// By Andrea Cataneo, Esq.

IPO, DE-SPAC OR REVERSE MERGER

WHO WINS, AND WHY?

What if there was no mystery to accessing the US capital markets, and a private issuer's going-public strategy hinged only on time and money? For those with both, the traditional underwritten IPO might be the obvious choice. For those with money and limited time, a de-SPAC might be the recommended path- and if the issuer has neither the time nor the available funds, a Reverse Merger into a distressed publicly traded company (or other shell) might be best.

While these generalizations are not entirely off base, factors including market conditions, regulatory changes and circumstances of each issuer need to be considered before making such an important move. Also, an issuer would be ill-equipped to face these decisions without examining historical trends- and thankfully, there is plenty of data available to analyze and to digest.

By now, we have all heard and lamented the extraordinary drop in IPOs from 2021 to 2022 - 1,035 vs. 181 respectively, as reported by many independent sources but here credited to Statista, a portal for market data. If we agree that 2021 was an odd year by most accounts, it may be worth looking back further in time to 2020 before declaring IPOs dead. In 2020, notably, 431 companies went public on national (U.S.) exchanges. Of these, 52 were foreign private issuers (FPIs), 230 were special purpose acquisition companies (SPACs) and 5 were real estate investment trusts (REITs). If we exclude SPACs and REITS from that total so we are comparing apples to apples, that leaves 201 IPOs in 2020- suddenly making 2022's 181 number look a lot less glum. Yes, those who know me say I may be the poster child of eternal optimists, but that aside, the numbers are the numbers.

De-SPACs have also been in flux and should viewed through the prism of recent history and not just one year. In 2022, there were 83 SPAC IPOs on national (U.S.) exchanges raising $13.4 billion in proceeds vs. 613 in 2021 totaling $162.6 billion in proceeds. In 2020, there were 248 SPAC IPOs raising $83 billion. Quite a contrast. The de-SPAC transactions in 2022 also declined significantly from 2021 and 2020 with 101 de-SPACs in 2022 vs. 199 in 2021. Notably, however, as reported by Bloomberg Law, some very large de-SPACS were completed in 2022, including the $4.5billion Lucid Motors Inc.–Lucid Group Inc. (formerly Churchill Capital Corp. IV) electric vehicle (EV) transaction.

Note that in 2020, there were only 93 de-SPACs as reported by Refinitiv, an LSEG entity. Removing the most unusual stand-out year of 202 once again makes the trend look a lot less dismal. Still, we can surmise and learn from the conditions that influenced the 2021-2022 decline, which include many things that fell outside the scope of anyone's individual control: increased regulatory scrutiny, inflation, poor performing de-SPAC'd companies immediately post transaction and high redemption activity to name a few.

Now let's look at Reverse Mergers. Often characterized as the option of last resort for issuers too weak to attract an underwriter, reverse mergers continue to have their time and place. In September of 2022, data provider Dealogic reported 152 reverse mergers in 2022 (not including de-SPACs) for a total value of nearly $335 million, with an average of approximately $2.2 million per transaction. The largest non-SPAC reverse merger announced in 2022, as reported by Bloomberg,was the $4.6 billion Hempacco Co. Inc.–Green Globe International Inc. cannabidiol (CBD) industry deal. Not too shabby.

Also according to Bloomberg Law, a total of 398 reverse mergers were completed in 2021 valued at over $134.8 billion *including* de-SPAC transactions- but without de-SPACs the number of traditional reverse mergers reported was 152, which is quite a coincidence –so it was worth a double check. Intelligize, on the contrary, reported this total at 200 but may have included some other business combination transactions that were not easily flagged as reverse mergers by Bloomberg. In any event, the state of the union for traditional reverse mergers is, they are alive and well and may be the answer for certain issuers.

Here is a quick, and by no means exhaustive list of Advantages and Disadvantages of each, **however**, in deciding on a path, an issuer absolutely must consult a competent securities attorney and an experienced public company accounting firm to explore which of these options, if any, is most appropriate. It may be that outside of these three paths, a Direct Listing or a Crowdfunding solution is best based on the issuer's profile, criteria and circumstances - but we can leave that discussion for another day. Discuss it with people who know what they are doing to avoid expensive mistakes.

IPO PROS:

- Potentially in less than a year, IPO proceeds can help an issuer acquire other business entities, finance R&D, acquire assets and IP, hire new employees, reduce debt and can expedite an issuer's mission.
- It creates an exit strategy/opportunity for founders and investors.
- Issuers tend to have more control over their initial investor base, they receive more attention from Wall Street analysts and IPOs typically get support in marketing and managing their initial trading volume from their underwriter.

IPO CONS:

- This is a costly, time-consuming option, which, all in, can be upwards to $1.5M and can take nine months to a year to complete depending on how quickly financial statements can be audited by a PCAOB (Public Company Accounting Oversight Board) registered accounting firm.
- Regulatory requirements and responsibilities don't end with the Securities and Exchange Commission. NASDAQ or NYSE American impose strict listing standards that must be maintained.
- Market pressure and potential loss of control are very real risks.

DE-SPAC PROS:

- Faster than an IPO, potentially achievable in 90 days if the issuer has audited financial statements, even considering the comprehensive S-4 preparation, proxy solicitation and combined financial statement disclosures.
- The "blank check" nature of the SPAC means there are no potential liabilities connected to an existing or former business operation and there is little or no likelihood of prior shareholder problems, bad actors, etc. since the SPAC IPO investors were vetted (hopefully) by the underwriter.

DE-SPAC CONS:

- There is a genuine risk that the de-SPAC will not get done. More than 55 de-SPAC transactions, valued at approximately $20 billion were terminated in 2022 according to industry reports, with an additional 65 SPAC sponsors shutting down transactions entirely.
- Lack of publicity/credibility.
- Substantial dilution to the issuer, possibility of no money being available in the entity post de-SPAC due to professional and other fees, and of course, redemptions.

REVERSE MERGER PROS:

- The legal steps are generally fewer and simpler, and there is no requirement to raise capital for the reverse merger transaction, which reduces the overall timeline. If a private issuer has its audited financial statements done, the process can be completed in as little as two months' time.
- It is considerably less expensive.
- Revers mergers are less dependent on market conditions.

REVERSE MERGER CONS:

- Extensive due diligence is required as there may be skeletons in the closet that are difficult to detect- even if the public entity is relatively recent IPO or "fallen angel" de-SPAC company.*
- Other potential legal and shareholder liabilities may exist from past operational activities.
- Unless the public entity/shell is not really a

shell (e.g. is still an operating company) neither Nasdaq not the NYSE American will permit the surviving reverse merger company to list until it is seasoned the combined entity has demonstrated trading on OTC Markets or a national or regulated foreign for at least one year following the filing of all required information, including the merger transaction documents, audited financial statements, etc.- which will likely pose an extreme deterrent for investors to invest.

- Lack of publicity/credibility.
- Fallen Angel is an informal term given to a private company that previously merged into a SPAC (post SPAC IPO) in a traditional de-SPAC transaction and has performed so poorly that it either cannot maintain its listing or has other problems, encouraging the underwriters or controlling shareholders to seek a replacement or enhancing private company to maintain the listing and to make investors less frustrated.

WHICH IS BEST:

There is no one-size-fits-all answer to which method is "best" for a company to go public, as each method has its own advantages and disadvantages that can be better or worse depending on the circumstances of the company.

For example, an IPO may be the best option for a well-established private company issuer with a strong track record and a well-defined growth plan, and if it can generate significant capital and provide more visibility and credibility with investors, underwriters will consider that issuer to be a relatively safe bet. On the other hand, a de-SPAC may be a better option for a company that is still in its growth phase and needs capital quickly, as it can be a faster and less expensive process (maybe 30% less expensive than an IPO). Similarly, a reverse merger may be a good option for a private company that has a clear and defined path to profitability but does not meet any listing criteria yet and lacks the financial resources or reputation to pursue an IPO or de-SPAC.

The decision is not one to be made lightly. A thorough evaluation of an issuer as a unique organism, including a study of its distinctive set of circumstances, its desired outcome, its budget, etc. all should factor in. And again, after diligent analysis, the path should be chosen in consultation with legal, financial, and other professional advisors.

Andrea Cataneo is a partner in MSK's Corporate & Business Transactions Practice Group in the firm's New York office, and serves the following teams and industries: Capital Markets & Securities, Healthcare, Alternative Energy, FinTech, Food/Beverage/Cannabis, Crypto Assets & Blockchain Technology.

Andrea's practice focuses on preparing companies for capital raises, structuring secured and unsecured equity and debt financing transactions, and taking private companies public via traditional IPOs, self-underwritten registration statements, deSPAC transactions and through equity crowdfunding. Additionally, through her extensive relationships in the investment banking community, Andrea offers her clients introductions to targeted sources of capital.

On the regulatory and compliance side, Andrea represents public companies with respect to 1934 Act reporting obligations to the Securities and Exchange Commission for a flat monthly fee. She performs a variety of corporate transactions for her clients, including mergers and acquisitions, joint ventures, proxy contests, restructurings, corporate governance, NASDAQ and NYSE-American listing applications and all related compliance matters. Her practice covers domestic and international transactions, and she has been active over the years in Italy, Mexico, Argentina, Canada, China, Israel and Kenya. Andrea has also been a leading voice in the Cannabis space, helping private and public clients navigate the developing legal landscape.

Andrea Cataneo has a 24 year history as a corporate & securities/capital markets lawyer. To her clients, she is more than a skilled attorney. Andrea is a recognized deal-team builder, funding source connector and business developer for her clients. Typically, in a private or public company transition, whether it is a financing, a merger, a SPAC, a PIPE- Andrea has made the introduction to the investment banker, family office, high net worth or placement agent, negotiating fair (and safe) terms for the companies she represents. As an advocate for her clients, Andrea maintains solid relationships with the investment banking community. Serving on the National Investment Banking Association (NIBA) for over a decade, Andrea is known on Wall Street has access to the 9,000 plus active national NIBA members as well as a robust LinkedIn following.

The "uplist" is shorthand for a public company's rise from a lower-tier trading platform to a national exchange. By all account, the uplist requires more skill and precision than an IPO for a private company. To be successful, project management and focus are core requirements. Andrea's most recent uplist to NASDAQ was for a growing technology company that develops digital communities and has a burgeoning publishing platform called Vocal. Leading the team, dealing with agencies, participants and oversight groups such as the SEC, NASDAQ, FINRA, DTCC, the investment bankers, the stock transfer agent and selling groups- Andrea quarterbacked the deal and got the company listed. Time, again, to ring that bell!

Andrea was the New York Diversity, Equity and Inclusion working group leader for her former AmLaw 100 firm, developing initiatives that were later mirrored throughout the firm's other offices nationally, and she plans to continue in some capacity at MSK. She pioneered the monthly DEI Happy Hour where a "Cultural Ambassador" would present a family story, with food, a cocktail and maybe even music from their childhoods or communities. Those events brought the office closer together and helped them learn about and know each other better. By advocating a commitment to diversity, Andrea believes we are better equipped to attract the best talent and improve employee satisfaction. She has noted what has been well documented -- that companies promoting gender, racial and ethnic diversity are more likely to have better financial returns.
Andrea also served for four years as Director and Secretary to Together1Heart Foundation, led by AnnaLynne McCord and supported by many voices and active participants, including Susan Sarandon. The Foundation trains and empowers women and girls that have been previously trafficked out of Cambodia and other developing countries. She is also a veteran Woman to Watch on the WABC Radio Legal Watch Team.

Leadership style is not just about taking on the world. She is not afraid to enthusiastically say "yes" and she is also not uncomfortable saying no. From her perspective, successful leaders are lauded for their track records of attempts vs. accomplishments. Being selective about projects, and taking on those that not only incite the required passion and drive- but that have received a green-light assessment after a careful factual analysis (e.g. does it have the essential elements- and how difficult a climb will it be?) enables Andrea, as a leader, to have continued success.