SPAC insights:

Cross-border challenges

The boom in SPACs is going international. Having watched the phenomenon explode in the U.S. last year, investors in Europe, Asia and Latin America want a piece of the action. In Europe, Amsterdam and London are competing to become the region's center for SPACs. Meanwhile, many U.S.-based SPACs are also looking abroad to make acquisitions. But crossing borders in a SPAC transaction raises unique challenges, starting with tax considerations.

Why more SPAC deals will cross borders

SPAC mergers are now firmly established in the U.S. as an alternative to IPOs. An active ecosystem of SPAC sponsors, targets, institutional investors and liquidity supports a growing market. Despite increasing competition for deals, most SPACs have found merger targets.

But as the U.S. market becomes more crowded, some SPACs are turning their eyes abroad for the following reasons:

- There are early-stage overseas companies that represent attractive acquisition targets with high-growth stories.
- U.S.-based SPACs can bring their domestic experience of capital-market transactions to a company in a foreign country.
- Foreign targets may be looking to join U.S.-based SPACs to tap into the liquidity and efficiency of execution of the U.S. market.

Tax issues at SPAC formation

The design and structure of SPACs incorporate elements of U.S. corporate and tax law that may not fit neatly into frameworks in other countries. Addressing these differences at the time of SPAC formation will improve your ability to make a successful acquisition and help avoid surprises at the back end.

Key issues to consider include:

Location of incorporation of the SPAC

- Incorporating the SPAC outside the U.S. (e.g., in the Cayman Islands) decreases the risk that U.S. anti-inversion rules will apply in the case that the SPAC identifies a foreign target, but increases the risk that PFIC rules will apply to U.S. investors in the SPAC (see below for more on PFIC and anti-inversion rules).
- But be mindful of Cayman's reputation—the European Union only recently removed it from a blacklist.

Inadvertent tax residency

— Unlike in many jurisdictions, in the U.S. tax residency is determined by the place of incorporation—e.g., Delaware.

— Other jurisdictions have a central management and control test—e.g., where are the SPAC directors located and from where do they make decisions?

— If you want to use tax residency in the U.K., beware that it's increasingly questioning if companies are really centrally managed from there; likewise, if you do not wish to have U.K. tax residency, then be mindful when having U.K. directors or holding your board meetings there.

Different tax regimes for share compensation and founder shares

— Unlike in the U.S., some jurisdictions may not respect the founder share "investment" made by the sponsors/founders, and instead tax shares when they are granted and/or converted (potentially resulting in duplicative taxation).

Passive foreign investment company (PFIC) issues for U.S. shareholders in a foreign corporation

— In the U.S., a foreign corporation may be treated as a PFIC: 1) if at least 75 percent of its gross income is passive; or 2) at least 50 percent of its assets produce passive income or are held for the production of passive income using a quarterly averaging test (which may include cash held in the trust account).

— U.S. shareholders of a PFIC must make certain annual elections in order to preserve capital gains treatment and avoid other potentially adverse tax consequences, including upon SPAC merger and thereafter.

Controlled foreign corporation (CFC) rules may also apply to a non-U.S. SPAC and could affect founder shareholders who are U.S. persons.

Challenges during the cross-border SPAC merger

Different rules in different jurisdictions can make a fundamental difference to how a SPAC deal is carried out. For example, tax rules in a foreign target's country may necessitate that it acquire the SPAC in a merger. Both sides should ask the following questions early in the transaction to avoid complications later:

Do U.S. anti-inversion rules apply?

— The U.S. has strict rules on a domestic corporation changing tax residency by reincorporating in a foreign jurisdiction, among various other types of transactions with respect to which the potential for an inversion can be unexpected.

— The application of the anti-inversion rules is complex and broad, and requires careful analysis in any transaction to avoid triggering anti-inversion scrutiny.

Does U.S. GAAP or IFRS apply to a foreign target merging with a U.S. SPAC?

— Depending on the way the deal is structured and the ownership status at close, the foreign target could potentially obtain foreign private issuer (FPI) status[1] and avoid preparing U.S. GAAP financial statements and enjoy other reporting reliefs applicable to an FPI.

— One common approach is to set up a new holding company outside the U.S. into which the target and SPAC are merged into and make that the ultimate registrant of the new combined entity, instead of the original SPAC, assuming it would qualify as an FPI.

Bottom line

As SPAC deals move into international M&A markets, SPAC sponsors and target companies should do their homework on cross-border issues before entering into a transaction. SPACs were born and raised in the U.S., so foreign investors and targets will need to work with U.S. laws and adjust to U.S. market conditions. U.S. investors in a SPAC hoping to strike a cross-border deal must also pay close attention to differences in the corporate and tax regimes of foreign countries. Better cross-border understanding is a win-win.

[1] According to Securities and Exchange Commission rules, a company incorporated or organized under the laws of any country other than the United States is an FPI, unless the following conditions are met:

— More than 50 percent of the outstanding voting securities are owned directly or indirectly (including beneficial ownership) by U.S. citizens/residents; AND the company meets any one of the following criteria:
  - the majority of executive officers or directors are U.S. citizens or residents
  - more than 50 percent of the company's assets are in the United States
  - the company's business is administered principally in the United States.

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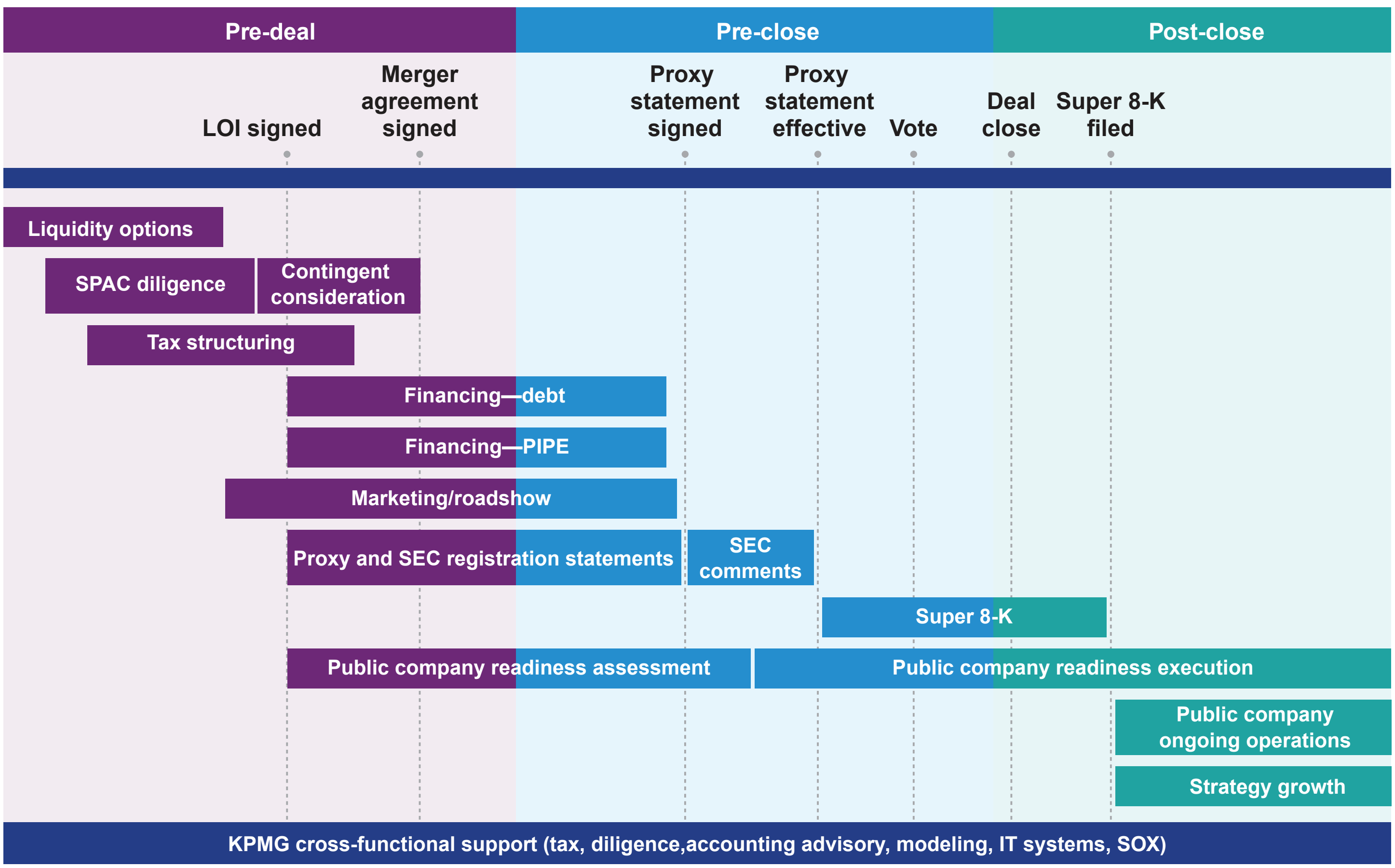
SPAC transaction lifecycle

A SPAC has a typical lifespan of 18-24 months, but completing a merger with a SPAC can take as little as six months after the signing of an initial agreement. This paper focuses on the pre-deal phase and tax structuring. But across the lifecycle of a SPAC transaction, many other issues will arise. For more on these, visit the KPMG SPAC Intel Hub.



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