WINSTON & STRAWN LLP

Going Public and Raising Capital in 2021

DIRECT LISTINGS, TRADITIONAL IPOS, AND SPACS IN A CHANGING MARKETPLACE

Agenda

- Introducing Our Speakers
- Direct Listings with a Primary Offering
- Traditional IPOs
- Business Combination with a SPAC
- Concluding Thoughts
- Q&A

Today’s Presenters




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Direct Listings

What is a Direct Listing?

- Traditionally, private companies interested in raising capital underwent initial public offerings (IPOs).
  - New shares were created, underwritten, and sold to the public on a public exchange. Model may be changing in the near future.
- Recently, the New York Stock Exchange (NYSE) adopted a direct listing process with a primary capital raise. Nasdaq has proposed a similar process.
- Today, we will discuss the processes that the NYSE adopted and Nasdaq has proposed to allow companies to direct list on their exchanges, the advantages and disadvantages of a direct listing when compared to an IPO or SPAC, and some prominent examples in the recent past.

NYSE Direct Listings

- The NYSE proposed, and the SEC approved, a new process to allow companies to directly list their securities on the exchange called a "Primary Direct Floor Listing."
- **Key Provisions**:
  - *Market Value*: To quality for a Primary Direct Floor Listing, a company must either:
    - sell at least $100 million in market value of its shares in the NYSE's opening auction on the first day of trading on the NYSE, or
    - if selling less than $100 million, provide evidence that the aggregate market value of the shares that it will sell on that day and the shares that are publicly held immediately prior to the listing is at least $250 million (calculated using a price per share equal to the low end of the price range established by the company in its registration statement for the offering).
  - *Listing Standards*: Companies must meet all applicable initial listing standards at the time of listing, without the benefit of a grace period, including the NYSE's requirement of 400 round lot holders, 1.1 million publicly held shares outstanding, and a price per share of at least $4.00.

NYSE Direct Listings

- **Relationship to Selling Shareholder Direct Floor Listing**: Previously, the NYSE had permitted companies that had not previously had their securities registered under the Exchange Act but that had sold securities through private placements to list such securities on the NYSE upon the effectiveness of a registration statement filed solely to allow existing shareholders to sell their shares.
  - Under the approved rule changes, the NYSE clarified that:
    - (1) companies would be permitted to make a Selling Shareholder Direct Floor Listing even if they had participated in one or more private placements and
    - (2) it would consider, on a case-by-case basis, permitting companies to list in connection with either a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.

Nasdaq Direct Listings

- Nasdaq has proposed, but the SEC has not yet approved, to permit direct listings in connection with a primary offering where a company would sell shares on the first day of trading on Nasdaq.
  - Nasdaq's proposal would allow companies to initiate a listing at a price per share up to 20% below the low end of the price range in the company's registration statement and without a limit on the maximum price (which would not be permitted under the NYSE's rules).
  - Nasdaq will calculate the value of the shares using the price that is 20% below the low end of the price range and will deem the test to be met if the aggregate market value of unrestricted publicly held shares immediately prior to listing, together with the value of the shares the issuer sells in the opening auction, is at least $110 million (or $100 million, if the company has stockholders' equity of at least $100 million).
  - Unlike the NYSE direct listing process, Nasdaq's proposal allows the issuer's financial advisor, rather than a designated market maker, to be responsible for determining the opening price.

Nasdaq Direct Listings

- The SEC has voiced several areas of concern with the Nasdaq proposals, including the lack of a limit on the upside of the price range.
- This concern should be easily addressed by Nasdaq clarifying that issuers cannot sell more than the number of securities registered or, if an aggregate dollar amount is registered, not more than the aggregate offering amount registered.
- The SEC has launched an additional comment period for the Nasdaq proposal and additional comments are expected in the near future.

Advantages & Disadvantages of Direct Listings

- **Advantages**
  - *Costs*: The primary benefit of a direct listing is its substantially lower cost when compared to a traditional IPO, because companies will not need to pay investment banks any fees. Moreover, companies keep more of the value related to the “pop” from the first day of trading when compared to a traditional IPO.
  - *Speed*: Without an underwriting process or roadshow process, companies can directly list much more quickly than completing a traditional IPO.
- **Disadvantages**
  - *Volatility:* Because there are not backstopping banks or institutional investors, there is typically more initial volatility in the price of the securities being listed. The transactions that occur are based purely on market demand.
  - *Novelty:* Unlike SPACs or traditional IPOs, direct listings are still new processes on the exchanges, and a company may encounter some additional regulatory hurdles.

Recent Examples & Looking Ahead

- **Prominent Examples**: Several companies have directly listed on the NYSE, including Spotify, Slack, Asana, and Palantir.
- **Competing with SPACs?**: Given their low fees and speed, it remains to be seen whether direct listings will have an impact on IPO activity. Requirements, including the 400 round lot holders, may be a hurdle for some companies interested in using the direct listing process, but it may be attractive for companies that want the liquidity of a traditional IPO, even if it comes with more volatility.
- **Familiarity/Ease of Use**: Similar to SPACs, as more companies choose to directly list on exchanges, we expect that the process will become more familiar to market participants and will become a well-trod path to accessing capital markets. The process surrounding a direct listing is still in flux, including understanding the risks to investors when compared to a traditional IPO or SPAC, legal and financial due diligence, and how to best set initial reference points and price ranges.

Traditional IPOs

Traditional IPO Process

- **Initial Steps**:
  - *Core Team* – Develop core team for planning, drafting sessions. The senior level team should have input but often need not be in every drafting session / update call. Publicity training should be given to everyone who knows about IPO preparation
  - *Selection of Bank*: Companies interested in undergoing a traditional IPO must first select an investment bank to serve as their "book-running manager" to lead them through the process. The bank will advise the Company through the process and underwrite the IPO.
  - *Filings*: The Company will then confidentially file a registration statement with the SEC, which typically goes through rounds of comments from the SEC's staff and is publicly filed.
  - *Firm Commitment*: The Company may enter into an agreement with underwriters that offer to purchase the whole amount (or some portion) of securities being offered and will then resell the shares to the public.

Traditional IPO Process

- **Roadshow**: Following the filing of the registration statement, the Company begins a “roadshow” process where management meets with prospective investors and answers questions about its business.
- **IPO Pricing Process**: Once the Company has completed the roadshow process, the book-running manager and the Company’s management will meet to determine the price of the stock and the allocation of their shares based on the interest they have received. In general, the vast majority of shares are sold to institutional investors and the remainder are sold to individual investors.
- **IPO Launch**: On the effective date of the IPO, the shares being offered will be freely traded, and, typically, companies will see a rise in the price of their shares on the first day of trading (which in turn increases demand for the issue).
- **Stabilization/Pricing Period**: After the shares begin to be traded, the underwriters of the IPO will provide recommendations to stabilize the market for the securities and may purchase additional shares at or below the offering price to keep trading steady. 25 days after the IPO is launched, the “quiet period” of the IPO will end and investors will begin relying on market forces instead of estimates of the earnings and valuations of the issuing Company from underwriters.

Advantages & Disadvantages

- **Advantages**
  - *Support*: Traditional IPOs will likely remain the best way for well-known companies to go public, and they will likely benefit the most from the support from institutional investors and underwriters that will create a market for their securities.
  - *Process*: Traditional IPOs are historically the most common way to go public, and markets understand how to treat companies that use a traditional IPO when they hit the market.
- **Disadvantages**
  - *Fees:* Traditional IPOs are significantly more expensive, both in terms of fees and the benefits accrued to advisors instead of the issuer as a result of going public, than direct listings.
  - *Speed:* Traditional IPOs are typically slower to market than direct listings or SPACs.

Has the Traditional IPO Declined?

- **A Period of Decline?**: With the advent of direct listings and SPACs, some have argued that the traditional IPO has entered a period of decline. However, this doesn't appear to be true as deal volume and deal size have increased for traditional IPOs over the past few years.
- **Change in Perception**: A better way to view traditional IPOs may be that this process is merely one tool in the toolbox for companies interested in going public rather than the exclusive means to do so.
- **Recent Examples and Future Growth**: In 2020, there were 194 traditional IPOs, which raised over $67 billion in capital (the best year since 2014). We can expect that there will be room for growth in traditional IPOs, and several companies, including SpaceX, Stripe, and Waymo are reportedly considering a traditional IPO in the near future.

Business Combinations with a SPAC

The SPAC Process

- **What is a SPAC?**: A SPAC, or special purpose acquisition company, is a blank check company without operations that raises capital in an IPO that will be used to complete an acquisition of a private company. Targets may not be identified at the time of the IPO.
- **Why Would Anyone Invest in a SPAC?**: The success of SPACs hinges on the reputation and network of the management team, their knowledge of an industry or geography, and their ability to identify attractive acquisition candidates.
- **How Does it Work?**: The SPAC process occurs in several stages, described below:
  - *Pre-IPO*: The SPAC entity will be formed and will sell founder shares to the team supporting the SPAC (also called the Sponsor) in exchange for funding. The SPAC team will prepare a registration statement on Form S-1 and negotiate underwriting and ancillary agreements.
  - *IPO*: The IPO will be consummated, with the proceeds placed into a trust account until released to fund a potential business combination or used to redeem the shares sold in the IPO. Offering expenses will be funded by the entity or management team that forms the SPAC (e.g. the Sponsor).

The De-SPAC Process

- **How Does it Work? (Continued)**:
  - *Post-IPO*: After the IPO has been completed, the SPAC will identify target businesses, conduct diligence and negotiate acquisition agreements, arrange for PIPE or debt financing (if needed), draft proxy and tender offer documents, and prepare acquisition agreements with potential targets. Throughout this stage, the SPAC will file regular, periodic SEC filings.
  - *Acquisition*: Once a target has been identified, the SPAC will hold a shareholder vote or undergo a tender offer process (e.g., offering public investors the right to return their shares to the SPAC in exchange for cash equal to the IPO price paid). If approved, the business combination is consummated with the SPAC entity merging with and into the target. This acquisition and closing process is referred to as the "De-SPACing."

2020: The Year of the SPAC

- **Growth**: In 2020, almost 250 SPACs were launched, over four times the number launched in 2019. So far in 2021, there have been more than 133 SPACs launched.
- **Size**: The average 2020 SPAC was $335MM in size, nearly ten times the average SPAC in 2009.
- **Momentum**: Several high-profile companies have gone public through the SPAC process in the past few years, including Virgin Galactic, DraftKings, United Wholesale Mortgage, and many more. In January 2021, speed appears to be picking up even more with 91 SPACs launched with over $24.3 billion in capital raised.
- **Trans-Atlantic Presence**: While SPACs have primarily been an American phenomenon, we are seeing interest in launching SPACs on European exchanges as well. Winston is leading the way on these developments, including assisting with the launch of 2MX Organic which listed on NYSE Euronext – the second French SPAC ever introduced.

Process Timeline for SPAC Business Combination

Transaction (3-6 months)

- Engage with multiple SPACs to determine the optimal partner
- Enter into non-binding LOI to initiate due diligence – non-binding agreements are not subject to Form 8-K disclosure requirement
- As part of diligence process, select investors are “wall crossed” to gauge investor interest
- Begin definitive documentation
- Arrange PIPE and/or debt financing
- Board approval for transaction
- Execute definitive merger documentation along with PIPE agreements
- Announce transaction – Form 8-K, press release and investor presentation
- Proxy filing with the SEC – typically takes 2 months from initial filing to final version
- Conduct roadshow to educate investors about investment opportunity

Closing

- Schedule shareholder vote (sometimes as short as 10 days following mailing proxy statement but longer period may be needed to ensure sufficient time to reach retail investors)
- Shareholder vote to approve transaction and related corporate actions
- At closing of the business combination and after payments to redeeming stockholders, the cash in the trust account is released to the surviving company

Target Considerations in Selling to a SPAC

IPO Readiness	• Target company must have 2 years of financial statements audited under PCAOB standards (3 years if SPAC has filed its first Form 10-K) • Target must be able to become Sarbanes-Oxley-compliant by closing but not by signing • Corporate housekeeping typical in an IPO to become public-company-ready
Uncertainty Regarding Cash/Redemption Risk	• Seller can mitigate through minimum cash conditions • Agreements between SPAC and large SPAC stockholders not to redeem • Backstop and forward purchase agreements • PIPE financing
Dilution/Warrant Overhang	• Negotiation of founder share economics • Warrants are cash exercise at 15% premium to deal price • Warrants can be amended in connection with business combination or tendered for post-closing
Public Float	• Seller can require minimum cash condition, including minimum amount remaining in Trust Account • “Testing the waters” pre-signing can gauge investor demand, including demand for PIPE • De-SPAC roadshow to broaden stockholder base

Considerations in Choosing a SPAC

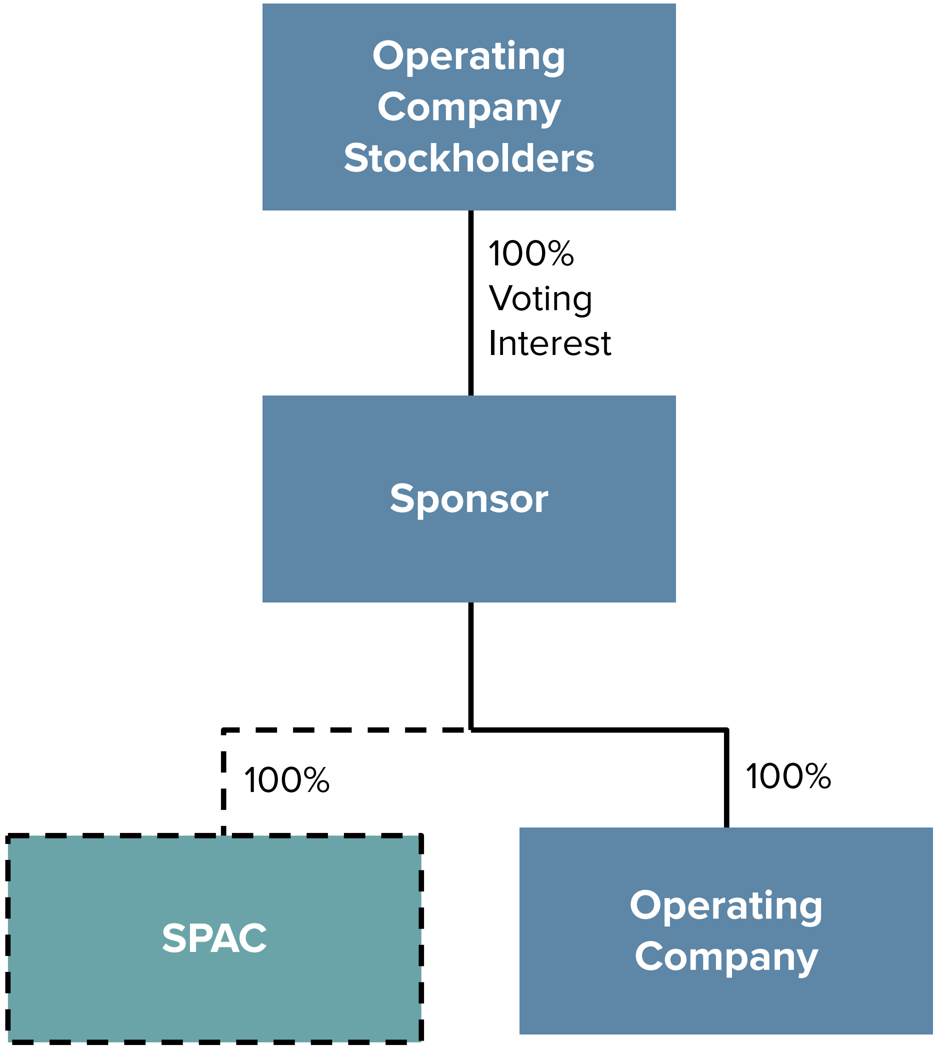
Size	• SPACs are generally looking for targets with EV 3x to 5x trust account size to minimize effect of dilution resulting from founder shares and warrants, although SPACs can acquire larger targets by raising additional capital in a PIPE
Industry Focus/General	• Target may have advantage in negotiating with a SPAC that has sector focus that matches target's business model; Target may also benefit from sponsor's access to sector investors and independent board members and from SPAC management's operational experience
Warrant Coverage	• Generally ranges from one-fifth to one-half of a warrant, and varies depending on size, prominence/track record of sponsors & market conditions at time of SPAC's IPO
Experienced Sponsor	• Whether Sponsor team has successfully completed an initial business combination
Time Remaining	• Remaining SPAC life can impact negotiating leverage
Forward Purchase/Backstop	• Does SPAC have capital outside of Trust to back stop redemptions and provide certainty of closing
Other	• Other factors include length of requested seller lock up and size of LTIP • Rollover of incentive equity

SPACs vs. Traditional IPOs

	SPAC	IPO
Use of Projections in Marketing	Yes	No
PCAOB-compliant audited financial statements required	Yes	Yes
Structuring flexibility to use seller earnouts	Yes	No
Diverse stockholder base	Yes	Yes
Public currency for future M&A	Yes	Yes
Public currency for employee compensation	Yes	Yes
Seller ability to achieve liquidity at the time of initial transaction or through secondary offerings	Yes	Yes

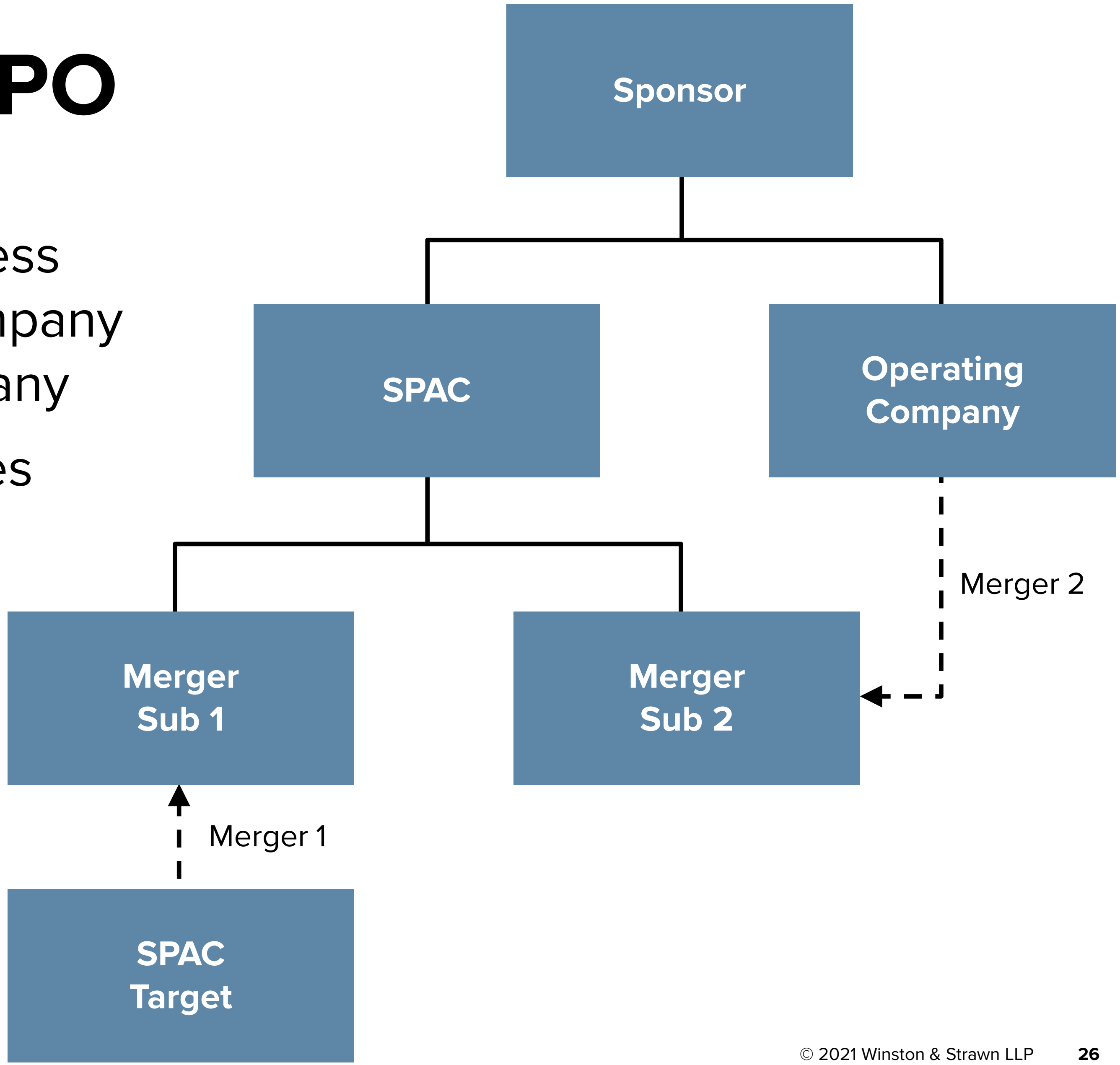
SPAC Subsidiary IPO

- Operating company forms a SPAC Subsidiary
- SPAC discloses it will merge with both the operating company and a new target company acquired by the SPAC



SPAC Subsidiary IPO

- SPAC completes initial business combinations with target company and existing operating company
- Combined company continues SPAC's public listing



Recent Examples & Looking Ahead

- **SPACs in 2021**: SPACs are expected to continue to grow significantly in 2021, with increased interest across industries as varied as technology, healthcare, consumer services, energy, financial services, and fintech.
- **Market Adjustment**: Some high-profile business combinations have stumbled following their launch, so some market participants are looking at enhancing due diligence processes and focusing on performance.
- **Bubble Concerns**: Recent market observers have debated the presence of a bubble in the IPO market generally, with a volume of trading and investment that has not been seen since the late 1990’s and early 2000’s. However, given the impact of COVID-19 and pent-up investment demand (and the reinforcement of the importance of emergent technologies), it is unclear whether this is a part of a larger market realignment or potential over-heating.
- **Regulation**: The SEC, and the federal government more broadly, may step in to regulate SPAC’s more heavily in 2021 following increasing media and public scrutiny.

Questions?