

SPACs: What You Need to Know to Prepare for the Wave of Litigation and Investigations

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Today's Panelists



Moderator: Stephen Glover
Washington, D.C.
siglover@gibsondunn.com



Brian Lutz
San Francisco
blutz@gibsondunn.com



Mark Schonfeld
New York
mschonfeld@gibsondunn.com



Lori Zyskowski
New York
lzyskowski@gibsondunn.com



Evan D'Amico
Washington, D.C.
edamico@gibsondunn.com



Gerry Spedale
Houston
gspedale@gibsondunn.com

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Rapid Growth in SPAC Market in 2020 and 2021

In 2020, there were 248 SPAC IPOs, raising \$83.4 billion in proceeds, with an average size of \$336.4 million. Compares to 59 IPOs in 2019, raising \$13.6 billion.

In 2021, there have been 315 IPOs, raising over \$101.5 billion, with over 275 SPACs in the IPO pipeline.

Over 420 SPACs with roughly \$135 billion in proceeds raised are seeking targets.

- **SPACs have growing share of M&A market**
 - In 2020, SPACs closed 64 business combinations
 - In Q1 2021, de-SPAC deals totaled \$172 billion (over a quarter of U.S. M&A)
 - Notable deals include \$24 billion acquisition of Lucid and \$40 billion acquisition of Grab
- **However...pace of IPOs and M&A deals has slowed**
 - Change in accounting guidance impacting IPO market
 - After 109 IPOs in March, only 13 listed in April
 - De-SPAC transactions increasingly reliant on PIPE market
 - In 2020, ~70% of all deals had a PIPE investment
 - In February 2021, ~\$15bn of PIPE commitments
 - In April 2021, just over \$5bn in PIPE commitments (with \$3.5bn coming from the Grab transaction)
 - Post-LOI adjustment to valuation increasingly common based on input from PIPE investors

What is a Special Purpose Acquisition Company?

- Newly formed shell companies, with no revenue or operating history, that raise proceeds in an IPO for the purpose of acquiring one or more operating businesses
- Capitalized with investment from SPAC's sponsor and IPO proceeds, and post-IPO, sponsor owns 20% of SPAC's shares and private warrants, and public owns public shares and public warrants
- Sponsor investment "at risk" from and after closing of IPO
- Cash raised in the IPO is placed in a trust account and is not released until SPAC completes a business combination or liquidates
- Typically has 18-24 months to complete a business combination
- At time of business combination, public shareholders can redeem shares for their pro rata share of the funds held in trust. Sponsor not entitled to any cash from trust account if no business combination
- Key offering terms are relatively static and driven by market forces

Shift in SEC Accounting Guidance for Warrants

New SEC guidance will require most SPAC warrants to be accounted for as a liability

Impact on Pending IPOs

- Most IPOs on hold as auditing firms assess impact and determine (1) what changes would be necessary to obtain equity treatment and (2) full extent of impact on financial reporting
- Could see SPACs abandon private warrants and/or more warrantless deals
- Some IPOs proceeding with liability treatment

Impact on Existing SPACs

- Require third party valuations for warrants at time of IPO and each fiscal quarter
- Restatement of prior financial statements if change is determined to be material
- Need to assess impact on any pending de-SPAC transactions—even if change is quantitatively material for a shell company, impact on financial statements arguably is qualitatively immaterial to investors
- SPACs may miss 10-Q filing deadlines

Impact on de-SPAC'd Companies

- May require restatement of predecessor SPAC's prior 10-K
- Depending on specific terms, public warrants may qualify for equity treatment post-business combination if de-SPAC'd company has a single class of common stock

Trends in Evolving de-SPAC Landscape

- **PIPE Process Has Become More Difficult**
 - Pressure on valuations, with SPACs and targets revisiting valuations post-LOI based on feedback from PIPE investors
 - Advantage for repeat sponsors or SPACs backed by traditional PE/investment firms?
 - SPACs may explore options to improve PIPE execution—e.g., preferred allocations, warrants for anchor investors, and accelerating registration process for PIPE shares
 - Increasing trend in PIPE participation by SPAC sponsors and target investors
- **SPACs Focused on Procedural Safeguards in Light of Increased Regulatory/Litigation Risk**
 - Comprehensive due diligence by third party advisors, which results in fulsome public disclosure
 - Buy-side financial advisors and fairness opinions from independent financial advisors
 - Summary target risk factor disclosure now made to PIPE investors and at time of deal announcement
 - Advisors should understand assumptions underlying projections (e.g., max vs. min cash scenarios)
 - Projections disclosure should include multiple cases if relied on by SPAC board or its advisors

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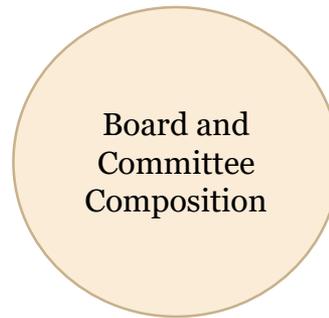
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Public Company Compliance and Governance

- SPACs are **public companies** — they are subject to both SEC rules and regulations as well as applicable stock exchange rules.
 - Until recently, most SPACs listed on Nasdaq because NYSE rules were more restrictive, but NYSE recently changed its rules so that their listing requirements are substantially similar to Nasdaq.
 - In light of the SEC’s increasing focus on SPACs, attention to and compliance with all applicable rules and regulations is crucial.



- **Key Areas of Focus Include:**



SEC Reporting Obligations

- Following the IPO, the SPAC will be a non-accelerated filer subject to SEC reporting obligations:

Document	Filing Deadline
10-K	90 days after end of fiscal year.
10-Q	45 days after end of fiscal quarter.
8-K	Generally 4 business days after occurrence of the reportable event.

- It's common for SPACs to engage advisors to assist in preparing financial statements and periodic reports.
 - The company is still subject to SOX, and the CEO and CFO must provide certifications that will be filed as exhibits to Form 10-K and 10-Q relating to, among other things, the accuracy of the information in the reports

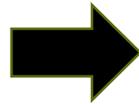
SEC Reporting Obligations, Cont.

- **Annual financial statements** must be **audited** by an independent, registered public accounting firm.
- **Interim financial statements** are generally **reviewed** by the accounting firm, but are *not audited*.
- The audit committee should review Forms 10-Q and 10-K and discuss financial statements with both management and auditors.
- A **filing calendar** helps ensure that all the appropriate parties receive and review drafts with sufficient time to meet appropriate filing deadlines.

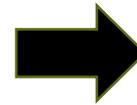


Board Composition

At time of IPO



Following IPO



After de-SPAC



- Typically, SPAC boards consist of affiliates of the sponsors and independent directors.
 - Sponsor affiliates may also serve as executive officers of the SPAC.
 - Identify potential board candidates and committee members early, *including* financial experts for the audit committee.
 - The search for suitable candidates may be lengthy – must take into account independence, expertise, and increasing demand for directors in light of the increase in the number of SPACs.
-

Board Composition, Cont.

Under stock exchange rules, within **one year after the IPO**, the board must be **majority independent** and must have **independent key board committees** (unless the company is controlled).

At least **one independent director** is required at the IPO's effectiveness (Nasdaq) / listing (NYSE) due to audit committee rules (regardless of controlled company status).

There are also specific SEC and stock exchange requirements for audit committee members, including the requirement that **all directors on the audit committee** must be **financially literate** and there must be at least **one** "audit committee financial expert" as defined under the SEC rules (or explain the lack thereof).

Key Governance Documents/Forms

Certain Key Governance Documents and Forms

Certificate of Incorporation

Bylaws

Indemnification Agreements

Committee Charters (audit, comp & nom/gov)

Corporate Governance Guidelines

Code of Business Conduct and Ethics

Audit-Related Policies (RPT policy, auditor personnel hiring policy, pre-approval policy, complaint procedures policy, and internal audit charter)

Whistleblower Policy

D&O Questionnaire

Key Considerations

- In advance of an IPO, companies should ensure their Board committee charters and policies comply with Nasdaq/NYSE listing standards and SEC rules and regulations.
- Corporate policies should be drafted in a way such that they comply with legal requirements while providing appropriate flexibility given the lack of any company operations.
- Monitor and ensure that actual practices align with the policies and procedures stated in the governance documents.

Related Person Transactions/Conflicts of Interest

Because of the structure of SPACs and the presence of a sponsor, **related person transactions** and **conflicts of interest** may arise that need to be navigated and potentially disclosed.

Related Person Transactions

- The SEC requires disclosure of transactions involving the company and a “related person” in which the amount involved exceeds \$120,000 and the “related person” has a direct or indirect material interest in the transaction.
 - “Related persons” include directors, nominees, executive officers and five percent shareholders.
- Because a sponsor may enter into a number of agreements with the SPAC (e.g., voting agreements, loan agreements, support services agreements, etc.), it is common to see disclosures relating to related person transactions.
- The SEC also requires disclosure relating to related person transaction policies.

Conflicts of Interest

- Each director should be alert and sensitive to any personal or financial interest that may be considered to conflict with the company's interests. For sponsor-affiliated directors, this includes interests of the sponsor that may conflict with the SPAC.
- Before a board deliberates or takes action on a matter, each director should consider whether he or she has a conflict of interest, including any personal, financial or other interest.

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SEC Investigation Risks and Strategies for Mitigation: Recent SEC Staff Statements



- Special Purpose Acquisition Companies Disclosure Guidance (Dec. 22, 2020)
- Staff Statement on Select issues Pertaining to Special Purpose Acquisition Companies (Mar. 31, 2021)
- Financial Reporting and Auditing Considerations of Companies Merging with SPACs (Mar. 31, 2021)
- SPACs, IPOs and Liability Risk under the Securities Laws (Apr. 8, 2021)
- Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”) (Apr. 12, 2021)

Special Purpose Acquisition Companies Disclosure Guidance (December 22, 2020)

Staff guidance on disclosure considerations for SPACs

Disclosures in connection with SPAC IPO

- Potential conflicts of interest of SPAC sponsors, directors and officers, including separate business activities or interests in potential targets
- Financial incentives of sponsors, directors and officer to consummate an acquisition
- Underwriter compensation, including contingency on acquisition or for other services
- Investments in SPAC by sponsors, directors, officers and affiliates, including differences in terms of securities from public shareholders, impact of conversions, or other compensation arrangements

Disclosures in connection with subsequent business combinations

- Financing needs of combined entity, including impact of converted securities
- Evaluation of acquisition targets and relevant conflicts of sponsor, officers, directors or affiliates
- Underwriter compensation and connection to business combination

Staff Statements on SPAC Companies and Financial Reporting and Auditing Considerations of Companies Merging with SPACs (March 31, 2021)

Staff statement addressed “certain accounting, financial reporting and governance issues that should be carefully considered before a private operating company undertakes a business combination with a SPAC.”

- The combined entity will not be eligible for certain capital raising provisions (e.g., WKSI)
- “Upon consummation of the business combination, the combined company will need the necessary expertise, books and records, and internal controls to provide reasonable assurance of its timely and reliable financial reporting.”
- “If the SPAC is listed on a national securities exchange, ... in order to remain listed after the merger, the combined company must satisfy quantitative and qualitative initial listing standards upon consummation of the business combination, which include certain corporate governance requirements.”
- “The target company’s annual financial statements should be audited in accordance with the Public Company Accounting Oversight Board (“PCAOB”) standards by a public accounting firm registered with the PCAOB and compliant with both PCAOB and SEC independence requirements.”

SPACs, IPOs and Liability Risk under the Securities Laws (April 8, 2021)

Statement by John Coates, Acting Director, Division of Corporation Finance on “legal liability that attaches to disclosures in the de-SPAC transaction” and addressed commentary that “an advantage of SPACs over traditional IPOs is lesser securities law liability exposure”



“Any simple claim about reduced liability exposure for SPAC participants is overstated at best, and potentially seriously misleading at worst. Indeed, in some ways, liability risks for those involved are higher, not lower, than in conventional IPOs, due in particular to the potential conflicts of interest in the SPAC structure.”

- A material misstatement or omission in a disclosure in connection with a de-SPAC business combination may give rise to liability under Securities Act Section 11 (registration statement), Exchange Act Section 14(a) and Rule 14a-9 (proxy solicitation), Exchange Act Section 14(e) (tender offer), and state corporate fiduciary duties.

SPACs, IPOs and Liability Risk under the Securities Laws (April 8, 2021), Cont.

- PSLRA safe harbor for forward looking statements does not apply to:
 - SEC enforcement actions
 - False or misleading statements made knowingly or recklessly

“A company in possession of multiple sets of projections that are based on reasonable assumptions, reflecting different scenarios of how the company’s future may unfold, would be on shaky ground if it only disclosed favorable projections and omitted disclosure of equally reliable but unfavorable projections....”

- Statements in connection with an IPO. ***Is a de-SPAC merger a de facto IPO?***

“If a major shift in owners is in fact occurring in most or all SPACs as they progress through a de-SPAC, it is the de-SPAC as much as any other element of the process on which we should focus the full panoply of federal securities law protections – including those that apply to traditional IPOs. If we do not treat the de-SPAC transaction as the ‘real IPO,’ our attention may be focused on the wrong place, and potentially problematic forward-looking information may be disseminated without appropriate safeguards.”

Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”) (April 12, 2021)

Statement by Acting Chief Accountant Paul Munter highlighted “potential accounting implications of certain terms that may be common in warrants included in SPAC transactions,” i.e., whether warrants should be accounted for as **equity** or a **liability**



- “The evaluation of the accounting for contracts in an entity’s own equity, such as warrants issued by a SPAC, requires careful consideration of the specific facts and circumstances for each entity and each contract.” For example:
 - Warrants that “included provisions that provided for potential changes to the settlement amounts dependent upon the characteristics of the holder of the warrant ... preclude the warrants from being indexed to the entity’s stock, and thus the warrants should be classified as a liability measured at fair value....”
 - Warrant in which, “in the event of a qualifying cash tender offer..., all warrant holders would be entitled to cash, while only certain of the holders of the underlying shares of common stock would be entitled to cash,” and therefore, “the tender offer provision would require the warrants to be classified as a liability measured at fair value....”

Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”) (April 12, 2021), Cont.

- If a registrant concludes there was an error in previously-filed financial statements, “the registrant would then need to evaluate the **materiality** of the error” and determine whether they are required to file a restatement.
- A registrant that determines pending filings include accounting errors but such errors are **not material** “may provide the staff with a written representation to that effect...”
- “Registrants should consider their obligation to maintain internal controls over financial reporting and disclosure controls and procedures to determine whether those controls are adequate,” as well as “whether prior disclosure on the evaluation of internal controls over financial reporting and disclosure controls and procedures needs to be revised in the amended filings.”

Remarks of Acting Chair Allison Herren Lee at Meeting of Investor Advisory Committee (March 11, 2021)



“How can we insure that SPAC sponsors and other financial advisors have sufficient incentives to perform robust due diligence? These private companies are often not going through the same rigors and discipline as that which accompanies the IPO process. Are they going to have the right controls in place and understand how to navigate public markets?”

“How do we ensure that SPAC disclosures provide investors with a sufficient understanding of the target company’s risks, operations, or other factors?”

“[W]e are seeing more and more evidence on the risk side of the equation for SPACs as we see studies showing that their performance for most investors doesn't match the hype. And as the volume of SPAC transactions reaches unprecedented levels, the staff is taking a close look at the structural and the disclosure issues surrounding these business combinations.”

SEC Investigations of SPACs and Resulting Public Companies



U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy -sources (Reuters 3/25/21)



SPAC Stable Road Acquisition Corp. disclosed SEC investigation of certain disclosures made in connection with proposed merger with Momentus (Preliminary Prospectus 4/7/21)



Nikola reveals it has received subpoenas from DOJ, SEC (CNN, 11/10/20)



SEC v. Hurgin (June 2019) – SEC alleged misrepresentations concerning target company's business prospects in disclosures seeking SPAC shareholder approval of merger

Risks That May Draw Regulatory Scrutiny

- **Disclosure of Projections**

- Appearance of selection of optimistic projections and exclusion of more conservative projections

- **Disclosures of financial interests and incentives and related conflicts of interest**

- Sponsor incentive to complete an acquisition within time period.
- Investment banker and financial adviser incentives to earn fees upon acquisition.

- **Market for Targets**

- Increased volume of SPAC capital seeking acquisition targets

- **Target readiness to be public company**

- Internal controls for financial reporting and disclosures

Risks That May Draw Regulatory Scrutiny

- **Disappointing performance of combined entity post-acquisition**
 - Investigations are inevitably conducted in hindsight
 - Since the start of 2020, companies that went public through SPAC combinations are trading at an average of 39% down from the highs (“Spac share prices slump as enthusiasm wanes,” *Financial Times* 5/2/21)
- **Short seller reports**
- **Participation of Celebrities**
 - Heightens visibility to regulators, media, politicians
 - “Investors ... should not make decisions based on celebrity endorsements” (Enforcement Co-Director Steven Peikin, 11/29/18)



Current Risk Assessment

- **Anticipatory analysis of SPAC inventory and acquisitions**
- **SPACs at or near end of acquisition period or extension**
 - Due to potential perception of heightened incentives, assess diligence process in light of timing
- **SPACs with Celebrity Sponsors**
 - Due to potential for heightened regulatory scrutiny, assess for risks relating to role of celebrity and related disclosures
- **Post-Acquisition Performance of Combined Entity**
 - In the event of disappointing performance, assess reasons and review against disclosures
- **Confer with financial professionals in light of regulatory risks for assessment of previous, ongoing and contemplated IPOs and acquisitions**
- **Assess Financial Incentives and compensation arrangements of sponsors, officers, directors, advisers and affiliates and review against disclosures**

Tips for Mitigating Regulatory Risk Going Forward

- **Reinforce training for professionals on importance of electronic communications**
 - Avoid sarcasm, humor, or disparagement of deals, targets, sponsors, projections
- **Encourage escalation of concerns to legal and compliance, including inbound communications**
- **Conduct appropriate diligence on acquisition targets and assess risks, context of projections, factors in selection of target**
- **Document decision-making process and evaluation of targets, including board deliberation**
- **Review disclosures in light of recent SEC guidance, with attention to:**
 - Financial incentives and potential conflicts of interest of sponsors, officers, directors, advisers and affiliates
 - Risks of business combination
 - Context for financial projections used in disclosures

Tips for Mitigating Regulatory Risk Going Forward, Cont.

- **Assess target readiness to be a public company**
 - Internal controls for financial reporting
 - Disclosure controls and disclosure controls and procedures
 - Board and audit committee composition
 - Auditors registered with PCAOB and meeting independence requirements
- **Assess compliance with accounting standards for warrants as either equity or liabilities, and assess whether restatements are required or explain why they are not**

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SPAC Civil Litigation Trends

- **Flood of shareholder lawsuits filed since beginning of SPAC boom**

Federal securities law claims

- Section 14 of the Exchange Act (SPAC shareholder vote on acquisition)
- Section 10(b) of the Exchange Act (company performance after de-SPAC)
- Section 11 and 12 of the Securities Act (SPAC IPO)

Breach of fiduciary duty claims

- Misleading disclosures
- “Conflicted” transactions

Federal Securities Claims

- **Litigation challenging De-SPAC transaction**
 - SPAC stockholders bringing Section 14(a) proxy claims for false and misleading statements in connection with vote to approve de-SPAC transaction
 - Nuisance disclosure lawsuits seeking to enjoin the transaction
 - Most resolving for mootness fees
 - Driving SPAC litigation volume



Federal Securities Claims

- **Litigation Following the De-SPAC transaction**
 - Section 10(b) and 14(a) claims alleging false and misleading statements made in connection with and following the transaction
 - Different pleading standards for 10(b) and 14(a) claims
 - Claims being asserted against SPAC, SPAC directors, target, target D&Os
 - Section 11 claims – false and misleading statements in registration statement
 - SEC – “SPACs, IPOs and Liability Risk under the Securities Laws” (Apr. 2021)

Breach of Fiduciary Duty Claims



- **Breach of fiduciary duty claims following the De-SPAC transaction**
 - Litigation focused on “conflict” transactions
 - Economic interest of sponsor and SPAC directors
 - Related-party transactions / director “interest”
 - Disclosures in connection with de-SPAC transaction
 - Timing of de-SPAC transaction

Amo v. Multiplan Corp. (Churchill) Complaint (Del. Ch.)

- **Shareholder class action challenging SPAC's acquisition of MultiPlan Corp.**
- **One month after the merger, MultiPlan's stock price declined following shortseller report that company losing 35% customer.**
- **Alleged conflicts:**
 - "Founder shares" allegedly incentivized push for a bad deal.
 - Directors allegedly not independent of the controller of Sponsor because they had familial, business, and other ties, and could be removed by controller.
 - SPAC's financial advisor controlled by the same person that controlled Sponsor.
- **Proxy allegedly failed to disclose issues about MultiPlan's big customer that was planning to leave.**
- **Business Judgment Rule vs. Entire Fairness**

Civil Litigation Takeaways

- **Full and accurate disclosure key to trigger *Corwin* protection:**
 - Diligence of target company
 - All potential conflicts or related party transactions
 - Key risks to target
 - Adverse trends
- **Do not let timeline dictate when deal occurs**

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Additional Resources

Additional Resources

[March 11, 2021 | Webcast: Navigating Complex Challenges in Carveout Transactions](#)

[January 28, 2021 | Webcast: The Art of the Spin-off](#)

[Recorded Webcasts \(Available for CLE Credit\)](#)

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Our Offices

Beijing

Unit 1301, Tower 1
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

Brussels

Avenue Louise 480
1050 Brussels
Belgium
+32 (0)2 554 70 00

Century City

2029 Century Park East
Los Angeles, CA 90067-3026
+1 310.552.8500

Dallas

2001 Ross Avenue, Suite 2100
Dallas, TX 75201
+1 214.698.3100

Denver

1801 California Street
Denver, CO 80202-2642
+1 303.298.5700

Dubai

Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0)4 370 0311

Frankfurt

TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
+49 69 247 411 500

Hong Kong

32/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong
+852 2214 3700

Houston

811 Main Street, Suite 3000,
Houston, TX 77002-6117
Tel: +1 346.718.6600

London

Telephone House
2-4 Temple Avenue
London EC4Y 0HB
England
+44 (0) 20 7071 4000

Los Angeles

333 South Grand Avenue
Los Angeles, CA 90071-3197
+1 213.229.7000

Munich

Hofgarten Palais
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

New York

200 Park Avenue
New York, NY 10166-0193
+1 212.351.4000

Orange County

3161 Michelson Drive
Irvine, CA 92612-4412
+1 949.451.3800

Palo Alto

1881 Page Mill Road
Palo Alto, CA 94304-1125
+1 650.849.5300

Paris

16 Avenue Matignon
75008 Paris
France
+33 (0)1 56 43 13 00

San Francisco

555 Mission Street
San Francisco, CA 94105-0921
+1 415.393.8200

São Paulo

Rua Funchal, 418, 35° andar
Sao Paulo 04551-060
Brazil
+55 (11)3521.7160

Singapore

One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

Washington, D.C.

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
+1 202.955.8500