# De-SPAC Transaction Trends in 2023

A Practical Guidance® Article by
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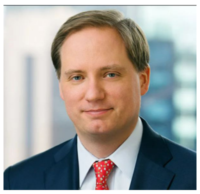

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This article provides an overview of the state of the SPAC market and key trends and issues in de-SPAC transactions, and describes how, through creative deal making, de-SPAC deals are still getting done. Special purpose acquisition companies (known as SPACs or blank check companies) are publicly listed companies that search for a business to combine with after raising capital through an IPO. The proceeds from the SPAC IPO are held in a trust account until the earlier of the consummation of the merger or the liquidation of the SPAC. The merger between the SPAC and the target company is known as a "de-SPAC transaction," and as a result, the target company becomes a publicly listed company.

SPAC transactions (IPOs and de-SPACs) have been on a rollercoaster ride for the past few years. In 2019, de-SPACs emerged from a less used IPO alternative to become, by mid-2021, the IPO vehicle of choice for many private companies in high-growth industries, such as electric vehicles and batteries, tech and fintech, space travel, and biotech. As a result, SPACs became a popular investment class during this period. However, as a result of a number of factors discussed in this article, including a decrease in investor appetite for high-risk investments and de-SPAC related PIPE investments, a significant increase in the rate of shareholder redemptions in de-SPAC transactions, and increased judicial and regulatory scrutiny, SPACs began to wane in popularity in 2022 and the first half of 2023.

Over this same period, the traditional IPO market has experienced a meaningful decline for many of the same factors that challenge the SPAC market, including a shift in investors preference from growth companies to high-quality, low-risk investments. Against this challenging backdrop, however, SPAC IPOs and de-SPAC transactions still are being completed, albeit at a significantly slower pace than in 2021. It remains to be seen whether SPACs will continue to offer companies a viable path to go public when compared to a traditional IPO.

## The Rise and Fall of the SPAC Market

SPACs have been an alternative route for private companies who wish to go public since the 1990s. In late 2020 and early 2021, the SPAC market exploded, as founders, venture capitalists, and private equity firms saw de-SPACs as an attractive alternative to traditional IPOs. The low interest rate pandemic environment offered opportunity for high-growth companies to expand at a rapid pace. The ability for these companies to access the public markets with reduced capital markets risk, flexibility of price discovery, deal terms within an M&A construct, and (for a "public-ready" target) a potentially shorter deal timeline, was incredibly attractive.

Traditional IPOs typically take 12 to 18 months from conception to completion and even at their quickest, still often take 6 months. By comparison, at least in 2019 to early 2021 before the increase in regulatory scrutiny described below, de-SPAC transactions typically could be completed in about 4 to 6 months. In late 2020 and early 2021, certain de-SPACs (if the requisite financials were already prepared) were closed and completed in as little as 2 months. In addition to speed, many founders viewed the M&A aspects of a de-SPAC transaction as offering benefits over a traditional IPO (e.g., the ability to negotiate the target's valuation upfront, rather than going through a negotiated process after filing a registration statement to go public).

This confluence of factors led to a boom in SPAC transactions. In January 2021 alone, SPAC IPOs raised about $26 billion, which equated to one-third of the funds raised in all SPAC IPOs during 2020. At that time in early 2021, the SPAC IPO market was so robust, that nontraditional sponsors, including celebrities, began taking SPACs public. In Q1 of 2021 alone, 314 SPAC IPOs were filed, and by the end of the year, over 600 SPAC IPOs were filed. A record number of 199 de-SPAC transactions were announced in 2021. However, as with many rapidly expanding assets classes, this growth proved unsustainable. The market quickly became saturated with SPACs seeking private targets, investors questioned the lofty valuations of some target companies and developed a negative perception of the SPAC product, and a variety of market-related and regulatory factors led to a significant cooling of the SPAC market by the end of 2021. Although, as of Q1 2023, 1,038 SPACs have completed IPOs since the start of 2021, only 467 de-SPAC transactions have been completed. Further, in 2023, as of the end of Q1 2023, only 11 SPAC IPOs were filed and 40 de-SPAC transactions were completed. As a result, the SPAC market looks considerably different in 2023 than it did in 2021.

The slowdown in SPAC activity is expected to continue for the remainder of 2023 for a variety of reasons. First, interest rates and inflation remain high and investors continue to prefer lower risk investments over higher risk growth companies. Also, many of the 600+ SPACs that went public in 2021 are nearing their business combination expiration dates or have expired and liquidated without completing a de-SPAC transaction. SPACs typically need to complete a transaction with a business combination target within 18–24 months following their IPO, absent an extension approved by shareholders. If a SPAC cannot find a target and complete a business combination by the expiration date set forth in the SPAC's organizational documents, the SPAC must liquidate. At the end of Q1 2023, 50 SPACs had been liquidated so far in the year.

## Redemptions, Liquidations, and Poor Stock Price Performance

One key feature of SPACs is that shareholders in a SPAC have a redemption right. Because the target company is not known at the time of the SPAC IPO, investors have the right to redeem their shares prior to a business combination with a target company. This right can introduce considerable risk into the de-SPAC transaction if the target company is depending on the SPAC's trust account cash for primary capital to fund operations and capital expenditures.

The rate of exercised redemptions for deals closed in 2022 exceeded 80% on average, which is double that of 2021. Q1 2023 saw even higher redemption rates. In March 2023, for example, investors on average elected to redeem 95% of the capital in trust. In addition to this increase in redemptions, SPAC fundraising has become more difficult. In 2021, the average size of a SPAC trust was over $320 million, and in 2022, the average size of a SPAC trust was just $248 million and continued to decline in the first half of 2023. These smaller trust amounts at the SPAC IPO are due in part to a desire to reduce the potential dilution from the SPAC's warrants, contracts that give the holder the right to purchase from the issuer a certain amount of additional shares of stock in the future at a certain price, as SPACs are not delivering a large amount of cash in trust at the de-SPAC transaction because of high redemption rates and the decision to engage in smaller business combinations.

The perceived lack of "public company ready" targets has resulted in a large number of SPACs wanting to complete business combinations chasing a small set of viable, high-quality targets interested in becoming public through a transaction with a SPAC. In the high redemption climate, many targets which may have once viewed the de-SPAC transaction as a potential growth opportunity are instead staying private as the lack of committed primary capital in de-SPAC transactions (e.g., via a PIPE or non-redemption agreements) and the likelihood of high redemptions means the transaction may be more costly than the amount of cash left in the SPAC's trust. As a result of these factors, more SPACs are expected to announce an intention to liquidate in 2023, which comes with its own issues for SPAC sponsors, including payment of advisor fees and rights to any break fee paid to the SPAC.

Stock price performance of the newly public companies following their de-SPAC transactions generally has been poor—another factor contributing to the slowdown of the SPAC market. Companies that have merged with SPACs have underperformed the S&P 500 by eighty percentage points since 2018. This underperformance began at the end of 2021 and steadily accelerated through the end of 2022. From March 2021 to February 2023, Pitchbook's de-SPAC Index has been down almost 80%. However, this poor performance has generally mirrored the poor performance of traditional IPOs in the same period.

# Key Terms in 2023 De-SPAC Transactions

Despite this challenging environment, some deals are still getting done in 2023. Market participants are adapting to the ever changing regulatory and economic landscapes with increasingly innovative and novel terms and structures, and, for the time being there still seems to be a viable role for SPACs in the market.

## Redemption Mitigation

As the market continues to see high redemption rates and challenges for obtaining third-party financing, SPACs and SPAC sponsors are devising inventive strategies to mitigate the lack of primary capital that SPACs provide. Sponsors are signing up deals without (or with much smaller) minimum cash conditions, which require that after redemptions (and often after payment of transaction costs), a specified amount of cash remain in the SPAC trust account. In 2021, 94% of merger agreements included a minimum cash requirement. In 2022, only 77% of closed deals required a minimum cash condition to be satisfied. Moreover, for deals signed before very high redemption rates became the norm, many targets ended up waiving the minimum cash condition or negotiating an amendment to the merger agreement (often to trade a lower minimum cash condition for the SPAC sponsor forfeiting additional "promote shares" or warrants, or to bring in a PIPE investment, often on unfavorable terms for the sponsor and company). In 2021, only 37% of merger agreements were amended. However, in 2022, that number increased to 60%.

In addition, SPAC sponsors are attempting to mitigate high redemption rates (and make up for a lack of traditional common stock PIPE financing) by signing up PIPEs on nontraditional, potentially highly dilutive terms or using convertible debt, post-closing liquidity facilities like equity lines, or even traditional acquisition financing, or a combination of one or more of the foregoing, all of which were rare in 2020 and 2021 when traditional common stock PIPE financing priced at $10/share was the standard.

One result of the rise in redemptions and decrease in traditional PIPE financing is that transactions are decreasing significantly in size. In January 2023, the average enterprise value of the target companies in de-SPAC transactions was approximately $185 million. In contrast, in January 2022, the average enterprise value of target companies was $1.06 billion, and in January 2021, the average was $2.22 billion.

No magic bullet yet exists to solve for redemptions; rather, it is typically a multi-strategy approach of employing different levers to mitigate the impact of, or to replace the cash paid out on, redemptions. For example, SPACs have been attempting to use non-redemption pools and other similar structures to incentivize non-redemption. These bonus pool arrangements attempt to incentivize shareholders to hold their shares because the higher the redemption rate, the larger the relative piece of the bonus pool becomes for each non-redeeming shareholder. However, these arrangements have not yet proved successful. For example, in September of 2022, 91% of one SPAC's shares were redeemed when shareholders voted on the business combination, despite a bonus pool arrangement, and another SPAC which used a "tontine" style warrant arrangement was forced to liquidate after being unable to find a viable target company.

## PIPE Financing

PIPE financing was a vital part of the SPAC boom in 2021. In 2021, 95% of SPAC deals had some type of PIPE financing, and the average size of the PIPE was $316 million, which, in many cases, was larger than the size of the SPAC trust account. The PIPE market began tightening at the end of 2021, and this trend continued throughout 2022, with the average PIPE size declining almost 80% to just $65 million by the end of 2022. The PIPE market in 2023 is expected to continue to be challenging, as traditional PIPE investors have increasingly moved away from making investments in SPAC transactions and investors generally remain apprehensive to invest in SPACs due to market volatility (and longer timelines to closing) and poor stock price performance from many newly de-SPACed companies.

Historically, PIPE shares were priced at $10 per share (consistent with the IPO pricing), but increasingly investors can buy shares for less than $10 after the de-SPAC transaction. For example, since Q4 2022 through February 2023, 20 SPACs have traded or are trading at $2.50 or less and just 6 de-SPACs have traded or are trading above $10 per share. In addition, in the current market, deals are taking longer to close, which locks up investor PIPE commitments for longer periods of time. In 2021, the average time between signing and closing a de-SPAC transaction was 5.2 months. The average time between signing and closing was about 6.8 months in 2022, with this interim period being as long as 18 months in certain cases. The increase in the length of time between commitment and closing coupled with market volatility and the flight to quality, low-risk investments has caused PIPE transactions to slow considerably. The consequence is that SPACs generally are no longer as attractive an investment vehicle for investors, and PIPE financing has become harder to obtain.

As a result, sponsors and financing sources have become more creative, putting in place novel and bespoke financing arrangements tailored to a company's particular objectives. Since 2021, there has been an increase in "insider only/ friend and family" PIPEs, where investors are SPAC sponsors, target insiders, or others with whom the sponsor or the target has a close relationship (i.e., "friends and family"). In many deals, the sole PIPE investment came from this type of arrangement. Similarly, "strategic" PIPEs, which are funded and led by investors that have a business interest in or commercial connection with the target, have been another alternative, with the PIPE counterparty being not just an investor, but rather establishing a longer term relationship with the target's business. In addition, the historic $10 per common share PIPE has been replaced with other types of instruments, such as convertible debt, promissory notes, preferred stock, non-redemption agreements, bank facilities, private loans, and equity lines of credit. Further, third-party PIPE investors often require more investor-favorable terms than the historic $10 per share valuation, such as more than one share per $10, extra sweeteners such as warrants or downside protection (where additional shares are issued, or there is other anti-dilution protection, if a SPAC trades down after closing), or a structure that funds in tranches, or converts equity to debt, based on liquidity or other conditions or milestones.

Using these alternative financing structures can (1) mitigate the risk of not having enough capital to fund the business combination and satisfy the minimum cash requirement and (2) provide a newly de-SPACed company with post-closing liquidity and access to capital. As with mitigating redemptions, the "ideal" PIPE structure more often consists of a multi-faceted strategy of several different closing and post-closing funding sources that work together to address the company's needs.

## Sponsor Economics

Given the abundance of SPACs in the market, the increased costs of SPAC transactions (see Regulatory Landscape below), as well as longer timelines to close, volatility in the market, and the resulting preference shift away from growth investments, targets are using their leverage to extract value from SPAC sponsors. Typically, a SPAC sponsor, through "founder shares," will hold 20% of the equity of a post-IPO SPAC as well as private warrants (used to fund deferred underwriting discounts and initial SPAC costs) and hold these through the completion of the business combination. More and more sponsors are forfeiting their founder shares or their private warrants to attempt to reduce dilution and improve deal economics for targets. In 2021, sponsors forfeited a portion of their founder shares in 56% of deals. However, by 2022, this number increased to 85% of deals.

SPAC sponsors will also often agree to subject their founder shares to vesting and forfeiture provisions (e.g., a portion of sponsor shares are forfeited if the de-SPAC company stock does not trade above a certain price threshold within a certain time period). This vesting structure is seen as a way to align the incentives of SPAC sponsors, target shareholders, and public shareholders and mitigate some of the criticisms that SPAC sponsors will pick any deal over a good deal for SPAC public shareholders. In 2022, 80% of deals with a vesting condition had a vesting period that was five or more years. 2022 saw more forfeiture conditions tied to the amount of cash in the SPAC trust plus third-party PIPE raised as a way to incentivize delivery of financing. We expect continued focus on SPAC sponsor economics, as a tool that can be used in combination with other structures and incentives, to get transactions completed.

## Regulatory Landscape

As SPACs grew in popularity in 2021, SPAC critics increasingly voiced their view that a lack of rules and regulations exposed retail investors to undue risks. In March 2022, the SEC proposed sweeping new regulations, which would require additional disclosures and other obligations similar to those that exist in traditional IPOs. The proposed rules and likelihood of prescriptive final rules are having an effect on the SPAC market and deal structure.

These proposed rules would require more detailed disclosures about SPAC sponsors and their incentives, conflicts of interests, and sources of dilution. SPACs would also need to disclose more details about potential business combinations, including providing specifics about the fairness of the de-SPAC transaction and any related financing transactions. Although the proposed SEC rules do not explicitly require a fairness opinion from a third party, we expect more SPACs to obtain a fairness opinion to ensure compliance should the proposed rules be adopted. 32% of SPAC deals had a fairness opinion in 2022, while only 15% of deals had such an opinion in 2021. SPAC critics and plaintiff firms have also advocated that the SEC adopt a rule requiring the disclosure of "net cash per share" which is the cash that will be invested by the SPAC in the target on a fully diluted per share basis. Although not a traditional valuation metric, at least one court has held at the pleading stage that a SPAC's pre-merger "net cash per share" is a material metric that, if not expressly disclosed, may expose SPAC fiduciaries to liability. More de-SPAC transaction disclosures are expected to expressly include this calculation going forward.

The proposed rules would also expand statutory underwriter liability under Section 2(a)(11) of the '33 Act to apply to de-SPAC transactions. The SEC states in the proposing release that attaching underwriter status to SPAC IPO underwriters in connection with de-SPAC transactions should incentivize underwriters to help ensure accuracy of the disclosures in de-SPAC transactions, given the attendant liability for registered de-SPAC transactions. The expanded scope of Section 11 Liability would force banks to conduct increased levels of due diligence on the target, similar to that required in the traditional IPO context.

Currently, the Private Securities Litigation Reform Act (PSLRA) provides a safe harbor for forward-looking statements when accompanied by meaningful cautionary statements. However, this safe harbor is not available when the forward-looking statement is made in connection with an IPO or an offering by a blank check company. The definition of a blank check company under the PSLRA does not include SPACs. The proposed rules would amend the definition of "blank check company" to include SPACs, which would cause the PSLRA safe harbor to not be available for forward-looking statements, such as projections, made in connection with de-SPAC transactions involving an offering of securities by a SPAC. The unavailability of the safe harbor would extend to statements regarding the projections of target private operating companies in these transactions. As the de-SPAC transaction is an M&A transaction in which the valuation of the target company reached by the SPAC board is often based on the target's projected financial information, the closing of the safe harbor (to the extent it was ever available) is expected to have a chilling effect on de-SPAC transactions in which the target company is not an established operating company.

Due to the perceived increased exposure to liability, many financial institutions have reevaluated their SPAC activities. Institutions who continue to partake in the SPAC market are being more cautious, given the proposed rules would make it easier for investors to bring lawsuits against them. The cost of de-SPAC transactions has increased in part because many such institutions are conducting increased due diligence, and more banks are requesting comfort letters from the target company's auditor in connection with de-SPAC transactions, a practice consistent with a traditional IPO.

Before the SEC proposed these new rules in March 2022, SPACs were viewed as an attractive alternative to traditional IPOs because they were seen as a potentially less expensive and quicker way to take a company public. The proposed rules would make compliance more expensive and cumbersome, while potentially increasing liability, which will likely negatively impact an already weak SPAC market.

The final rules are expected to be released during Q2 of 2023, according to the SEC's most recently published regulatory agenda.

# Increase in SPAC Litigation

Along with the SEC's proposed rules, there has been an increase in SPAC litigation and Delaware courts have begun to weigh in on SPAC transactions. Note that the *Multiplan* and *Gig3* decisions described below were reached at the motion to dismiss stage.

### In re MultiPlan Corp. Stockholders Litigation

In January 2022, the Delaware Court of Chancery issued its decision in In re MultiPlan Corp. Stockholders Litig., 2022 Del. Ch. LEXIS 1 (Ch. Jan. 3, 2022). In MultiPlan, the SPAC's sponsor held Class B shares which it purchased for a nominal price. The SPAC sponsor also allegedly hand-picked the board, all of whom had significant ties to the sponsor and all of whom also held Class B shares. If the SPAC did not complete a transaction, Class A shareholders had a redemption right to receive their pro rata share of the amount from the SPAC IPO plus interest, and the Class B shares would expire as worthless. The SPAC identified MultiPlan as its target, and an overwhelming majority of the shareholders voted in favor of the business combination. After the merger closed, it came to light that MultiPlan's largest customer planned to form a competitor entity, and the stock price dropped significantly. This information allegedly was omitted from the proxy statement.

The defendants moved to dismiss the suit, but the court held that the defendants allegedly interfered with the shareholders' redemption rights through the form of purposefully and materially misleading disclosures. The court held that the proxy statement contained misleading disclosures regarding MultiPlan's largest customer's plan to form a competing entity, with associated loss of revenue for MultiPlan. The court explained that "[b]ased on the plaintiffs' allegations, it is reasonably conceivable that a Class A shareholder would have been substantially likely to find this information important when deciding whether to redeem [their] Churchill shares."

The court held that interference with the shareholders' redemption right through materially deficient disclosures gave rise to direct claims, not derivative claims. The court went on to evaluate those direct claims under the entire fairness standard of review, holding that the de-SPAC merger was a conflicted controller transaction. The court held it was reasonably conceivable that the sponsor was the SPAC's controlling shareholder, and that a majority of the board was not independent of the sponsor. Because of conflicting interests between the board and shareholders given the dynamics of the Class A and Class B shares, the court found the sponsor (and board members who also held Class B shares) had different interests than the Class A shareholders. The court observed that if no deal occurred, the Class B shares would be worthless, but the Class A shareholders would get back all of their capital. However, if the board chose to enter into a risky or "bad" deal, the Class B shareholders would still benefit, as they would receive an immediate and significant return on their Class B shares compared to the purchase price, but the Class A shareholders would lose a substantial amount of their capital. The court also rejected the argument that the claims should be dismissed as "holder claims" (i.e., a claim predicated on shareholder inaction) that typically cannot be brought as a class action. In rejecting this argument, the court concluded that the claim was not founded on shareholder inaction, but instead on a claim that shareholders had an affirmative choice as to whether to exercise their redemption right and whether to approve the merger.

### Delman v. GigAqcuisitions3, LLC

In January 2023, the Chancery Court expanded on MultiPlan in Delman v. GigAcquisitions3, LLC, 2023 Del. Ch. LEXIS 1 (Ch. Jan. 4, 2023). GigCapital 3, Inc. was a Delaware SPAC that planned to merge with Lightning eMotors, Inc. Plaintiff alleged that Gig3's sponsor (GigAcquisitions3, LLC) was controlled by the defendant, Avi Katz, who effectively controlled the SPAC. Mr. Katz held nonredeemable founder shares, spearheaded the conversations with the target, controlled the SPAC's board, and oversaw the SPAC from inception until the completion of the de-SPAC transaction. No fairness opinion was obtained. Following the de-SPAC transaction, Lightning eMotors' stock was worth around $5.25 per share, substantially less than $10 per share indicated by the proxy.

The court found that the complaint adequately stated a claim that the defendants were disloyally motivated to discourage redemptions and did so by issuing a proxy statement containing false and misleading information, which impaired shareholders' ability to make an informed decision whether or not to redeem their shares. In doing so, the court noted that "[t]he right to redeem is the primary means protecting shareholders from a forced investment in a transaction they believe is ill-conceived . . . It follows that a SPAC's fiduciaries must ensure that right is effective, including by disclosing 'fully and fairly all material information' that is reasonably available about the merger and target to inform the redemption decision."

Because the court found that the complaint stated a viable claim for breach of fiduciary duty for issuing false and misleading disclosures that impaired shareholders' right to redeem, it denied the defendant's motion to dismiss. The court went on to apply the rationale of MultiPlan and evaluate the transaction under the entire fairness standard of review.

### Garfield v. Boxed, Inc.

In December of 2022, the Delaware Chancery Court issued Garfield v. Boxed, Inc., 2022 Del. Ch. LEXIS 360 (Ch. Dec. 27, 2022), a decision that had implications for the many SPACs that had dual class common stock. Boxed was initiated as a dispute over attorneys' fees, but the Boxed court first had to determine whether the defendant's voting structure was valid. Seven Oaks Acquisition Corporation planned for its Class A and Class B shareholders to vote together as a single class on an amendment that would increase the number of authorized Class A stock. A shareholder of the SPAC argued that Class A and Class B shares were separate classes of stock, and therefore, under Section 242 of the Delaware General Corporation Law, could not vote together. The SPAC argued that the Class A and Class B shares were one class of stock with two series and could vote together as one class. In the context of determining whether the shareholder presented a meritorious claim for purposes of being entitled to a fee award, the court concluded that the shareholder had a meritorious claim that Class A and Class B shares were separate classes, not series, and that therefore a class vote should have been required under Section 242.

Following the uncertainty created by Boxed, dozens of de-SPACed companies sought relief under Section 205 of the DGCL, which permits the court to ratify or validate a company transaction or amendment that was adopted in a defective manner. The Delaware courts quickly recognized the impact the Boxed decision could have if they did not provide some avenue for relief, as many SPACs approved their de-SPAC transactions with similar voting structures.

De-SPACed entities that have not yet done so should review their historical actions to determine whether the issues identified in the Boxed decision exist. If a corporation identifies a problem, it should consider filing a Section 205 petition with the court to seek to have the defective amendment or transaction retroactively ratified. Going forward, it is necessary that SPACs treat Class A and Class B stocks as different classes of stocks for voting purposes.

As a result of the increased regulatory and litigation pressures SPAC sponsors have faced within the United States, we are seeing more SPACs incorporate in the Cayman Islands. In 2021, 65% of all SPACs were incorporated in Delaware; however, in 2022, only 49% of SPACs were Delaware incorporated and 47% of sponsors chose to create Cayman Island SPACs. Furthermore, in August of 2022, a 1% excise tax on net stock buybacks was enacted which only impacts U.S. SPACs. We expect the trend of SPACs incorporating in the Cayman Islands to continue to increase.

## Related Content

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- Proposed Rules for Special Purpose Acquisition Companies, Shell Companies, and Projections: Client Alert Digest
- Delaware Chancery Court Issues First SPAC Decision
- Delaware Suit Means SPACs Will Face Tougher Legal Scrutiny
- 20 Key Considerations for Private Companies Evaluating Whether to be Acquired by a SPAC
- Key Enforcement Risks For SPAC Parties Amid SEC Scrutiny

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### Practice Notes

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- Market Trends 2022: De-SPAC Transactions
- Market Trends 2021/2022: De-SPAC Transaction Terminations
- Special Purpose Acquisition Companies: 2020's Biggest Corporate Development
- PIPE Transactions
- PIPEs and Raising Capital
- Market Trends 2021/22: PIPEs
- Top 10 Practice Tips: PIPE Transactions by SPACs

## Templates

- Agreement and Plan of Merger (Private Target) (Pro-Buyer) (DE)
- Agreement and Plan of Merger (Private Target) (Pro-Seller) (DE)
- Agreement and Plan of Merger (Public Target, One Step, Stock for Stock) (Pro-Buyer) (DE)
- Agreement and Plan of Merger (Public Target, Two Step, Mixed Consideration) (Pro-Buyer) (DE)
- Amendment to Merger Agreement
- Registration Rights Agreement (PIPE Offering)
- Voting Agreement (Merger Agreement)

*Contributions provided by Sean Coburn and Abigail Johnson, Skadden, Arps, Slate, Meagher & Flom LLP*

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Mr. Barlow regularly advises private equity firms, alternative asset managers, public and private companies, SPACs and financial institutions in a variety of corporate matters, including acquisitions, divestitures, restructurings, financial advisor engagements, financings, leveraged buyouts, shareholder activism, corporate governance and takeover preparedness.

Mr. Barlow was named one of the Top Advisor Lawyers in North America in 2020 by *MergerLinks* and has been recognized as a Rising Star by *The Deal*. He also has provided *pro bono* legal services to a variety of New York-based clients.

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He has represented acquirers and targets in a number of U.S. and cross-border mergers, acquisitions, takeovers, re-domiciliation transactions, joint ventures and leveraged buyouts.

Mr. Chitwood also regularly advises clients with respect to corporate governance and compliance matters, SEC reporting obligations, takeover preparedness and general corporate matters.

Mr. Chitwood has represented a diverse range of clients in a broad range of industries

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Mr. Ellin previously served on Skadden's Policy Committee.

Among the private equity sponsors that Mr. Ellin has advised are Wasserstein & Co., First Reserve Corporation, Windward Capital Partners, Castle Harlan, Colony Capital, TD Capital, Poster Financial Group and PSP Investments. He also represents many companies in their dealings with private equity firms in going-private transactions, having represented Univision, National Financial Partners and AMC Entertainment Inc. when it was taken private by JP Morgan Partners and Apollo Investors.

Mr. Ellin has been named as one of *The American Lawyer's* Dealmakers of the Year and has been repeatedly selected for inclusion in *Chambers Global*, *Chambers USA*, *Legal 500 U.S.*, *The Best Lawyers in America*, *IFLR1000* and Lawdragon 500 Leading Lawyers in America, which also named him to its 2023 Legends of Law list. He also has been included in *Variety's* Dealmakers Elite New York.

### Raquel Fox, Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Prior to joining Skadden, Ms. Fox held a number of leadership positions at the U.S. Securities and Exchange Commission (SEC) over the past decade, including serving as the director of the Office of International Affairs, senior adviser to then-Chairman Jay Clayton and senior special counsel to two directors in the Division of Corporation Finance. She also spent time working in the Office of Rulemaking and Office of Capital Markets Trends.

While at the SEC, Ms. Fox oversaw the agency's participation in international disclosure-related projects focused on accounting and audits, sustainability, COVID-19, emerging risks, data privacy, Brexit, LIBOR transition and fintech, and led negotiations with senior foreign regulatory officials. She managed enforcement and supervisory assistance programs to support cross-border securities examinations, investigations, trading suspensions and enforcement actions by the SEC and foreign authorities. Additionally, she served as a primary advisor on rulemakings, legal interpretations, capital formation and small business matters, the disclosure review program, waivers, enforcement referrals, corporate governance matters, shareholder proposals, international matters and proxy advisory firms. Ms. Fox also prepared testimony and briefing materials for congressional hearings on a broad range of issues, including mandated rulemakings, corporate governance, executive compensation, proxy matters and cybersecurity. She provided substantial assistance on the Disclosure Effectiveness Initiative to help modernize the public company reporting regime, including regarding the legal and accounting requirements of SEC filings and technological improvements to EDGAR. In honor of her work, she was recognized with three SEC Law and Policy awards.

Before joining the SEC, Ms. Fox worked at another international law firm in its Washington, D.C. office, where she advised companies and their boards on securities law compliance and corporate governance matters, including SEC reporting obligations, quarterly earnings releases and investor presentations, the Sarbanes-Oxley Act and exchange listing standards, insider trading policies, and requests for SEC no-action and exemptive relief. She served as a lead counsel for over $60 billion in debt offerings and $3 billion in equity offerings. Ms. Fox also is a certified public accountant.

Ms. Fox has been named to *Chambers USA*, as well as one of Lawdragon's 500 Leading Lawyers in America and 500 Leading Dealmakers in America. She was elected as a 2022 fellow of the American College of Governance Counsel and is currently a member of the Nasdaq Listing and Hearing Review Council, which is responsible for making recommendations to the Nasdaq board on policy and rule changes related to issuer listing standards.

### Michelle Gasaway, Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Ms. Gasaway also counsels clients on an ongoing basis, including with regard to the analysis of transaction alternatives and structures, disclosure issues, securities law compliance, public reporting, stock exchange rules and ESG-related issues.

Ms. Gasaway is recognized in Chambers USA and Chambers Global, was named by the Los Angeles Business Journal as one of its Top 100 Lawyers in 2023 and a Woman of Influence in 2021, and was selected by the Daily Journal as a Top Women Lawyer in 2020. She also was named Best in Capital Markets at Euromoney's 2020 Women in Business Law Americas Awards and was a key member of the deal team recognized by the Daily Journal with a California Lawyer Attorneys of the Year (CLAY) award for innovative work on behalf of Living Health, Inc. in its $18.5 billion acquisition by Teladoc Health, Inc. which was the largest-ever M&A transaction in the digital health sector (2021). She also was chosen as one of The Deal's 2020 Top Women in Dealmaking and has been named to The Legal 500 U.S., IFLR1000 and The Best Lawyers in America.

Ms. Gasaway also is a frequent author of, and contributor to, numerous publications on key topics and trends affecting the capital markets.

### Edward Micheletti, Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Mr. Micheletti repeatedly has been selected for inclusion in *Chambers USA: America's Leading Lawyers for Business*, *The Best Lawyers in America* and Lawdragon 500 Leading Lawyers in America. In 2011, he was one of five attorneys named to the securities section in Law360's list of "Rising Stars," and he was selected as one of the 40 Under 40 by *The M&A Advisor*. Mr. Micheletti also is the co-author of the treatise *Mergers and Acquisitions Deal Litigation Under Delaware Corporation Law*.

Mr. Micheletti is highly experienced in litigation matters arising from mergers and acquisitions, corporate governance disputes and statutory proceedings involving Delaware corporation law. He has had success in cases at every stage in the Delaware courts — from motion practice through trial and on appeal — representing boards of directors, special committees, buyers and investment banks in a vast array of proceedings involving injunctive relief and money damages. He also has handled other significant business litigation matters involving, among other things, federal securities law, complex commercial litigation and escheat law, in state and federal courts both in Delaware and around the country.

Recent clients, among others, have included Activision, American Apparel, Inc., Becton, Dickinson, CME Group, Cypress Semiconductor, Gannett Co., Goldman Sachs, Intercept Pharmaceuticals, Jos. A. Bank Clothiers, Inc., J.P. Morgan Chase, Lattice Semiconductor Corporation, LSI Corporation, Plum Creek, Qlik Technologies, Inc., SanDisk Corporation, Tumi, and Viacom, Inc. board members.

Mr. Micheletti has extensive experience with, and frequently provides advice concerning, the Delaware General Corporation Law. Some of his merger litigation matters resulted in seminal Delaware corporate law decisions, including *Omnicare*, *Toys"R"Us* and *Lyondell*. He also has written numerous articles on Delaware Corporation Law issues, some of which have been cited in opinions issued by the Delaware Court of Chancery and Delaware Supreme Court. He also is a member of the Corporation Law Council of the Delaware State Bar Association, which is responsible for reviewing and recommending revisions to the Delaware General Corporation Law on an annual basis. In addition, he also is a member of the Delaware Court of Chancery Rules Committee.

**Gregg Noel, Partner, Skadden, Arps, Slate, Meagher & Flom LLP**

In a capital markets environment characterized by rapid change and necessitating innovation, Mr. Noel is sought by U.S. and international issuers, investment banks and financial institutions to provide sophisticated guidance in the most complex transactions.

Annually, he is involved in numerous transactions totaling in the tens of billions of dollars. Clients from a broad range of industries, including health care, real estate, financial services and hospitality, call on him to handle their most important matters. He has extensive experience advising technology companies, including PayPal Holdings, Inc.; Freescale Semiconductor, Inc.; Ten-X, LLC; NVIDIA Corporation; Shopify Inc.; Yahoo! Inc.; Hulu, LLC; SurveyMonkey Inc.; SanDisk Corporation; and EMC Corporation.

He has been involved in numerous initial public offerings for U.S. and foreign issuers, including Arysta LifeScience Limited; Safety-Kleen Systems and Vencore Holding Corp. (each part of a dual-track process, which, in the case of Vencore, resulted in a merger via a Reverse Morris Trust); Affirm Holdings, Inc.; D.E Master Blenders 1753 B.V.; Houlihan Lokey Capital; Pinterest, Inc.; and Shopify Inc. He has an active practice representing special purpose acquisition companies (SPACs), with his team advising on approximately 350 SPAC IPOs since 2006. Among many other groundbreaking SPAC deals, Mr. Noel handled the $690 million IPO for Social Capital Hedosophia Holdings Corp., which was recognized as the top matter in the "Driving Value" category in the Financial Times' 2017 Innovative Lawyers report, as well Social Capital's subsequent IPOs.

He also regularly handles the financing aspects of strategic transactions such as mergers, acquisitions, joint ventures and spin-offs. Some of Mr. Noel's representations include EMC Corporation in its $67 billion acquisition by Dell, Inc.; Hillshire Brands Company in its $8.6 billion unsolicited acquisition by Tyson Foods; Plum Creek Timber Company in its $8.4 billion acquisition by Weyerhaeuser Co.; and SanDisk Corporation in its $19 billion acquisition by Western Digital Corporation. He also has represented clients such as J.C. Penney Corporation, Inc.; Viking Cruises Ltd.; and CF Industries in notes offerings and other transactions.

As co-head of the firm's real estate investment trusts (REIT) practice, Mr. Noel regularly represents REITs in connection with capital market transactions, including initial public offerings and general corporate matters. He handled one of the largest-ever REIT IPOs — a $1.6 billion offering by Douglas Emmett Inc. — and has represented numerous other REITs including Westfield Corporation and Colony Capital, Inc.

In 2023, Mr. Noel was recognized as a Stand-Out Lawyer by Thomson Reuters. In addition, on the strength of feedback from his clients, the BTI Consulting Group has recognized him several times as a Client Service All-Star.

Mr. Noel was named to Euromoney's 2022 Best of the Best USA Expert Guide as one of the country's top 30 capital markets practitioners. He also was recognized in 2021 as one of The American Lawyer's inaugural Trailblazers of the West, which honors leading attorneys who have "moved the needle in the legal industry." In 2020, the Daily Journal recognized him as one of the Top 100 Lawyers in California. Additionally, on the strength of client and peer feedback, he repeatedly has been recognized in The Best Lawyers in America, which named him a 2020 Lawyer of the Year in the area of Securities/Capital Markets.

He is listed annually in Chambers Global and Chambers USA, where he is one of only eight attorneys ranked in Band 1 for Capital Markets: Debt & Equity, both in California and the Western United States. He also is ranked in Chambers' Band 1 for SPAC transactions, with a client commentator noting in a recent edition that "there is nothing he doesn't know." He has been named repeatedly as one of Lawdragon's 500 Leading Dealmakers in America and is annually recognized in The Legal 500 U.S., IFLR1000 and The International Who's Who of Business Lawyers — Capital Markets.