transaction
 - Accounting for additional investments (i.e. PIPE financing or any other additional funding)
 - Additional filing requirements
 - Proxy
 - Super 8-K
 - S-1
 - Comfort letter—typically not required as compared to traditional IPO

What is the timing for a de-SPAC transaction?

- Parties need to negotiate a Business Combination Agreement or Merger Agreement (and sometimes parties also negotiate a PIPE or Forward Purchase agreement upfront)
- From the signing of the Business Combination Agreement or Merger Agreement, it takes approximately three to four months (with the longer ones taking six months)
- The SPAC and the Target will be required to prepare an S-4 or Proxy Statement, or similar document, which will be subject to SEC comments
- The Target will need to become “public ready” before the closing
- The SPAC will need to hold a shareholder meeting
- Filing of Super 8-K
- A Target can pre-emptively start preparing some of the sections required for the S-4 or Proxy Statement and hire outside third-party firms that specialize in preparing certain sections of an S-4 or Proxy Statement (such as MD&A)

What are the Financial Statement Requirements for Target?

- Financial Statement Requirements
 - Audited financial statements
 - Quarterly unaudited financial statements
 - MD&A
 - Pro formas

How to prepare for a de-SPAC transaction?

- Preparation for de-SPAC transaction and post-merger considerations
 - Internal accounting and finance staffing
 - SEC reporting requirements
 - Post merger tax structure
 - IT systems
 - Cyber security
 - Internal controls

What are some of the things a seller needs to plan for in terms of becoming a public company post-de-SPAC?

Long before closing, the seller, together with the SPAC, needs to be ready for the operating business to function as a public company.

- First, do you have the right team?
 - Board of Directors and committees—corporate governance requirements
 - Executive team
 - Finance/accounting team
 - Investor relations
- Are you and your insiders prepared to deal with the following?
 - Insider trading restrictions
 - Section 16 reporting and short-swing liability
 - Regulation FD
- Are you prepared to file, on a timely basis, your SEC filings?
 - Super 8-K will be due 4 business days after closing
 - Be ready for the quarterly earnings season
 - Understand 8-K triggers

What are some deal certainty issues for a de-SPAC?

- Recent de-SPAC transactions that failed to close
- Reasons for why a de-SPAC transaction may fail close:
 - Too many of the SPAC investors withdraw their money from the trust account
 - PIPE investors are unwilling to invest, unless given terms which are not acceptable to the seller
 - Failed closing conditions
 - More attractive opportunities exist for the seller (such as a traditional IPO or private acquirer)
 - Stockholder approval
- How to obtain greater certainty of closing:
 - Get forward purchase agreements or a PIPE agreement with very limited closing conditions for the investors to back out
 - Have debt financing available if necessary to back-stop
 - Have the SPAC be willing to improve the economic terms for existing SPAC holders

What should sellers consider in evaluating proposed consideration for a de-SPAC transaction?

- Most de-SPACs today involve mainly stock or a combination of cash and stock consideration
- Potential sellers should consider the following:
 - How much of the consideration, if any, should be cash?
 - Will there be a post-closing purchase price adjustment?
 - Will there be an escrow for any portion of the consideration?
 - Will there be an earn-out for seller equity holders?
 - What will the pro forma ownership be after the closing?
 - What kind of lock-up is required?
 - Will the sponsor forfeit any of its equity?
 - How much dilution will be caused by the PIPE?
 - How will the transaction be taxed?

What are some possible adjustments to the consideration?

- The consideration to be received by the seller may be subject to downward adjustments.
 - Haymaker Acquisition Corp. SPAC Transaction had a straight cash reduction of \$50 million from the consideration (amongst other downward adjustments).
 - E-2open Holdings, LLC SPAC Transaction had the consideration adjusted so that the target at closing received less cash and got more SPAC stock.
 - DraftKings SPAC Transaction had \$10 million of the purchase price placed in escrow to be released in two years to serve as security due to a recent cyber attack.
 - More cash may be deferred and shifted in the form of earn-outs or milestone payments.
- The target is free to not accept any of these changes and potentially walk away from the de-SPAC transaction, if allowed to by the Business Combination Agreement or Merger Agreement.

Why are PIPEs so common in de-SPAC transactions?

- PIPEs are a common way to help increase deal certainty in de-SPAC transactions.
- Funds in the SPAC trust account are subject to significant use restrictions to ensure the funds are available for any redemptions, and then for the acquisition.
- If many stockholders redeem, then the SPAC may not have enough cash to close or for initial working capital.
- Purchase Agreement will include trust waiver claim language.
- Common to have minimum cash requirement at closing following the redemption—especially if a lender is involved.

What are some challenges for de-SPACs today?

- Legal challenges:
 - Increasing SEC scrutiny
 - Potential SEC rule changes
 - Litigation
- Practical challenges:
 - Getting the vote in
 - Too many SPACs and not enough suitable target companies
 - Hesitancy from investors due to poor stock performance of many SPACs

What are some restrictions that apply to the new public company following the closing, and how do those impact the ability to raise capital?

Note that a former SPAC will be treated as a “shell company” which means that it cannot enjoy all of the benefits of public company status for a period of time.

- For example, the company will not be able to file a Form S-8 registration statement for 60 days—this registration statement registers shares issued under employee benefit plans.
- Also, the company will not be able to become a “well-known seasoned issuer” for 3 years—WKSIs are able to raise capital more easily by filing registration statements without SEC review and they enjoy other benefits.
- The company will not be able to “incorporate by reference” in registration statements for 3 years—the ability to incorporate by reference typically streamlines the disclosure process in an offering. The bottom line is that the company will be able to raise capital through registered offerings but there will be some meaningful restrictions for a period of time.
- Insiders will not be able to re-sell shares under Rule 144 for a year.

CLE Code Word

- The code word for this webinar is: **SPAC 719**
- Please email Shana Sanders with the following:
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Questions?

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