Your SPACs checklist: from conception to acquisition and beyond

There is no question that Special Purpose Acquisition Vehicles ("SPACs") have become a hot topic on both sides of the Atlantic over the past twelve months. Following on from our recent webinar, "SPACs – is Europe really the next big market?" we've prepared a high level checklist for bringing a SPAC from the drawing board, through IPO, to acquisition and beyond.

If you're considering setting up a SPAC, you should always speak to your legal and tax advisors in the first instance, they will provide you with the detailed guidance and counsel required in relation to the listing process as well as the associated timing and structuring considerations (which will vary depending on the structure of the SPAC and the jurisdiction in which the SPAC is incorporated and listed). Below is an overview of some of the key considerations and factors that may form part of that process.

1. Assess whether a SPAC is right for you

Consider your and your investors' objectives:

- What is the purpose of your SPAC? For example, is the purpose of your SPAC:
  - To raise capital outside of your existing fund strategy to fund new acquisitions?
  - To use your existing fund capital to invest into a SPAC (for example as the PIPE investor)
- Do you intend to generate liquidity for existing fund investors via:
  - an exit to a third party SPAC
  - an exit to a SPAC fully or partially funded by existing investors

Weigh up your options:

- Consider whether a SPAC is the optimal means of achieving your and your

investors' goals within your preferred timeframes. Other exit or financing options may include:
    - Trade sale
    - Traditional IPO
    - Direct listing
    - Secondary sale to another fund
    - Debt facilities
- Consider running a price discovery process to benchmark the value that would be generated by a SPAC transaction against other exit options:
    - Bear in mind that the ultimate value of the post-acquisition listed business will be determined by any post-IPO PIPE funding process and by market sentiment

Consider the upsides (and potential downsides) of using a SPAC:

Pros:

- Reduced time to market and burden on management time compared to raising a new fund or a traditional IPO
- Reduced funding / execution risk (SPAC IPO proceeds will be held in escrow pending consummation of an acquisition or the expiry of the acquisition timeframe)
- Simplified initial prospectus and disclosures
- Reduced IPO underwriter costs
- The potential to enhance sponsor returns by retaining shares and acquiring warrants in the listed entity
- An opportunity to use the SPAC as a co-investment vehicle to facilitate more valuable acquisitions
- A means of avoiding leverage
- A route to accessing a broader capital base

Cons:

- A set timeframe within which to identify and acquire suitable targets, but can be and often is extended
- Post-IPO/acquisition lock-up periods and sell-down agreements:
    - A SPAC merger is not a complete exit due to post-IPO lock-up and sell-down restrictions.

    - Lock-up and sell-down restrictions are likely to result in longer timeframes to final exit and residual exposure to listed share price volatility for the sponsor via allocated shares and warrants
- A SPAC process may be more expensive than other (more traditional) forms of exit

2. Consider fund governing documents and resolve conflicts

- Review your LPA and side letters:
    - Assess whether your existing fund governing documents permit you to establish a SPAC.
        - If not, investor and/or Advisory Board consent will be required
    - Assess whether your SPAC will be classified as a successor fund or co-investment vehicle:
        - If so, assess whether existing investors have the right to be offered participation opportunities in the SPAC or in any deal that you source for the SPAC
    - Consider your allocation policy:
        - Will M&A opportunities need to be apportioned between your SPAC and other funds under your management?
- Consider and resolve conflicts of interest – for example:
    - Consider whether there will be a detrimental impact on the time management obligations of key individuals with respect to your existing funds/investment vehicles.
    - If time management is an issue, consider how this will be resolved and any impact on timing – for example:
        - Seek investor or Advisory Board approvals
        - Consider alternative staffing options
    - Assess whether the SPAC will be classified as a sponsor affiliate and (if so) what the implications of that classification are:
        - Obtain investor and/or Advisory Board consents as required
- Consider other terms that may restrict or prohibit your ability to execute a SPAC transaction – for example:
    - Fund finance documents

    - Existing regulatory permissions
- Engage with your investors and other interested parties at the earliest opportunity – proactivity and transparency will be key

3. Consider the corporate form, jurisdiction of incorporation and capital structure of your SPAC

- Assess whether the corporate structures available in your preferred jurisdiction of incorporation permit you to implement traditional SPAC features
- Consider the SPAC's capital structure and related shareholder rights
    - Consider different share classes and the allocation of shares and warrants
    - Consider shareholder rights under shareholders' agreements and the SPACs's articles of incorporation
    - Assess the proposed duration of post-IPO / SPAC merger lock-up periods and sell-down terms
- Assess how to ensure that your SPAC is not categorised as a fund and/or how to utilise available regulatory exemptions

4. Select the right stock market

- Assess whether your preferred stock market and the relevant regulators permit you to implement traditional SPAC features
- Consider the nature and geographic location of your preferred investor base
- Review the complexity of the listing rules, the IPO timeline and the disclosure / prospectus requirements in your preferred jurisdiction / on your preferred market
- Consider regulatory marketing issues and pre-IPO filings
- Assess the cost and burden of post-IPO and post-SPAC merger reporting and governance requirements

5. Pre-IPO steps

- Select your management team – in the absence of an operating history and a named target, there will be a great deal of focus on the

management team and the SPAC sponsor, including:
    - Experience in target geographies and industries
    - Experience in successfully sourcing and executing M&A deals
    - Experience in business integration post-acquisition
    - Listed company experience
- Appoint IPO advisers
- Incorporate the SPAC vehicle and draft constitutional documents
- Draft a prospectus, with particular focus on:
    - The operating and deal-sourcing credentials of the management team and the SPAC sponsor
    - Risk factors (e.g. lack of operating history, potential impact of the loss of management team members, the risks of a 'no deal' scenario and industry and geographic risks)
    - Simplified financials
- Submit pre-IPO regulatory filings and liaise with regulators
- Undertake pre-IPO marketing roadshows / investor presentations:
    - Consider time, costs and logistics
    - Consider the potential impact of "remote" roadshows on marketability in light of Covid travel restrictions
- Consider and (if required for IPO and to the extent practicable) establish new corporate governance, reporting and risk/compliance frameworks, including:
    - Board composition:
        - Executive directors
        - Non-executive directors
        - Board representation of SPAC sponsors, cornerstone investors and PIPE investors
    - Composition of board committees and terms of reference
    - Financial reporting function
    - Internal audit function
    - Company secretarial function
    - Investor relations function
    - Compliance function
    - Legal function
    - Draft new policy environment
    - Provide directors with training if required
    - Establish internal reporting procedures

6. Post IPO/pre-acquisition

- Appoint advisors, including buy-side corporate advisors (if required)
- Assess potential targets
- Undertake PIPE funding round or consider alternative additional financing arrangements (e.g. credit facilities) if required
- Seek investor consent to extend the acquisition period if suitable targets cannot be identified within the prescribed timeframe

7. Acquisition

- Identify and undertake due diligence on targets:
    - Assess the likely impact of the acquisition and of the target obtaining listed status on key contracts to which the target is a party (e.g. management equity documents, customer/supplier contracts, credit facilities, etc).
    - Assess what changes will be needed to the target's internal governance, reporting and compliance frameworks following completion
- Agree heads of terms
- Disclose the deal to SPAC shareholders and (if required) obtain SPAC shareholder consent to the proposed acquisition
- Facilitate share redemption rights if shareholders do not support the acquisition (if applicable)
- Draft the merger agreement and associated legals
- Submit regulatory notifications and announcements

8. Post-acquisition

- Revisit corporate governance, reporting and risk/compliance frameworks, and ensure that each is appropriate in light of the newly merged and listed business
- Undertake or facilitate sell downs following the expiry of the lock up period
- Facilitate the exercise or redemption of warrants (if applicable)
- Consider a change of listing venue (if appropriate/applicable):
    - For example, in the UK SPACs cannot list on the premium

segment of the official list, so one might consider moving the merged entity from the standard segment to the premium segment