Get Your Board On Board with Limiting SPAC-Related Litigation Risk

Although Special Purpose Acquisition Companies (SPACs) have been around for decades, only recently have they experienced an incredible surge in popularity and, inevitably, attention from regulators and plaintiffs' law firms. As a result of this increase in scrutiny, it is crucial that SPAC sponsors, their boards of directors, and the directors and officers of acquisition targets take steps to limit litigation risk and minimize associated costs. Although each transaction presents its own unique circumstances, adherence to a thorough and well-documented transaction process is critical. Goodwin recommends consideration of the following to mitigate disclosure and process-based claims in connection with SPAC business combinations.

Hold board meetings

SPAC boards should regularly hold board meetings in accordance with standard formalities, with an increase in frequency upon the identification of and engagement with a likely target.

Review and retain board materials

The SPAC board should review and retain written materials that reflect valuation analyses, transaction terms (and the negotiation thereof), interests of the sponsors/promoters in the transaction, and alternatives that were considered.

Form a special transaction committee in certain limited circumstances

A board may consider forming a special transaction committee to analyze potential operating companies and to evaluate and negotiate the deal under certain circumstances. This safeguard may be particularly useful and advisable in instances in which a private equity or venture capital firm is considering its portfolio company as a potential target.

Establish guidelines

To avoid any perceived conflicts from discussions related to employment with the target, a board should establish appropriate guidelines regarding members of SPAC management refraining from such discussions unless they receive board authorization.

Do your due diligence

Due diligence efforts should be thorough and well-documented, including any potential "red flags" noted, such that they can be accurately reflected in filings related to the deSPAC transaction.

GOODWIN

Involve an independent financial advisor in certain limited circumstances

Although typically not required or obtained,in certain circumstances "more ripe for conflicts" a SPAC board may want to consider engaging an independent financial advisor to provide a fairness opinion in connection with the deSPAC transaction to add a layer of protection for the board. If retained, the financial advisor should complete a customary conflicts questionnaire and the board should document its discussion relating to the rationale for selecting the particular financial advisor and any conflicts or lack of conflicts on the part of the financial advisor.

Adopt resolutions

The SPAC board should adopt appropriate resolutions approving the transaction and related matters.

Encourage a similarly robust process for the target company

The operating company target should also engage in a similar, robust process to limit litigation risk as it too could be subject to a post-closing breach of fiduciary duty or securities law claim from the operating company's stockholders.

Develop complete and accurate disclosures

The SPAC board and the target company should also work together to ensure that disclosures related to the business combination are materially complete and accurate to reduce the risk of protracted and expensive litigation.

Analyze D&O insurance

The SPAC board and the target company should also carefully analyze the combined company's D&O coverage and consider whether the amount and scope of insurance are appropriate and understood.

Want to learn more about limiting SPAC-related litigation risks?

Connect with our team to discuss key process and disclosure considerations in connection with SPAC IPOs and deSPAC transactions.

Caroline Bullerjahn | Partner, Boston | cbullerjahn@goodwinlaw.com
Morgan Mordecai | Partner, Boston | mmordecai@goodwinlaw.com
Alexis Coll-Very | Partner, Silicon Valley | acollvery@goodwinlaw.com
Sam Rubin | Partner, New York | srubin@goodwinlaw.com

Meet us at the intersection of capital and innovation: goodwinlaw.com

GOODWIN