Davis Polk

Post deSPAC Webinar Series

Module 1 – Capital Markets

Presented by **Derek Dostal** and **Shane Tintle**

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Your presenters

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Derek has deep experience on a wide variety of public and private capital markets transactions, including IPOs, SPACs and other equity offerings, investment-grade and high-yield debt financings, private placements and mandatory and optional convertible securities offerings. He co-leads the firm's SPAC practice, advising on more than 125 SPAC transactions since the start of 2020.

In 2021, *Law360* named Derek a "Capital Markets MVP of the Year" and *New York Law Journal* selected him as a "Dealmaker of the Year."

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Shane advises U.S. and non-U.S. issuers and underwriters on capital markets and corporate transactions, including private placements, initial public offerings and other equity offerings, and high-yield, investment-grade and convertible debt offerings. Corporate clients, ranging from early-stage privately held companies to well-known seasoned issuers, turn to him for advice on governance, corporate and securities law matters.

He serves as a member of the Board of Directors of Venture for America.

Introducing the webinar series

- Unprecedented waive of private companies that went public via a deSPAC transaction
- Many recently deSPACed companies are facing the same issues – many of these stem from having completed a deSPAC transaction
- Davis Polk is launching this webinar series to focus on these issues
  - No CLE credit – focusing on practical issues, and aiming to keep each webinar to 30 mins or so
  - Upcoming topics
    - Litigation issues related to deSPAC transactions, including recent stock-drop litigation and SEC inquiries
    - M&A considerations for deSPACed companies
    - Shareholder activism

Overview of “regular way” approach

- A public company that has completed a traditional IPO would be able to confidentially submit to the SEC a registration statement for its debut follow-on / secondary offering in the first year after the IPO
- For any offering, it would record a roadshow that would be available in an electronic format on a hosting website like netroadshow.com
- It would not otherwise be limited in its ability to use “free writing prospectuses” – it could file “FWPs” in connection with offerings without further SEC review
- “Well known seasoned issuer” status would be available after one year post-IPO, which would mean the ability to file an automatically effective S-3 registration statement that would future incorporate SEC filings by the company, if it had a public equity float of greater than $700 million

deSPAC status as an “ineligible issuer”

- A public company that has completed a business combination with a SPAC in the *last three years* is considered an “ineligible issuer”
- Status does not turn on structure of the deSPAC transaction
- Various consequences of this status –
  - Limited use of “free writing prospectuses” means
    - No ability to use recorded net roadshow or traditional term sheets
    - But TTW is available – need to discuss scope with internal legal
  - Unable to become a well known seasoned issuer and file an automatically effective S-3 registration statement, but still become S-3 eligible after one year post-deSPAC
  - No ability to “incorporate by reference” in first year when using Form S-1

Registered primary offerings

- Newly public companies are not eligible to file a “shelf” registration statement in their first year to raise primary capital
- Means that a long-form, deal-specific registration statement will be required to be filed with the SEC – that registration statement is subject to SEC review– no “incorporation by reference” of future filings
- Ability to file confidentially will turn on deSPAC structure
  - Traditional structure – one year period keys off of date of SPAC IPO
  - “Double dummy” / “target on top” – keys off of deSPAC transaction
- Part III Info, which includes exec comp disclosure – may be required sooner than it typically would provided as part of ongoing reporting for the filing of a new registration statement after year end

Registered secondary offerings

- Very common for recently deSPACed companies to have filed a long-form registration statement on Form S-1 / F-1 to register the resale of existing equity
- No “incorporation by reference” and must be updated manually via “424 stickers”
- Form requirement to update the plan of distribution for underwriters
- Various approaches in this situation in respect of naming underwriters
  - Menu of underwriters identified in the initial S-1 filing
  - No underwriters identified in the initial S-1 filing but post-effective amendment filed to include them or file a new S-1
  - Some deals have only identified underwriters in a 424 filed at launch – only way to launch without notifying market and no “48 hour” rule
- Other items –
  - Part III Info – same concern as primary offering
  - Consider contractual lock-ups agreed as part of the deSPAC transaction
  - For an effective S-1 / F-1, interplay with timing for the 10-K and whether to “sticker” the 10-K or file a post effective amendment

Convertible offerings

- Not uncommon for deSPACed companies to consider a convertible offering, either an optional convert or a mandatory convert
- Various considerations in doing a convert
  - Optional converts would typically be done on a private 144A basis due to signaling considerations of filing a stand-alone registration statement on a public basis that is subject to SEC review
  - Rule 144(i) introduces certain considerations around the ability to remove legends after one year – may require a resale shelf
  - No ability to use a traditional term sheet for a registered convertible unless it can be shoehorned into Rule 134

Other offering-related issues

- Equity research safe harbors (rules 138 and 139) – not available for deSPACed companies for three years regardless of structure
- Various Resale Issues / Rule 144(i) / Rule 145 PIPE investors – get benefit of resale registration statement and generally don't rely on Rule 144, but depends on structure of the deSPAC
  - SPAC public shareholders – get freely tradeable shares pursuant to S-4 / F-4
  - SPAC sponsor – get benefit of resale registration statement and generally don't rely on Rule 144
  - Former target shareholders who are affiliates
    - Rule 145(c)/(d) – deemed to be "underwriters" but can sell after three months / six months / one year depending on structure of deSPAC transaction
  - Former target shareholders who are not affiliates
    - Rule 145(c)/(d) does not apply, and either get freely tradeable shares pursuant to S-4 / F-4 or can rely on Rule 144 (but note: would have to wait one year before availability of Rule 144 given 144(i) for traditional SPAC structure or "double dummy" structure but not in a "target on top" structure)
- Delegending practices

Warrant exchanges

- Issuer offers to exchange the existing warrants for newly issued common shares – eliminates the warrant “overhang” and induces exercise
- Usually done with a bank acting as dealer manager, in which case the transaction is registered with the SEC using a Form S-4 / F-4 registration statement and a Schedule TO, but could be done on a 3(a)(9) basis
- Offer is required to be kept open for 20 business days per tender offer rules
- Consents to an amendment to the warrant agreement is simultaneously sought – usually provides that there will be a forced conversion of the warrants for common equity at a slightly less preferential exchange rate than offered to holders who participate in the exchange
- Usually will wall cross key warrant holders to gauge pricing terms and viability of an exchange offer

Equity lines

- An alternative to a traditional “at the market” offering where the company sells shares opportunistically through a sales agent bank when the company is not eligible to raise primary capital on a Form S-3 registration statement
- Consists of a private placement to an investor under a purchase agreement and a resale registration statement on Form S-1 registering the resale by that investor
- Under the purchase agreement, the investor has the right to put its shares to the investor over a period of time and the investor is obligated to purchase them
- Purchase agreement establishes a cap on the dollar value of the equity line, but the number of shares is determined by a formula tied to the market price of the securities at the time the company exercises its put – typically a discount to the VWAP over some period
- Various other considerations
  - SEC guidance published in Nov 2020 – requires facility to meet certain criteria
  - Fees to purchaser and ongoing maintenance fees (e.g., accounting / legal)
  - Shareholder approval / 20% rule

Secondary offerings – prospectus sales

- Involves a pre-deSPAC shareholder using the existing S-1 / F-1 registration statement to make sales into the market with a broker-dealer acting as sales agent
  - Many banks have internal policies about when they will be willing to do this – this is different than relying on Rule 144's safe harbor because it involves selling pursuant to an effective registration statement and therefore a different liability profile.
  - Ultimately bank-specific, but a few rules of thumb for non-affiliates –
    - Notional value $5-25 million or less: no indemnity required
    - Notional value greater than $5-25 million and less than $50 million: indemnity from the seller is needed and possibly company as well
    - Notional value greater than $50 million: must be executed as a traditional, underwritten follow-on offering
  - If the seller is an affiliate, then may be fact specific
  - Investment banking coverage and/or research coverage of the company are helpful facts
  - Resales usually must be executed solely on an "Exchange" – principal resales are typically not permitted

Next module

- Plan to cover various litigation topics
  - Scheduled for late June (exact date to be announced)
  - We welcome any feedback on future topics – please reach out!