SPACS: AN IPO AND PRIVATE EQUITY ALTERNATIVE: DEAL POINTS

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I. Executive Summary

SPACs ("Special Purpose Acquisition Companies") burst into mainstream popularity in 2020 as a financing alternative to traditional Initial Public Offerings ("IPOs") and private placements after years of on-again-off-again vogue. SPACs are "blank check" companies - shell companies without an operating business - formed and taken public in an IPO for the sole purpose of merging with or acquiring an operating business, usually a private company, with the IPO proceeds, in a transaction called a "business combination." According to SPAC Insider, in 2020, 248 SPAC IPOs raised $83.38 billion in 2020, at an average IPO size of $336.2 million. In 2021, 613 SPAC IPOs raised $162.42 billion at an average IPO size of $265.0 million.[1] As of January 5, 2022, only one 2020 SPAC IPO had been liquidated, with 78 in "search mode" (for a business combination; see below), 34 deals announced, and 135 completed. Of 2021 SPACs, none had been liquidated, 496 were in search mode, with 78 deals announced and 39 completed.

While SPACs are not for every business financing need, they have largely shed an earlier sometimes negative reputation and emerged as a mainstream alternative in the palette of financing options. Because SPACs are registered public offerings, they are regulated in the U.S. by the Securities and Exchange Commission (the "SEC") pursuant to the Securities Act of 1933 (the "Securities Act") during the IPO process and, once registered, by the Securities Exchange Act of 1934 (the "Exchange Act") more strictly than private placements (see our "Raising Capital through Private Placements: Deal Points" ("Raising Capital"), available at Kurtin PLLC Whitepapers and Advisories or on request to Kurtin PLLC Publications). Like all other financing methods, SPACs have their advantages and disadvantages, which we'll cover here. As in "Raising Capital," following the discussion are "Deal Points" on important considerations in the SPAC IPO and business combination process and *what at all costs not to do.*

[1] https://spacinsider.com/stats/.

II. The SPAC IPO

a. Structure. SPAC structuring and IPO preparation generally involves the following steps:

- The SPAC must be formed, almost invariably as a Delaware corporation, with a certificate of incorporation and initial capital structure appropriate for use as the IPO vehicle. The certificate of incorporation may state the specific corporate purpose of the SPAC, down to the industry in which an acquisition is intended, or may be open as to corporate purpose, a true "blank check" company. It is also possible to use pre-existing public shell companies, ones that have sold their operating businesses and been de-listed from the securities exchange on which they traded, the NASDAQ, for example. Pre-existing shell companies come with their own problems, however, including potential and often hidden liabilities from the company's operating business days, so we'll focus here on newly-created public shells.

- The SPAC, once formed, prepares a registration statement, with itself as registrant-issuer ("Issuer"), usually on SEC Form S-1, pursuant to Securities Act section 5 and Regulation C (17 CFR Part 230, §§ 400 – 498A), with special attention to the rules discussed in subsection (b), below (in September 2020, the SEC explained some unusual circumstances in which a SPAC might register on abbreviated Form S-3, a less time-consuming and costly process; the corresponding foreign Issuer forms are F-1 and F-3).

- The SPAC offering usually consists of units of one share of Class A common stock and one or a fractional Class A warrant to buy additional shares of common stock, usually priced at $10.00 per unit, a nominal pricing given that the unit valuation is not based on any underlying operating business fundamentals. The warrants function, as warrants ordinarily do, as a "sweetener" to compensate investors for the lock-up of their funds during the post-effective period when the SPAC is searching for its acquisition target (see below). Effectively, the warrants are futures contracts that are settled in the SPAC's own stock. SPAC warrants typically feature terms like contingencies under which the warrant would be exercisable, such as a business combination, and anti-dilution and redemption provisions. The common stock and warrants are priced separately, with the warrants priced higher than the stock, usually at $11.50, "out of the money," so there will not be an incentive to exercise them until the stock price rises to meet or exceed the exercise price (but see section IV (b), below on trading in warrants). After the IPO goes effective,

the units trade for a while, and then the stock and warrants trade separately. SPAC securities/unit composition and pricing are in some flux, as the financing dynamics come under competitive pressure and rapidly evolve.

- The SPAC sponsor or promoter usually receives 20% of the SPAC's common stock as founders' compensation for perhaps 4 – 5% of the IPO proceeds (often syndicated or financed by the sponsor), although, again, there are increasing variations on those terms.

- The founders' shares are usually subject to a lock-up agreement until the business combination closes (see discussion of Rule 419 and exemption from it in subsection (b) below). The sponsor may also buy warrants to finance the IPO costs, often in a private placement under Securities Act Regulation D concurrent with the IPO.

- Post-filing the registration statement, the SPAC engages in limited roadshow activities (see subsection (b), below).

- Upon closing the IPO, all of the IPO proceeds are placed in a trust or escrow account, which cannot be accessed (other than for some expenses) except to complete the business combination transaction or, under certain circumstances, redeem IPO investors and return their investments (see section III, below).

- Once the IPO goes effective, the IPO sponsor proceeds to list the SPAC on a securities exchange, usually the NASDAQ, and must comply with the exchange's listing rules as well as the Exchange Act's sections 13 or 15(d) periodic reporting requirements.

b. Legal/Regulatory Issues. The IPO is conducted pursuant to Securities Act section 5 and Regulation C (17 CFR Part 230, §§ 400 – 498A) rules applicable to registered offerings. Special legal/regulatory issues include:

- Rule 419. The most important Reg. C rule of special application to SPACs is Securities Act Rule 419. Most SPACs structure themselves to be exempt from Rule 419's application, but adhere to most of its provisions as a matter of transaction norms and for prospective investor confidence. For that reason, Rule 419 merits discussion here. Rule 419 defines a "blank check company" as "a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a

merger or acquisition with an unidentified company or companies." Rule 419 requires a blank check company's IPO gross proceeds *and the securities issued in the IPO* to be deposited into an escrow or broker's trust account, less certain IPO expenses (including underwriting commissions, up to 10% of proceeds for the Issuer-registrant), and not used until paid at closing to the business combination target. The IPO funds are held in escrow for the sole benefit of the IPO securities purchasers, and must be invested in government securities or a money market fund that invests only in government securities. The purchasers of the securities have voting rights under the applicable state corporate law.

Rule 419 further provides that the registration statement disclose the terms of the offering, including post-effective amendments containing information on any probable acquisition or one for which an acquisition agreement has been signed. Notice must be given to each purchaser, which has at least 20 and no more than 45 business days to notify the issuer-registrant whether it wishes to remain an investor or not. If the purchaser wishes to redeem its investment, or merely does not respond by the 45th business day, the Issuer-registrant SPAC must return the investors *pro rata* share of the investment then held in the escrow or trust account, with interest, within five business days. If no business combination acquisition is consummated within the required 18-month period, all purchasers' *pro rata* investments, with interest, must similarly be returned and the trust or escrow fund liquidated.

The Rule 419 requirements are in fact how SPACs mainly operate as a matter of transaction norms, and they might not be able to raise capital in the IPO if they did not offer that investor protection and opportunity for redemption; because of the escrow of IPO proceeds and redemption opportunity, SPAC IPOs are treated as unusually safe by the investment community. However, most SPACs nevertheless structure themselves to be exempt from Rule 419, since the rule also requires that there be no trading in the IPO securities until after the business combination closes. Exemption from Rule 419 is generally available to SPACs because the rule limits the definition of blank check companies to those issuing "penny stock" in the meaning of Exchange Act Rule 3a51-1, which excludes from the penny stock definition, among other criteria, the stock of a securities issuer that has been in operation for fewer than three years and which has at least $5 million in net tangible assets. To be Rule 419-exempt, the SPAC must file a Form 8-K containing an audited balance sheet as soon as practicable after the IPO closes,

a requirement generally expressly undertaken in the SPAC's registration agreement and underwriting agreement, if any. In the result, SPACs as a practical matter comply with most Rule 419 requirements even if formally exempt, with the major exception of allowing trading of first the units and then the unit elements of common stock and warrants separately prior to the closing of the business combination transaction.

- Rule 405. SPACs are considered "shell companies" and therefore "ineligible issuers" under Securities Act Rule 405, which refers back to include Rule 419's definition of blank check companies as well as Rule 405's own definition of shell companies as those with no or nominal operations and no or nominal assets consisting only of cash and cash equivalents. As ineligible issuers, SPACs may not generally use free writing prospectuses (a post-registration statement written communication constituting an offer to sell or solicitation of an offer to buy the securities), and are restricted in their roadshow presentations. Many Regulation C communications "safe harbors" during the IPO process are also restricted.

- Emerging Growth Companies. Securities Act section 2(a)(19) defines a class of "Emerging Growth Companies," or EGCs. The definition includes annual gross revenues of at least $1.07 billion or a common equity value of at least $700 million. EGCs have more lenient reporting and disclosure assignments, and SPACs may qualify for EGC status for the first five years after IPO closing.

- Rule 144. SPAC shares are "Restricted Securities" under Securities Act Rule 144. Rule 144 creates a non-exclusive "safe harbor" for resale of securities by non-underwriter purchasers. Under Rule 144, Restricted Securities generally may not be resold unless a holding period passes (six months for a reporting company and 1 year for a non-reporting company or a company that has been a reporting company for fewer than 90 days) or an exemption is available (see "Raising Capital," section I(e)). Aside from Rule 144 and the holding periods, a common exemption used for resales is Rule 144A's exemption for resales to "Qualified Institutional Buyers," or QIBs.

  As stated, SPACS are "shell companies" under Rule 405 even if exempt from Rule 419 for 12 months after becoming a reporting company, completing the business combination and filing SEC Form 10 to register the securities for trading on U.S. securities exchanges. Much early SPAC securities trading occurs under Rule 144 exemptions or expiration of

the applicable holding period. Resellers may have to file Form 144 for certain sales, including more than 5,000 shares or units or an aggregate sale price of over $50,000 in a three-month period.

c. Additional Financing. The SPAC may also, concurrently with the IPO, raise additional capital, including for founders' expenses, in a PIPE (Private Investment in Public Equity) transaction, usually conducted under the Regulation D, Rule 506 exemption from registration (see "Raising Capital").

d. Closing. When the IPO closes, the IPO proceeds are deposited into the escrow or trust fund, and the SPAC may commence its search for an acquisition target. Meanwhile, the SPAC becomes a public reporting company required to file periodic reports pursuant to the Exchange Act and lists on a securities exchange, usually the NASDAQ.

III. The SPAC Business Combination

a. Structure and Documentation. Once the IPO has closed and gone effective, the SPAC commences the search for its acquisition target:

- In general, the SPAC has 24 months to complete its business combination (called "de-SPACing"), although those terms vary (the 24-month period is another deviation permitted when exempt from Rule 419's 18-month period to complete the business combination, and is also in flux owing to SPAC competitive dynamics). Some SPACs may have provided in their registration statement for a relatively short term automatic extension of time to complete the business combination provided that a binding Letter of Intent has been entered into by the original deadline; such an extension will usually require shareholder approval.

- No identification or communications with a business combination target are permitted until the IPO closes.

- The business combination is generally structured as a reverse merger under the state (usually Delaware) corporations statute, meaning that the SPAC technically merges into the private target company, with the target the surviving company, but succeeding to the now dissolved-by-merger SPAC's public company status.

- The business combination transaction is structured and documented in a merger agreement and supporting documents, schedules and exhibits similar to those in a non-SPAC merger transaction. Once all regulatory, shareholder and third-party approvals are obtained, the business combination closes like any other merger.

b. Legal/Regulatory Issues.

- Because the reverse merger business combination is not part of the IPO, regulatory requirements are less of a burden than in the IPO itself. Nevertheless, the SPAC will usually need to obtain shareholder approval for the proposed business combination, which the shareholders may grant or withhold, usually by proxy statement. There are cases in which the SPAC sponsor itself and its affiliates have enough shareholder votes not to require other shareholders' votes to approve the de-SPACing business combination. In those cases, the SPAC will provide shareholders with an information statement prior to closing the business combination. In other cases in which the SPAC is not required to furnish shareholders with a proxy statement or information statement, it will generally furnish shareholders with a tender offer statement giving information about the business combination and shareholder redemption rights.

- If shareholder approval is not granted, the SPAC may liquidate and return shareholders' investment to them with interest (with the exception of the founder's shares, which are usually not redeemed), or, if there is still time before the expiration of the 24-month deadline, search for another target. As a general rule, however, failure to obtain shareholder approval would be expected to result in liquidation.

- Shareholders will be granted the right to either remain as shareholders of the merged SPAC and target, post-business combination closing, or redeem their shares for their *pro rata* share of the aggregate amount then in the escrow or trust account.

- The business combination transaction must still obtain any required regulatory approvals that would be required in a non-SPAC merger, ranging from Hart-Scott-Rodino pre-merger notification clearance to any foreign investment, technology export or industry specific regulatory clearances.

- As with a non-SPAC merger, third party approvals may need to be obtained, such as intellectual property licenses and assignment and consent to the assignment of third party contracts that require it.

c. Closing. Once all regulatory and third party approvals and consents are obtained, the SPAC business combination may close, and the SPAC process is complete, with the target company, as surviving entity, succeeding to the now-merged SPAC's public reporting company status and trading on the SPAC's securities exchange, and responsible for remaining compliant with both.

IV. SPAC Advantages and Disadvantages

a. Advantages.

- SPAC IPOs are faster and less expensive to prepare and for the SEC to review than traditional IPOs, in large part because the registration statement filed with the SEC does not include financial history (because there is none), only projections, nor any operating business plan or qualitative information other than the business combination with an unidentified company. From the perspective of the target as well, the SPAC may be a faster and less expensive option than undertaking its own IPO.

- SPACs may provide greater certainty as to pricing and other deal terms than a traditional IPO.

- The usual advantages of public company status apply, such as improved access to new capital and liquidity, given the transparency implied by public reporting company disclosures. As stated, SPACs may also benefit from EGC lesser reporting requirements.

b. Disadvantages.

- SPACs are at risk of liquidation until the business combination closes.

- The usual disadvantages of public company status apply, such as increased regulatory compliance burdens, increased disclosure and risks of shareholder activism.

- SPACs are at risk of significant volatility, since their trading price is not tied to any operating business fundamentals, but only industry perceptions.

- A SPAC is in essence a pool of capital looking for an investment target, and if it doesn't find one in time, the sponsor has to return purchasers' money. The transaction dynamics are not necessarily aligned with long-term growth or dividend-producing investments, and countervailing incentives are sometimes built in to the structure. For example, in recent months, it has become apparent that some SPAC investors have invested primarily to trade and arbitrage the warrant, rather than become long-term investors in the eventual target company.

V. Deal Points

Deal Point No. 1: Remember that a SPAC is a real registered public offering and results in a real public reporting company. SPAC dynamics are such that the moment the IPO closes, the SPAC promoters or sponsors pivot to the search for a business combination target with the clock ticking to the deadline by which they will have to return the escrowed IPO proceeds to investors. Also, SPAC promoters are often entrepreneurs more accustomed to the less regulated world of private equity capital raising and less oriented to, and experienced in, public reporting company governance. Under those pressures, it is easy for Exchange Act reporting company and NASDAQ or other securities exchange compliance requirements to be relaxed. Don't do it! Lax compliance may poison the shareholder proxy business combination approval when the time comes, and even if that is cured, may poison the business combination itself.

Deal Point No. 2: Don't identify or communicate with a specific potential business combination target before the IPO closes. As of the closing of the SPAC IPO, no business combination target is supposed to have been specifically identified, and no communications with one are supposed to have occurred. While it will often happen that a SPAC's registration statement will identify a class of business combination targets small enough that there are a relatively small number of potential targets that savvy investors can identify with reasonable assurance, no specific target identification or communication is supposed to have occurred. To have done so and not to have disclosed it in the IPO registration statement would probably breach regulatory requirements, be a material omission to disclose material facts, would change the dynamics of the SPAC transaction, and might deprive the SPAC of status as a blank check company. Any post-closing disgruntled investor would have ample grounds to

seek to recoup its investment, often through use of a nuisance lawsuit designed to force a settlement that would survive a motion to dismiss.

Deal Point No. 3: Respect the permissible allowances from the IPO proceeds escrow fund. The IPO investors are investing in reliance upon the knowledge of the security of the escrow fund in which the IPO proceeds are held pending the business combination closing. The escrowed IPO proceeds are not available until that time, other than permissible allowances as set forth in the rules and registration statement, such as underwriters and Issuer-registrant fees and expenses.

Deal Point No. 4: Maintain alignment with IPO investor expectations. The IPO investors invested based on the sponsor's representations in the registration statement. While post-effective amendments are possible, the investors' confidence, good will and lack of buyers' remorse will be critical for obtaining their approval of the business combination as much as two years down the road. Don't deviate from their expectations and, even if the registration statement is relatively unspecific about potential business combination targets, maintain good lines of communication with investors.

Deal Point No. 5: Don't commit fraud! This is the same Deal Point as in "Raising Capital." The anti-fraud prohibitions of the Securities Act, Exchange Act and associated rules and regulations apply to any offer and sale of securities, whether exempt from registration or not. Fraud can occur by the misrepresentation of material facts that a purchaser relies upon to its detriment in its decision to purchase the securities, *or by the omission to state material facts.* Inadvertent technical errors in the securities offering process can often be fixed or excused. Fraud cannot. Don't commit fraud.

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