

## securities and public markets bulletin

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### Special Purpose Acquisition Corporations

#### Introduction

On December 19, 2008, the Toronto Stock Exchange (the “**TSX**”) adopted and the Ontario Securities Commission approved amendments to offer the special purpose acquisition corporation program (the “**SPAC Program**”) as an alternative investment vehicle for going public in Canada. The SPAC Program enables a special purpose acquisition corporation (“**SPAC**”), a private “shell” or “blank-cheque” company with no previous operational history, to access public capital markets through an initial public offering (“**IPO**”) and obtain a listing on the TSX. Following the listing, the SPAC must use the proceeds raised to complete a Qualifying Acquisition (as defined below) by merging with an operating company within 36 months. This article provides an overview of the newly adopted TSX rules regarding the SPAC Program.

#### Background

SPACs have existed in the United States market since the early 1990s. However, over the past five years, the use of SPACs as a viable alternative for investors looking to participate in corporate acquisition opportunities traditionally pursued by private equity firms has risen sharply within the United States and European markets. Since 2003, more than US\$21 billion in gross proceeds has been raised through SPAC offerings.<sup>1</sup> On May 8 and July 25, 2008, the United States Securities and Exchange Commission approved rules allowing for the listing of SPACs on the NYSE and NASDAQ, respectively. In Europe, SPAC offerings have been listed on the Euronext since 2007.

The TSX was initially reluctant to permit SPACs to go public in Canada, largely because SPACs lack an operational history and cannot meet certain financial standards. However, as a result of the growing market interest in SPACs, the development of sophisticated investor protection practices and the desire to improve access to Canadian public capital markets, the TSX proposed to amend the TSX Company Manual (the “**Manual**”) to permit the listing of SPACs on the TSX in a request for comments on August 15, 2008. Effective December 19, 2008, the final SPAC Program is substantially similar to the original TSX proposal and follows the recently introduced SPAC listing rules on the NYSE and NASDAQ, with certain adjustments to reflect the current Canadian marketplace.

#### The SPAC Program

The SPAC Program is primarily governed by the new Part X of the Manual, entitled “Special Purpose Acquisition Corporations”. The SPAC Program involves a two-stage process:

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<sup>1</sup> Raymond D. King, Senior Manager, Global Diversified Investments, Toronto Stock Exchange and TSX Venture Exchange, “Special Purpose Acquisition Corporations – A Listing Opportunity for Toronto Stock Exchange” (2008, TSX Inc.) (PowerPoint presentation) <[www.tsx.com/en/pdf/TSX\\_SPAC\\_Presentation.pdf](http://www.tsx.com/en/pdf/TSX_SPAC_Presentation.pdf)>.

- the filing and clearing of a SPAC listing application and prospectus (to be prepared in accordance with applicable securities laws), the completion of the IPO and the listing of the SPAC's common shares on the TSX; and
- the identification and completion of a Qualifying Acquisition.<sup>2</sup>

The SPAC Program is similar to the capital pool companies program of the TSX Venture Exchange that has been available in Canada since 1987. Both programs enable companies with no assets and no commercial operations to enter the Canadian public capital market and later acquire an operating business using the initial proceeds raised. However, the SPAC Program operates on a larger scale, contains more stringent investor protections and is generally more attractive to a wider range of investors as it does not restrict the amount that any one person may invest in an initial SPAC public offering.

The SPAC Program is not available to issuers that have entered into a written or oral binding acquisition agreement with respect to a potential Qualifying Acquisition prior to the completion of the IPO. However, a SPAC is permitted to engage in the process of reviewing potential Qualifying Acquisitions and may enter into non-binding agreements, including confidentiality agreements and non-binding letters of intent. It may also identify target business sectors or geographic areas in which to make a Qualifying Acquisition before listing on the TSX, provided that the SPAC's intentions are disclosed in the final prospectus for its IPO.

### Stage 1 - SPAC Application, Prospectus and Exchange Listing

#### Overview of Process

- An issuer wishing to participate in the SPAC Program must complete a listing application to demonstrate its

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2 "Qualifying Acquisition" means the acquisition of assets or one or more businesses by a SPAC which result in the issuer meeting the TSX's original listing requirements set out in Part III of the Manual.

ability to meet the TSX's original listing requirements, in the form found in Appendix A of the Manual.

The listing application, preliminary prospectus, draft escrow agreement governing the IPO proceeds and personal information forms for all insiders of the SPAC must be filed with the TSX and with the applicable Canadian securities regulatory authority in each SPAC jurisdiction in which the distribution will be made.

- The TSX may grant or deny the prospectus and listing application on the basis of any factors that, in its discretion, the TSX considers relevant to assess the merits of the application. Once the application for listing is conditionally accepted, and the relevant regulator(s) indicates that it is clear to receive final materials, the SPAC will file its final IPO Prospectus<sup>3</sup> and all supporting documents with the TSX and the regulators.
- A receipt for the final IPO Prospectus and all final listing documentation must be issued by the SPAC's principal regulator.<sup>4</sup>

#### Minimum Listing Requirements for SPACs

The following minimum listing requirements must be satisfied to be listed as a SPAC with the TSX and to maintain that listing:

- A minimum of 1,000,000 freely tradable securities of the SPAC must be held by at least 300 public holders, holding at least one board lot each.
- The minimum total amount of capital raised by the SPAC through the issuance of shares in its IPO must be equal to or greater than CAD\$30 million.
- Prior to the SPAC's IPO, the founding securityholders<sup>5</sup> must subscribe for units, shares or warrants of the SPAC and agree not to transfer any of their founding

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3 "IPO Prospectus" means the final prospectus for the initial public offering of the SPAC.

4 The issuer's principal regulator is determined in accordance with Multilateral Instrument 11-102 – Passport System.

5 The term "founding securityholders" means insiders and equity securityholders of a SPAC prior to the completion of the IPO who continue to be insiders or equity securityholders immediately after the IPO.

securities<sup>6</sup> before the completion of the SPAC's IPO. The terms of these initial investments must be disclosed in the IPO Prospectus.

- The minimum price per share at which SPACs must issue securities pursuant to the IPO is \$2.00 per share or unit.
- The SPAC Program recommends that SPACs seeking listing on the TSX should be incorporated under Canadian federal or provincial corporate laws. Otherwise, the SPAC should obtain a preliminary opinion on whether the TSX would accept the foreign jurisdiction of incorporation under the SPAC Program.
- Once a SPAC is listed on the TSX, it must place a minimum of 90% of the gross proceeds raised in its IPO in escrow with an escrow agent that invests the escrowed funds in permitted investments. The SPAC is required to disclose the proposed nature of this investment and any intended use of the interest earned from this investment in its IPO Prospectus.
- A listed SPAC is permitted to raise additional funds through the issuance of securities from treasury to fund the completion of a Qualifying Acquisition. However, the issuance must be in accordance with Part VI of the Manual and at least 90% of the funds raised must be placed in escrow.
- In connection with its listing on the TSX, a SPAC will be subject to certain original listing provisions in Part III of the Manual.<sup>7</sup>

### ***Restrictions on Business and Capital Structure of SPACs***

- SPACs seeking a listing on the TSX are not permitted to carry on an operating business. The only business permitted to be undertaken by a SPAC pending the completion of the Qualifying Acquisition is the identification and review of assets, business sectors,

or geographic areas with a view to completing a Qualifying Acquisition.

- SPACs are also not permitted to utilize any form of debt financing before the completion of a Qualifying Acquisition. This restriction is intended to limit management's expenses and preserve the funds available to make a Qualifying Acquisition. A SPAC may enter into a credit facility with a lender prior to the Qualifying Acquisition, but it can only utilize the facility during or after the completion of the Qualifying Acquisition.
- Securities issued in a SPAC IPO must contain certain investor protection features. A conversion feature is required that permits securityholders who vote against a successful Qualifying Acquisition to have their securities converted into a cash amount. A liquidation distribution feature must also be included to compensate securityholders of a SPAC where a Qualifying Acquisition is unsuccessful within the 36 month time period required by the TSX. Any warrants issued by the SPAC in its IPO must not be exercisable before the Qualifying Acquisition and must satisfy certain other requirements in s. 1008(b) in Part X of the Manual.

### **Stage 2 - Completion of a Qualifying Acquisition**

- The second stage involves the completion of a Qualifying Acquisition. A listed SPAC has 36 months from the date of closing of the distribution under its IPO Prospectus to complete a Qualifying Acquisition or Acquisitions.
- The fair market value of the business or assets forming the Qualifying Acquisition must equal at least 80% of the aggregate amount then on deposit in the escrow account.
- Approval of the Qualifying Acquisition is required by (i) a majority of directors unrelated to the Qualifying Acquisition, and (ii) a majority of the votes cast by the SPAC's securityholders. Any securityholder who votes against the Qualifying Acquisition will be entitled to convert their securities for their pro rata share of the escrowed funds if the Qualifying Acquisition

<sup>6</sup> The term "founding securities" means securities in the SPAC held by the founding securityholders, excluding any purchased by founding securityholders under the IPO Prospectus, on the secondary market or under a rights offering by the SPAC.

<sup>7</sup> Such provisions include ss. 325, 327, 328, 338-351, 352-356, 358-359 and 360 of Part III of the Manual.

is successful. As discussed above, this conversion right is an important investor protection feature provided under the SPAC Program. The founding securityholders are not permitted to vote on the approval of the Qualifying Acquisition.

- A listed SPAC is required to prepare an information circular that contains prospectus level disclosure of the issuer resulting from the Qualifying Acquisition.
- A listed SPAC must also file a final prospectus disclosing information on the SPAC and its proposed Qualifying Acquisition with the Canadian securities regulatory authority in each jurisdiction in which the SPAC and the resulting issuer is and will be a reporting issuer upon completion of the Qualifying Acquisition. The final prospectus must also, if applicable, be filed in the jurisdiction in which the head office of the resulting issuer is located in Canada. A receipt for the final prospectus must be obtained from the applicable securities regulators before the SPAC mails its information circular.
- The resulting issuer upon completion of the Qualifying Acquisition must comply with the TSX's original listing requirements in Part III of the Manual and all continued listing requirements in the Manual without exception. Failure to obtain the TSX's approval of such compliance will result in the delisting of the SPAC. After completion of the Qualifying Acquisition, the resulting reporting issuer will also be subject to the TSX's escrow policy.
- If a listed SPAC does not complete a Qualifying Acquisition within the 36 month period permitted by the TSX, it must complete a liquidation distribution within 30 days after the end of such time period. Under the liquidation, escrowed funds will be distributed to the securityholders, other than founding securityholders with respect to any of their founding securities, on a pro rata basis. Upon completion of the liquidation distribution, the TSX will delist the SPAC's securities and the SPAC will no longer have access to the safeguards provided under Part X of the Manual.

### Conclusion

The SPAC Program is designed as a listing and finance vehicle for sophisticated management teams that have credibility to raise sufficient capital to fund a Qualifying Acquisition which meets the TSX original listing requirements. This capital would be available to an issuer at an earlier stage than might otherwise be available to an issuer under the IPO process.

According to the TSX, the SPAC Program can provide an opportunity for a wider range of investors to participate in corporate acquisition opportunities traditionally targeted by hedge funds and private equity firms. As a result, the SPAC Program is likely to be a viable alternative investment avenue for many companies, even in the current financial climate.

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### A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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### About McMillan LLP's Securities and Public Markets Group

Our Securities and Public Markets Group acts for a variety of clients (domestic and foreign issuers of debt and equity securities, municipal, territorial and provincial governments, financial institutions, investment banks and securities dealers) and have extensive experience in all areas of public market securities law practice. Our experience includes corporate finance, mergers and acquisitions, public company servicing, capital markets and registration, and securities litigation.

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