INSIGHTS

The Corporate & Securities Law Advisor

VOLUME 34, NUMBER 11, NOVEMBER 2020

Preparing for Proxy and Annual Meeting Season **Page 3**

LAURA D. RICHMAN, **ANNA T. PINEDO,** and **MICHAEL L. HERMSEN** of Mayer Brown LLP discuss preparations for the 2021 proxy and annual report season, including the ramifications of COVID-19 and SEC rule changes and guidance.

The Board and Workplace Diversity **Page 19**

HOLLY J. GREGORY, LEONARD WOOD, and **REBECCA GRAPSAS** of Sidley Austin LLP examine calls for greater communications to shareholders regarding the diversity of a company's workforce and board, including diversity goals and data.

Going Public through a SPAC **Page 28**

SEAN DONAHUE, JEFFREY LETALIEN, and **BRIAN SOARES** of Morgan Lewis & Bockius LLP explore the use of special purpose acquisition companies (SPACs) by private operating companies seeking to go public and the unique issues such transactions present.

DEPARTMENTS

34 CLIENT MEMOS

Valuable, practical advice...

38 INSIDE THE SEC

Share repurchases and insider trading...

Enforcement focus on corporate disclosure...

Wolters Kluwer

www.WoltersKluwerLR.com

SECURITIES REGISTRATION

Going Public through a SPAC: Legal Considerations for SPAC Sponsors and Private Companies

SPACs have emerged as the preferred route for taking a company public in 2020 after market volatility has led to a decline in the traditional IPO market for operating companies. Although this new trend shows no signs of slowing down, SPACs present their own set of unique corporate and securities law issues.

By Sean Donahue, Jeffrey Letalien, and Brian Soares

There are over 100 special purpose acquisition companies (SPACs) currently in the process of looking for acquisition targets.[1] Whether a SPAC is looking for an acquisition target or a private company is considering going public by combining with a SPAC, several corporate and securities law issues must be considered in undertaking any such transaction.

Preliminary Observations

First, going public through a SPAC as opposed to a traditional initial public offering (IPO) offers some advantages to a private company, most notably in the speed of execution. Simply put, the process of going public through a de-SPAC transaction almost always is faster than engaging in an underwritten IPO. In this regard, in some de-SPAC transactions, the Target becomes public less than two months after the signing of the merger agreement for the de-SPAC transaction. On the other hand, even under the best of timing scenarios, the traditional IPO process typically takes at least four months.

Second, one of the perceived disadvantages of going public through a SPAC was the historical perception that there may be some difficulty in raising additional capital beyond the funds contained in the SPAC trust account. This perceived disadvantage is largely mitigated by the ability of the SPAC and the Target to raise additional capital in a private investment in public equity (PIPE) that will sign at the same time that the de-SPAC merger transaction signs and fund at the same time that the de-SPAC merger transaction closes.

In our experience, the combination of an investment banking firm serving as placement agent for the PIPE, coupled with the existing relationships of the SPAC sponsor, has enabled the SPAC and the Target to raise sufficient additional capital through a PIPE. The completion of the capital raising through the PIPE transaction that is marketed and signed (subject only to funding at closing) concurrently with the negotiation and execution of the merger agreement significantly reduces financing risk and enhances the probability of completion of the de-SPAC transaction. In less common examples, the PIPE was conducted after the signing of the merger agreement, and the execution risk has been much greater because of the lack of certainty that new cash from PIPE investors will cover the loss of cash used to satisfy redemptions.

The Merger Agreement and Other Corporate Documentation

Since a de-SPAC transaction is structured as a reverse merger, the primary document needed for the transaction is a merger agreement. The merger agreement will be the subject of intense negotiations between the SPAC and the Target. There also likely will be several key ancillary agreements to the merger agreement, including a voting agreement relating

Sean Donahue, **Jeffrey Letalien**, *and* **Brian Soares** *are attorneys at Morgan, Lewis & Bockius LLP.*

to certain of the Target's shareholders, a registration rights agreement relating to various securities issued in private placements, and an investor rights agreement governing certain matters between the Target's shareholders and the public company post-closing.

At the same time that the merger agreement is being negotiated, the SPAC will be conducting due diligence on the Target. Once the merger agreement and due diligence process are both substantially complete, the Target and the SPAC will need to obtain board approval for the transaction.

Obtaining and Documenting Board Approvals for the Merger Agreement

Each of the SPAC and the Target must obtain the approval of their respective boards of directors for the merger agreement. Several other items also will require board and shareholder approval, such as amendments to the certificate of incorporation and the adoption of an incentive plan for the combined company's employees. Although some of the amendments to the certificate of incorporation will be technical, many of the amendments will reflect substantive determinations agreed to by the parties to the transaction. These include whether to adopt a classified board of directors and the number of authorized shares of capital stock of the post-combination company. Following approval by the board of directors of the SPAC, such proposals will be subject to shareholder approval at the special meeting of SPAC shareholders in connection with approval of the merger.

The approval by the SPAC board could be subject to legal challenge.

The SPAC will want to be particularly diligent and thoughtful in its approval process since the approval by the SPAC board could be subject to legal challenge. As an acquirer, the SPAC board's decision to acquire the Target likely will be subject to the deferential business judgment rule, assuming the SPAC is a Delaware corporation. Nevertheless, board members will need to make sure that they were duly informed about the transaction, and outside counsel should help the SPAC conduct a process that will withstand legal challenge.

Historically, there were fewer legal challenges to de-SPAC transactions as compared to traditional public company M&A transactions, but there has been more threatened and actual litigation involving de-SPAC transactions in the last few years.[2] Board members, members of management, and the advisors to the SPAC should maintain careful records of the negotiations and deliberations, as the board's process and the negotiations between the parties will need to be described in detail in the proxy statement filed with the US Securities and Exchange Commission (SEC) and mailed to shareholders, and such disclosure will be scrutinized by plaintiffs and their law firms.

Shareholder Approval from the SPAC and the Target

The transaction will require approval by both the SPAC and the Target shareholders. The approval by the SPAC shareholders will occur at a special meeting of shareholders immediately prior to the closing of the de-SPAC transaction. The SPAC and the Target also will want to ensure prior to signing the merger agreement that the Target's shareholders will vote in favor of the merger. If the transaction is structured as a share exchange in which the SPAC will be filing a Form S-4 registration statement, pursuant to SEC Staff guidance, the consent of the Target's shareholders to the merger cannot be obtained prior to the signing of the merger agreement and the effectiveness of the registration statement. However, the SEC Staff permits obtaining voting agreements from certain shareholders to vote in favor of the merger and such agreements can be obtained at the signing of the merger agreement.[3] In this regard, it is permissible to obtain voting agreements locking up the vote of

Target shareholders (lock-up agreements), provided that the following procedures are followed:

- The lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5 percent or more of the voting equity securities of the Target,
- The persons signing the lock-up agreements collectively own less than 100 percent of the voting equity of the Target, and
- Votes will be solicited from shareholders of the Target who have not signed the lock-up agreements and would be ineligible to purchase in a private offering.

De-SPAC Transactions and PIPE Transactions

Many de-SPAC transactions are accompanied by a PIPE transaction in which the SPAC and the Target raise additional funds through a private placement. The PIPE transaction ensures that the post-combination company will have additional capital to fund its operations post-closing. The PIPE transaction typically will sign at the same time as the merger agreement and close and fund at the same time that the merger closes. The primary documentation for the PIPE transaction will be PIPE subscription agreements that will be entered into with PIPE investors. The SPAC typically drafts the subscription agreement while incorporating feedback from the Target and the PIPE investors. A final form of subscription agreement will then be entered into between the SPAC and the PIPE investors, typically at the same time the merger agreement is signed, and funding and delivery of shares will occur at closing of the transaction.

Potential investors in the PIPE transaction are solicited through a "wall crossing" process. Such investors agree to maintain the confidentiality of information provided, which typically consists of an investor presentation similar to an IPO roadshow presentation and contains information about the Target's business and the terms of the transaction. As discussed below, the investor presentation also will be used to market the transaction to shareholders of the SPAC to solicit approval of the de-SPAC transaction and require coordination between the SPAC, the Target, and their advisors, including the Target's investment bankers.

In order to "cleanse" the PIPE investors and enable them to resume trading in the SPAC's securities after the public announcement of the de-SPAC transaction, the parties will agree to make the investor presentation publicly available concurrent with the public announcement of the transaction. Targets should be aware that information that they are used to keeping confidential as private companies will need to be made public in connection with such a cleansing obligation. Some SPACs seek to make even more detailed information, such as draft sections of the proxy statement, available to potential PIPE investors, but such an approach can result in the need to make that information publicly available earlier in the process than may be desirable.

Required SEC Filings upon Signing of the Merger Agreement

The SPAC will need to file a Form 8-K within four business days of the signing of the merger agreement. In practice, the "Signing 8-K" is filed on the same day the merger is announced via a press release so that the SPAC and the Target can engage in detailed discussions with the press, employees, investors, and analysts in compliance with Regulation FD. Regulation FD prohibits the selective disclosure of material nonpublic information to investors, analysts, and other securities market professionals, and thus it is a best practice to have the Signing 8-K on file immediately after the transaction is announced via press release.

The Signing 8-K will include disclosures regarding the merger agreement, any voting agreements, any PIPE subscription agreement, and any other material ancillary documents relating to the merger. The Signing 8-K typically also will include an investor presentation that will be used in discussions with investors and analysts regarding the merger and which usually is largely unchanged from the presentation delivered to PIPE investors. The Signing 8-K also may contain various investor communication materials that will be used by the SPAC and the Target on the day of signing.

Required SEC Filings in Connection with Shareholder Approval

The primary SEC filings relating to the merger transaction will be either a proxy statement or a Form S-4[4] registration statement, which will contain a proxy statement/prospectus. A Form S-4 will be used if the transaction is structured as a share exchange in which the SPAC's shares are being exchanged for the Target's shares. Otherwise, rather than filing a Form S-4, the SPAC will file a proxy statement. Regardless of whether the SPAC files a proxy statement or a Form S-4, the disclosure requirements are very similar.

Because a de-SPAC transaction is essentially a public company M&A transaction coupled with an IPO, the proxy statement or S-4 contains the typical disclosures that would be required in any public company M&A transaction that requires a shareholder vote and all of the typical disclosures that would be contained in a Form S-1 registration statement for an IPO. The parties will want to file the proxy statement or the Form S-4 as soon as possible after the signing of the merger agreement.

SEC Filings between Signing and Closing

Regardless of whether the primary SEC filing relating to the merger is a proxy statement or a Form S-4, the SEC rules mandate that any communications relating to the de-SPAC transaction be filed the date the materials are first published, sent, or given to shareholders. This means that any written communications relating to the transaction will need to be filed with the SEC on the date of first use. These requirements are not present in the typical IPO process as they arise from the fact that there is a business combination that will require a vote of the SPAC's shareholders. Careful coordination is required between the SPAC and the Target, and the SPAC's and the Target's outside counsel, public relations advisors, and investment bankers, to ensure that all filings are made with the SEC by the required 5:30 p.m. Eastern Time deadline on the day they are first used.

SEC Staff Review

The SEC Staff will conduct a full review of the proxy statement or Form S-4 and the review team will consist of SEC lawyers and accountants. The SEC Staff typically takes approximately four weeks to issue its first comment letter on the proxy statement or Form S-4. Upon receipt of the SEC comment letter, the team will move quickly in responding to the SEC comments by preparing a revised proxy statement or amended Form S-4 with revised disclosures and a response letter addressed to the SEC Staff responding to the SEC Staff's comments. In addition, other updates to the proxy statement or S-4 may be required due to the passage of time, such as updating the financial statements. Also, it is fairly typical that post-business combination employment agreements are negotiated between signing and closing so the executive compensation section of the proxy statement or Form S-4 will often need to be updated as well.

Once the SPAC responds to the first round of SEC Staff comments, there often is a second round of comments from the SEC Staff that they typically issue within 10 to 14 calendar days of the amended filing. The SPAC and Target will want to respond to those comments as quickly as possible, respond to any final comments received from the SEC Staff, and get the SEC's go-ahead to file the definitive proxy statement or final proxy statement/prospectus.

Lastly, it should be noted that because the S-4 is a registration statement under the Securities Act of 1933, whereas a proxy statement is filed solely under the Securities Exchange Act of 1934 (Exchange Act), it is our experience that it typically takes a little longer to get through the SEC Staff review process when filing an S-4 registration statement as opposed to a proxy statement.

Mailing the Proxy Statement and Conducting the Special Meeting

Once the SPAC files the definitive proxy statement or the final proxy statement/prospectus, the document will need to be printed and mailed to shareholders. Typically, the shareholder approval process can take about three weeks from the filing of the definitive proxy statement or a Form S-4 to the special meeting where shareholders of the SPAC will be asked to approve the merger. Careful planning should be done prior to the filing of the definitive proxy statement or the final proxy statement/prospectus to set a record date for the meeting, conduct a broker search, and obtain the corporate approvals needed for the special meeting to the extent any such approvals have not yet been obtained. In addition, the SPAC and Target will need to decide whether to hold the special meeting in person or virtually, with virtual meetings having become much more common due to the COVID-19 pandemic.

Closing the de-SPAC Transaction and Filing the "Super 8-K"

Upon conclusion of the special meeting and the closing of the transaction, the SPAC must file a Form 8-K reporting the voting results of the special meeting and the closing of the transaction, which often is referred to as a "Super 8-K." The Super 8-K will contain information about the completion of the merger, will describe any material agreements entered into in connection with the merger and the closing thereof, and will need to disclose the information about the post-combination company required by the SEC's Form 10. Most of the Form 10 information will be incorporated by reference from the Form S-4 or proxy statement.

If the Super 8-K is filed after the Target's most recently completed fiscal period but does not contain financial statements for such period, the Super 8-K will need to be amended after the transaction closes to include updated financial statements of the Target for the most recently completed fiscal period, as well as updated pro forma financial statements.

In addition to filing the Super 8-K, the SPAC and Target will need to file Form 3 and Form 4 for the executive officers and directors of the post-combination company pursuant to Section 16 of the Exchange Act. The newly combined company will need to file a resale registration statement to register the resale of the shares and warrants issued in connection with the private placement that occurred in connection with the SPAC's IPO, as well as the resale of the PIPE shares, if applicable. In addition, the combined company will need to file a Form S-8 to register any shares that may be issued under equity plans to the combined company's employees. The Form S-8 cannot be filed until 60 days after the filing of the Super 8-K due to the combined company's former status as a shell company.

While post-closing securities compliance is outside the scope of this article, two issues are worth mentioning. As noted above, the combined company will need to file a resale registration statement. Such resale registration statement must be filed on Form S-1 because the SEC Staff takes the position that the post-combination company is not S-3 eligible until it has 12 calendar months of Exchange Act reporting history.[5] In addition, due to its former shell status, the post-combination company is subject to Rule 144(i), which essentially means that no resales can be conducted pursuant to Rule 144 until one year from the filing of the Super 8-K.

Conclusion

Numerous SPACs currently are searching for acquisition targets. At the same time, private companies looking to enter the public markets may find a merger with a SPAC to be an attractive way to become a publicly-traded company. In engaging in any such transaction, SPACs and private companies should keep in mind the legal considerations discussed above.

Notes

1. Laura Forman, "SPACs Could Be a Bubble That Never Quite Pops," *The Wall Street Journal* (Oct. 18, 2020), *https://www.wsj.com/articles/spacs-could-be-a-bubble-that-never-quite-pops-11603029780*.
2. *See, e.g.*, Wheby v. Greenland Acquisition Corp. (D. Del. Oct. 14, 2019) (alleging deficiencies in a proxy statement in violation of Sections 14(a) and 20(a) the Exchange Act); In re Akazoo S.A. Securities Litigation, No. 20-cv-1900, Dkt. No. 15 (E.D.N.Y. 2020) (alleging liability under Section 14(a) on behalf of SPAC shareholders eligible to vote on the merger, Sections 10(b) and 20(a) on behalf of other purchasers of shares, including through the SPAC's PIPE subscription agreement, and Sections 11 and 15 of the Securities Act, on behalf of purchasers of common stock traceable to the Company's registration statement and prospectus, as both were issued in connection with the de-SPAC transaction); and Welch v. Meaux (W.D. La) (asserting claims under Sections 11, 12(a)(2), and 15 of the Securities Act and Sections 14(a), 10(b), and 20(a) of the Exchange Act, alleging that various statements, including financial projections, included in the proxy and registration statement filed in connection with the de-SPAC transaction, along with other statements made after the de-SPAC transaction, were false and misleading).
3. *See* Securities Act Sections Compliance and Disclosure Interpretation Question 239.13.
4. A Form F-4 may be used instead if the issuer meets the definition of "foreign private issuer" set forth in Rule 3b-4 of the Exchange Act.
5. *See* Securities Act Forms Compliance and Disclosure Interpretation Question 115.18.