LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Legal Tips For SPACs Facing Looming Acquisition Deadlines

By **Tom Zanki**

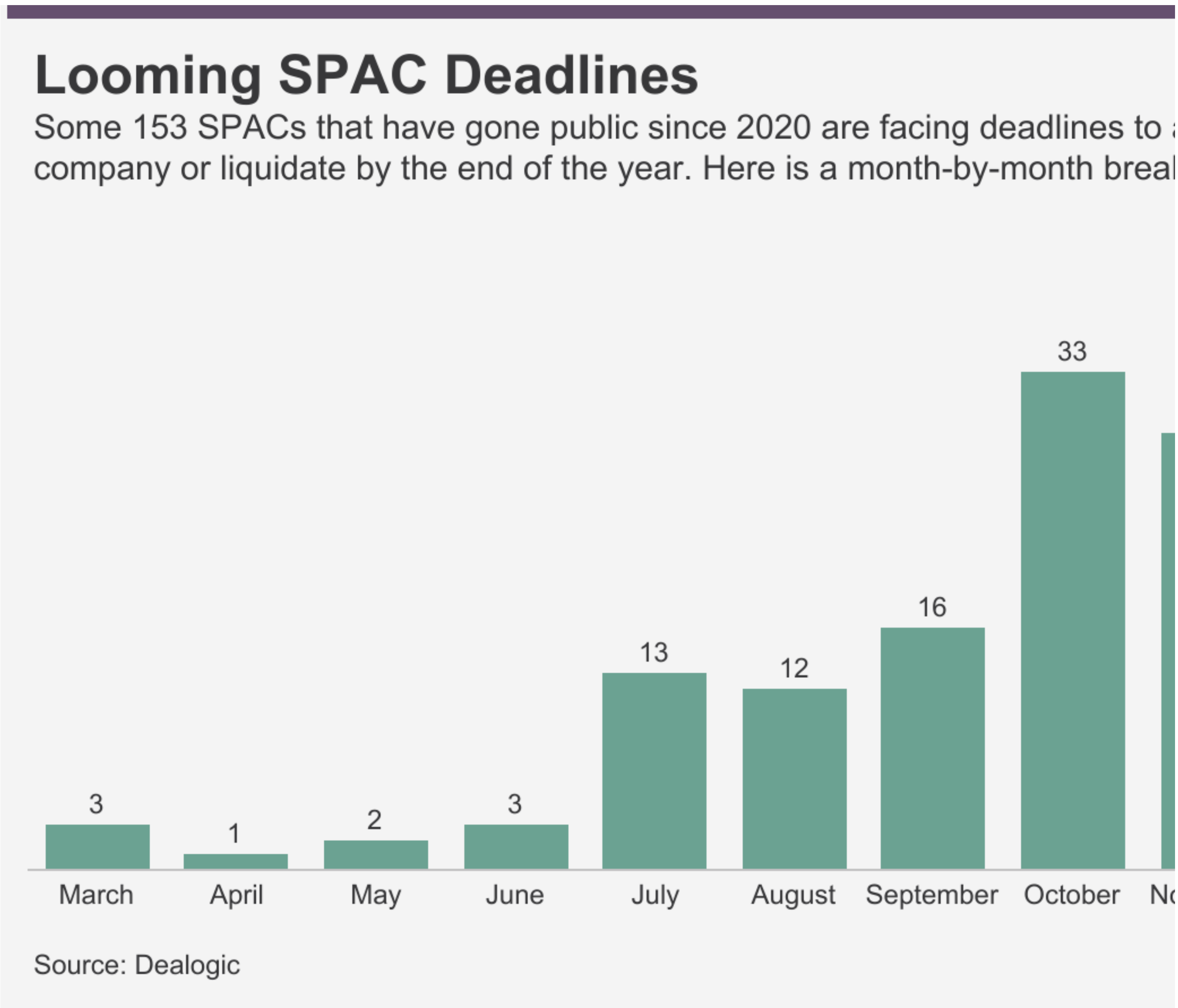
Law360 (March 14, 2022, 5:29 PM EDT) -- More than 150 special purpose acquisition companies face deadlines this year to acquire a target or return money to shareholders, a process sure to be scrutinized by regulators and litigators for signs of rushed deals.

The deadline crunch follows a surge in SPAC initial public offerings in 2020, a **pivotal year** that resulted in a booming market for these alternative funding vehicles. SPACs, also called blank-check companies, raise money in IPOs in order to acquire a target and take it public, typically operating on timetables of two years or less.

According to research firm Dealogic, 153 SPACs that went public in 2020 and 2021 have between now and Dec. 31 to acquire a target. The vast majority of time limits will occur in the second half of 2022, starting July 1. The rapidly approaching deadlines coincide with an environment of greater regulatory oversight, plus more lawsuits alleging SPAC mergers **did not provide** shareholders fair value or were made on **misleading claims**.

"There is a risk that SPAC founders will rush for deals and not demand valuation or terms that they might otherwise in order to avoid a forced liquidation," said Clifford Chance LLP counsel Matthew Warner, who focuses on international mergers and acquisitions deals, including blank-check mergers. "As a consequence, SPACs near their dissolution deadline may well receive enhanced scrutiny from the SEC."

As pressure mounts for existing SPACs to land deals, lawyers shared with Law360 five tips to avoid a rushed deal, and stay out of legal and regulatory crosshairs.



Click to view interactive version

Don't Rush

For starters, lawyers say acquirers must not hurry to complete a deal at the expense of quality.

The U.S. Securities and Exchange Commission, which is **eyeing new rules** on SPACs, has repeatedly indicated it wants more thorough disclosures from blank-check companies so investors better understand the value of a merger target and any conflicts that benefit insiders. Plaintiffs firms are also watching for signs of deals that shortchange investors.

"Don't rush into a transaction just because you're coming up against a time deadline," said Haynes and Boone LLP partner Matt Fry, who co-chairs the firm's capital markets and securities practice group. "If appropriate steps are not followed, it can create unnecessary liability for the SPAC."

Another thing to consider is investors are more discerning now that the blank-check boom has slowed from the breakneck pace of prior years. SPAC investors unwilling to remain as stockholders in the merged company can redeem their shares ahead of a combination, adding pressure on SPAC founders to come up with other financing.

"What it takes to get a deal done today is a lot harder than it was a year ago," said DLA Piper's Jeffrey Selman, who chairs the firm's SPAC transactional practice. "Investors aren't just going to let a deal go through that they don't believe [involves] a good, quality company at the right price."

Consider Extensions

SPACs ordinarily disclose they may seek extensions if they don't land a target within their specified timetables, which generally range from 12 to 24 months.

Fry said these extensions can be useful, though they come with added costs. SPAC founders typically have to add money into a trust account — say 10 cents a share for a three-month extension — that becomes available to SPAC investors if they opt to redeem their shares.

But if an acquisition is in sight, these costs may be worth it in order to avoid liquidating the SPAC and starting from scratch with a new vehicle later.

"It's often cheaper to extend a SPAC than for the sponsor to give up and start over," Fry said. "You're just paying an extension fee and not all the other costs to start up a SPAC."

SPACs can seek extensions beyond what is specified in their registration statements, though such extensions often require the approval of 65% of shareholders, who also must be given the option to redeem their shares at the time of the vote.

Broaden Your Search

SPACs generally disclose target industries in their search that are consistent with the expertise of their founders. But nothing binds SPAC founders to only consider certain sectors. Disclosures typically indicate SPACs can look beyond their preferred focus.

As the number of domestic targets shrink, lawyers say more SPACs are looking abroad for viable targets. Plus, many newly formed blank-check companies are **considering international targets** from the get-go, including in places like Latin America and Asia.

"We are seeing more and more conversations where sponsors or management of SPACs are looking overseas for targets in addition to what they're seeing here domestically," DLA Piper's Selman said.

Scrutinize Your Projections

Many SPAC mergers disclose financial projections to prospective investors before a proposed business combination, a practice typically avoided in traditional IPO prospectuses because underwriters have liability concerns.

While discussing outlooks can appeal to market participants, lawyers caution that SPAC parties eager to complete a deal can't be reckless in their projections. If the merged company's stock later plunges, those projections will be **scrutinized by litigators**.

"We've seen too many reports lately of companies failing to meet their projections in ways that make you look, with the benefit of hindsight, as to whether or not pencils should have been sharpened a little bit more," said Foley Hoag LLP partner Dan Clevenger, who represents SPAC merger targets.

Review Your Governance

Courts are taking a harder look at SPACs to determine whether they have certain checks in place to ensure insiders' interests are aligned with shareholders'.

The Delaware Chancery Court recently **let stand** an investor's suit alleging a SPAC's management disloyally pursued a merger favoring insiders. The court's refusal to dismiss the suit — involving a merger with blank-check company Churchill Capital Corp. and health data analytics firm MultiPlan Corp. — signaled that a board of directors' fiduciary duties to shareholders will apply to SPACs under the state's corporate conduct standards, just as they would for traditional mergers.

In the pivotal MultiPlan case, investors allege several Churchill Capital directors were conflicted in that they received "founder shares" in the combined company's equity. This compensation was predicated on the merger being approved, though shareholders allege they suffered losses after the merger when MultiPlan's stock dropped.

Regulators and litigators will likely look for similar arrangements in future SPAC mergers, particularly if those vehicles are incorporated in Delaware, as many are for business or tax reasons.

Lawyers say there are ways to mitigate accusations of conflicts. For one, SPACs can appoint a special committee of independent directors to vet a proposed acquisition.

This somewhat goes against the grain of SPAC arrangements. In reality, many SPAC directors have relationships with the blank-check company sponsors and seek to work on future transactions with those same sponsors.

"It is a tricky feature to implement, but one that should clearly be considered," Clifford Chance's Warner said of appointing independent directors.

Attorneys add that boards can reduce liability if they hire a third party to conduct what is known as a "fairness opinion," or an independent appraisal concluding a proposed deal is fair.

Even beyond Delaware, lawyers note fiduciary duties owed by management and directors to shareholders are being viewed with more watchful eyes.

"If you're coming up to the end of life of a SPAC, it doesn't mean that your fiduciary duties are in any way lessened, or that somehow you're going to escape regulatory scrutiny," Clevenger said.

--Editing by Kelly Duncan and Lakshna Mehta.