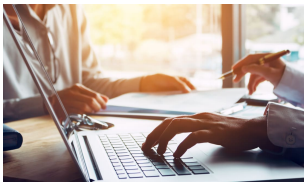

De-SPACing: Target Company Due Diligence

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Your private company is considering selling itself to a special purpose acquisition company (SPAC), and several SPACs are interested suitors. How does your company's board of directors and management determine whether to proceed with a de-SPACing transaction and, if so, which SPAC to choose? Set forth below are several considerations that the directors and officers should address and consider:

Public Company Readiness

On the date of the consummation of the de-SPACing transaction, your private company will become a publicly traded company, and it and its board and management will become subject to the Securities and Exchange Commission's (SEC) rules and regulations. Depending on the chosen SPAC's life cycle and the time period that it has remaining to consummate a transaction, the de-SPACing transaction may take place on a schedule that is more accelerated than a typical IPO. The closer the SPAC is to the end of its life cycle, the more anxious it will be to consummate a transaction. Therefore, your company must be ready to become a public company or able to get ready during this time frame.

Executive Management and Director Bench Strength

Your management team and directors must have the skill sets and ability, while continuing to successfully run your business day-to-day, to (i) assemble and organize the due diligence materials that the SPAC will want to examine, (ii) negotiate the de-SPAC transaction documents, and (iii) prepare the disclosures required for the SPAC's proxy/registration statement. Also, your board of directors roster will need sufficient independent members to constitute a majority and to satisfy the stock exchange requirements of an independent audit committee and

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compensation committee, as well as to satisfy the expanding diversity requirements.

Financial Information and Reporting

Your company will need audited statements for inclusion in the SPAC's proxy/registration statement and financial/accounting personnel with the discipline and training to produce interim and annual financial statements meeting SEC requirements. Related to this, you will need in place internal controls over financial reporting and disclosure requirements. Finally, you will need complete and accurate financial projections for your company to be included in the SPAC's proxy/registration statement. These projections should be based on reasonable and justifiable assumptions.

Private Information Disclosure

As a public company, certain personal information of the officers and directors that was previously private will be publicly disclosed in the SEC-required reports and filings. For example, (i) your salary, benefits and other compensation and related items, (ii) your work experience and background, and (iii) purchases and sales of your company's stock will be disclosed to the public. Are you comfortable with this public disclosure?

Alternative Strategies

The company and board should have explored possible alternative transactions, such as a private sale, initial public offering and direct stock listing, and determined that the de-SPACing transaction was the most appropriate strategy.

Due Diligence About the SPAC

In the same manner in which the SPAC conducts due diligence on your company, you need to conduct due diligence on the SPAC. That means you should investigate the SPAC sponsors, their business reputations and their successes or failures in previous de-SPAC transactions, as well as the major investors in the SPAC. Do the SPAC sponsors, major investors and investment bankers have

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conflicts of interest or other relationships that you need to know about and consider? *See*, "Division of Corporation Finance, Securities and Exchange Commission, CF Disclosure Guidance: Topic No. 11," for the disclosure considerations that the SEC expects SPACs to publicly disclose. These considerations are also questions that you should be asking the SPAC when choosing a SPAC with which to enter a transaction.

In addition, you will want to know the post de-SPAC transaction management structure and business strategy and the SPAC's financial wherewithal to achieve its strategy. Finally, if you will be retaining a management rollover stake after the de-SPAC transaction, you need to understand when and at what price you might expect to sell your retained stake.

From the above, you can see that due diligence is not a one-way street and that the target company in a de-SPAC transaction has work to do before entering into the transaction.

For additional information on de-SPAC transactions, please contact Neil Ganulin or any attorney with Frost Brown Todd's Private Equity industry team.

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