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Ellenoff Grossman & Schole LLP

ROUNDTABLE

# ALTERNATIVE PUBLIC OFFERINGS

The APO market has grown dramatically in recent years, and SPACs in particular have made headlines in 2008. Although the recent boom may have caused an oversupply in the market which has dampened demand, the increasing awareness of APOs, the possible introduction of SPACs on the NYSE and NASDAQ, and regulatory improvements which provide more investor protection, should ensure continued growth.

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# THE PANELLISTS

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**How would you describe the alternative public offering (APO) market over the last 12-18 months? What have been the underlying drivers of activity?**

**Pappas:** In the US, the APO market has grown dramatically in the past 12-18 months, with special purpose acquisition companies (SPACs) adding significantly to the market, providing sponsors, management teams, and private equity groups an alternative vehicle for capital and companies a source for capital through merger with a SPAC. The market for SPACs was very robust in 2007 and for the first quarter of 2008. In 2007, SPACs represented about a quarter of the IPO volume in the US. This year, excluding the VISA transaction, SPACs were nearly 70 percent of the IPO dollars raised. As market volatility has increased, the structure of the SPAC product has become attractive to more hedge funds and alternative asset managers, as the downside risk can be limited while the upside potential can be substantial. Terms for investors improved considerably during the past 12-18 months. Among other changes, the percentage in trust increased from approximately 98 percent to approximately 100 percent, which enhanced returns for investors. In addition, the quality of the issuers in the last 12-18 months rose substantially, which further drove demand for the product.

**Ellenoff:** 2007 was an extraordinary year for SPACs – 66 were financed for an aggregate of over $12bn. SPACs came of age in 2007 due to a confluence of factors. The public market interest in participating in private equity like transactions increased. The quality of the SPAC sponsor management teams continued to strengthen. SPAC sponsors identified and proposed significant SPAC acquisitions. More top international underwriting houses entered the market. SPAC structures became even more investor friendly, and the registration process for the SPAC IPO normalised, as did the M&A/proxy review process. We also observed the acceptance of foreign private issuer SPACs, private equity sponsored SPACs and corporate sponsored SPACs.

**Weiss:** Trends in the APO market have varied over time and by geography. In the US, SPACs were particularly active in 2007, constituting approximately a quarter of overall activity. Sponsors and their vehicles such as Blackstone, Fortress, and Ochs Ziff also met with US investor receptivity through to late 2007. On the European front, alternative investment vehicles were well received and highly innovative.

**Anslow:** The APO market for the US and China has operated differently over the last 12-18 months. The Chinese market for APOs has exploded over this time period and seems to be getting stronger. The main factor is that Chinese based operating companies are eager to access US markets and the APO method is much quicker than an IPO or self filing. As for the US APO market, the volume of activity has slowed down due to the economy and Securities and Exchange Commission (SEC) rule changes, such as its interpretation of Rule 415 and the exception to the new six month change to Rule 144, where shell companies were excluded from the new benefits of the shortened Rule 144 six month holding period.

**Marcus:** The last 12-18 months has witnessed a sputtering APO market. While deals have been getting done they have been moving on a stop/start basis. The underlying driver appears to be the particular industry or region where an acquisition is being sought and the amount of deals in the pipeline.

**Miller:** Over the last 12-18 months, the SPAC IPO market has gone from frothy to ice cold. SPACs became ‘hot’ as they were adopted by the financial community into mainstream investment banking – more and larger underwriters got into the SPAC game and more notable individuals determined that they wanted to become sponsors of a SPAC IPO. This created an oversupply of SPAC IPOs waiting to be marketed. This oversupply and the current liquidity crunch chilled the market.

**Rubinstein:** The SPAC IPO market has been on a rollercoaster ride during the last 12-18 months, and its participants are now holding on in a downturn anticipating the next wave. In 2007, the market surge was driven by the entry of new underwriters leading larger sized deals for top quality, well known management teams. They fed the appetites of many willing buyers, mostly in the form of hedge funds that were flush with cash and significantly leveraged their investments. These buyers found the SPAC structure, which became more and more favourable to investors, to be a compelling risk reward proposition.

**Have any notable deals caught your attention, and why?**

**Marcus:** No deal has really caught my attention over others, however what has caught my attention is the prevalence of incentives and strategies to help facilitate obtaining shareholder approval of the business combination in SPAC transactions. For example, in the China Growth Alliance deal, an additional half warrant has been added which is only issued to those choosing not to redeem. Furthermore, there have been more SPAC IPOs filing as foreign private issuers, which alters the shareholder approval process.

**Anslow:** Without naming any specific deals in the APO market, the volume of deals has caught my attention. This includes deals with Chinese based operating companies; surprising, since in September 2006 the Chinese government changed foreign ownership rules for PRC based operating companies, after which numerous practitioners proclaimed that the Chinese APO market was unofficially over. Not only has this been a fallacy but the Chinese APO market has actually gained momentum and this is likely to continue in the future.

**Weiss:** Notable listings included Fortress, KKR, Boussard & Gavaudan, MW Tops, and Pan-European Hotel Acquisition, as they were first of their kind in paving the way for the listing of similarly structured transactions. In doing so, these deals were instrumental in building investor appetite for such products.

**Ellenoff:** Notable deals include Liberty Acquisition raising over $1bn, making it the largest SPAC IPO. There were also several SPAC financings in the $500m region. During the year, Liberty’s sister SPAC Freedom, announced and closed on its business combination GLG, the London-based hedge fund. Endeavor also acquired American Apparel. Vantage Energy announced the agreement to acquire four to be built ‘jack-up rings’ and an option on a drill ship. While the smaller proposed business combinations had more difficulty getting approved, the larger SPAC acquisitions have been approved and the sponsors have retained their promote.

**Miller:** The acquisition by Endeavor Acquisition Corp. of American Apparel in December 2007 is notable because it is one of the only SPAC mergers over the last year that received overwhelming shareholder support. It is commonplace today for a SPAC to have to renegotiate the terms of its merger to decrease the purchase price in order to convince SPAC shareholders to approve the deal. To the contrary, in the Endeavor/AA deal, the terms were actually renegotiated to increase the purchase price of AA and the transaction was still overwhelmingly approved. This is because the American Apparel transaction epitomises what a SPAC merger should be about – a true partnership between the SPAC and the target in which the owners of the target are enrolled in the entire SPAC value creation paradigm. These target owners understand that they need to establish a valuation for their company attractive enough to the SPAC shareholders so that the shares of SPAC common stock trade at a premium to trust value.

**Rubinstein:** What has really been notable is how similar the SPAC IPO terms have become, at least until recent SPACs began testing the waters for change. The similarities have been driven by the pace of the market, and the desire to give investors what they wanted while they continued to snap up the offerings. Another factor has been the steady decrease in the volume of SEC comments in its review of IPO filings, which led issuers and underwriters to seek to mimic other filings as closely as possible in order to get quickly out of SEC review. Few people were looking to rock the boat until it tipped by itself.

**Pappas:** At the end of 2007 we saw Liberty Acquisition, the first SPAC to raise more than $1bn. This offering certainly reflected the market's interest in SPACs and the success the management team had with their acquisition of GLG. This transaction, together with the other large SPAC transactions greater than $300m that occurred in the past six months, marked a significant divergence in the SPAC market. I believe these large transactions are the genesis of the current difficulties in the market. With a SPAC focused on deals above $1bn, there are fewer attractive opportunities of appropriate size. At that size, the market is much more efficient and it is difficult to find deals priced attractively enough to gain shareholder approval. In the past six months, 31.6 percent of transactions have been large SPACs, representing approximately 65 percent of the monies raised by SPACs during that time, compared to 9.8 percent of transactions in the prior 12 months representing 29.7 percent of the capital raised. In my view, SPACs are most appropriate for the middle market. Particularly in the current environment where it is difficult to go public and the private equity firms have less access to leverage, I believe there are many attractive opportunities available for SPACs focused on transactions below $500m.

**Although SPAC IPOs still represent a significant percentage of all IPOs to date in 2008, this part of the market has somewhat cooled. What are the reasons behind this decline, and when do you expect the market to rebound?**

**Rubinstein:** As of the beginning of April, the SPAC IPO market had not just cooled off, but had ground to a halt. A number of factors converged to make this happen, including hedge fund redemptions which left primary buyers of SPAC units with less capital to deploy, and the credit crisis which led to a significant decrease in the availability of leverage for buyers. Also, the extraordinary amount of SPAC issuances in 2007 and the beginning of 2008 led to an oversupply in the market, and with SPAC common stock generally trading down in the aftermarket, buyers can acquire shares for less than they are being offered in the IPOs.

**Consistent with general IPO trends, SPAC issuances have declined. Dampened valuations have been partly attributed to the limited pool of SPAC investors and the need to recycle dollars from existing deals to new ones as business combinations are effected.**

ROBIN L. WEISS

**Weiss:** Consistent with general IPO trends, SPAC issuances have declined. Investor appetite has been limited by unfavourable valuation comparables, in some instances below cash value. Dampened valuations have been partly attributed to the limited pool of SPAC investors and the need to recycle dollars from existing deals to new ones as business combinations are effected. Further evidence of M&A success is expected to positively impact the marketing opportunity for these alternative investment vehicles.

**Miller:** The decline in the SPAC IPO market has occurred because of basic supply and demand. There is an oversupply of SPAC IPOs waiting to be marketed and demand is low because investors do not have cash to invest. This situation occurred because, as SPACs mainstreamed, more underwriters filed SPAC IPOs and all of them were sold to the same two dozen investors. These buyers are now flush with SPAC securities and are waiting for either a well received business combination announcement or a liquidation to recoup some of their cash to invest in other SPAC IPOs.

**Marcus:** The reason for the slowdown in the SPAC market is the increased volume of deals that have been filed, combined with the still relatively small market of investors participating in these IPOs. Also, as the percentage of escrowed money has risen to the 10 percent range, some higher level executives have questioned whether investors are really buying to be in the deal or simply as a hedge. The emphasis has definitely swung to structuring a deal in a manner that is conducive to obtaining shareholder approval for the business combination.

**Pappas:** There are several interrelated reasons for the recent cooling off of the SPAC IPO market – the oversupply of SPACs, poor trading of the warrants and the lack of compelling acquisitions. In the last two months of 2007 and through the first quarter of 2008, approximately $7bn of SPAC IPOs were completed.

While the demand for SPACs has grown, there is still a finite universe of buyers. As a proxy for the depth of the market, there are approximately 72 SPACs that have not yet announced an acquisition representing approximately $13.5bn of gross proceeds. Until a number of those SPACs announce an acquisition, which is when buyers might naturally trade in or out of a particular issue, we anticipate little capital will be available for new deals. A further issue affecting the SPAC IPO market is that most recent SPAC IPOs are trading below the issue price. Equally important is the decline in market value of the warrants included in the units. Furthermore, many acquisitions that were originally announced before the market correction have seen relative valuations decline for comparable companies, and price adjustments have not been sufficient to be attractive to investors. Many of these SPACs have then traded down since closing or failed to get shareholder approval. The most crucial thing that needs to occur in order for the market to rebound is for several SPACs, particularly some of the larger ones, to announce very attractive deals that trade well.

**Anslow:** In my opinion, APOs are still more prevalent in the marketplace and take away some solid companies from the SPAC IPO market. Notwithstanding this fact, the main reason that SPAC IPOs have declined is because the original SPACs have run their course and have either undergone a merger with an operating company – the original goal – or the required time period for a merger has expired and 90 percent of the IPO's funds have been returned. Since the SPAC IPO has not proven to be a 100 percent guarantee, some investment banks have decided to focus their attention on other areas of the market.

**Ellenoff:** While the market has cooled, it is interesting to note that while SPACs represented nearly 25 percent of all US IPO activity in 2007, the percentage in 2008 is significantly higher – 11 SPAC IPOs have closed in 2008 and the first quarter was quite active. The reason the numbers are not even higher has to do with a confluence of factors including complicated global debt and equity financial markets, the inventory of too many SPACs, the uncertainty related to the closing of several recent and underway proposed SPAC acquisitions, and whether or not certain structuring adjustments need to be considered.

**SPACs are structured so that investors have significant upside potential through the warrants, and the ability to preserve their initial investment if the acquisition is not attractive.**

TINA PAPPAS

**What benefits do investors derive from participating in a SPAC IPO? Are there any downsides, and if so, how can these be mitigated?**

**Miller:** When we helped create the SPAC in 1993, we tried to provide investors with the benefit of 100 percent downside protection, like a secured creditor, while giving them an opportunity for upside participation as stockholders. The primary risk to this thesis is if the SPAC's trust account, which provides the downside protection, can be invaded or violated by creditors. In order to mitigate against this, we created the concept of a 'trust fund waiver letter', which we require all SPACs to obtain from anyone they will do business with. This prevents such persons from bringing any claims against the trust fund. An additional protection is the SPAC sponsors' backstop, whereby the sponsor personally indemnifies the trust if claims are brought.

**Anslow:** Although investors in a SPAC IPO do not initially know the company that will ultimately be the operating company merging into the SPAC, they have the benefit of knowing the specific industry that such company will be focused on. Furthermore, they also know that if, and hopefully when, an operating company merges into the SPAC, it will have a value of at least 80 percent of the total amount raised in the SPAC IPO. In addition, there is significant cash in the SPAC for the operating company to use after the merger is completed. This should allow the operating company to be able to run its business without an imminent need to raise capital.

**Pappas:** SPACs are structured so that investors have significant upside potential through the warrants, and the ability to preserve their initial investment if the acquisition is not attractive. The warrants are priced at a discount to the IPO price so they have intrinsic value immediately after the IPO. Also, because investors have the ability to get their money back if a SPAC fails to find a deal or if they vote against a deal that is approved, the downside is generally limited to the pro rata amount in trust per share. In recent deals the percentage placed in trust has been 99 to 100 percent, and because the trust earns interest over a two year period, minus a small percentage that the SPAC can use to fund working capital, many deals accrete to over 100 percent in trust. So in most cases, the downside is really the opportunity cost of investing in other securities with a more attractive potential return.

**Rubinstein:** Investors in SPAC IPOs typically purchase units consisting of one share of common stock and one warrant. Because virtually all of the purchase price is placed into a trust account, which is released to the investor if it converts its shares in connection with a vote on a business combination or the SPAC liquidates, and investors can begin selling their warrants separately shortly after the closing of the IPO, the risks to investors of losing money on their IPO investment before a business combination are low. The sponsors, however, do have significant risk because their investment at the time of the IPO, in addition to their promote, will be forfeited if a business combination does not occur.

**Marcus:** These deals are pretty investor friendly. An investor has the comfort of knowing that it can buy in the IPO and ultimately redeem at 100 percent of his investment while still being able to 'play the deal' by choosing a positive time to sell the warrant. The primary downsides to the investor are the extended period of time that the company has to consummate the business combination that ties up their money, the fact that the warrants have not been trading robustly and the chance that money could get tied up in the event of litigation. The fact that the percentage in escrow has increased to the 100 percent level is a pretty good mitigator for the investor, as is the increased requirement for the founders to indemnify the company for any potential claims.

**Weiss:** Investors participating in SPAC IPOs benefit from their upside potential with downside cash protection and a reasonable return on capital. Nevertheless, there are numerous risks, some of which cannot be mitigated, but only assessed pre-investment. Such risks include uncertainty as to the M&A target and its industry context, M&A deal sourcing issues, sponsors' conflicts of interest and undue veto power held by special interest shareholder groups. While deal 'technology' has evolved to guard against some of these issues, other risks must be judged based on the track record of sponsors.

**Ellenoff:** Now that the modern day SPAC program is five years old, many of the concerns of the program have been either addressed with the restructuring of certain terms and provisions or been satisfied. However, one of the concerns that has arisen in the last year is that in certain instances a SPAC sponsor might propose a perfectly good quality transaction but due to the corporate governance protections afforded investors, certain institutional investors are nonetheless indicating that they are intending to vote against the transaction just so they can have their interests purchased at a slight premium to market. SPACs provide that if more than a certain specified percentage of the stockholders vote against the proposed transaction and demand their capital back, known as the conversion threshold, then the proposed business combination may not be concluded. This percentage has been increased over the last five years from 20 percent to as high as 45 percent. There is also a provision that limits the ability of certain large institutional holders (greater than 10 percent of the offering) to request all of their capital back, although they may vote all of their interests against the proposed transaction. As the market continues to mature, all of the various features of the program are being actively reviewed and tinkered for the overall benefit of the program.

**Over the years, what changes have you seen in APO deal structures and terms? How much of this is being shaped by regulators and how much by investor demand?**

**Anslow:** Historically, APO deal structures have been driven by an equity versus debt component. Companies prefer equity and investors prefer debt. However, the strength of the company is what normally drives the final structure. The specific structures and terms are basically common stock, convertible preferred stock and convertible debentures. It is not unusual to see 'warrant kickers' in all three structures. This is mainly controlled by investor demand. However, SEC rule changes and interpretations of specific SEC rules and regulations such as the Rule 415 interpretation and the new Rule 144 changes to holding periods are reshaping the terms of the APO transactions.

**Ellenoff:** The single biggest change in the program has been

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JOEL L. RUBINSTEIN

sponsors being required to put some amount of their own capital at risk in the transaction. Over the last five years that amount has grown significantly and is typically in the range of 3 to 3.5 percent of the amount raised in the IPO – a development that is solely a result of investors, not regulators. This change has resulted in the amount held in trust reaching the 100 percent level. In addition to the changes to structure, investors are also accepting corporate sponsored SPACs, private equity sponsored SPACs and foreign private issuer and Euronext listed SPACs.

**Rubinstein:** In recent years, the most significant changes in SPAC terms have been the continuous increase in the percentage of IPO proceeds placed into trust, which favours investors, and the increase in the percentage of public stockholders who can convert their shares at the time of a business combination with the deal still closing from 20 percent to up to 40 percent. The latter change favours both investors and sponsors because it decreases the chances of arbitrage-fund buyers blocking a deal that a significant majority of the other stockholders has approved. SPAC terms have been driven more by investor demand than by regulators. Because SPACs have net tangible assets in excess of $5m they are not governed by SEC Rule 419, which prescribes certain terms for blank cheque companies. As a result, SEC review of SPAC IPOs focuses more on disclosure of SPAC terms rather than the terms themselves.

**Marcus:** There has obviously been an increase in the percentage of the proceeds being held in the trust account. When these deals first came back into the marketplace escrow was in the 80 percent range. Today deals are in the 100 percent range. The legal professionals who clear the registration statements with the SEC have been able to react quickly to SEC concerns and there are more markets that have been willing to list SPACS. The real dictator of the terms has been large investors. There are a relatively small number of funds that are big players in the market and because so many deals have been stockpiled, these funds are dictating. In the reverse merger area the changes in structure have been driven by regulatory changes, particularly the timing of the Super 8-K requirement and the recent modifications to Rule 144. Since the new rules provide that 144 is no longer available to shell companies until they have ceased to be a shell for one year, there is no longer the emphasis placed on acquiring shares that are free under Rule 144. I think this has been positive because it eliminates some of the historically prevalent antics found in the reverse merger market.

**Miller:** Most, if not all, of the changes in SPAC IPOs have been shaped by investor demand and the desires of the sponsor. Hardly any of the changes have been forced upon SPACs by the regulators, primarily because we designed SPACs to actually circumvent all applicable regulations. A number of significant changes have occurred in the last five years. As a result of investor demand, the aftermarket warrant purchase obligation of the sponsor has been switched to the private purchase of warrants directly from the SPAC, thereby placing the purchase price into trust and increasing the per-share trust amount to what is now typically at or close to 100 percent of the IPO price. From the sponsors' side, to help improve the chances of consummating a business combination, we have seen the veto power increase from 20 to 40 percent, the creation of a 10 percent maximum conversion feature and a shift to having only fractional warrants as part of a unit in order to minimise dilution.

**Pappas:** Investors rather than regulators have driven most of the significant changes in terms and structure. As the market has grown larger and the number of issuers has grown, investors have become more sophisticated and demanding. For example, early SPACs had only 85 to 90 percent in trust and most deals had two warrants per unit sold in the IPO. Today, the percentage in trust is closer to 100 percent and deals generally have one warrant per unit. The lower dilution from the smaller amount of warrants has made it easier for SPACs to consummate an attractive acquisition, which in turn adds value to the warrants. The higher percent in trust reduces the downside for investors so the structural trend has been towards a higher upside and lower downside for investors.

**Weiss:** Both investor and regulatory demands have impacted the evolution of APOs. As a result, we have witnessed the development of private equity vehicles from blind pools to 70 percent designated funds such as Conversus and Lehman Brothers Private Equity. Hedge fund listings migrated in two directions – single strategy funds through master feeder constructs. Additional sophistication came in the form of interchangeable multi-currency issues. SPACs further expanded the opportunity set.

**With the recent changes in Rule 144 and the further delay in implementing the auditor attestation requirement of 404 of SOX, I believe we are now on a more even footing with the foreign markets.**

ARTHUR S. MARCUS

**Are APOs growing in popularity in jurisdictions outside the US?**

**Ellenoff:** Just as there is increasing awareness and acceptance of the program in the US, there is similar development in Europe, Asia, China, India, Israel and South America. Several years ago there were a handful of AIM-listed SPACs, now there are the beginnings of the program being seen on the Euronext, with Liberty International being the most prominent. Part of the reason for the increase in the presence of international sponsor teams is that the best performing SPAC acquisitions seem to have been both the China SPACs and the international shipping deals. The belief is that the ability to source undervalued assets, to justify the sponsor promotes, is more likely in emerging markets, although with less competition in the US for transactions due to the credit crisis, domestic SPACs are also gaining more acceptance. We are very encouraged by a new category of American Stock Exchange (AMEX) listed SPACs referred to as foreign private issuers. These SPACs are foreign incorporated and foreign sponsored by non-US teams but they register their IPO in the US and list on the AMEX.

**Marcus:** We have seen more and more deals move overseas as a result of the regulatory climate in the US, particularly the perceived expenses of complying with Sarbanes-Oxley (SOX) and the longer holding periods in the US. With the recent changes in Rule 144 and the further delay in implementing the auditor attestation requirement of 404 of SOX, I believe we are now on a more even footing with the foreign markets.

**Anslow:** APOs are definitely growing in popularity outside of the US. Growth depends on the local laws of the jurisdictions that have an affinity for this process. The Chinese market has grown dramatically over the last few years, notwithstanding the fact that in September 2006 the Chinese government adopted certain rules and regulations that made it more difficult for foreign ownership of People's Republic of China organised entities. An APO as we know it in the US with domestic companies needs to be structured differently for a Chinese organised and operated company. Practitioners have found different methods to respond to such rules and regulations by creating certain 'work around' structures. Therefore, the Chinese market is still active. Plus, there have been recent indications that the Chinese government may relax the present rules and regulations.

**Rubinstein:** Outside the US, the jurisdiction in which US SPACs have found the most buyers is the UK. In terms of listings outside the US, a number of SPACs have listed on the London Stock Exchange's Alternative Investment Market (AIM) in the past, but this trend has ebbed, as those SPACs did not perform well. Recently, SPACs have begun listing on Euronext, but it is too soon to say if this trend will take hold. SPACs targeting acquisitions outside the US often still list in the US, but are domiciled and headquartered outside the US for regulatory and tax reasons.

**Pappas:** We have seen SPAC-like offerings done on AIM and more recently on Euronext. At this time, the AIM is no longer a viable alternative principally due to liquidity concerns. Euronext is still a nascent market for SPACs. Over time we are likely to see more SPACs in international markets, however, for the moment the US market is the largest and most liquid market for SPACs. The majority of SPACs should continue to be issued in the US. In terms of investor appetite, while the majority of institutional investors are still US based hedge funds, institutional investors in Europe and the Middle East have expressed interest in SPACs. We see this trend continuing.

**What are the practical regulatory requirements placed on APO vehicles looking to go public? What ongoing compliance issues do they face once they have listed?**

**Weiss:** The practical regulatory requirements placed on APOs vary by jurisdiction and area of incorporation. Variables such as EU law, national legislation, securities regulation and oversight and stock exchange rules all contribute. In general, alternative investment vehicles are governed by rules similar to those in effect for ordinary companies, unless overridden by rules designed specifically for this asset class. In some instances, best in class practices force issuers towards greater stringency than existing rules.

**Ellenoff:** The issues for an APO are actually quite similar to any other publicly traded company, although given the unique structure of the SPAC vehicle, substantially all of the money raised is held in an account at a major financial institution until the sponsors identify and propose a business combination and the stockholders approve it.

**Miller:** The regulatory requirements placed on a SPAC doing an IPO, and through its post-IPO/pre-combination life, are no more cumbersome or intrusive than the regulatory requirements placed on operating companies. In fact, if anything, the process of clearing the SPAC IPO with the SEC and preparing the SPAC's post-IPO/pre-combination periodic reports is easier than with an operating company, since disclosures with respect to a blank cheque are more easily made than disclosures relating to an operating business.

**Pappas:** SPACs listing in the US have to comply with SEC reporting and governance requirements, as well as exchange governance requirements. Once a SPAC acquires a company, its reporting and regulatory requirements, including those pertaining to SOX, are the same as any other public company. So, the company being acquired should be large enough and mature enough to have the proper governance and systems in place and have the scale necessary to support the costs of being public.

**Rubinstein:** A SPAC conducting an IPO in the US must file a registration statement with the SEC and comply with SEC rules governing public offerings. Once listed, SPACs need to comply with SEC reporting requirements, and with SEC proxy rules when seeking approval of a business combination. If a SPAC is headquartered outside the US and otherwise qualifies as a 'foreign private issuer', it can list in the US without being required to comply with the SEC's proxy rules. As a result, it would not have to file a preliminary proxy for its business combination with the SEC, saving a significant amount of time and money associated with the SEC review process.

**The regulatory requirements placed on a SPAC doing an IPO, and through its post-IPO/pre-combination life, are no more cumbersome or intrusive than the regulatory requirements placed on operating companies.**

DAVID ALAN MILLER

**Anslow:** Specifically, the main SEC regulatory requirement for an APO is the filing of a Form 'super' 8-K within four business days after the transaction closes. The super 8-K filing is equivalent to disclosing information that is normally required in a 1933 Act registration statement. The 8-K rules adopted in August 2004 changed the way reverse mergers and APOs were looked upon, in a positive way. The ongoing compliance issue, not from a listing or quotation standpoint but from a SEC standpoint, that has recently come to the forefront, is compliance with SOX 404 and the related costs.

**Marcus:** In the SPAC arena, the SEC has clearly laid out the regulatory framework and it is has been pretty well accepted by both practitioners and companies. In the reverse merger area, the filing time of the super 8-K has decreased to four days but also includes the financial statements, which used to be a post-closing item. Once public, companies are obligated to file their 1934 Act periodic filings and to comply with SOX. Although the requirement for smaller reporting companies to comply with the auditor attestation requirement of SOX 404 has been delayed, management must make their own attestation of internal controls and auditors of many small companies have begun to recommend bringing in consultants to help management perform the evaluation of internal controls.

**To what extent do reporting requirements, disclosure, liquidity, timing and related considerations affect the decisions of companies selecting an exchange on which to undertake an APO?**

**Pappas:** Reporting requirements on all US exchanges are very similar. In the US, market recognition and sponsor preferences are the biggest factors affecting selection. As stated earlier, we still recommend raising a SPAC in the US markets. Certainly one of the key considerations for SPACs seeking listing on non-US exchanges has to do with avoiding the lengthy SEC review process associated with the merger proxy as well as the ongoing reporting requirements and costs of complying with SOX. For SPACs with a focus outside the US, we recommend filing as a foreign private issuer if they qualify. This could shorten the time between acquisition announcement and closing by as much as three months.

**Miller:** If a SPAC wants its securities to be actively traded in the US, there are currently only two choices – the AMEX and the OTC Bulletin Board (OTCBB) – since NASDAQ and NYSE have not yet been approved for listing. The benefit of being AMEX listed is the panache and imprimatur of being an exchange listed company. Plus, securities can be sold to individual investors in all 50 states due to blue sky exemptions granted to AMEX-listed companies. The advantage to being OTCBB listed is that the majority of directors do not need to be independent, nor must there be an audit committee comprised of independent directors, including a financial expert. Other than these differences, the listings are comparable in terms of reporting requirements, disclosure, liquidity and timing.

**Ellenoff:** Generally speaking, SPACs have listed on the AMEX for both the credibility of the listing authority as well as the liquidity benefits associated with such a listing. The AMEX has also recently indicated its willingness to accept listing applications for certain qualified foreign private issuer SPACs, which reduces some regulatory burdens associated with a US SPAC listing, including the preliminary filing of a proxy with the SEC. The market has also expanded to involve Euronext listings.

**Rubinstein:** One of the considerations that has driven SPACs to seek a listing outside the US has been the lighter regulation on some non-US exchanges. However, the liquidity of the US markets has ultimately resulted in the vast majority of SPACs continuing to list in the US. Most SPACs that qualify for listing on the AMEX have listed because it allows them to avoid compliance with the blue sky laws of the states in which the offering is sold, which they would need to comply with if they trade on the OTCBB. Listing on AMEX does require SPACs to comply with its independence and other listing requirements, but given the nature of SPACs, most do not find this to be an issue.

**The AMEX has also recently indicated its willingness to accept listing applications for certain qualified foreign private issuer SPACs, which reduces some regulatory burdens associated with a US SPAC listing.**

DOUGLAS S. ELLENOFF

**Marcus:** In my opinion, liquidity is still the ultimate long term test of what makes sense for a particular company from the perspective of what market to list on. I believe that the US markets still offer companies the best bet for liquidity, particularly compared to the AIM. From a regulatory compliance perspective, SOX was initially perceived as too onerous and expensive for many smaller companies to comply with. Gradually, companies and their professionals have grown more comfortable with these requirements.

**Weiss:** Timing, liquidity, reporting requirements, disclosure and governance all affect a SPAC's choice of listing venue. Timing, for example, is a key driver of listing venue choice with regard to the IPO process and the ultimate business combination. In some instances, this need for agility drives SPACs to list on Euronext as regulators in Amsterdam facilitate an expedited initial review process and do not require a proxy, pre-business combination. In the US, foreign private issuers may also avoid the proxy requirement. As to liquidity, Euronext is attractive as it provides the means for a robust price discovery process.

**Anslow:** On a broader level, practically all APOs occur on the OTCBB. Some reverse mergers occur on the Pink Sheets but companies that take this method find it difficult to obtain financing, albeit, it is not a true APO. Therefore, the decision of what exchange to undertake an APO is normally not one that needs to be made by a company contemplating an APO. If by some chance there is a NASDAQ or AMEX APO, its viability is limited by the fact that APOs usually involve a 'public shell company' and such exchanges normally will not allow a 'shell' company to still be listed on its exchange for any significant period of time. Furthermore, the respective exchanges still require a full application and approval process. Notwithstanding the above, most companies that do an APO and are immediately quoted on the OTCBB normally have the goal of applying to an exchange such as NASDAQ or AMEX within a year if they quantitatively qualify to do this.

**Would you say that the level of corporate governance observed by companies formed via an APO is improving? What measures have regulators implemented to increase investor protection, and what more could be done?**

**Rubinstein:** Since SPACs re-emerged in 2003, the quality of the management teams, underwriters and counsel associated with SPAC offerings has continually improved, leading to improvements in the level of corporate governance. The IPO SEC review process has become relatively straightforward, as the focus has shifted to the business combination approval process. Here, the SEC has been learning from experience, and consistent with its authority, focusing on mandating disclosure of the terms and risks of the transaction to investors. As many SPAC business combinations have underperformed, we have seen the market police itself by voting down a number of weak deals.

**Ellenoff:** The corporate governance for a SPAC is in most cases as stringent as with any other public company and in some cases even more. The regulatory review process over the course of the last five years has vetted most if not all of the concerns of the SEC to the point where I believe that the staff's review of a SPAC filing has a much more normalised review as with any IPO. In my opinion, the investor protections that are unique to a SPAC are certainly more investor friendly than in an ordinary IPO.

**Miller:** Any target that merges with a SPAC must do so knowing that it is the equivalent of consummating its own IPO and that it will therefore be subject to all the corporate governance requirements that any public company is subject to. One recently implemented regulation designed to protect investors, requires SPACs to file a Form 8-K within four days of consummating its business combination. This Form 8-K must contain all the information that would have been contained in the IPO prospectus for the target if it had consummated its own IPO. Since all SPACs are required to get shareholder approval for their business combinations and all the information required in this 8-K would typically be found in the SPAC's proxy statement anyway, this regulation did not make SPAC transactions more difficult. However, it is a valuable investor protection mechanism for non-SPAC APOs that do not require shareholder approval to consummate their business combinations.

**Weiss:** In general, the governance of APOs is improving. Investor demand for best in class practices is, in some instances, driving these vehicles to standards beyond those required by the applicable code of their country of incorporation.

**Marcus:** I would say that corporate governance is improving for companies going public through APOs. We have worked with many companies that recently completed a reverse merger to try and structure themselves from a corporate governance point of view in the same manner as if they were traded on a national exchange even though they are currently listed on the OTCBB. This should help facilitate their move to a larger, more recognised market. Clearly, the largest force in improving corporate governance is the requirement for OTCBB companies to be fully reporting.

**Anslow:** Corporate governance for companies that have undertaken APOs with OTCBB companies has recently improved slightly, but not drastically. Since 2002, such companies have had to comply with SOX and undertake such things as hiring independent directors, creating audit committees consisting solely of independent directors and a prohibition on related party or insider loans. However, the OTCBB is a quotation system and there is no real oversight of corporate governance by an actual exchange. When corporate governance drastically changes is when the company is listed on an exchange such as the AMEX. Such an exchange mandates certain corporate governance that is regularly overseen. The adoption and implementation of SOX has required full adequate disclosure, which is intended to more fully protect investors. However, this legislation has had the effect of overburdening public companies, especially small cap companies since it can be cost prohibitive to comply.

**Pappas:** Originally SPACs were issued primarily on the OTCBB where initial governance provisions at the time of the SPAC IPO were limited. Today, most new SPACs are issued on AMEX where governance requirements include having a majority of independent directors and an audit committee with qualified financial experts, among other provisions. However, in either case once the initial acquisition is consummated, companies usually move to a major exchange like NASDAQ or the NYSE where they have to comply with such governance provisions. Generally, regulators like the SEC have increased and refined the disclosure in SPAC IPO registration statements over the last few years. However, investor protections are really a function of the basic structure of a SPAC – including the shareholder vote to approve an acquisition and the ability to redeem a share for cash – and less a function of any changes implemented by regulators.

**If the SEC allows SPACS to list on the higher NASDAQ exchanges (Global and Global Select) or the NYSE, this will, most likely, increase the size of the SPAC IPO resulting in numerous billion dollar SPACS.**

RICHARD I. ANSLOW

**NASDAQ and the NYSE recently requested permission from the SEC to list SPACS, and other exchanges may follow suit. If they receive approval, how will this affect the market?**

**Marcus:** We see NASDAQ and the NYSE's willingness to list SPACs as a mixed blessing. If it serves to bring more retail investors into these deals, it is positive because the key to the ongoing health of the SPAC market is driven by the ability to get the business combination approved. At the same time, the contrarian point of view is that this indicates that the market has become saturated with SPACs and that the bubble will burst.

**Anslow:** If the SEC allows SPACS to list on the higher NASDAQ exchanges (Global and Global Select) or the NYSE, this will, most likely, increase the size of the SPAC IPO resulting in numerous billion dollar SPACS. Such NASDAQ markets and the NYSE are known to have greater liquidity and are more reputable. From a volume perspective, the SPAC market has slowed down of late. However, this volume change in the market may soon turn if the SEC approves this contemplated action.

**Weiss:** We anticipate receiving approval from the SEC very shortly for our latest NYSE US listing standard, permitting us to list SPACs for the first time in the US. To date, NYSE has listed SPACs on its European platform, NYSE Euronext, including the second largest one in history, Liberty International Acquisition Company. This newfound US capability will ensure that the NYSE is thus positioned to list SPACs on its other platforms globally, which are NYSE, NYSE Arca and NYSE Alternext. The impact on the market is expected to be positive as the NYSE group expands the listing venue choices for sponsors of these vehicles. As a result, SPACs will be able to benefit from the value associated with a NYSE Euronext listing, including its liquidity, global visibility and investor relations tools.

**Pappas:** It is a positive development for the market and frankly, overdue. That said, the NASDAQ, where most SPACs have moved post acquisition is likely to be where we see a majority of SPACs listing. As mentioned earlier, I believe SPACs are best suited to the middle market and therefore the NASDAQ is a more likely exchange for most SPACs rather than the NYSE.

**Ellenoff:** The AMEX has established itself as the exchange of choice historically and truly helped pave the way for the SPAC industry to evolve, which is why their exchange has secured most of the existing SPACs. The recently announced actions of the NYSE and NASDAQ only validate the AMEX's early entry to the marketplace. Having the NYSE and NASDAQ available for SPAC listings is a welcome set of new options.

**Rubinstein:** The listing of SPACs by NASDAQ and the NYSE would represent the maturation of the product on the exchange side, similar to the evolution on the underwriter side from small firms to bulge bracket firms. However, as opposed to the significant impact that the entry of bulge bracket underwriters into the SPAC market has had, or even the impact when AMEX began listing SPACs a few years back, the listing of SPACs on NASDAQ or the NYSE should not have a significant affect on the market. The benefits from a regulatory perspective of listing on an exchange are already achievable by listing on AMEX, and after a business combination, many post-SPAC companies have already moved to NASDAQ or the NYSE.

**Miller:** NASDAQ and NYSE listing SPACs will have no effect on the SPAC market because SPACs are already highly visible financing vehicles, which have been accepted into the investment banking mainstream. SPACs have been listed on the OTCBB since 1993 and on the AMEX since 2005. NASDAQ and NYSE will simply piggyback on the work that AMEX has done in this arena and follow the trail that AMEX has blazed for them.

**To what extent does Goldman Sachs' entrance to the market reflect the growing awareness and credibility of SPACs, which were a niche area of capital markets not too long ago?**

**Anslow:** When a company such as Goldman Sachs participates in a certain market, there is instant credibility and therefore a positive impact. Goldman Sachs' participation strongly reflects that numerous players in the financial markets have recognised SPACS as a vehicle to be reckoned with presently, and in the near future.

**Marcus:** It is great that a firm like Goldman Sachs has entered the SPAC market as it adds credibility to the concept. This is similar to what we have seen in the reverse merger market over the last few years. Where reverse mergers were once shunned as vehicles to facilitate 'pump and dump' schemes, now most investment banks view them as a viable way to go public. The SPAC vehicle has definitely become more mainstream in the last 18 months but it is still a niche market in that it is simply not a vehicle that makes sense for everyone.

**Miller:** The first SPAC IPO filed by Goldman Sachs in March 2008, does not reflect the growing awareness and credibility of SPACs as much as it reflects the fact that Goldman Sachs could no longer withstand the pressure it was receiving from its clients continually badgering them about why they were not doing SPAC IPOs. The Goldman Sachs filing adopted the basic SPAC IPO structure with one tweak – they lowered the sponsors promote from what is typically 20 percent to a mere 7.5 percent. This is not earthshaking or groundbreaking since prior deals had already eroded the 20 percent promote, although not as significantly. It remains to be seen whether this will force other underwriters to demand lower promotes from their sponsor teams.

**Rubinstein:** The recently filed Liberty Lane SPAC underwritten by Goldman Sachs has been one of the first major SPACs to take a fresh look at SPAC terms and implement changes designed to make the product more attractive to long term investors. The fact that Goldman Sachs has entered the market indicates that it studied it carefully and concluded that SPACs could no longer be ignored as a significant participant in the capital markets. While many observers have questioned whether the Liberty Lane deal can be sold in its present structure, others believe that the reduction in the percentage of the sponsors' promote from 20 to 7.5 percent, coupled with a significant increase in sponsor warrants, is a positive step in reducing the incentive for sponsors to get a deal done at any cost while focusing them on getting a good deal done that will result in their warrants having value.

**Ellenoff:** The structure of the Goldman Sachs' Liberty Lane filing is the talk of the SPAC community. The Goldman Sachs structure takes a very strong position relating to its analysis and perception of the shortcomings of the SPAC structure, particularly with respect to the impediments imposed by the warrant dilution for the proposed M&A combination. There can be no doubt that reducing the dilutive effects of the 1-for-1 warrant coverage is a positive development if the investment community is supportive.

**Pappas:** The Goldman Sachs filing is quite late to the market, entering into a challenging environment. However, it is a positive development because it further validates the product. Goldman Sachs has proposed certain changes to the structure that may not be as appealing to the current investors in SPACs but their entry into the market may be encouraging for some of the more traditional long only funds and other alternative asset managers who have, for the most part, avoided SPAC IPOs to date.

**Weiss:** Goldman Sachs' recent SPAC filing is notable for two reasons. Firstly, it marks the continuing evolution of a market that has transformed itself from being dominated by boutique underwriters into a market stewarded by a broad base of classic Wall Street firms. The evolution, coincident with the improvement in investor protection mechanisms, was also supported by the entry of the NYSE Euronext. Secondly, it is an attempt to shift the economics of SPACs, as deal terms have been re-crafted from the existing paradigm. The ultimate impact on the market will be a function of investor appetite for new deal economics. ■