Private Equity Hot Topics

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Qualified Small Business Stock Handbook

Author: Scott Dolson

Many participants in ACG Capital Connections are involved in transactions that involve Qualified Small Business Stock (QSBS) and qualified small businesses, whether that involvement is as an investor purchasing QSBS, a PE firm or family office purchasing a qualified small business, a banker representing a corporation that has issued QSBS, or as a member of a management team being asked to roll over QSBS in a sale process. Beyond these everyday QSBS touches, there are VC funds and PE firms that are focusing their efforts on making investments intended to qualify for Section 1202's attractive gain exclusion.

The purpose of this article is to introduce ACG participants to QSBS and to let them know of the resources we have available to assist them with navigating through Section 1202's eligibility requirements and planning issues.

QSBS (Code Section 1202) Background

Under Code Section 1202, taxpayers who are issued corporate founder or investor qualified small business stock (QSBS) for cash, services, or other property (excluding stock) can potentially exclude at least $10 million of gain on the sale of their QSBS at the federal and often state levels if they satisfy Section 1202's five year holding period requirement. A wide variety of business activities qualify under Section 1202, including many software, biotechnology, pharma and manufacturing.

Code Section 1045 Background

Under Code Section 1045, taxpayers who sell QSBS prior to satisfying Section 1202's the five-year holding period requirement can elect to roll over their QSBS proceeds into replacement QSBS investments. QSBS proceeds can be rolled over into third-party replacement QSBS investments or the taxpayer can organize a new C corporation and commence start-up activities or undertake to acquire the assets or equity of a qualified small business.

Legislative Outlook

Code Section 1202 has been around since 1993 and enjoys strong support in U.S. venture communities as an incentive for encouraging investment in start-up companies. Although the potential exists for the benefits of Section 1202 to be reduced or eliminated during the coming years, more legislative attention has been paid to increasing the capital gains rates for high income taxpayers and the corporate tax rate above the historically low 21% rate currently enjoyed by domestic corporations. If enacted, an increase in the capital gains rates for higher income earners could result in even more attention being paid to structuring investments that are intended to ultimately qualify for the Section 1202 gain exclusion.

Fund Investment in QSBS

Funds structured as partnerships can invest in QSBS and the LLC members or limited partners can take advantage of the Section 1202 gain exclusion when the QSBS is sold by the fund or its equity owners. The rules that apply to ownership of QSBS through pass-thru entities is complicated and requires careful attention to properly structuring the investment in QSBS and equity ownership in the fund. One area of particular interest where Frost Brown Todd (FBT) has extensive experience is how the holders of carried interests will be treated for Section 1202 purposes when the fund invests in QSBS.

Structuring Recapitalizations and M&A Transactions Involving Qualified Small Businesses and QSBS

As one might expect, many ACG participants are involved in making investments, buying companies, recapitalizing companies, selling companies, and rolling over equity in companies where the company involved has issued or intends to issue QSBS. One of the principal roles of our QSBS tax planning group is assisting participants through these transactions with an eye towards maximizing the availability of Section 1202's benefits.

Maximizing Section 1202's Gain Exclusion through Gifting

ACG participants sometimes find themselves expecting that the aggregate proceeds from the sale of an issuer's QSBS will exceed Section 1202's usual $10 million gain exclusion cap. Our QSBS tax planning group works with a client's estate and wealth planners to structure gifts that accomplish multiple goals, including asset protection planning, maintaining privacy and potentially increasing the aggregate Section 1202 gain exclusion available to the client's beneficiaries.

FBT's QSBS practice includes:

Assisting businesses:

- helping them make choice of entity decisions
- converting partnerships (LLC/LPs) to corporations, along with related start-up tax planning
- restructuring their businesses that are operating a S corporations for the purpose of positioning owners to reap various business and tax benefits, including the Section 1202 gain exclusion
- providing tax advice and tax opinions, when appropriate, with respect to Section 1202 and Section 1045 issues
- advising founders, management teams and investors with respect to Section 1202's and Section 1045's eligibility and documentation requirements
- restructuring business assets and activities to attain and maintain qualified small business status, including businesses engaged in multiple activities or with operating through subsidiaries or joint venture investments
- advising them with respect to the interaction of equity compensation arrangements with Section 1202
- advising them with respect to the interaction of various equity and equity rights, including convertible debt, SAFEs, stock options, and stock grants with Section 1202

- providing Section 1202 and Section 1045 tax planning in connection with M&A transactions, including those involving equity rollovers
- helping companies formulate their communications with investors, including representations and covenants supporting QSBS eligibility

Assisting founders and service providers:

- advising taxpayers how to expand Section 1202's usual $10 million cap on the gain exclusion
- planning for the rollover of QSBS proceeds under Section 1045, including utilizing newly-formed C corporations for start-up activities or to serve as a vehicle to acquire qualified small businesses
- advising taxpayers with respect to remedying Section 1202 eligibility problem
- providing Section 1202 and Section 1045 tax planning in connection with M&A transactions, including those involving equity rollovers
- addressing gift and estate transfer issues, including working with Delaware and Nevada trusts and estate and trust counsel in various jurisdictions throughout U.S.
- advising them with respect to the interaction of equity compensation arrangements with Section 1202
- advising them with respect to the interaction of various equity and equity rights, including convertible debt, SAFEs, stock options, and stock grants with Section 1202

Assisting investors:

- documenting eligibility for claiming Section 1202's gain exclusion or a Section 1045 rollover of QSBS proceeds
- providing tax advice and tax opinions with respect to Section 1202 and Section 1045 issues
- advising taxpayers with respect to efforts to expand the basic $10 million or 10X cap on the Section 1202 gain exclusion
- addressing gift and estate transfer issues, including working with Delaware and Nevada trusts and estate and trust counsel in various jurisdictions throughout U.S.
- planning for the rollover of QSBS proceeds under Section 1045, including forming C corporations as vehicles for start-up activities and as acquisition vehicles

Assisting investment funds:

- QSBS planning for holders of carried interests, including tax opinions with respect to the sharing of Section 1202 gain exclusion by holders of carried interests
- QSBS planning for the holding of QSBS through LLCs/LPs
- documenting eligibility for claiming the Section 1202 gain exclusion
- planning for the rollover of QSBS proceeds under Section 1045, including the use of newly-formed corporations as vehicles for start-up activities or as vehicles for acquiring a qualified small business stock.

FBT's QSBS and Tax Planning Practice

FBT's tax planning team has substantial expertise and experience handling Section 1202 and Section 1045 projects for founders, investors, venture firms, venture funds, PE firms, PE funds, family offices, wealth planners, investments bankers, accountants and attorneys.

FBT's QSBS practice involves: (i) helping clients navigate through their choice of entity decision, and in particular their decision whether to operate as a C corporation with the hope of benefiting from the Section 1202 gain exclusion; (ii) helping client satisfy Section 1202's and Section 1045's eligibility requirements; and (iii) helping clients prepare for a potential future IRS audit by documenting their eligibility to claim the Section 1202 gain exclusion.

FBT's Tax Planning Team

The tax planning team assists FBT business attorneys with entity structuring, financing and M&A transactions. The tax planning team also functions as a “destination team” for clients seeking specialized partnership, M&A, venture financing (including QSBS) and state and local (SALT) tax planning assistance.

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A Tech Checkup

Author: Daniel Murray

In order to keep up with a changing world, each company must periodically assess how technological changes impact its legal requirements and liabilities. Review the following list each year to keep up to date.

Data Privacy and Security

GDPR in Europe, CCPA in California, PIPEDA in Canada, and other data privacy laws are in effect and always changing. Even companies not operating in these jurisdictions may have customers who live there. And these laws may apply. IT and data security teams need to be up to date on applicable regulations and how companies and their vendors are in compliance. Because new laws come out every year, technology contracts from last year may already be out of date. When these contracts were negotiated, there may have been provisions in place regarding GDPR. But CCPA may not have been in force yet, or a company's operations may have expanded into Canada wherein PIPEDA rules. Revisit vendor contracts every year and make sure they mandate compliance with applicable data privacy laws. There are also laws about the reporting of security breaches if customer or employee data is exposed. Make sure all these provisions are up to date.

For companies that are not in compliance with data privacy laws, the first step toward compliance may be the pseudonymization of data. For example, GDPR in Europe does not apply to data that "does not relate to an identified or identifiable natural person or to data rendered anonymous in such a way that the data subject is no longer identifiable." GDPR, and other laws, contains many complicated provisions. But a first step to avoid regulation can be starting the process to pseudonymize all customer data.

Cloud Computing

Many companies are moving functionality into the cloud. Along with great technical advantages, the cloud also brings challenges. Security protocols should be checked at least once per year. This includes procedures for employees to access cloud-based tools and also third-party vendors who may be interfacing with the cloud. Security teams should review multi-factor authentication needs, whether on the employee or vendor side.

Part of reviewing cloud services includes knowing where cloud tools are located. Cloud services based in the European Union might have different legal requirements from those based in the United States. Some companies may need to mandate that cloud vendors maintain all data in the United States, for example, in order to avoid extra-territorial regulation.

When transitioning from an on-premises solution to a cloud product, carefully consider which agreements are impacted. Office software, VPN, database, software development tools – these may all be impacted. Compatibility must be confirmed between a new cloud solution and any interfacing tools. Sometimes contracts must be renegotiated.

Data Ownership

Besides protecting data, companies should consider ways to monetize their data, or take a close look at how it's already being monetized. Software vendors may be collecting and monetizing data without a company's knowledge. This data can be valuable, and companies shouldn't give it away for free. It is common to allow software vendors to only collect and use anonymized data. If a vendor is extracting further value out of the data it collects from a company, it should give compensation. Better yet, companies should innovate ways to monetize data. Even if analyzing and monetizing data isn't in a company's current business plan – it could be.

Brexit

Any company with operations in Great Britain needs to understand how Brexit impacts its business. New technology regulations may apply. Patents, copyrights, or trademarks may be affected, and new filings may be required to maintain intellectual property rights. Make sure Europe or UK-based personnel know how Brexit impacts company operations and can react accordingly.

Contract Updates

Every few years standard agreements, such as employment or vendor agreements, should be reviewed to keep up with current law. For example, the Defend Trade Secrets Act was passed by Congress in 2016. Yet many agreements still lack the DTSA whistleblower language that allows companies to seek enhanced damages when trade secrets are stolen.

Additionally, force majeure language has come under increased scrutiny in the past year. The pandemic may have taught companies lessons about what specific force majeure language best serves their interests.

Open-Source

Open-source software is publicly available software code that can be accessed and used by developers. Open-source may seem free – but watch out. Open-source code comes with licensing requirements, some friendly and not so friendly. The worst-case scenario is when use of open-source code requires that any such software be then freely available to the public. Most open-source code does not carry such stringent licensing terms, but companies should review all open-source code used by their developers. Maintain a list of known open-source products and whether they're approved for use or not. Audit the list, and developers' uses, every year. And make sure developers know to seek approval for any open-source code they use.

One good place to review the basic terms of popular open-source licenses is https://choosealicense.com/licenses/. While this resource is good for reviewing the basics, when confronting whether to use a specific open-source license, have a lawyer review it.

Covid Issues

Many companies have begun tracking employee health data, such as daily temperature or symptoms, vaccination history, and more. This kind of personal health data is subject to HIPPA and should not be treated like other confidential data. Company security infrastructure may be secure from a confidentiality perspective, but still fail HIPPA standards. On site storage, cloud-based software solutions, teleworking solutions – all of these need to be considered from a HIPPA perspective if they're involved in collecting or storing employee health data.

Telecommuting

Telecommuting has grown during the pandemic. This brings up many issues related to privacy, security, and wages. The appropriate type of enterprise software may change depending on whether employees, and which employees in particular, are using employer-provided devices or personal devices. Monitoring and security software will differ, for example. Telecommuting may implicate different legal jurisdictions as well. Are some employees located in California or Europe? If so, consider what law applies and how it changes company strategy. How companies measure hours or wages may change in the telecommuting world. Also consider approaches to work-related injuries. It may be necessary to draft new employment agreements or policies related to injuries and obtain proof of receipt of such new policies.

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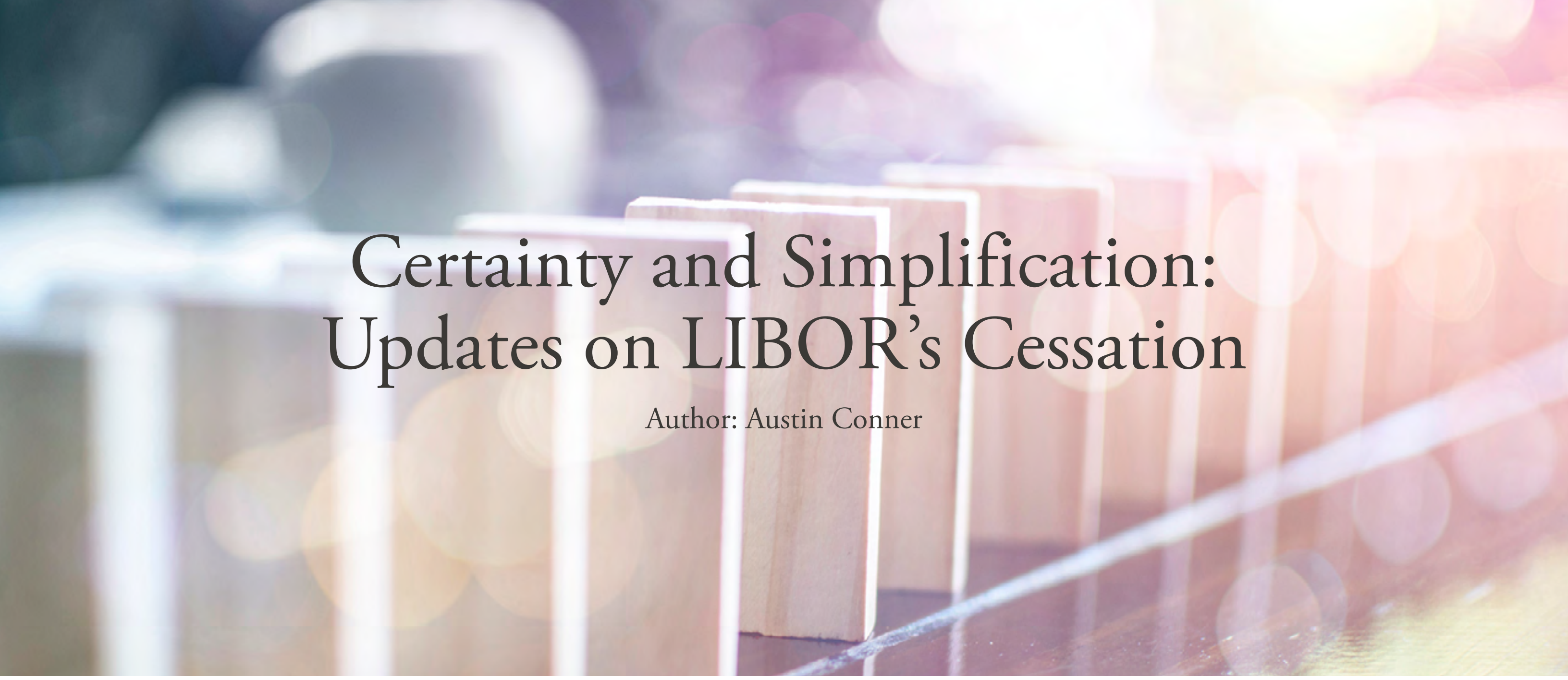

Certainty and Simplification: Updates on LIBOR's Cessation

Author: Austin Conner

On March 5, 2021, the United Kingdom's financial market regulator, the Financial Conduct Authority (FCA), and the Intercontinental Exchange Benchmark Administration (IBA), the authorized regulator of the London Interbank Offered Rate (LIBOR), each made announcements regarding the future of LIBOR. Both announcements provided much-needed certainty for financial markets and market participants as to both the timing of the LIBOR termination and the economic impact of the transition to alternative reference rates.

Cessation Certainty

The announcements confirmed that IBA could no longer publish LIBOR and therefore set specific cessation dates for all LIBOR tenors. Specifically, all non-U.S. LIBOR tenors shall cease on December 31, 2021, and with respect to U.S. LIBOR, the cessation dates shall be as follows:

- December 31, 2021 for 1 Week and 2 Month tenors; and
- June 30, 2022 for Overnight and 1, 3, 6, and 12 Month tenors

The one caveat to these firm cessation dates is that, under the UK's Financial Services Bill, FCA possesses the ability to require IBA to continue publishing 1-Month, 3-Month and 6-Month U.S. LIBOR after June 30, 2022, provided that IBA does so on a "synthetic" basis, meaning it must change its methodology for the rates. However, FCA has not stated whether it will exercise this requirement, but it has indicated that it will consult and evaluate whether the new "synthetic" U.S. LIBOR might be necessary for certain "tough legacy" financial contracts, where implementing a new replacement reference rate would be particularly problematic.

In addition to the timing certainty, the recent announcements provided additional clarity on the economic impact of transition away from LIBOR. The economic clarity stems from a statement by the International Swaps and Derivatives Association (ISDA) that pursuant to ISDA IBOR Fallbacks Protocol and ISDA IBOR Fallbacks Supplement, an "Index Cessation Event" occurs upon the earlier of LIBOR (i) no longer being provided or (ii) becoming "non-representative." According to ISDA, per FCA's announcement that LIBOR will cease to be published after the dates set forth above or will be "non-representative," an "Index Cessation Event" did occur. Further, with an "Index Cessation Event" having occurred, the fallback spread adjustment is also established. Referencing the FCA announcement, ISDA declared, "Today's announcement constitutes an index cessation event under the IBOR Fallbacks Supplement and the ISDA 2020 IBOR Fallbacks Protocol for all 35 LIBOR settings. As a result, the fallback spread adjustment published by Bloomberg is fixed as of the date of the announcement for all euro, sterling, Swiss franc, U.S. dollar and yen LIBOR settings." As a result, market participants no longer face the uncertainty of when an index cessation event will occur or what the spread adjustments might be.

Simplifying Fallback Language

Following the certainty provided by FCA and IBA announcements, on March 25, 2021, the Alternative Reference Rates Committee (ARRC) supplemented its recommended fallback language for new originations of U.S. LIBOR denominated syndicated and bilateral business loans. The supplemental fallback language simplifies the fallback language recommended by ARRC on June 30, 2020, for syndicated loans and on August 27, 2020, for bilateral business loans while maintaining ARRC's stated goal that lenders and borrowers implement the Secured Overnight Financing Rate (SOFR) "hardwired" fallback language for clarity and certainty as market participants prepare for LIBOR's upcoming cessation. However, while ARRC continues to strongly recommend its "hardwired" fallback language, ARRC reiterated that whether lenders and borrowers do so is voluntary, and that lenders and borrowers should independently evaluate their existing financial contracts and decide whether to implement such recommended language.

By leaning on the economic and timing certainty provided by the FCA and IBA announcements, ARRC was able to update its previously recommended fallback language to "simplify the fallback language and to offer additional transparency into the spread adjustments that will be applied to fallback rates upon transition." More specifically and most notably, ARRC's updated language: (i) eliminates and consolidates definitions now that there are set dates for when the trigger event for the transition away from LIBOR will occur, (ii) provides for what the payment period will be for loans that have made the transition to Daily SOFR, and (iii) with the spread adjustments having been fixed, ARRC implements the spread adjustment values within the definition of "Benchmark Replacement."

Alternatives to the Alternative

While ARRC continues to promote, and many large traditional banks are adopting, SOFR as the preferred alternative reference rate to LIBOR, other alternative reference rates are also becoming more popular in the market. One alternative rate, the American Interbank Offered Rate, more commonly known as "Ameribor," has also been recently introduced to the markets. Ameribor is published on the American Financial Exchange (AFX) and is calculated on the weighted average of unsecured overnight interbank transactions on the AFX. Community, state and smaller regional banks may prefer Ameribor as an alternative replacement rate under the theory that Ameribor accounts for credit risk in the markets and the AFX is a regulated exchange.

Additionally, *The Wall Street Journal* reported on May 13, 2021, that Bank of America Corp. and JPMorgan Chase & Co. entered into a derivatives transaction using the Bloomberg Short Term Bank Yield Index (BSBY), which is published by Bloomberg on a daily basis. Bloomberg first announced BSBY in January 2021 with the intent of creating an alternative to SOFR that provides the market a credit-sensitive index measuring the average yields at which large global banks access U.S. dollar senior unsecured margin wholesale funding.

Takeaways

With the recent FCA and IBA announcements, finance market participants now have certainty as to when the termination of the different LIBOR tenors will occur and also what that cessation event means for fallback spread adjustments. As a result, ARRC was able to simplify its recommended fallback language while maintaining the substance of its recommendations – that both lenders and borrowers need to evaluate their existing loan documents and implement a "hardwired approach" adopting SOFR as the replacement reference rate.

While ARRC continues to push the "hardwired approach" and hopes the updated and simplified fallback language will provide clearer guidance for lenders and borrowers, adopting SOFR and the hardwired approach remains a voluntary and independent decision for market participants, who now also have alternatives to SOFR, such as Ameribor and BSBY, which both aim to provide a more credit-sensitive reference rate that could be better suited for certain lenders and borrowers.

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Emerging Environmental, Social, and Governance Trends in the Municipal Bond Market

Author: Emma Mulvaney

The environmental, social, and governance (ESG) movement has been newly adapted as a best practice for disclosure in the municipal market. ESG encompasses many facets of investing, including investments focused on sustainability, such as a green bond, or social improvement, such as a social bond. ESG provides an expansive framework for viewing both risks and opportunities. It may be utilized as a tool for consideration by issuers, rating agencies, and investors to view existing risk factors through a modern lens.

Green Bonds and Social Bonds

Investors' views of ESG as a broader social movement are represented by the targeted funding of projects that align with specific ESG goals through the emergence and popularization of bond designations, primarily green bonds and social bonds, which are based upon intended project impact. Investors are attracted to these specifically designated bonds because they allow them to better target the impact of their financial investment based upon their personal beliefs and interests. While no formal process for issuing such green or social bonds currently exists, the market has established standards, as published by the International Capital Market Association (ICMA).[1] These standards are fourfold:

1. Use of Proceeds for a clear environmental or social benefit;
2. Process for Project Evaluation and Selection should be described to the investors;
3. Management of Proceeds should be allocated to green or social projects; and
4. Reporting annually on use of proceeds to investors.

Additionally, ICMA recommends external review to verify the issuer's green or social claims through second opinion, verification, certification, and/or scoring or rating as a green or social bond.

1 Green Bond Principles, International Capital Market Association, June 2018 https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf; Social Bond Principles, International Capital Market Association, June 2020 Social-Bond-PrinciplesJune-2020-090620.pdf (icmagroup.org)

ESG Disclosure as a Best Practice

According to Moody's, the "ability to address ESG risk will increasingly differentiate credit quality after [the COVID-19] pandemic."[2] The rating agency discusses how in a post-pandemic world, limited resources and an increase for services will challenge the public issuer's ability to operate while maintaining a strong financial outlook. Climate risks, if not addressed and properly prepared for, will likely affect credit ratings in the long term. Issuers need to consider which costs may be deferred and which are most critical, as well as which resources are most critical to ensure disaster preparedness due to increased climate risks, such as extreme weather and increased flooding. The pandemic forced social inequities into public view, especially healthcare and racial inequities. Further, demographic trends may play a role in increasing demands upon the healthcare system, while also potentially reducing revenue for higher education institutions. Such social factors are likely to increase the pressure on governments for more public services and intervention amidst sinking revenues and strained budgets. Governance is key to proper budgeting and financial planning, as well as a mechanism for addressing such climate and social issues.

Recent publications by both the Securities and Exchange Commission (SEC) and the Government Finance Officers Association (GFOA) have signaled requirements for ESG disclosures. On March 8, 2021, the GFOA adopted ESG disclosures as a best practice for inclusion in municipal bond offering documents.[3] The GFOA recommends three elements in crafting a suitable ESG disclosure:

"(1) vulnerability assessment, or recognition of ESG related risks, (2) plans/preparedness for mitigating such risks, and (3) progress updates, including impacts of recent ESG elements/events and how they shape future response."[4]

In a March 11 public statement, Acting Director of the SEC's Division of Corporation Finance John Coates said, "Going forward, I believe SEC policy on ESG disclosures will need to be both adaptive and innovative. We can and should continue to adapt existing rules and standards to the realities of climate risk. . . We will also need to be open to and supportive of innovation – in both institutions and policies on the content, format and process for developing ESG disclosures."[5] As ESG grows in significance in both the corporate and municipal worlds, municipal issuers can look to guidance from public bodies, as well as corporate issuers and filings.

This burgeoning trend in disclosure has not been widely incorporated in municipal offering documents. As such, issuers may struggle to determine the materiality of ESG-related issues and disclosures. The GFOA acknowledges such disclosure should be considered a case-by-case basis based on the characteristics of the issuer, noting, "The key for municipal issuers is to determine which ESG factors are material to their own credit profile and relevant to investors."[6] The GFOA does not provide any standard disclosure language.

Takeaways

Bond markets will likely continue to see a growth in various ESG-targeted bonds, as well as a continued discourse related to ESG issues. Municipal issuers should begin to consider ESG disclosures, if material, as part of their offering documents for the project to be financed, and, more broadly, the ESG factors related to the municipality. Within the ESG risk analysis framework, municipalities and other public issuers must determine which ESG risks or opportunities are material, providing necessary disclosure, but also a mechanism for fostering financial resiliency.

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2 Sector In-Depth - Public-Finance-US - 30Oct20.pdf (cdfa.net)
3 https://www.gfoa.org/materials/esg-disclosure (While the GFOA recommends including ESG disclosure information as part of primary offering documents, it also notes that material factors are already required to be included in such documents).
4 GFOA, ESG Considerations for Governmental Issuers 915e145a-6ad4-437d-a3b9-e0b4b4ff9122_ESGResearchReport_GFOA2020.pdf (prismic.io)
5 SEC.gov | ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets
6 GFOA, ESG Considerations for Governmental Issuers 915e145a-6ad4-437d-a3b9-e0b4b4ff9122_ESGResearchReport_GFOA2020.pdf (prismic.io)

SPACs
Is the Party Over?

Author: Neil Ganulin

The boom in special purpose acquisition company (SPAC) IPOs continued at its record pace during the first quarter of 2021, and there didn't seem to be any reason to doubt its continued record growth. Then, April 2021 happened, and the number of SPAC IPOs and the amount raised declined precipitously. The question now is whether April portends the SPAC "boom" cycle ending and becoming a "bust."

To answer that question, we need to examine several factors:

Increased Securities and Exchange Commission (SEC) Scrutiny

Commencing late last year, the SEC indicated that it would be examining SPAC transactions to ascertain that SPAC transactions they were properly structured and that investors were adequately protected before investing in SPAC IPOs and approving de-SPAC transactions. From December 2020 through mid-April 2021, the SEC has issued statements to the participants in SPAC IPO transactions and de-SPAC transactions, stressing issues such as: the risks that SPAC transactions pose; the necessity of complete and accurate disclosures concerning all participants in the transactions, their relationships and potential conflicts of interest that may arise among SPAC investors, SPAC sponsors, underwriters, target companies and their shareholders and management; post de-SPAC limitations imposed on former shell companies; the necessity for the target company to be public company ready (for example, in all accounting and financial statement matters and corporate governance); and details of the due diligence of the target company and the de SPAC transaction.

However, the two most significant SEC statements occurred in April and addressed:

1. Guidelines that SPACs should use to determine whether warrants issued by them should be accounted for as equity of the SPAC or as an asset or liability, and that the determination should be based on an evaluation of the warrant's terms and the SPAC's specific facts and circumstances. In addition, the SEC indicated that existing SPACs might have to restate their financial statements based on the outcome of this analysis.

2. The assertion that the safe harbor for certain forward-looking statements contained in the Private Securities Litigation Reform Act is available to the target company projections in the de-SPAC transaction documents and that a de-SPAC transaction subjects its participants to less liability than an IPO. The SEC questioned both of these conclusions and indicated that SPAC participants might be subject to greater potential liability than IPO participants.

Increased Liability Exposure

It is expected that the SEC will continue to focus on SPAC and de-SPAC transactions to make certain they will meet all legal requirements and that investors are protected. As more and more de-SPAC transactions come to market, the plaintiffs' bar is zeroing in on de-SPAC transactions, and more SPAC shareholders are filing suits alleging inadequate or false and misleading disclosures, omissions in the de-SPAC transaction documents, and state law breaches of fiduciary duty, especially when the post de SPAC company doesn't meet its projections. The SEC's statements regarding SPACs are providing a playbook for the plaintiffs' bar to follow.

More Educated Investors

As SPACs' popularity has increased, more investors have informed themselves about the advantages and risks of SPACs. The investors have realized that many companies being taken public in a SPAC merger have little or no operating revenues and that there is no guaranty that the sponsors will be able to effect the target company's projections post-merger. In fact, they are realizing that for every SPAC home run, there are many post-de-SPAC companies that are trading below their initial IPO price.

Excessive Number of SPACs Seeking Transactions

There are currently approximately 427 SPACs seeking target companies. Will all of them find a target company with which to enter a de-SPAC transaction? Will there be an increase in SPAC redemptions?

So, are SPAC IPOs and de-SPAC transactions headed into a bust cycle? I don't think so.

What I think we'll see is a slow down or delay in the number of SPACs coming to market as sponsors and their associates wrestle the proper accounting treatment of "warrants" to the ground, and they spend additional time making certain that their disclosures in the SPAC and de-SPAC transaction documents are totally transparent and do not contain untrue statements of fact or material omissions, especially when they address the target company's projections and the meaningful cautionary language that is required to accompany the projections.

As for the target companies being considered for acquisition, I do not see any immediate slowdown. There are too many existing SPACs that will need to acquire a target in the next two years. In addition, both the favorable (to sponsors) economics and the SPAC process are hard to ignore and will continue to motivate the parties to consummate de-SPAC transactions.

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Private Equity Industry Team

Our team strives to understand our clients, including their business model, history and plans, and to know the critical aspects of the industries they operate in. Our attorneys stay on top of the rapidly evolving Private Equity marketplace and the deal terms that shape that marketplace. We focus our experience, expertise and efforts on getting to a closing professionally, accurately, and efficiently.

From the smallest local or regional acquisitions to large, international business combinations, we offer decades of experience successfully handling M&A and Portfolio Company transactions of all types, joint ventures and strategic business combinations, including special expertise in leveraged buy-outs and Portfolio Company financings and refinancings of all sizes and structures. Our Private Equity team is comprised of the nation's leading legal minds in the areas of M&A, leveraged financing, government relations, federal and state and local tax, privacy and data protection, intellectual property, ERISA, immigration and environmental law. Our team works for you from formation to exit event.

Our clients vary in size and industry, but they typically share a desire to team with a law firm that provides market knowledge and expertise combined with value-driven, creative legal and business solutions to achieve our clients' goals, delivered at competitive middle-America rates. Our experience working in different industries and areas of the country within a variety of transaction and regulatory frameworks enables us to identify and solve issues early in the deal cycle. A key goal of our team is to help our client identify and manage operational and ownership risks, even after the transaction is closed.

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About Frost Brown Todd

A full-service law firm with more than 500 attorneys in multiple states, Frost Brown Todd offers that rare blend of local market knowledge and world-class problem solving. Our attorneys work together across disciplines and across the map to support a diverse client base, including some of the world's best-known companies as well as numerous startups, government entities, and social-sector organizations. Whether we're crafting deals or compliance solutions that are above reproach, or intervening in high-stakes commercial disputes, we're driven to exceed expectations and deliver value by working creatively, meticulously and passionately.

Industry-Focused Services

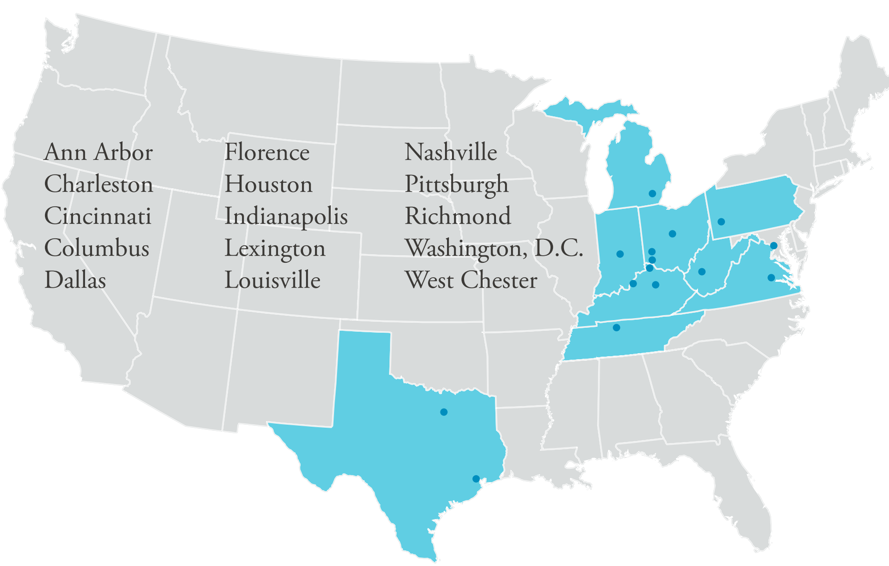
There is no substitute for deep industry knowledge and experience. Our industry teams have both in abundance.

Each team has been organized comprehensively to ensure consistent and effective execution across our clients' broad range of legal needs. With a focused understanding of both the everyday realities and changing dynamics of the industries we serve, we're able to protect and assist our clients at the most essential levels, from the C-suite to the factory floor, from the high courts to the data room, and everywhere in between.

Our Culture

We strongly believe that diversity enriches the creativity of our team, which in turn leads to better solutions for our clients.

We also believe that an inclusive workplace is the cornerstone of a healthy business. Our formalized diversity and inclusion efforts feature an ever-growing mentor program, a corporate culture of acceptance, a commitment to work-life integration, and an energized Women's Initiative — all contributing to a more vibrant law firm for our people, our clients, and communities.



INDUSTRIES

- Energy
- Financial Services
- Franchise & Hospitality
- Health Care Innovation
- Manufacturing
- Mobility & Transportation
- Private Equity
- Technology

PRACTICES

- Appellate
- Bankruptcy & Restructuring
- Business & Commercial Litigation
- CMBS Lending & Servicing Transactions
- Construction
- Corporate Law
- Employee Benefits & ERISA
- Environmental
- Estate Planning & Administration
- Finance
- Government Contracting
- Government Services
- Insurance Coverage & Bad Faith
- Insurance Regulation & Risk Management
- Intellectual Property
- International Services
- Labor & Employment
- Litigation
- Product Liability & Tort Litigation
- Public Affairs
- Real Estate
- Tax

Frost Brown Todd LLC
ATTORNEYS

Frost Brown Todd LLC
ATTORNEYS