Feature

Anatomy of a Health Care SPAC Transaction—a Taxing Perspective for Providers

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As the world looks to recover from a historic pandemic, health care providers and their related industries have moved quickly to take advantage of a remarkably active—and profitable—capital market. The pandemic triggered a madcap dash for companies focusing on telemedicine and digital health as the world worked to adapt and deliver quality health care in a rapidly evolving environment.[1] Interest in expanding the realm of for-profit health care providers continued unfettered by the events of 2020.[2]

During the 2020-21 period, many health care providers and their related industries, familiar with the trend of traditional private equity investors in their field, were introduced to the world of SPACs, or "special purpose acquisition companies."[3]

This article provides a description of the SPAC transaction and the key tax issues to consider when health care clients are approached as a target party with a SPAC business partner. SPAC transactions can proceed at breakneck speed and having a strong team of tax advisors in place, familiar with incoming issues and strategies, can help targets navigate the high-stakes process more smoothly.

The SPAC's Formation and Structure

SPACs are commonly referred to as "blank check" companies, since the initial public shareholders of a SPAC have basically provided a "blank check" to SPAC founders, who in turn will acquire an active, operating business—not yet identified other than perhaps by general industry—and raise capital for its expansion through the SPAC's initial public offering (IPO).

The SPAC goes through the IPO process before it actually has an operating business and typically is founded by well-known institutional investors, private equity titans, and hedge funds.[4] The investors are buying into the SPAC founding team's reputation and skill set, relying on them to identify the ultimate targets for future investment. This founding, management team is referred to as the SPAC's "Sponsor."

The SPAC's IPO raises capital by pricing the SPAC common stock at an industry standard $10 per share, with the proceeds of such IPO placed in a SPAC trust account. The IPO process will have the Sponsors initially owning a combination of SPAC shares and "warrants," with the combined rights of shares and warrants referred to as "units." The shares consist of common stock, and the warrants are contractual rights that permit the unit holder the right to purchase from the SPAC a certain number of additional shares of common stock in the future, at a premium price. The Sponsors contribute nominal capital for Sponsor shares, and their shares usually entitle them to at least 20% in value of the final post-IPO common stock.

Due to the speed of the process and the need to maintain critical contracts and agreements without triggering termination upon assignment clauses—particularly in the health care field, with payor contracts, licenses, and permits to preserve—the entity's equity interests are more often than not transferred, as opposed to an asset sale.

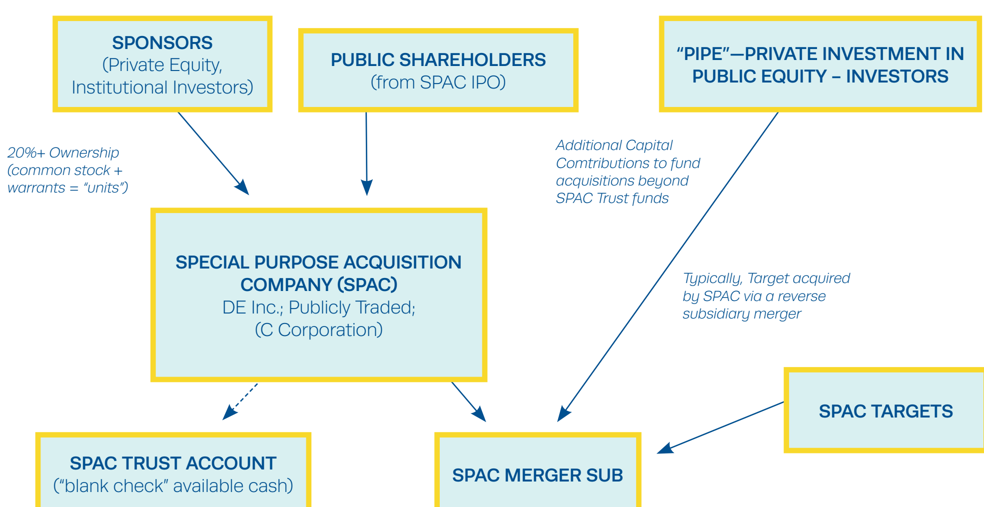
The SPAC's clock begins ticking upon the IPO. SPACs usually have 18 to 24 months to locate and close an acquisition transaction (called a "business combination") following the IPO, or else the SPAC is liquidated and cash plus interest is returned to the SPAC shareholders. In addition, the SPAC shareholders must approve the business combination. Shareholders usually have a redemption right such that they can choose not to go along with the business combination and instead receive a proportionate share of trust funds back in lieu of continuing ownership in the post-business acquisition entity.

Since the SPAC is already publicly traded through its IPO, a SPAC target for a business combination is given the opportunity to become part of a publicly traded entity more quickly than it would have had it pursued the IPO process itself.

The initial IPO proceeds may not be sufficient to cover the ultimate purchase price of a SPAC's identified targets. The SPAC may raise more capital in connection with the business combination by doing a "PIPE"—private investment in public equity—offering prior to or simultaneously with the target acquisition.

The closing of the business combination and the target company or companies is known as the "De-SPAC" process, since by the time the business combination closes, the SPAC is no longer a "blank check" company but a live, operating business. The end result usually will have the SPAC Sponsors owning a significant minority interest, at least 20%, of the final publicly traded operating entity, with a combination of the original SPAC public shareholders and target shareholders owning the remainder.

Figure 1—Typical SPAC Acquiror Structure



Many SPAC transactions will not focus on one Target; rather, a number of them may be coordinated in a combined "roll-up" such that multiple, previously unrelated entities are acquired by a single SPAC.

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Targets entering into a discussion with a SPAC will find it helpful to visualize their future SPAC business partner as being in a corporate structure similar to that shown in *Figure 1.* From a tax perspective, the end game will be to provide the equity of the SPAC to the target shareholder owners on a tax-favorable basis.

The SPAC Business Combination Process and Tax Techniques

Target companies and SPAC leaders will begin negotiations towards an ultimate De-SPAC closing, which will be governed by a definitive business combination agreement, or "BCA." The resulting final entity will be a publicly traded company—i.e., the former SPAC, which will likely change its name to reflect the final new, branded, and public-facing business.

Due to the speed of the process and the need to maintain critical contracts and agreements without triggering termination upon assignment clauses—particularly in the health care field, with payor contracts, licenses, and permits to preserve—the entity's equity interests are more often than not transferred, as opposed to an asset sale. The key is to keep in mind the various acquisition structures and issues that can arise for target companies upon closing of the De-SPAC process.

The final publicly traded company will be owned by a combination of the original Sponsors, the original SPAC public shareholders, the target's original owners, and possibly, PIPE investors.

Completing the De-SPAC transaction requires an understanding of new tax techniques unfamiliar to even many tax advisors in the health care industry, as this can be their first real introduction to corporate tax concepts more typically learned by advising Fortune 500 companies. Target company CFOs and boards will hear the terms "reverse triangular merger," "National Starch" and "double dummy" thrown out by tax advisors, kind of making many feel akin to dummies themselves.[5]

These tax-speak terms describe how a SPAC business combination can occur so as to minimize the tax impact of such a transaction on the target and their owners. The fundamental tax issue is *that the target owners' receipt of SPAC publicly traded stock can, absent exceptions in tax law, be treated as if they were receiving cash.* There is more limited tax planning to avoid taxation on the receipt of such stock when publicly traded stock is the consideration that target shareholders receive. Since the target shareholders typically continue to work for the new publicly traded entity, they will expect their target equity to be exchanged for SPAC equity, or "rollover," on a tax-free basis.

Section 368 Corporate Reorganization Technique

To help understand rollover techniques, we start with the simplest structure—consider a target (Target), taxed as a C corporation for federal income tax purposes. The proposal will have Target's shareholders getting SPAC stock in exchange for all of their Target common stock. Because SPAC stock is publicly traded, and can be treated like cash,[6] simply exchanging SPAC stock for Target common stock is the same as if the Target shareholders got cash for their Target shares—absent the tax structure exceptions discussed below.

So, what is the typical structure to avoid this? Section 368(a)(1) of the Internal Revenue Code of 1986, as amended (Code), is the baseline law for C (and to an extent, S) corporation tax-free reorganizations. Each capitalized sub-paragraph—(A), (B), (C), (D), (E), and (F)—within Section 368(a)(1) describes a particular type of tax-free corporation reorganization. Section 368(a)(2)(D) and (E) get into another subcategory of transactions described below as well, triangular mergers.[7]

The simplest one is the Type A merger—two or more corporations merge under state law. Assuming certain substantive requirements are met,[8] and at least 50% of consideration received by the Target shareholders following the merger must be stock, the equity exchange is tax-free. The basic merger has two varieties, forward and reverse, which describe which entity survives. The forward merger occurs where the Target merges into the acquiring corporation and the acquiring corporation survives. The reverse merger occurs when the Target merges into the acquiring corporation and the Target survives.

In the SPAC world, however, the simplest structures described above are rarely used. The publicly traded SPAC (which usually has a substantial trust amount) rarely wants the Target's liabilities combined into the SPAC. As a result, SPAC acquisitions of a Target almost always involve a "reverse subsidiary merger."

In a reverse subsidiary merger, the acquiring corporation creates a wholly owned subsidiary to merge with the Target (colloquially called a "Merger Sub" in most discussions). Reverse subsidiary mergers are covered under Section 368(a)(2)(E), forward subsidiary mergers are under Section 368(a)(2)(D) (not utilized much since the Target disappears).

Why "reverse? Why "subsidiary? First, a reverse merger is needed since the Target may have payor contracts and licenses that must survive; absent a reverse merger, the Target disappears and can trigger contractual breaches, loss of licenses, and changes of ownership (CHOWs). Second, and importantly in the health care field, a reverse merger ensures the Target's employer identification number, also known at the taxpayer identification number (EIN or TIN), remains in existence. A disappearing EIN can cause many delays in payments under private and governmental payor agreements—causing an untenable cash flow issue. Third, the "subsidiary" component of a reverse subsidiary merger has the acquiring corporation create a shell holding company to act as a merging party—the Merger Sub, wholly owned by the acquiring company, such that the liabilities of the target are separate from the SPAC since the Target ends up being a wholly owned subsidiary of the SPAC itself. Hence, a reverse subsidiary merger.[9]

In order for the reverse subsidiary merger to have a desired tax-free impact (that is, receipt of acquiring SPAC stock is tax-free as much as possible), tax advisors will want to watch for the following requirements.

1. There needs to be a statutory merger somewhere (easy enough, Target usually merges into a new Merger Sub, created by the SPAC, and Target survives).
2. After the Target merges and survives, substantially all the properties must be held by Target (usually not an issue, the idea is a Target can't use the merger to essentially sell off assets).
3. The overall transaction must satisfy judicial "doctrines" created in a mess of case law designed to ensure that taxpayers do not use the Section 368 provision as a tax-dodging mechanism. These include the "business purpose" requirement, the "continuity of business" requirement, and the "plan of reorganization" requirement. In essence, the policy of these rules is to permit business owners to expand their business, not necessarily cash in. Most SPAC deals will satisfy these tests (after all, the SPAC is only a blank check company and wishes to continue the Target's business and expand it).
4. The Target shareholders must give up at least 80% of their voting Target stock in exchange for SPAC stock, and at least 80% of each class of non-voting stock, if any. Stated differently, the Target shareholders are not supposed to get more than 20% of their consideration as cash or anything other than SPAC stock. This is where issues can occur. It costs a lot for Targets to get through the SPAC process. What if it has to get some cash out of the deal to pay indebtedness, legal fees, and tax advisors and CPAs? This cash is called "boot" and can cause failure of this requirement.

Before backing off that 20% limitation, let's assume the proposed SPAC structure meets all of the Section 368(a)(2)(D) or (a)(2)(E) requirements. This permits the SPAC stock—publicly traded—to be issued to the Target shareholders on a tax-free basis, in exchange for their former Target stock. The cash they get out of the deal—the boot—is taxable. But it's usually long-term capital gain, which is about the best you can get these days.

Since many deals will require more than 20% cash or boot be received, what then?

Section 351 Contribution Technique

Enter the Section 351 concept. Tax advisors in the health care field usually have at least some awareness of this fundamental corporate tax rule—that upon a contribution of capital (cash, property, intangibles, anything) to a new corporation solely in exchange for stock, and, immediately after such contribution a person *or persons* contributing the capital are in *control (own 80% or more)* of the corporation, such receipt of the corporation's stock is tax-free to the stockholder.[10] The stockholder takes a "carryover basis" for the new stock, and the corporation takes the same basis in the property as the contributing stockholder had.

Why is the language above italicized? Well, in the SPAC reverse subsidiary merger context, note that the final ownership of the SPAC, post-De-SPAC, is made up of a combination of Target shareholders, SPAC Founders, public SPAC shareholders, and PIPE investors. This means that under Section 351, Target shareholders and a combination of the other current and future SPAC shareholders (including PIPE investors) could collectively contribute property (Target equity and cash) in exchange for that group collectively owning at least 80% of a new corporation.[11]

This is useful if the Target or some Targets are getting less than 80% in voting stock on an individual basis (say, one Target is going to receive stock but at least 50% of the Target's shareholder's consideration is cash or other non-stock consideration. So long as that 80%

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control requirement is met when counting *all* Target shareholders on an aggregate basis (current and future SPAC shareholders and PIPE investors) the Target shareholders can receive more cash than otherwise permitted pursuant to a reverse subsidiary merger).

That said, the reverse subsidiary merger form is still done due to the need to have the entity survive and held as a subsidiary. The Internal Revenue Service (IRS) has privately ruled that even if the requirements of a reverse subsidiary merger are not met, the transaction can still fall within Section 351 since, in essence, the reverse subsidiary merger just ends up getting shareholders stock in an entity they were trying to contribute property to in the first place.[12]

The SPAC acquisition structures thus far, then, frequently fall into the category of (1) a "basic" Section 368(a)(2)(E) reverse subsidiary merger, or (2) a failed Section (a)(2)(E) reverse subsidiary merger that nevertheless qualifies for tax-free treatment under Section 351 (assuming a combination of Target shareholders and other shareholders (Founders, PIPE)) combine to own 80% of the resulting De-SPAC entity.

The "Roll-Up"

Many SPAC transactions will not focus on one Target; rather, a number of them may be coordinated in a combined "roll-up" such that multiple, previously unrelated entities are acquired by a single SPAC. In this case, the above SPAC transaction is often prefaced by earlier acquisitions or reorganizations such that a single entity with new subsidiaries and a combination of multiple Target shareholders own a new holding company, which ultimately enters into the business combination with the SPAC. Here, the Target shareholders will have direct interface with a new holding company that hopefully will eventually, though not yet, close with a SPAC.

In the roll-up portion, the health care provider and Targets need the most awareness of tax planning and participate with advisors who will understand the end game of being part of a publicly traded entity. A summary of the common issues follows.

Avoiding Roll-Up Tax Hiccups—EIN Retention and Pass-Through Entity Tax Traps

Targets will commonly be pass-through entities, consisting of federal tax partnerships or, particularly in the case of provider-based entities or many home health/assisted living structures, S corporations.

As mentioned earlier, nearly all acquisitions in the health care field will need to preserve the EIN of the Target to acquire the credentialing status and payor contracts of the Target. In this regard, tax advisors should take care to (1) ensure that the EIN of the target cannot be inadvertently changed, and (2) ensure the IRS' own records are timely updated to accommodate any name changes that are required in connection with the acquisition.

Handling the first issue requires awareness of any changes in tax classification of the Target; the problem for the tax advisor is that the rules for the IRS EIN changes aren't easy to find, are imbedded in arcane Treasury Regulations[13] or a sometimes-updated IRS Publication,[14] and contain varying terminology that makes research difficult (for example, the interchangeably with the EIN and TIN acronyms).

In general, where state law corporations, taxed as C or S corporations for federal income tax purposes, undergo a conversion transaction in which the corporation is deemed liquidated and re-constituted in another form, the risk is that the IRS may change the EIN on its own. The author has not experienced an unprompted IRS change of an entity's EIN directly, but knows of some situations where this has occurred. Given the high stakes involved, the safer route is to avoid a deemed liquidation and control the process by converting, if required, the state law corporation into a state law limited liability company first—and at least, for a period of time, provide that the "new" limited liability company continue to be taxed as a C or S corporation so as to avoid a technical breach of the requirement that a new EIN be obtained in the event of a corporate liquidation.

This works because LLCs (and, it appears, non-corporate entities such as associations) are given flexibility to change their federal tax classification to partnerships and disregarded entity, as well as both varieties of

Target tax advisors should consider some internal preventive diligence, prior to a SPAC transaction, to ensure targets make every effort to be current in state and local tax compliance—not only income and property, but particularly sales and employment taxes.

corporations. Stated differently, any change in the state law classification of an entity needs to be viewed by the IRS as either solely a name change, or as a permitted change in tax classification as an LLC or association.

Proactively working with the IRS to inform them of name changes is advisable, although the process can be slow. In recent years, the IRS has insisted on written notices—signed by the clients under penalties of perjury—of the conversion change with enough supporting documentation to hopefully get the change processed sooner rather than later. But several months of administrative stagnation is not uncommon. The IRS often changes its notification addresses, so the current instructions on the IRS website are typically the best bet and should be followed precisely.[15]

The acquisition of a Target taxed as a federal income tax partnership can cause immediate recognition of taxable income, even if the acquisition can be structured on a tax-favorable basis (i.e., a contribution of equity as capital to another entity) due to the fact the acquisition can relieve partners and members from debt. In other words, the amount a partner realizes from a sale or exchange (or contribution) will include a share of the partner or member's liabilities that the partner is essentially relieved from paying. This taxable gain can inadvertently cause issues even if no cash or equity consideration is actually received upon a transfer of a Target's interests. If, however, the partner or member remains subject to the same amount of liabilities as before, the issue is minimized. Targets taxed as partnerships need to always monitor the "hot asset" rule that may require some of the eventual gain, if any, to be characterized as ordinary versus capital gain if underlying assets consist of accounts receivables, inventory, as well as fixed assets with Section 1250 depreciation that needs to be "recaptured."

S corporations have their own traps to watch out for when reorganizing prior to a roll-up. Distributions of appreciated property out of an S corporation, unlike with partnerships, are not on a tax-free basis; rather, the S corporation recognizes gain equivalent to the value of the appreciation, which is passed through to the shareholders. And because S corporations generally cannot be held by non-individuals, Targets that are S corporations need to be prepared to go through some additional steps (usually an "F" reorganization) that essentially will require creation of a new S corporation holding company to permit the SPAC to acquire the Target.

Section 382 Limitations

Where a Target (taxed as a corporation) has net operating losses (NOLs) and significant tax credits (as may be the case with research and development, tech, and early-stage pharmaceutical corporations),

Arguably, so long as tax motivation is not at all the purpose for the unwound transaction, the taxpayers should not bear an unreasonable cost for a transaction that did not occur (and already being forced to eat transaction costs for a deal that did not close), and fair tax policy should dictate that the same tax year recission doctrine rule is not rigidly enforced.

Section 382 of the Code operates to *limit the amount of future income that can be offset by NOLs after a corporation has gone through an ownership change*. The rules are beyond the scope of this article, but in essence, the policy of the rules is to create an annual limitation on the use of NOLs. The limitation calculation is quite a burden and is based on the value of the NOL corporation prior to a change of ownership, multiplied by a federal long-term tax-exempt rate. In the SPAC world it is unlikely that a driver of a Target is due to potential NOL usage; rather, it is the long-term appreciation of the NOL corporation's intangibles. Nonetheless, tax advisors may be alert for the Target's internal monitoring of Section 382 compliance.

State & Local Tax Compliance

Target tax advisors should consider some internal preventive diligence, prior to a SPAC transaction, to ensure targets make every effort to be *current in state and local tax compliance*—not only income and property, but particularly *sales and employment taxes*. While most health services are exempt from state sales taxes, other components of health care-related businesses—particularly, medical billing services and medical consulting—may have taxable data processing or insurance functions that may be addressed during a SPAC's diligence. States often exempt professional services from taxation but retain taxation over data processing and insurance processing. Remote workers became commonplace in 2020 so a Target's internal teams should take steps to assure that it is properly withholding employment taxes in compliance with every state where a worker is employed (and also properly registering its corporate entity in each state).

Contingent Stock and Earn-Out Compensation

SPAC transactions usually provide some form of "contingent" stock, which provides Target shareholders with rights to receive additional stock if the trading prices reach certain levels in the future. Tax advisors should watch these structures carefully, as ideally these rights should be structured to avoid immediate taxation. Relying on longstanding IRS revenue rulings, these rights should be non-assignable, give rise only to the receipt of additional stock of the acquiring SPAC entity, and be no more than 50% of non-contingent shares issued to ensure the contingent shares are, essentially, treated as issued voting stock for purposes of the solely for voting stock tests (versus boot).[16]

Additional stock to Target shareholders might also be contingent upon, at least in part, continued employment. Here, the structure of "earn-out" stock needs to be carefully considered since the receipt of the stock (assuming not fitting under the "contingent" stock received as a part of the reorganization) will be taxed to the Target shareholders as ordinary compensation (subject to payroll withholding) versus capital gain. There are many factors that the IRS will consider if an earn-out is to be treated as compensation—tying the earn-out to continued employment, tying the earn-out to equity ownership, the existence and sufficiency of the Target shareholder's other salary and compensation, and whether the earn-out and prior payments equate to a reasonable value for the Target, as well as any variance based on length and type of service of the Target shareholders. Properly documenting the earn-out in the transaction documents as a part of the purchase price helps but is of course not definitive.

Unwind Rules

No one entering into a SPAC transaction wants to hear about the possibility it doesn't close, but regardless, it happens. In the event a SPAC transaction does not occur prior to a De-SPAC transaction (i.e., a roll-up has to be reversed), can the Targets rely on the so-called recission doctrine to get the Target back to the tax position it was prior to entering into a roll-up transaction? This can be an issue, for example, where the Target entity is an S corporation, or in a federal tax partnership in which debt or receivables may have been triggered as income. The "recission" doctrine, or unwind, is the tax theory that restoring the taxpayer to a same position before a transaction, upon reversing (unwinding) the transaction, will nullify any tax impact triggered by the unwound transaction. The problem is that (1) both parties to a transaction need to be in the same position before the transaction and (2) the "unwinding" must occur in the same taxable year as the transaction.[17] The second can be problematic, especially when the transaction is signed at the end of the calendar year but is not expected to close until the following calendar year. And what if key deal issues arise, through no fault of either party? The IRS has already shown some leniency where a federal tax partnership unwound into a limited liability company versus a partnership.[18] And there is also the argument that so long as no tax return had been filed that reports the transaction in any way other than the unwound position, the IRS should respect it as reported. Arguably, so long as tax motivation is not at all the purpose for the unwound transaction, the taxpayers should not bear an unreasonable cost for a transaction that did not occur (and already being forced to eat transaction costs for a deal that did not close), and fair tax policy should dictate that the same tax year recission doctrine rule is not rigidly enforced.

Transaction Costs

Finally, as with any M&A transaction, Target companies should track transaction costs (legal, accounting, etc.) as "facilitative" or "non-facilitative." The transaction costs following execution of a letter of intent (LOI) relating to a SPAC transaction are "facilitative" and must be capitalized on the argument that the costs create benefits beyond the current year. Prior to the point where the LOI is signed, costs are said to be primarily exploratory and investigatory in nature and therefore non-facilitative, and deductible, costs. That being said, the tax regulations provide that if an activity is so inherently facilitative—like an appraisal or tax structuring for the particular transaction—such amounts are facilitative regardless of when an LOI is signed. Thus, transaction costs are either facilitative, non-facilitative, or inherently facilitative.[19] As practical matter, even after an LOI is signed, ongoing professional fees that would have been incurred regardless of a proposed transaction need to be tracked separately and continue to be deducted.

Success-based fees—financial advisory fees only paid upon a successful closing—are usually a percentage-based number. While the fees can be allocated to particular services performed by the advisor, the easier route is to take advantage of a safe harbor that permits the deduction of 70% of the success-based fee, capitalizing the rest.[20]

Conclusion

The popular SPAC transaction seems to be a prospective end game for many ambitious health care companies. As this article illustrates, navigating the SPAC journey requires many tax concepts not always common in the typical deal structure. The events of 2020, which continue in 2021 with their own market uncertainties, will only increase the need for market consolidation for health care providers and companies.

AHLA thanks the leaders of the **Tax and Finance Practice Group** *for contributing this feature article:* **Justin Cook**, *Bricker & Eckler LLP (Chair);* **Albert Lin**, *Husch Blackwell LLP (Vice Chair—Education: Programming);* **Kendall Schnurpel** *(Vice Chair—Education: Programming);* **Andrew Kloeckner**, *Baird Holm LLP (Vice Chair—Education: Publishing);* **Colin McDermott**, *VMG Health (Vice Chair—Education: Publishing); and* **Vallerie Propper**, *University Hospitals (Vice Chair—Member Engagement).*

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1 "In the first quarter of 2021, U.S. SPACs across all industries raised more capital, to the tune of $83.1 billion, than across all of 2020 ($82.6 billion). In the first quarter of 2021, 10 digital health SPAC deals were either announced or closed. Hims & Hers and Butterfly Network went public via SPAC, while Talkspace, Uphealth and Cloudbreak, 23andMe, Sema4, Sharecare, Owlet, QuantumSi and DocGo announced SPAC deals that have yet to close." *See* Heather Landi, *Digital health's red-hot quarter: $6.7B raised in 147 deals*, Fierce Healthcare (Apr. 5, 2021), https://www.fiercehealthcare.com/tech/digital-health-s-red-hot-quarter-6-7b-raised-147-deals. As of this writing, Talkspace, Upheath Inc, 23andMe, Sema4, Sharecare, Owlet, and QuantumSI have all gone public and Owlet expected soon. *See, e.g., Talkspace, a Leading Virtual Behavioral Healthcare Company, Completes Meger with Hudson Executive Investment Corp and Will Being Trading on Nasdaq under the Sympbol "Talk,"* Bus. Wire (June 22, 2021); *UpHealth and GigCapital2 Announce Closing of Business Combinations*, Bus. Wire (June 10, 2021), https://www.businesswire.com/news/home/20210609005895/en/UpHealth-and-GigCapital2-Announce-Closing-of-Business-Combinations.

2 "The latest deal involves a SPAC called Deerfield Healthcare Technology Acquisitions Corp., which is merging with CareMax Medical Group and IMC Medical Group Holdings in a transaction with a combined consideration of $614 million in cash and stock," Tim Mullaney, *What the $614M CareMax SPAC Deal Could Mean for Senior Living Providers*, Senior Housing News (Dec. 21 2020), https://seniorhousingnews.com/2020/12/21/what-the-614m-caremax-spac-deal-could-mean-for-senior-living-providers/. *See also Deerfield Healthcare Technology Acquisitions Corp. Announces Closing of Business Combination With CareMax,* businesswire.com (June 8, 2021), https://www.businesswire.com/news/home/20210608006108/en/Deerfield-Healthcare-Technology-Acquisitions-Corp.-Announces-Closing-of-Business-Combination-With-CareMax.

3 For the benefit of those who hate acronyms, SPACs are to be differentiated from single purpose entities (SPEs), which are formed for narrow purposes primarily to isolate financial risk when property is purchased, or special purpose vehicles (SPVs), which are formed to undertake a specific single venture.

4 *See* U.S. Securities and Exchange Comm'n, *What You Need to Know About SPACs—Updated Investor Bulletin* (May 21, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin; *see also* Tom Huddleston, Jr., *What is a SPAC? Explaining one of Wall Street's hottest trends,* CNBC (Jan. 30, 2021), https://www.cnbc.com/2021/01/30/what-is-a-spac.html.

5 In the early formative years, and most of the operating years, the majority of provider-based health care organizations will be structured as pass-through entities, taxed as either a partnership or an "S" corporation for federal income tax purposes. The double tax disadvantage of a federal tax corporation (even after the reduced tax rates following the Tax Cuts and Jobs Act (TCJA) passed in 2017), coupled with the personal service corporation flat tax disadvantage for many health care companies, meant that the pass-through structures remained most common. The nature of pass-through entities, especially tax partnerships, meant more flexibility in equity-based acquisitions. For this reason, in the early stages of a SPAC transaction, particularly if there are multiple entities, the pass-through structure may need to be terminated or otherwise accounted for since the SPAC final structure is a publicly traded "C" corporation.

6 *See* Section 731(c) (treating distributions of marketable securities out by partnership as a taxable event based on the fair market value of the marketable securities).

7 Note the distinction between the two (D) and (E) subsections here—the reverse mergers are not "D" or "E" reorganizations.

8 Section 386 tax-free reorganizations must meet some non-objective requirements for the Internal Revenue Services (IRS) to respect them—generally the business of the target should continue and there needs to be a bona fide business purpose (not tax avoidance) for the merger. These are usually not issues in the SPAC transaction.

9 Just to confuse people more, the term "reverse triangular merger" is synonymous with "reverse subsidiary merger." In a diagram, the picture of a reverse subsidiary merger looks like a triangle—so easy to remember! The reverse subsidiary merger falls under Section 368(a)(2)(E) of the Code (with a forward subsidiary merger falling under Section 368(a)(2)(D) of the Code). Note—this doesn't mean we call them "E" or "D" reorganizations. Subparagraphs 368(a)(1)(D) and (a)(1)(E) are "D" and "E" reorganizations. D reorganizations entail dividing up corporations and E reorganizations are internal reorganizations. Don't forget the (a)(2) subparagraph designation when dealing with reverse subsidiary mergers. It makes a difference in citing the right Code section.

10 Note that contributions of capital to a corporation, from a shareholder who already owns stock, but where no stock is issued in connection with the contribution, is a nontaxable transaction. This is a capital contribution that increased the stockholder's basis in the stockholder's existing shares. This rule applies to S corporations as well. Contributions of appreciated property to corporations *in exchange for stock* thus run the risk of triggering taxable income upon receipt of stock when the 80% control test is not met (and the stock being issued out has a value higher than the contributor's basis of the appreciated property contributed). Partnerships (and LLCs taxed as partnerships) have a lot more flexibility in terms of partner/member contributions for partnership equity; there is no corresponding control test to worry about.

11 The technique of creating a new corporation is an element of the so-called "National Starch" tax strategy of using Section 351 to provide tax-free treatment to rollover equity by creating a transitory new company, which serves as the corporation receiving contributions of property for Section 351 purposes. The "double dummy" structure also uses new, transitory corporations as a party to an overall reorganization plan designed to minimize tax on the rollover equity. Many of the SPAC transactions will have variations of these techniques.

12 *See* PLR 9143025 (July 24, 1991); PLR 200049026 (Dec. 8, 2000).

13 Treas. Reg. § 301.6109-1 (Identifying Numbers).

14 Internal Revenue Serv., *Employer Identification Number: Understanding Your EIN,* https://www.irs.gov/pub/irs-pdf/p1635.pdf.

15 *See* Internal Revenue Serv., Business Name Change, https://www.irs.gov/businesses/business-name-change.

16 Rev. Rul. 66-112, 1966-1 C.B. 68.

17 Rev. Rul. 80-58, 1980-1 C.B. 181.

18 PLR 200952036 (Sept. 23, 2009).

19 Treas. Reg. § 1.263(a)-5 (T.D. 9107).

20 Rev. Proc. 2011-29.