



U.S. Special Purpose Acquisition Companies (SPACs): Pursuing a public listing through a merger with a SPAC (a so-called “de-SPAC” transaction) remains an attractive strategy for life sciences companies, despite increased SEC scrutiny and heightened litigation risk

U.S. SPAC TRENDS:




The number of life sciences SPACs is expected to continue to increase, and will be particularly attractive to companies with high growth potential and high capital requirements, like biotechs.



Increased scrutiny by the SEC could result in new proposed regulations impacting SPACs and de-SPAC transactions.





SPACs — public companies formed for the sole purpose of acquiring or merging with another company — are viewed by many as an attractive and alternative road to public markets that offer certain advantages to traditional IPOs, particularly for earlier-stage companies that are pre-profitable or even pre-revenue, but with both high growth potential and capital-intensive growth plans. SPACs are therefore an attractive path to a public listing for the biotech industry, where it can take years of capital-intensive work for drugs to be successfully developed, approved, and marketed.


Although they have been around for decades, SPACs exploded in popularity during the unprecedented market volatility brought on by the pandemic, which made traditional IPOs more difficult to execute due to the way their pricing can unpredictably fluctuate in a volatile market. In the first half of 2021, the number of tech and life sciences companies going public via a de-SPAC merger — the merger of a SPAC and another company — increased by 71% over the second half of 2020, and the number of life sciences de-SPAC transactions quadrupled.

SPACs continued to take the corporate world by storm throughout 2021, showing staying power beyond the volatility seen in the depths of the pandemic. They are expected to remain popular among investors throughout 2022.

There have been some regulatory headwinds, however, that have depressed SPAC activity, and which could contribute to some continued uncertainty for the SPAC market in 2022.

Beginning in the second quarter of 2021, the SEC increased its focus on SPACs, due largely to their newfound prevalence in the marketplace and increased popularity among retail investors as well as traditional institutional players.


First, the SEC threw a wrench in the market by issuing new and unexpected interpretations of accounting rules that required industry-wide accounting restatements by SPACs. Although of



little long-term import to the marketability or viability of the SPAC product, the sudden change created massive bottlenecks in the SPAC ecosystem, which depressed deal activity almost overnight.

At the same time, senior SEC officials began making what have now been numerous public comments calling into question the strength and effectiveness of the current rules and regulations applicable to SPAC IPOs and de-SPAC mergers, waxing philosophical about the divergence between the rules governing de-SPAC mergers versus traditional IPOs, as well as a potential divergence in perceived investor protections offered between the two.

Historically, companies going public through a de-SPAC have been able to take advantage of rules governing merger transactions, including safe harbors from certain lawsuits that have served to protect de-SPAC participants from otherwise costly securities litigation. That, in turn, has facilitated the now almost universal use of a de-SPAC target company's forward-looking financial projections to promote its de-SPACs in a manner not facilitated by the rules governing a traditional IPO. The use of such projections has been a critical distinction from — and for many companies choosing to de-SPAC, a key advantage over — traditional IPOs.



The public statements by senior SEC officials calling this regime into question has led many to fear that new rule proposals and interpretive guidance are in the offing for 2022 that could in some way quell the use of such projections and thus have a chilling effect on the SPAC market as a whole.

However, it is unclear how and when any rule changes would be implemented, and whether the SEC would have the authority to do so in a manner that could fundamentally alter, or in the worst case grind to a halt, the SPAC market without legislative action. All eyes will be on the SEC in the coming months to see what, if any, new SPAC regulations they may propose.

U.S. SPAC TIPS:

- SPACs remain a viable path to access the public markets and raise critical financing for life sciences companies in 2022, despite some regulatory headwinds. Companies should be prepared to execute quickly and effectively should they see the opportunity to take advantage of the de-SPAC process to go public.
- Life sciences companies should beef up internal audit functions, prepare management and employees for public company-style quarterly disclosure and 24/7 public accountability, prepare two to three years of audited financial statements, develop robust business plans and financial projections, and do a thorough housecleaning to understand how their financing history, organizational documents, and other contractual relationships could impact the timing and success of a possible de-SPAC transaction.
- Robust due diligence by SPACs and target companies, thorough and rigorous public disclosures in the de-SPAC registration statement, and the implementation of structural legal measures to cleanse any potential conflicts of interest that may exist between de-SPAC participants and public SPAC shareholders should all be considered in order to mitigate both increased regulatory scrutiny and resulting litigation risk in de-SPAC transactions.

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