Vinson&Elkins

Post De-SPAC Series

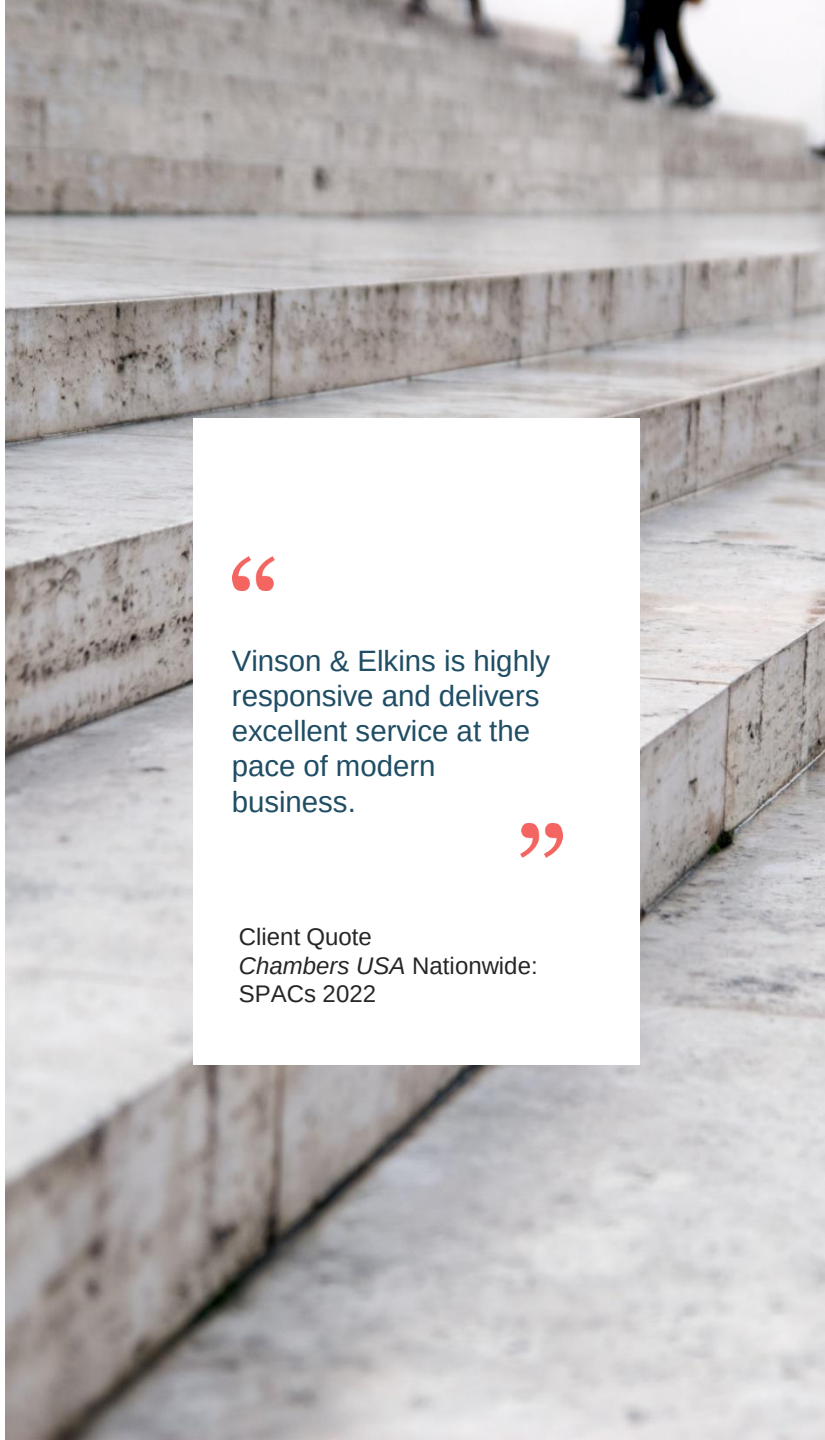
Common Issues with Post-SPAC Combination Companies

November 15, 2022

Overview

Today's Topics

- The Special Place in Hell For Former SPACs (a/k/a Shell Company Rules Applicable Post De-SPAC)
- "Now That You're Public" Issues Facing IPO and De-SPAC Companies
- Prior Guidance
- Financing Options
- Warrant Overhang
- Liquidity Options and Delegending Requests



"Vinson & Elkins is highly responsive and delivers excellent service at the pace of modern business."

Client Quote
Chambers USA Nationwide: SPACs 2022

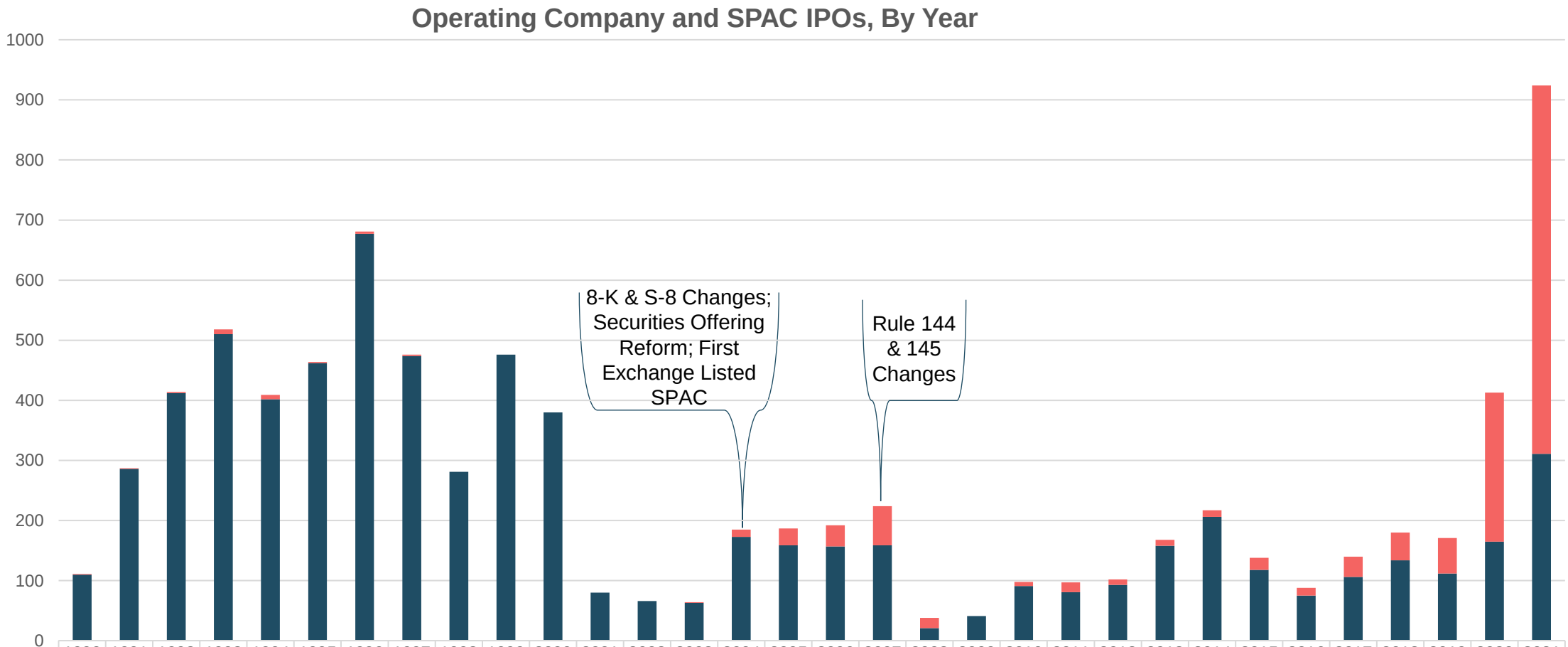
The Special Place in Hell

(a/k/a Shell Company Rules Applicable Post De-SPAC)

Regs Applicable to Former Shell Companies

- SPACs are “shell companies” (but not “blank check companies,” issuers of “penny stock” or “business combination related shell companies”) under SEC definitions
- The SEC adopted restrictions on shell companies and former shell companies in 2005 and 2007
  - In 2005 first adopting requirements under Form 8-K and limitations on use of Form S-8
  - Later that year excluding applicability of Securities Offering Reform (mostly WKSI status, FWP usage and prospectus/offering safe harbors) to shell companies and former shell companies for 3 years post business combination
  - In 2007 carving shell companies and former shell companies from the relaxation of requirements in 144 and 145 (although the 144 change effectively codified guidance of the SEC from 2000)
- The SEC’s Proposed SPAC Rules would not change the existing restrictions, although the SEC did ask for input on whether it should revisit the restrictions to better align the restrictions to better align with the rules applicable to companies that went public via IPO
  - Many commenters suggested the SEC should align restrictions applicable to public companies, regardless of whether they went public via De-SPAC or IPO
  - Timing of any rule changes is uncertain – likely not before 2023

Context



	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
SPAC IPOs	1	1	2	8	7	2	4	2	0	0	0	0	0	1	12	28	35	65	17	0	7	16	9	10	11	20	13	34	46	59	248	613
Operating Company IPOs	110	286	412	510	402	462	677	474	281	476	380	80	66	63	173	159	157	159	21	41	91	81	93	158	206	118	75	106	134	112	165	311

Source: Jay R. Ritter, *Special Purpose Acquisition Company (SPAC) IPOs Through 2021*

Regs Applicable to Former Shell Companies (cont.)

- When reporting on Form 8-K an event that causes the shell company to cease being a shell company, the shell company must include in that report the information that it would be required to file to register a class of securities under Section 12 of the Exchange Act using Form 10 (including financial statements, with no seventy-one day extension)
- Holders of securities of a former shell company cannot rely on Rule 144 (a safe harbor from underwriter status) until one year after the Super 8-K is filed
  - Any reliance on Rule 144 requires the former shell company be current on periodic reports, with no expiration date
- Where a business combination includes a shell company, any party to such transaction, other than the issuer, and any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, are “deemed underwriters” for purposes of Rule 145

Regs Applicable to Former Shell Companies (cont.)

- Former shell companies are defined as “ineligible issuers” until three full calendar years after ceasing to be a shell company
  - Not eligible to use Free Writing Prospectuses
  - Not eligible to use WKSI shelf registration statements
- Former shell companies are not eligible to update selling securityholder information in Form S-3 via prospectus supplement or incorporated document until three full calendar years after ceasing to be a shell company
- Former shell companies are not eligible to incorporate by reference into Form S-1 until three full calendar years after ceasing to be a shell company
- Former shell companies are not eligible to use Form S-8 (to register offerings of offerings under employee benefit plans) until sixty days after filing of Super 8-K
- Former shell companies are not eligible for “Baby Shelf” S-3 until twelve full calendar months after ceasing to be a shell company and at least twelve months from Super 8-K filing

Regs Applicable to Former Shell Companies (cont.)

- Rules 137 through 139 and 163A provide safe harbors from certain communications being "prospectuses" or distribution of such communications being deemed to be participation in an offering by an issuer. Former shell companies, and communications regarding such issuers, are not eligible for such rules until three full calendar years after ceasing to be a shell company.
  - Rule 137 – Publications or distributions of research reports by brokers or dealers that are not participating in an issuer's registered distribution of securities
  - Rule 138 – Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing
  - Rule 139 – Publications or distributions of research reports by brokers or dealers distributing securities
  - Rule 163A – Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed

“Now That You’re Public…”

Issues Facing IPO and De-SPAC Companies

Generally Applicable Public Company Obligations

- Periodic Reports, with SOX certificates
- Current Reports
- Proxy Statements
- Proxy Rules
- Non-GAAP Financial Measures (Reg G)
- Selective Disclosure (Reg FD)
- Internal Controls
- Beneficial Ownership Reports
- Short Swing Profits
- Insider Trading
- Offering Registration Requirements
- Corporate Governance Requirements
- SOX

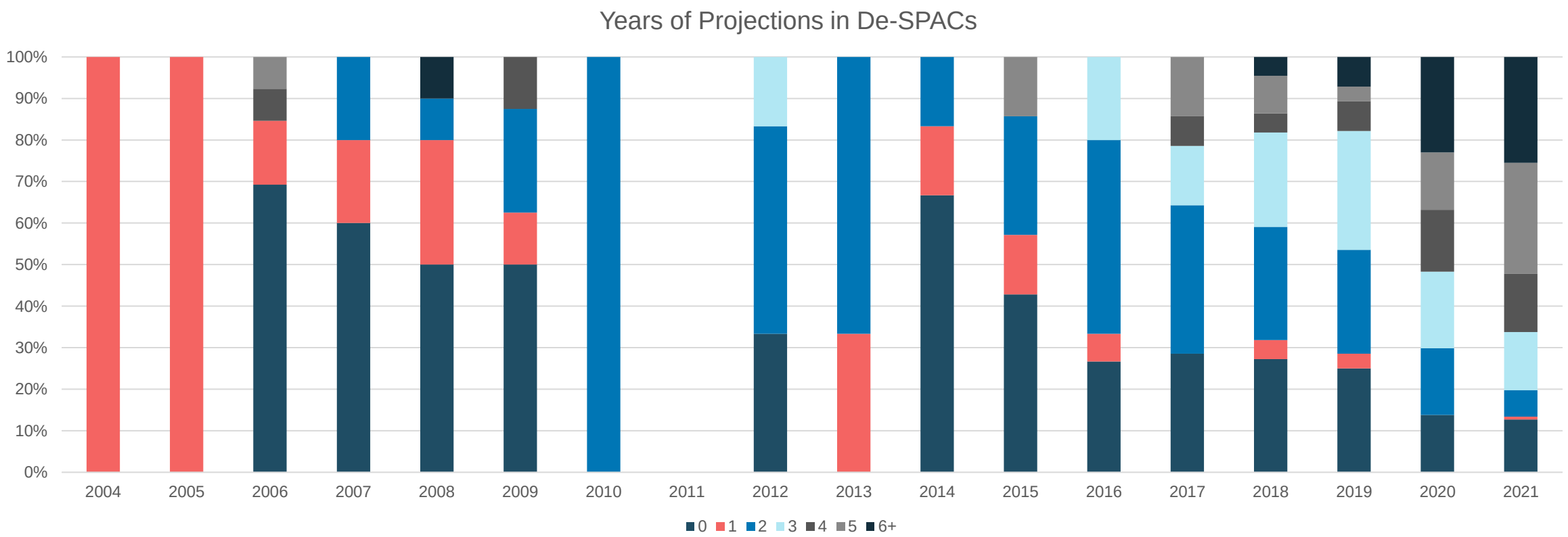
Quirks for Former SPACs

- Former Shell Company Regulations (discussed earlier)
- Warrant accounting
- S-1 Shelf for:
  - Warrant exercise/resale
  - PIPE shares
  - Founder shares
  - Equity consideration (subject to restrictions on registration of shares for a “parent”)
- Certain obligations may* be determined based on SPAC’s IPO date:
  - Accelerated Filer Status (public at least 12 months and has filed at least one annual report)
  - EGC Status (end of fiscal year in which 5th anniversary of IPO occurs)
    - Non-Accelerated or EGC status permits deferral of SOX auditor attestation requirement
  - First “say on pay” vote (three years after IPO)

Prior Guidance

Financial Projections Included In De-SPAC Filings

- De-SPACs from 2004 to 2021, on average, included ~4 years of projected financial results
- In 2020 and 2021, the number of De-SPACs projecting 5 or more years of revenue increased substantially (over 50% in 2021)



Source: Blankespoor et al., *A Hard Look at SPAC Projections*

Typical De-SPAC Disclaimers re Projections

- "The projections … were prepared on the basis of projections provided to [SPAC] by [Target], solely for use by [SPAC] and the [SPAC] Board in connection with the proposed Business Combination and are subjective in many respects and are therefore susceptible to varying interpretations and the need for periodic revision based on actual experience and business developments. You are cautioned that **the projections may be materially different than actual results.**"
- "…a summary of the projections is provided … because they were made available to [SPAC] and the [SPAC] Board … . The inclusion of the projections … should not be regarded as an indication that [Target], [SPAC] or its respective representatives considered or consider the projections to be a reliable prediction of future events."
- "Neither [SPAC] nor [Target] has warranted the accuracy, reliability, appropriateness or completeness of the projections to anyone… . Neither [SPAC] [nor] [Target] … makes any representation … regarding the ultimate performance of the Post-Combination Company compared to the … the projections, and **none of them intends to or undertakes any obligation to update or otherwise revise the projections** to reflect circumstances existing after the date when made or to reflect the occurrence of future events in the event that any or all of the assumptions underlying the projections are shown to be in error. Accordingly, the projections should not be looked upon as "guidance" of any sort. [Resulting Company] **will not refer back to these projections in its future periodic reports filed under the Exchange Act**."

Considerations For Prior Projections

- Disclaimers of obligations may not be effective if there are duties to correct material misunderstandings
  - really to make statements not misleading “in light of the circumstances in which they are made”, with the circumstances being prior disclosure
  - comparable to need to correct public misunderstanding where analyst consensus is materially wrong
- Issue is acute when the company is offering securities on its own behalf or registering securities for resale (at the time of effectiveness or time of a 10A-3 amendment)
- Mitigating factors:
  - Post De-SPAC financial guidance (common to provide for current fiscal year and next fiscal year, when appropriate) should reduce materiality of De-SPAC projections
  - Disclosing intervening circumstances or events, particularly where De-SPAC disclosure identified related material assumptions
  - Analyst consensus consistent with current expectations
  - Passage of time

Financing Options

Financing Options for Former SPACs

- Underwritten offering, off S-1 or S-3
- ATM, once S-3 eligible
- Equity line
- PIPE
- Preferred equity
- Convertible debt
- Merge (Romeo Power)

Warrant Overhang

Motivations and Options for Warrants

- A former SPAC may desire to eliminate its warrants to:
  - Raise capital
  - Simplify its capital structure
  - Eliminate the book liability associated with the warrants
- Should a former SPAC want to eliminate its warrants, it may have several contractual and extra-contractual options
  - Forced exercise (through use of contractual call/redemption rights)
  - Inducement to exercise
  - Tender/Exchange offer

Warrant Redemption Features

- Standard redemption
  - Redemption for $0.01/warrant when stock has traded above $18.00 for 20/30 trading days
  - Often inappropriately viewed as an $18.00 “cap”
- Make-whole redemption
  - Redemption for $0.10/warrant when stock trades above $10.00
  - Holders must be given the option to exercise on a cashless basis for stock based on a valuation grid specified at IPO
- Both rights require 30 day notice of exercise
- Neither redemption right is available until the warrants are exerciseable
- Redemption is really forced exercise (absent abnormal price swings)
- Terms vary between former SPACs, and many do not have the make-whole call provision
- Private Placement Warrants typically have different terms

Inducements, Exchanges and Tenders

- A former SPAC could offer an inducement for warrantholders to exercise, such as a reduced exercise price
- A former SPAC could tender (offer to pay cash) or exchange offer for its warrants. The offer:
  - Could be for cash, stock, or a combination
  - Could be conditioned on a minimum participation by warrant holders
  - Could be accompanied by a consent solicitation to change the terms of any warrants not tendered (akin to a covenant strip in a bond tender) or to permit a call of any warrants not tendered
  - Would be required to be open for 20 business days
  - Would require filing of Schedule TO
  - Issuance of stock in consideration may require registration

Liquidity Options and Delegending Requests

Liquidity Options and Considerations Post De-SPAC

Until S-3 Eligible (at least 12 full calendar months post De-SPAC)

- No sales during lockup, absent company consent (and any considerations for waivers)
- Underwritten Offerings, Registered Direct Offerings or Brokerage Sales, assuming holder is eligible for S-1 registration
  - Remember FWP issue
- Private Resales
- In-Kind Distributions

After 12 full calendar months (assuming current reporting for S-3 eligibility)

- Same lockup considerations
- Underwritten Offerings, etc., off S-3 (no issue with S-1 eligibility)
  - Remember FWP issue
- Private Resales
- In-Kind Distributions
- Rule 144 Sales

Liquidity Options and Considerations Post De-SPAC (cont.)

- Various categories of shareholders will have “restricted securities”:
  - SPAC sponsor
  - PIPE investors
  - Recipients of equity consideration (but if received shares off an S-4, only affiliates* of target company hold restricted securities, others unrestricted)
- Restricted securities require registration for reoffer, or availability of an exemption (most commonly the Rule 144 exception, which has stringent restrictions for former SPACs, as discussed earlier)
- Options for resale:
  - Private placement
  - Registered offering
  - Rule 144

Legend Removal

- Restricted securities typically bear a restrictive legend regarding the requirement for registration or exemption, and transfer agents will require a legal opinion stating that removing the legend is appropriate
- Practice for opinion removal opinions vary among law firm
  - Registration with “will comply” certificates from holder and broker
  - Registration with current sale
  - Rule 144 applicability with “will comply” certificates
  - Sale under Rule 144

Questions?

Today's Panelists

E. Ramey Layne

Partner, Capital Markets and Mergers & Acquisitions

Houston
+1.713.758.4629
rlayne@velaw.com

Ramey's principal areas of practice are capital markets, securities law, and mergers and acquisitions. He has a particular focus on transactions relating to Special Purpose Acquisition Companies (SPACs) and publicly traded master limited partnerships (MLPs). He represents both issuers and underwriters in public and private securities offerings. Ramey has advised clients on general corporate matters, public company reporting issues, restructuring of partnerships, and reporting obligations in connection with acquisition and disposition of partnership securities. Additionally, Ramey advises clients on Investment Company Act of 1940 avoidance. Ramey is recognized by *Chambers USA* Nationwide for Debt and Equity Capital Markets as well as SPACs.

Sarah K. Morgan

Partner & Group Co-Head, Capital Markets and Mergers & Acquisitions

Houston
+1.713.758.2977
smorgan@velaw.com

Sarah Morgan co-heads V&E's Mergers & Acquisitions and Capital Markets practice group. She is an experienced securities lawyer who focuses on capital-raising transactions for clients in the energy industry and other sectors, as well as securities disclosure, corporate governance, compliance and ESG matters. She also advises companies and private equity funds concerning mergers, acquisitions, disposition and separation transactions, including significant experience regarding combinations with Special Purpose Acquisition Companies (SPACs) and spin-off transactions. Sarah has extensive knowledge of securities law and has been recognized by *Chambers USA* (Nationwide and in Texas for Debt and Equity Capital Markets), *Legal 500 US, BTI Client Service All-Stars, Super Lawyers (Rising Stars),* and was recently named one of the 25 Most Influential Women in Energy.

THANK YOU

www.velaw.com

@VinsonandElkins

@VinsonElkins

Austin
T +1.512.542.8400

Dallas
T +1.214.220.7700

Dubai
T +971.4.330.1800

Houston
T +1.713.758.2222

London
T +44.20.7065.6000

Los Angeles
T +1.213.527.6400

New York
T +1.212.237.0000

Richmond
T +1.804.327.6300

Riyadh
T +966.11.250.0800

San Francisco
T +1.415.979.6900

Tokyo
T +81.3.3282.0450

Washington
T +1.202.639.6500