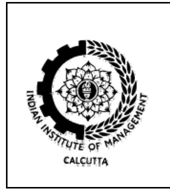

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Legal aspects of designing a "Special Purpose Acquisition Company (SPAC)" in India

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Legal aspects of designing a "Special Purpose Acquisition Company (SPAC)" in India

Brij Bhushan Garg and Soubhik Chatterjee

Introduction

Special Purpose Acquisition Companies or SPACs are publicly listed shell companies with no operations of their own. The main goal of these companies is to scout for a suitable target private company to merge with. There have been numerous such companies since the 1990s in the USA, Canada and other developed economies.

As the market for SPACs has matured, the terms and conditions for SPACs have become more and more favourable for the investors and the participation of leading banks in underwriting the issue has made SPACs more attractive. Such trends have placed SPACs firmly as source of capitalization for small and mid-sized companies. However despite this, SPACs have not received the kind of research coverage they perhaps deserve. This is mostly due to the sceptical attitude of the traditional sell side investors who are not sure about the deals going through.

SPACs have received even more sparse coverage in India. In fact though there are a number of SPACs operating in India scouting around for prospective targets, but there is no SPAC registered in India. There are various laws, which make it difficult for blank shell companies like SPACs to register in the India. Perhaps, it is more difficult to make an ordinary Indian investor to get convinced about the prospects of such companies. However, with the capital market in India getting more and more mature and growing at a rapid pace, introduction of SPACs in India seems like just a matter of time.

Literature Review

There is a dearth of research on SPACs, especially about how they have performed and impacted the markets. Most of the research mentions about the emergence of SPACs in light of the penny stock scams of 1980s. Heyman[1] in his article discusses how the fraudulent schemes of 1980s perpetrated the securities market resulting in loss of billions of dollars for the unwary individual investors. Of particular mention was the creation of the Onnix Financial Inc and the trading of its securities. "Onnix exemplifies the blatant disregard of securities laws and audacious schemes that were prevalent in the penny stock market during the 1980s. Onnix is a particularly poignant example because of both the large number of investors who were affected and the international reach of the fraud."[2.]

Goldstein and Cox[3] mention how in response to the rampant fraud and manipulation in the penny stock market,[4] Congress enacted the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. In its findings, Congress stated that the penny stock market is very susceptible to manipulation "because it is wrapped in secrecy and operates in relative obscurity" and provides "little or no useful information upon which the small investor can base a decision."[5]

Riemer[6] argues that this led to the advent of the SPACs. The first generation SPACs sought to protect the investors by putting the IPO proceeds in an escrow account and giving them the option to exit from an un-approving merger. However, the SPACs had two years to consummate the merger instead of 18 months as mandated by rule 419. As the IPO market heated up during the tech boom of 1990s, SPACs became an attractive vehicle for going public by small companies who found it difficult to do otherwise. Owing to the increase in popularity, a second generation of SPACs emerged in 2004[7]. While the early SPACs were formed by small and niche investment banks, now the bulge bracket investment banks like Merill Lynch, Deutsche Bank and Citibank formed SPACs. The SPACs even got listed in prominent exchanges like the AMEX and AIM.

While several others (Pittinger and Grisin[8],Heyman[9]) mention the formation of SPACs, the investor protection clauses they entail, the operation of SPACs and the SPACs market, there is not much written about the impact of SPACs on the market. Especially in the Indian context, there is hardly any research found on SPACs in the country. Though there are a number of legal roadblocks for SPACs to be formed in India, there have been a number of foreign SPACs merging with companies in India[9]

This paper intends to give an overview of the main laws affecting the formation of SPACs in India and the advantages of SPACs in the Indian context.

SPACs in India

There have been no listings of SPACs in India till date. The current Indian laws are not very conducive for the floatation of a SPAC. This is primarily to protect the interests of the unsophisticated small investors in the country. The government feels that the Indian capital markets are still not mature enough to invests in such vehicles. However, this does not mean SPACs have not targeted Indian companies. Indian economy, growing at one of the highest rates in the world, poses great attraction for foreign SPACs to merger with private Indian companies.

There have been several SPAC mergers in the country recently. In October 2008 Trans-India Acquisition Corporation (TIL), a blank check firm backed by former ICICI Bank chairman N Vaghul, announced its reverse merger with Hyderabad-based photovoltaic (PV) modules maker Solar Semiconductors Ltd. TIL acquired an 80% stake for $375 million. TIL also assumed long-term indebtedness in excess of $50 million of Solar Semiconductor. TIL was listed on AMEX in February 2007 and was looking for acquisitions in the life sciences sector. TIL was chaired by N Vaghul and led by Bobba Venkatadri, Nalluru Murthy and Sarath Naru (managing director of APIDC Venture Capital).

The same year, Phoenix India Acquisition Corp acquired a 65% stake in Citius Power Limited. Another AMEX listed SPAC is Millennium India Acquisition Company, which acquired 14.9% stake in Delhi-based brokerage firm SMC Global for about $40 million. There are also couple of other SPACs such as East India Company Acquisition Corp (backed by IT & ITES industry veterans Dipak Nandi, Kary Shankar and Saurabh Srivastava) and Global Services Partners Acquisition (floated by Avinash Vashista, founder of Tholons and former CEO of neoIT, and backed by Saurabh Srivastava).

Laws Affecting SPACs in India

India has a complex system of corporate and securities laws which are meant to protect the Indian investors. The laws that affect/prevent SPACs in India can be classified into two groups:

1) Laws affecting the formation of SPACs in India

a) Company Law

The Companies Act 1956 is a comprehensive set of laws and regulations governing the formation and operations of companies in India. With the progress of the Indian economy, a number of amendments were made to it so as to keep pace. As many as 24 amendments have been done since 1956.

Some of the significant provisions in the Companies Act relate to the formation of incorporated companies. For the incorporation of a company in India, one of the mandated documents includes the Memorandum of Association (MoA). The Act mentions the following requirements[10]

(1) The memorandum of every company shall state—

...

(c) in the case of a company in existence immediately before the commencement of the Companies (Amendment) Act, 1965, the objects of the company;

(d) in the case of a company formed after such commencement,—

(i) the main objects of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects;

(ii) other objects of the company not included in sub-clause (i); and

....

Clause (c), as mentioned above is called the object clause of the MoA. This is one of the most important clauses of the MoA. It defines the purpose for which the company is formed. A company is not legally entitled to undertake an activity, which is beyond the objects stated in this clause. The object clause is divided into two sub clauses, which are:

The main objects: The main objects for which the company is formed are listed in this sub-clause. It must be observed that an act, which is either essential or incidental for the attainment of the main objects of the company, is deemed to be valid, although it may not have been stated explicitly in the sub-clause.

Other objects: Objects not included in the main objects could be stated in this sub-clause. However, if a company wishes to undertake a business included in this sub clause, it has to either pass a special resolution or pass an ordinary resolution and get central government's approval for the same. [11]

This is one of the most important roadblocks in the formation of a SPAC in India. The sole business purpose of a SPAC is to consummate a merger with another company. It does not intend to carry out any kind of business of its own.

b) ICDR Norms

Securities and Exchange Board of India, Issue of Capital and Disclosure Requirements Regulations, 2009, govern the way a company might raise capital in the Indian market. In order for a SPAC to raise capital, it would have to go for an IPO. The ICDR norms mandate the following conditions for an IPO[12]

An issuer may make an initial public offer, if:

(a) it has net tangible assets of at least three crore rupees in each of the preceding three full years (of twelve months each), of which not more than fifty per cent. are held in monetary assets:

Provided that if more than fifty per cent. of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilise such excess monetary assets in its business or project;

(b) it has a track record of distributable profits in terms of section 205 of the Companies Act, 1956, for at least three out of the immediately preceding five years:

Provided that extraordinary items shall not be considered for calculating distributable profits;

(c) it has a net worth of at least one crore rupees in each of the preceding three full years (of twelve months each);

...

A SPAC, obviously would not be able to satisfy the above norms. It would neither have any net tangible assets nor an operating track record and as such it would be difficult for it to issue capital.

c) Listing Norms

In order for a SPAC to function, it needs to get listed on one of the national stock exchanges, BSE or NSE. Bombay Stock Exchange or BSE entails the following norms (relevant to our discussion) for a company to get listed.

Companies have been classified as large cap companies and small cap companies. A large cap company is a company with a minimum issue size of Rs. 10 crore and market capitalization of not less than Rs. 25 crore. A small cap company is a company other than a large cap company. [13]

a. *In respect of Large Cap Companies*

    i. *The minimum post-issue paid-up capital of the applicant company (hereinafter referred to as "the Company") shall be Rs. 3 crore; and*
    ii. *The minimum issue size shall be Rs. 10 crore; and*
    iii. *The minimum market capitalization of the Company shall be Rs. 25 crore (market capitalization shall be calculated by multiplying the post-issue paid-up number of equity shares with the issue price).*

b. *In respect of Small Cap Companies*

    i. *The minimum post-issue paid-up capital of the Company shall be Rs. 3 crore; and*
    ii. *The minimum issue size shall be Rs. 3 crore; and*

iii. The minimum market capitalization of the Company shall be Rs. 5 crore (market capitalization shall be calculated by multiplying the post-issue paid-up number of equity shares with the issue price); and
iv. The minimum income/turnover of the Company shall be Rs. 3 crore in each of the preceding three 12-months period; and
v. The minimum number of public shareholders after the issue shall be 1000...

As the BSE listing norms for small companies includes a condition for a minimum turnover for the preceding three years, it is clear that a SPAC can only get list through the Large Company Route.

The National Stock Exchange or NSE has a slightly different set of norms for listing. It mandates that a new company wishing to be listed has to satisfy the following conditions (relevant to our discussion). [14]

1. The paid up equity capital of the applicant shall not be less than Rs. 10 crores and the capitalisation of the applicant's equity shall not be less than Rs. 25 crores

2. Atleast three years track record of either:

a. the applicant seeking listing; or
b. the promoters /promoting company, incorporated in or outside India or
c. Partnership firm and subsequently converted into a Company (not in existence as a Company for three years) and approaches the Exchange for listing. The Company subsequently formed would be considered for listing only on fulfillment of conditions stipulated by SEBI in this regard.

Hence, for a SPAC to be listed on NSE, it has to be floated by a promoter group of long standing credibility.

2) Laws impeding the operation of SPACs in India

a) Takeover Code

The Takeover Code or Substantial Acquisition of Shares and Takeovers Regulations, 1997, were established by SEBI to govern re jigging of shareholding pattern of an Indian public listed company. The notion behind forming stringent guidelines to control such a realignment of share holding pattern is that a public listed company has many stakeholders (shareholders, creditors, banks etc.) who might have minority interests in the firm and oppose the realignment. To protect the rights and interests of such stakeholders, SEBI has instituted the Takeover Code.

Takeover Code will not apply in case a SPAC wants to acquire a private company. Private companies do not come under the ambit of the Takeover Code. Takeover code will be applicable when a SPAC proposes to acquire a listed company. One important point to note is that the Takeover code does not have any guidelines specific for SPAC-like acquisitions. In other words, Takeover code regulations for a SPAC acquiring a listed company and a Company like Reliance Industries acquiring a listed company are similar.

b)FEMA

The Reserve Bank of India is the body with regulates movement of foreign currency in India. The first act towards this was the Foreign Exchange Regulation Act of 1973 (FERA). FERA was aimed at

preserving India's foreign currency reserves and was a very conservative and restrictive regulation. In 2000, Foreign Exchange Management Act 1999 (FEMA) was implemented. FEMA focuses on promoting external trade and payments and orderly maintenance of foreign exchange market in India.

In context of SPACs, FEMA will be applicable with respect to QIB investments. As stated earlier, more than 50% investment in a SPAC in India should be through the QIB route. Some of these QIBs might be foreign entities and transfer of securities to foreign entities comes directly under the ambit of FEMA. FEMA 20 /2000-RB dated 3rd May 2000 is the applicable notification governing transfer and issue of India securities to persons resident outside India.

For the purpose of the FEMA 20 /2000-RB, investment in India by a non-resident has been divided into 6 categories and the regulations applicable have been specified in respective schedules as"

- *A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan) , may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions*
- *A registered Foreign Institutional Investor (FII) may purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme, subject to the terms and conditions Investments by NRIs (Non-Resident Indians) under the Portfolio Investment Scheme*
- *A non-resident Indian or an overseas corporate body or a registered FII may purchase securities, other than shares or convertible debentures of an Indian company, subject to the terms and conditions Purchase and sale of securities like government securities, treasury bills etc by FIIs and NRIs*
- *A non-resident Indian or an overseas corporate body may purchase shares or convertible debentures of an Indian company -*
    - *on a stock exchange under the Portfolio Investment Scheme, subject to the terms and conditions ; or/and*
    - *on non-repatriation basis other than under Portfolio Investment Scheme, subject to the terms and conditions.*
- *Investments made by Foreign Venture Capital Funds*

Of all the above, FDI route is the one used most frequently by investors and would be applicable to SPACs QIB investors as well. Please note that RBI has enforced certain sectoral caps on investments by foreign entities and those are applicable over and above all FEMA guidelines.

Designing a SPAC in India

SPACs can be a very useful vehicle for the thousands of small companies in India to get access to the capital market. In order to sustain a high rate of growth small industries, which are hitherto unable to conform to the stringent norms of listing, should grow at a pace commensurate with the growth of the economy. The currently booming capital markets in India would provide them a channel to not only obtain funds for their growth but by being more in the public eye, such companies are more likely to operate better and more profitably. As such, we discuss here how a SPAC can be designed, in conformance to the current laws in the country.

a) Incorporation:

For a SPAC to be formed, a group of initial investors or sponsors have to incorporate a corporation by the desired name of the SPAC. The sponsors should be experienced managers with successful investment or operational track records. They would initially hold 100% of the SPAC's common stock and also serve as the SPAC's management team during the IPO stage and the SPAC's subsequent search for acquisition candidates. Such credentials of the management would help its listing in NSE[15]

As mentioned earlier, in order to be incorporated as a company, the SPAC's MoA should have an object clause mentioning the business that the company intends to indulge in. The only restrictions on the choice of objects are as followed.

1. The objects should not be against the policy of the constitution.

2. The objects should not include anything which is illegal or against public policy.

3. The object must not be against the provisions of the companies act.

As such, it is not necessary for the SPAC to have a complete business description for its incorporation. It can state its objective as to acquire companies with a potential to generate value for the shareholders. However, in the Indian context, a company with such objectives might not be able to woo the investors. Hence, it would be advisable for the SPAC to already have preliminary targets/sectors in the objects clause. In fact, certain SPACs in USA already have some kind of a preliminary arrangement made before issuing their IPO prospectus. This model can be borrowed in the Indian market so that prospective investors get confident about the prospects of the SPAC.

The SPAC prospectus should contain explicit mention of the investor protection clauses as mentioned in Section 5. These would also serve to reassure the investors of the security and proper use of their funds.

b) Issue of Shares.

There are two issues regarding the issue of shares that the SPAC would need to tackle. The first is with respect to pricing. As per SEBI DIP Guidelines[16],

An eligible company shall be free to make public or rights issue of equity shares in any denomination determined by it in accordance with Sub-section (4) of Section 13 of the Companies Act, 1956 and in compliance with the following and other norms as may be specified by SEBI from time to time:

i. In case of initial public offer by an unlisted company,

a. if the issue price is Rs. 500/- or more, the issuer company shall have a discretion to fix the face value below Rs. 10/- per share subject to the condition that the face value shall in no case be less than Rs. 1 per share;

b. if issue price is less than Rs. 500 per share, the face value shall be Rs. 10/- per share;

For the SPAC and issue price greater than Rs 500 would make it even less attractive (at least in the initial stages until the SPACs' phenomenon catches the Indian market), as such it would be advisable to keep the price band less than Rs 500. This will also enhance the liquidity of the issue.

The next issue would be the inability to comply with the ICDR guidelines regarding net tangible assets, distributable profits and net worth. [17] However, ICDR has the following provisions for companies unable to comply with those norms. [18]

An issuer not satisfying any of the conditions stipulated in sub-regulation (1) may make an

initial public offer if:

(a) (i) the issue is made through the book building process and the issuer undertakes to allot at least fifty per cent. of the net offer to public to qualified institutional buyers and to refund full subscription monies if it fails to make allotment to the qualified institutional buyers ;

or

(ii) at least fifteen per cent. of the cost of the project is contributed by scheduled commercial banks or public financial institutions, of which not less than ten per cent. shall come from the appraisers and the issuer undertakes to allot at least ten per cent. of the net offer to public to qualified institutional buyers and to refund full subscription monies if it fails to make the allotment to the qualified institutional buyers;

(b) (i) the minimum post-issue face value capital of the issuer is ten crore rupees;

or

(ii) the issuer undertakes to provide market-making for at least two years from the date of listing of the specified securities, subject to the following:

(A) the market makers offer buy and sell quotes for a minimum depth of three hundred specified securities and ensure that the bid-ask spread for their quotes does not, at any time, exceed ten per cent.;

(B) the inventory of the market makers, as on the date of allotment of the specified securities, shall be at least five per cent. of the proposed issue.

The SPAC can opt for either of options (a) (i) or (ii) as mentioned above. Since the promoter group would comprise of bankers of long standing credit worthiness, it should not be difficult to either secure 50% placement to QIBs or secure finance from scheduled commercial banks. If the SPAC opts for option (a) (ii), the fund provided by the banks would have to follow the RBI cap of " 40 percent of the bank's net worth as on March 31 of the previous year prescribed for the bank's total exposure including both fund based and non-fund based to capital market in all forms"[19] Moreover, the banks are normally sceptical about financing an acquisition, and, getting funds to provide IPO financing for an acquisition-only company of no previous standing would be difficult.

Between option (b) (i) and (b) (ii) it would be possible to opt only for option (b) (i), because as per the structure, the SPAC would have to be dissolved within two years and hence it would not be able to act as the market maker for two years. But this should not pose a problem since the issue size would need to be significantly more than Rs 10 crore, without which the SPAC would not be able to merger with any private company of good standing.

c) Listing of Shares

The SPAC needs to get listed to NSE or BSE for it to be attractive for the private companies as candidates for merger. The promoter group, being seasoned professionals in the financial industry, would satisfy the criterion of the applicant's track record. The other requirement that needs to be satisfied is a minimum paid up equity capitalization of the applicant to be Rs 10 crore and the minimum capitalization of the applicant to be Rs 25 crore. As is evident, the promoter/sponsor group would need to contribute such amount of capital upfront for the SPAC to be listed. This would also serve to reassure the investor as the management would also have considerable stake in the venture and hence to strive hard to make it succeed.

d) Operation: Acquisition of a company.

Takeover code will be applicable when a SPAC acquires a public listed company. As per new Takeover code amendment, if a company acquires 26% stake in a listed company, the former has to make an open offer for 25% more stake. This way, a SPAC would gain control over the company with 51% stake. Other Takeover code guidelines like creeping acquisition etc. would be applicable as well. In case a SPAC acquires a private company, the regulations are much less stringent. The guidelines would depend on the private company's Memorandum of Association and Articles of Association and the Company Law.

FEMA would be applicable is the QIB is a person / entity resident outside India. We suggest the investment be done through the FDI route. Under FDI route, the specific steps regarding % stake, pricing etc. are governed by FEMA and SEBI rules subject to REBI sectoral caps. Please note that is the target company's industry is not in the RBI list, investment can be done via the "automatic route" and in case the industry is in the RBI list, Government approval would have to be solicited.

Conclusions

As discussed previously, despite the fact that the Indian market is still at a developing stage and as there is a need for regulatory authorities to devise strict laws to protect the unwary investors, SPACs as investment vehicles pose great opportunities for the mass investors to take part in the growth of the multitude of small and mid-sized companies. As such, the regulatory environment needs to be made more conducive for the incorporation and operation of such companies.

Though the Companies Act has no objection to the formation of SPACs in particular, the object clause of the MoA poses a slight problem. Again, there is no explicit mention of types of object permitted (rather there is mention of types of objects not permitted), but it would be difficult for a SPAC trying to incorporate in India to justify its objective to the Registrar of Companies. Hence a special addendum encompassing "Acquiring of private companies that might increase holder wealth" can make SPACs easier to get incorporate. Moreover, in order to protect the investors, the Act might specify that such companies should mention a sector or domain in which they wish to pursue their acquisition activities.

The ICDR norms particularly pose a great problem for the issue of share by a SPAC. While they necessarily have to follow the QIB route, the criterion of at least 50% QIB subscription make it very restrictive for SPACs to issue capital. This is because being a new investment vehicle in India; the

SPACs would not have enough mettle to secure such a significant chunk of QIB investors. As such, for such companies, the rules might be relaxed to let the SPACs increase the QIB stake slowly to a 50% level within the time period that they have to consummate the merger. However, completely removing this criterion would not act in favour of SPACs themselves, as it would increase the speculative element in SPACs for the retail investors.

Listing norms do not pose any problem for SPACs. The minimum capital requirement is most likely to be met by SPACs and would in fact lead to greater investor confidence in the SPAC issue. However, it would be advisable to put a cap on the size of the issue so as to decrease the capital exposure for the investors. It would also be advisable to increase the reporting requirements of the listed SPACs to keep the investors abreast of the current developments in the SPACs operations.

There should be restrictions on foreign investors subscribing to SPACs issues. They would obviously have to abide by the sectoral caps but it would be prudent to limit FIIs investing in SPACs. Companies merging with SPACs will have to bear a great risk if short-term foreign investors form a large share of the stakeholders of the firm. This would make the SPACs inherently unattractive for such firm as candidates of merger and hence would defeat the purpose of the SPACs. Hence foreign investment should be limited to FDIs only.

One of the most important factors that might guide the success or failure of SPACs would be investor awareness. Any SPAC issue would necessary need an extensive marketing campaign to make the investors aware of the attractiveness of the SPACs and the investor protective features it encompasses, in spite of the speculative nature of the company and hence higher expected returns.

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