

LAW & POLICY UPDATE

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SPACs: Business combination options for Indian companies (cross border mergers with emphasis on inbound mergers)

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Although Special Purpose Acquisition Companies (SPACs) have been active for decades, the year 2021 has been witnessing a considerable rise in SPAC activities, with nearly USD 128 billion raised from 447 SPACs in the United States of America (the **United States**) till the month of September, compared to approximately USD 83 billion raised from 248 SPACs in the year 2020 and 13 billion raised from 59 SPACs in the year 2019¹, thereby indicating a significant increase in the value and volume of transactions.

Due to the complexities surrounding the conventional IPO procedure, many companies are now opting for this alternative fast-track route for listing their shares. Despite the notification on July 16, 2021 of the IFSCA (Issuance and Listing of Securities) Regulations, 2021, which seeks to establish an ecosystem for listing of SPACs on the stock exchanges in the International Financial Services Centre, there are numerous legal and regulatory hurdles to the establishment of SPACs in India.² As a result, Indian companies are looking for options to go public via SPACs listed overseas, especially in the United States. For instance, Walmart Inc.'s Flipkart is exploring a merger with a blank-check company to go public in the United States. In this note, we explore some of the options available to Indian companies to enter into business combinations with SPACs listed in Nasdaq Stock Market LLC (**NASDAQ**) supported by recent case studies.

Business combination options for Indian companies can take the form of merger/reverse merger as well as inbound merger.

Merger/reverse merger

- Cross border mergers require prior approval of the Reserve Bank of India (**RBI**), the approval of three-fourth of the members and creditors of the merging companies, and the sanction of the National Company Law Tribunal (**NCLT**). However, RBI approval will be a 'deemed approval' if such a transaction is undertaken in accordance with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (**Cross Border Regulations**). This reduces the time taken and resources utilized in clearing regulatory hurdles for effectuating the transaction.
- Companies must also adhere to the requirements, (including the valuation and pricing guideline requirements) set forth in the Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004 (**ODI Regulations**) and Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**Non-Debt Rules**).
- Compliance with the ODI Regulations and Liberalized Remittance Scheme (**LRS**) is required for investment in shares by resident shareholders of Indian companies, and thus, prior permission of RBI may be required under the regulations framed under the Foreign Exchange Management Act, 1999 (**FEMA**).
- Such transactions are deemed to have RBI approval if, amongst other conditions, the fair market value of the securities acquired by a resident individual shareholder of the Indian company in the foreign company is within the limits prescribed under the LRS.

This is the **Note II** of our ongoing analysis on SPACs (please [click here](#) to read **Note I**). This is the second article in our series on SPACs and is divided in two parts. Here, we discuss the scope of cross border mergers and explore the option of inbound mergers, in the context of de-SPAC transactions. In the next part, we will examine/analyze other options, being outbound mergers and share swap arrangements.

¹ <https://www.spacresearch.com/>

² For legal and regulatory issues, please see our earlier article available at <https://www.mondaq.com/india/shareholders/1101002/statutory-regulatory-amendments-in-india-to-make-spac-effective>

- A significant risk in the Indian context is the possibility of a grievance application being filed before the NCLT by an aggrieved party or by a dissenting shareholder, resulting in delay in the completion of the transaction. Given that sponsors of a SPAC based out of the United States have around 2 years to complete the business combination, it becomes critical to evaluate and address these risks/situations and ensure the transaction is completed within the stipulated time-period, failing which the SPAC will have to be dissolved, and shareholders will be returned their money.
- An additional roadblock to a de-SPAC transaction is the perception of government agencies surrounding shell companies. Many companies have in the past misused the concept of reverse mergers by using shell companies to launder money, using their promoters to divert funds from unlisted to listed entities and evading tax.³ SPACs must be defined and distinguished from shell companies and misconceptions about SPACs being used as money laundering vehicles need to be clarified and corrected.
- A reverse merger between a private company and a SPAC enables the transfer of ownership of a clean shell with no previous history, operations or any potential liabilities associated with past operations. The SPAC sponsors retain control in the combined entity, unlike reverse mergers where the surviving management and board of directors of the combined entity are that of the acquired operations company. For instance, following the de-SPAC transaction, the board of directors of Videocon d2h Ltd. (**Videocon d2h**), Yatra Online, Inc. (**Yatra**) and ReNew Global retained nominees of their respective SPACs.

Inbound merger

- An inbound merger is one where the resultant company is an Indian company. Any office of the merged entity outside India is deemed to be a branch office or office outside of India of such merged entity and the transactions conducted by the merged entity with such branch or office will be in accordance with the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015 (**Current Account Regulations**).
- The Current Account Regulations permit an Indian party to open and maintain a foreign currency account abroad and to make remittances to such account for purposes of its branch abroad, subject to the provisions of Current Account Regulations.
- An instance of an inbound merger, with respect to de-SPAC transactions, is the merger of Videocon d2h and Silver Eagle Acquisition Corporation (**Silver Eagle**) in December 2014. Silver Eagle was an American SPAC listed in NASDAQ. In exchange of the proceeds from Silver Eagle's initial public offering held in the trust account (less certain expenses and payables), Videocon d2h issued equity shares to the stockholders of Silver Eagle in proportion to their stockholdings. The equity shares issued by Videocon d2h were represented by American Depository Shares (**ADS**) and issued and delivered to the stockholders of Silver Eagle through a depository in the United States. After consummation of the transaction Silver Eagle was dissolved and Videocon d2h was the surviving company. Consequently, Videocon d2h's ADS was listed in NASDAQ. Silver Eagle's Chairman and Chief Executive Harry Sloan and Silver Eagle's founder Jeff Sagansky joined the board of directors of Videocon d2h.⁴ As a result of this transaction, Videocon d2h became the first United States-listed Indian pay-tv operator.⁵
- The Cross Border Regulations provide for a 2-years window from the date of sanction of merger by NCLT for ensuring that the guarantees and outstanding borrowings of the foreign company are recorded in the books of the merged entity. The merged company may acquire and hold any asset outside India which an Indian company is permitted to acquire under FEMA and will have to sell off any assets or security outside India and extinguish any liability outside India that are not permitted to be acquired.
- Additionally, no remittance towards repayment of such liability is permitted from India within 2 years. SPAC financial statements are very short with no historical financial results to be disclosed, no assets to be described (other than cash) or any significant liability since SPAC does not have an operational business. Therefore, the process of merger becomes feasible to be completed within 2 years' time frame.

Conclusion

When looked from the perspective of a de-SPAC transaction, an inbound merger appears to present few regulatory hurdles, as there is no requirement for transfer of any assets or liabilities to the resultant Indian company, as the SPAC company has no assets (other than money) and a few liabilities. A merger of an Indian company through foreign holding company in a merger friendly jurisdiction, such as ReNew India's merger with RMG II via ReNew Global, is also a viable option, as the non-resident shareholders of the foreign holding company will not be subject to LRS compliances or any stringent regulatory guidelines. The other options, being outbound mergers and share swap arrangements will be discussed in the next part.

At present, the maximum amount stipulated under the LRS is USD 250,000 per financial year. It may therefore be easier for Indian companies having a foreign holding company located in a merger friendly jurisdiction to route the de-SPAC transaction through the foreign holding company. For instance, ReNew Power Pvt Ltd (**ReNew India**) entered into a business combination with RMG Acquisition Corporation II (**RMG II**) (a SPAC based out of Cayman Islands) through ReNew Energy Global Ltd. (**ReNew Global**), a public limited company registered in England and Wales (ultimate holding company of ReNew India). As a result of the business combination, RMG II has become a wholly owned subsidiary of ReNew Global. On August 24, 2021, ReNew Global's Class A ordinary shares and warrants commenced trading on the NASDAQ. It should, however, be kept in mind that if the foreign holding company has resident individual shareholder(s) in India, he/they may need to seek regulatory approval for investment in shares.

³ <https://blog.ipleaders.in/shell-companies-in-corporate-restructuring/>

⁴ https://www.sec.gov/Archives/edgar/data/1629220/000114420415018103/v405232_424b3.htm#tANNA

⁵ <https://www.vccircle.com/videocon-d2h-inks-375m-deal-us-blank-cheque-co-track-nasdaq/>

