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CORPORATE & COMMERCIAL **ALERT**

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The CIPC Compliance Checklist – submission guidelines

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Is the SPAC back?

The use of SPACs, or special purpose acquisition companies, seems to be back. SPACs are shell companies with no existing business operations, that are established as an investment vehicle for the purpose of raising capital to acquire Viable Assets in pursuit of a listing on the Main Board or the Alternative Exchange (AltX).

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The CIPC Compliance Checklist – submission guidelines

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Since the Companies and Intellectual Property Commission (CIPC) issued Notice 52 of 2019 introducing the Compliance Checklist, we have seen a number of clarifications regarding how companies should go about declaring their compliance with the mandatory provisions of the Companies Act 71 of 2008, as amended (Companies Act).

The CIPC introduced the Compliance Checklist to:

(i) ensure compliance with the Companies Act;

(ii) serve as an educational tool for directors and company secretaries with regards to their responsibilities in terms of the Companies Act; and

(iii) monitor and regulate proper compliance with the mandatory provisions of the Companies Act.

The Compliance Checklist was rolled out on a voluntary basis for a period of four months from 1 September 2019, and became mandatory for all companies whose annual returns are audited or independently reviewed, from 1 January 2020. Many companies did not file their Compliance Checklist responses for calendar years 2019 and 2020 on time. This was primarily due to the limited guidance available, coupled by the fact that the new requirement was overshadowed by the COVID-19 pandemic and ensuing national lockdown.

With lockdown restrictions easing, and the CIPC's offices reopening, the CIPC has dedicated a team to address Compliance Checklist queries, monitor responses, and identify areas of non-compliance. Companies are slowly becoming aware of the requirement and we have been inundated with queries on how to respond to the Compliance Checklist and the consequences companies may face for non-compliance with the Compliance Checklist requirement itself, and the provisions of the Companies Act in the broader context.

Following the initial uncertainty around whether the Compliance Checklist is linked to the filing of annual returns, the CIPC has clarified that that the Compliance Checklist is a standalone requirement, independent of the filling of annual returns. Companies are required to submit their responses for the preceding calendar year via the e-services platform within 30 business days of their anniversary of incorporation. For example, if a company's anniversary of incorporation is 1 July, then its Compliance Checklist for calendar year 2020 (i.e. 1 January 2020 to 31 December 2020) must be filed within 30 business days from 1 July 2021.

The CIPC is yet to take action against companies for failing to file their Compliance Checklist responses, however, we have received communication from the CIPC's Compliance Checklist team that the CIPC is troubleshooting various options and will communicate its position in due course.

The CIPC Compliance Checklist – submission guidelines*...continued*

Anyone who knowingly provides false information to the CIPC is guilty of an offence under section 215(2)(e) and could be liable for a fine, imprisonment not exceeding 12 months, or both a fine or imprisonment in terms of section 216(b) of the Companies Act.

Although the number of Compliance Checklist submissions have been limited, in just over 12 months the CIPC noted (in its Notice 15 of 2021) that there has been a spike in the number of companies that are not adhering to section 4 of the Companies Act (the solvency and liquidity test). The CIPC is without a doubt honing in on non-compliance and will be taking a close look at companies' Compliance Checklist responses.

This is an appropriate time to remind companies that the CIPC is mandated in terms of section 171(1)(a) of the Companies Act to issue a compliance notice to any person whom it believes, on reasonable grounds, has contravened the Companies Act. If a company fails to correct its non-compliance within the time period specified in the compliance notice, the CIPC may apply to a court for the imposition of an administrative fine in terms of section 175(1), or refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214(3) of the Companies Act.

Furthermore, anyone who *knowingly* provides false information to the CIPC is guilty of an offence under section 215(2)(e) and could be liable for a fine, imprisonment not exceeding 12 months, or both a fine or imprisonment in terms of section 216(b) of the Companies Act. The board of directors of a company are personally responsible for compliance with the Companies Act, and as such, it is necessary to draw directors' attention to their responsibilities in respect of the CIPC Compliance Checklist and the accurate completion thereof.

In order to navigate our way through this new requirement, our team at CDH has developed a guidance tool that will assist companies in preparing their responses to the Compliance Checklist. Please contact Vivien.Chaplin@cdhlegal.com and Haafizah.Khota@cdhlegal.com for more information about the Compliance Checklist Guidance Tool.

Vivien Chaplin, Haafizah Khota and Nicola Stipinovich

2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

DealMakers

2020
1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019
M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018
1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

2017
2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

Is the SPAC back?

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The use of SPACs, or special purpose acquisition companies, seems to be back. SPACs are shell companies with no existing business operations, that are established as an investment vehicle for the purpose of raising capital to acquire Viable Assets in pursuit of a listing on the Main Board or the Alternative Exchange (AltX).

The past year has seen a significant increase in SPACs in the international arena, with a record number of 64 new unicorn companies (private companies with a valuation of $1 billion and more) coming to fruition in the US in the first quarter of 2021, which according to a CNBC article, accounted for approximately 40% of all venture capital funding in the US (Cox "*Despite SPAC Woes, record-breaking run of money into IPOs may continue*" 2021 *CNBC Markets*). In this article we will take a look at what drives the use of SPACs internationally, what the South African trends have been for SPACs, some of the differences between SPACs as compared to traditional initial public offerings (IPOs) and what the future potentially holds for the use of SPACs in South Africa.

Why has there been an increase in SPACs internationally?

Plainly put, the traditional IPO route of bringing a company to market has proven to be an onerous and expensive process, and the SPAC route presents an attractive alternative route that is generally quicker and more cost-effective. A combination of the pursuit for alternative ways to bring companies to market, and the tightening of global markets as a result of the uncertain economic climate relating to COVID-19, has contributed to the increase in SPACs in the US (Norton Rose Fulbright "*SPACs: the London alternative*" 2021 *Norton Rose Fulbright Publications*). According to Conor Moore of KPMG enterprise, "there seems to be an endless supply of capital looking for a home", and companies that capitalise on work-from-home trends are well-positioned to attract speculative investor cash (Cox "*Despite SPAC Woes, record-breaking run of money into IPOs may continue*" 2021 *CNBC Markets*). In addition, many investors have sought investment opportunities spurred on by the fear of missing out on the recent boom in SPAC-related transactions. SPACs are also thought to offer more flexibility than private equity fund agreements, and offer advantages as to the SPAC sponsor who retains a 20% stake after the IPO is completed, which can provide worthwhile returns in the event that a profitable merger is accomplished (Jooste "*Are SPACs going to take off? Watch this space*" 2019 *Business Maverick*). There is also an increase of sophisticated investors and a high demand for private equity style investment opportunities, contributing to the rise in SPAC transactions.

Is the SPAC back?*...continued*

Whilst the concept of SPACs is not new (it originated in the US in the 1990s), it made its way to South Africa as recently as 2013 when the JSE Listings Requirements were amended.

SPACs in South Africa

Whilst the concept of SPACs is not new (it originated in the US in the 1990s), it made its way to South Africa as recently as 2013 when the JSE Listings Requirements were amended. There have been a few successful SPAC listings on the JSE since. To name a few, the first SPAC to list on the JSE was Capital Appreciation Group in 2015, which subsequently completed its Viable Acquisition in 2017. In 2016, Hulisani Limited, specialising in renewable energy investments, listed on the JSE as a SPAC, and subsequently completed its acquisition of Viable Assets thereby converting its listing as an investment entity. However, local trends mirrored the international trends between 2016 and 2019 which showed that more than half of SPACs traded below their initial offering price and low volumes of their shares were traded (Jooste *"Are SPACs going to take off? Watch this space"* 2019 *Business Maverick*). Often times, the board of the SPAC runs out of time to find Viable Assets to acquire, leading to the unwinding of the SPAC and the return of capital to its investors. An example of such a SPAC is Sacoven, which listed on the JSE in 2014 and was unable to execute a suitable acquisition, leading it to return the capital to its investors in 2016. Due to the infancy of the concept of SPACs and a number of failed SPACs, the concept has not yet taken off as a popular investment vehicle in South Africa, with South Africa representing merely 1% of the global equity trade (Jooste *"Are SPACs going to take off? Watch this space"* 2019 *Business Maverick*). Another reason why the use of SPACs has not yet taken off in the South African market is that investors are not acquainted with the benefits which SPACs offer as opposed to traditional IPOs. In order to better understand the differences between a SPAC IPO and a traditional IPO, we will take a look at the admission requirements and JSE Listings Requirements for SPACs.

SPAC IPOs versus traditional IPOs

To list a SPAC on the JSE, the SPAC must not be carrying on any commercial operations, and must have raised a minimum of R500 million through the issue of shares and/or units for listing on the Main Board and R50 million for listing on AltX (JSE Listings Requirement 4.34(g)). Furthermore, the SPAC must have completed an acquisition of Viable Assets within 24 months from the date of listing as a SPAC, failing which the JSE will suspend the listing and subsequently delist the SPAC (JSE Listings Requirement 4.35(a)). The manner in which the JSE Listings Requirements for SPACs differs from the JSE Listings Requirements for traditional IPOs offers a variety of advantages and protections to investors. For example, the capital raised for the acquisition of Viable Assets must be placed in an escrow account, and should the SPAC fail to acquire Viable Assets within the 24-month period, the residual capital must be returned to investors. Another advantage is the requirement that directors of the SPAC are obliged to invest in the SPAC alongside investors, with a minimum investment requirement of 5% shares or

Is the SPAC back?*...continued*

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units, which operates as an assurance to investors that the management team has "*skin in the game*". Additionally, directors may not dispose of their 5% shares in the SPAC for a period of six months from the date of the acquisition of Viable Assets. It should be noted that in the South African context, a strong management team with deep skills and sector expertise are pivotal and the success (or failure) of the SPAC is often determined by the quality of the management team and their ability to attract investors (Mclaren "*Thorts - What the SPAC?*" 2018 *DealMakers*). Other differences between SPACs and traditional IPOs include that costs may generally be lower with SPACs than with traditional IPOs as underwriting fees of SPACs are lower, and a SPAC is not required to have any operational assets. The level of disclosure required with SPACs is less than with IPOs because the SPAC is a shell company with no operational history, so private companies are able to present general acquisition strategies and projections for revenue and profitability, whereas in a traditional IPO, companies are required to disclose historical financial information (Norton Rose Fulbright "*SPACs: the London alternative*" 2021 *Norton Rose Fulbright Publications*).

While this aspect may be seen as a pitfall for potential investors, there are various protections to investors as outlined above, which serve to counter these risks. A further overall benefit of SPACs is that they offer a more expedited process to market than traditional IPOs due to the 24-month time limit within which the SPAC needs to acquire Viable Assets.

Conclusion

Although SPACs are not as common in South Africa as internationally, the international trends indicate that there is potential for this investment vehicle to become more popular as there is a growth in investors seeking opportunities in mergers and acquisitions. A management team with a strong reputation and a good track record may now have the opportunity to present attractive investments to the public in a post-pandemic world, with the prospect of acquisitions being possible in as little as two years. The boom of specific sectors such as FinTech, renewable energy, and healthcare may be further bolstered into the future.

Carmin Jansen van Vuuren and Roxanna Valayathum

2021 RESULTS

CDH's Corporate, Commercial and M&A practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Ian Hayes is ranked in the Hall of Fame in Corporate & Commercial and M&A in THE LEGAL 500 EMEA 2021.

David Pinnock is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Willem Jacobs is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Justine Krige is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Johan Latsky is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

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Vivien Chaplin is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

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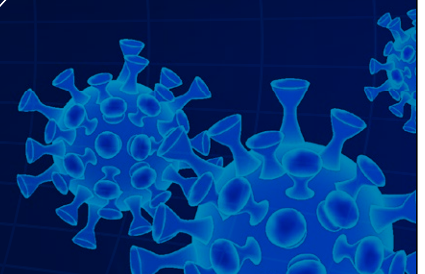
Mark Linington is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.

Wayne Murray is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2021.

CDH'S COVID-19 RESOURCE HUB



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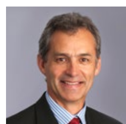

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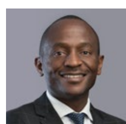

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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