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Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market

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Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market

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SYMPOSIUM

HERE TO STAY: WRESTLING WITH THE FUTURE OF THE QUICKLY MATURING SPAC MARKET[†]

WELCOME AND INTRODUCTORY REMARKS

Matthew Dillerⁱ

Dean and Paul Fuller Professor of Law, Fordham University School
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Fordham University School of Law

[†] This *Symposium* was hosted virtually by Fordham University School of Law on October 22, 2021. The transcript has been edited for clarity and to provide sources, references, and explanatory materials for certain statements made by the speakers.

i. Matthew Diller is the Dean of Fordham Law School and the Paul Fuller Professor of Law. He is one of the nation's leading voices on access to justice issues and a prominent scholar of social welfare law and policy. Dean Diller has lectured and written extensively on the legal dimensions of social welfare policy, including public assistance, Social Security, and disability programs, and on disability law and policy. His articles have appeared in the *Yale Law Journal*, *UCLA Law Review*, *NYU Law Review*, *Fordham Law Review*, *Texas Law Review*, and *Michigan Law Review*, among other publications, and he is widely cited as an expert by the media, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *Bloomberg*, and *The National Law Journal*. He has taught a range of law school classes, including Civil Procedure, Administrative Law, Social Welfare Law, and Public Interest Law. In addition to his work as an administrator and scholar, Dean Diller is a member of the New York State Permanent Commission on Access to Justice and is chair of the commission's Committee on Law School Involvement. He also serves on the board of The Legal Aid Society of New York and is co-chair of the Council on the Profession at the New York City Bar Association, where he has served as a vice president and member of the executive committee. In addition, Dean Diller is a member of the Judicial Institute on Professionalism in the Law and a fellow of the American Bar Foundation. He has also served on the boards of Legal Services NYC, where he was vice chair, the National Center for Law and Economic Justice, and Volunteers of Legal Service. Dean Diller received an A.B. and a J.D., both *magna cum laude*, from Harvard

PANEL ONE: HISTORY AND EVOLUTION OF THE SPAC MARKET

*Douglas Ellenoff*ⁱⁱⁱ
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University, where he was an editor of the *Harvard Law Review*. After clerking for the Honorable Walter R. Mansfield of the U.S. Court of Appeals for the Second Circuit, Dean Diller worked as a staff attorney in the civil appeals and law reform unit of The Legal Aid Society from 1986 to 1993. Dean Diller began his teaching career at Fordham Law in 1993 and was named the Cooper Family Professor of Law and co-director of the Louis Stein Center for Law and Ethics. From 2003 to 2008, he served as the associate dean for academic affairs. Prior to being appointed dean of Fordham Law in 2015, he served as dean at the Benjamin N. Cardozo School of Law from 2009 to 2015. Widely recognized by the legal community and beyond, Dean Diller has received numerous awards for his work and scholarship. In 1991, The Association of the Bar of the City of New York honored him with a legal services award. In 2014, the AALS Section on Pro Bono and Public Service Opportunities awarded him the Deborah L. Rhode Award for his leadership in legal education and public service. At Fordham Law School, he has been recognized with the Louis J. Lefkowitz Award for the Advancement of Urban Law from the *Fordham Urban Law Journal* (2000), the Eugene J. Keefe Award for outstanding contributions to the Law School (2002), and the Dean's Medal of Achievement (2009).

ii. AJ Harris served as the Symposium Editor for Volume XXVII of the *Fordham Journal of Corporate & Financial Law*. AJ earned his bachelor's degree from the University of Michigan's College of Engineering, master's degree from the University of Michigan's Ross School of Business, and law degree from Fordham University School of Law.

iii. Douglas Ellenoff, a founding member of Ellenoff Grossman & Schole LLP, is a corporate and securities attorney with a focus in business transactions, mergers and acquisitions (M&A), and corporate financings. Doug has represented public companies in connection with their initial public offerings (IPO), secondary public offerings, and regulatory compliance, as well as strategic initiatives and general corporate governance matters. During his career, he has represented numerous broker-dealers, venture capital investor groups and corporations involved in the capital formation process. In the last several years, Doug and his firm have been involved at various stages in numerous registered public offerings, including more than 100 financings, and hundreds of private placements into public companies, representing either the issuers of those securities or the registered broker-dealers acting as placement agent. Along with other members of his firm, Doug has been closely involved with over 370 registered blind pool offerings (commonly referred to as "SPACs"). In addition to his IPO experience with SPACs,

**PANEL TWO: ENFORCEMENT AND LITIGATION TRENDS TO
REIN IN MARKET EXCESS AND MISBEHAVIOR**

Mark Lebovitch^v

Partner, Bernstein Litowitz Berger & Grossmann LLP

Verity Winship^{vi}

Professor of Law, University of Illinois College of Law

Gregory F. Laufer^{vii}

Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP

Doug has been involved with more than 80 SPAC merger transactions. Doug is considered to be one of the top SPAC practitioners in the industry. Under his leadership, Ellenoff Grossman & Schole LLP has built a market-leading SPAC practice. The firm annually outpaces much larger and more traditional big law firms in both the number of deals completed and total transaction volume. Doug earned his bachelor's degree from Vassar College and his law degree from Fordham Law School.

iv. Stephen Fraidin is a partner in the corporate department at Cadwalader, Wickersham & Taft LLP. Steve is recognized as one of the most highly regarded and honored corporate, M&A, and corporate governance lawyers in the world. During his career, Steve's practice has ranged from M&A, representing bidders and targets in hostile M&A, private equity, corporate governance, proxy contests representing targets and investors, hedge fund activism and responses, and, recently, all aspects of SPACs. In each of these areas, he has represented large clients in their most consequential matters, including Procter & Gamble in its major acquisitions and dispositions, Forstmann Little in the creation of its private equity funds and on virtually all acquisitions and sales, 3G Capital on its major acquisitions, Adelphia Communications in dealing with a disclosure scandal, Pershing Square in its proxy contest for representation on the Board of Canadian Pacific, and NRG Energy in turning back a hostile bid and related proxy contest from Exelon. Recently, he represented Thoma Bravo in its \$1 billion SPAC IPO and Pershing Square Tontine Holdings in its groundbreaking \$4 billion SPAC IPO, for which he was named "Dealmaker of the Year" by *The American Lawyer*. Steve has authored and co-authored a number of articles, including "The Evolution of Private Equity and the Change in General Partner Compensation Terms in the 1980s," which was published in the *Fordham Journal of Corporate & Financial Law*, Volume 24, 2019. Prior to joining Cadwalader, Steve was Vice Chairman of Pershing Square Capital Management and a senior partner at two major law firms. Steve received his bachelor's degree from Tufts University and his law degree from Yale Law School.

v. Mark Lebovitch co-leads Bernstein Litowitz Berger & Grossmann LLP's corporate governance litigation practice, focusing on the startup and conclusion stages of derivative suits and transactional litigation. Working with his institutional investor

clients, he fights to hold management accountable, pursuing meaningful and novel challenges to alleged corporate governance related misconduct and anti-shareholder practices. A seasoned litigator, Mark also prosecutes securities fraud class actions and has been a senior or lead member of the trial teams on some of the most high-profile securities fraud class actions and corporate governance litigations in history. His cases regularly result in key legal precedents while helping recoup billions of dollars for investors and improving corporate governance practices. Mark is leading numerous of the firm's cases involving special purpose acquisition companies, including claims in Delaware's Court of Chancery, such as *In re MultiPlan Stockholders' Litigation*, a number of cases alleging violations of the shareholder franchise in de-SPAC proxy solicitations, as well as a series of novel federal actions involving alleged violations of the Investment Company Act by a number of SPACs. Mark earned his bachelor's degree cum laude from Binghamton University, State University of New York and his law degree cum laude from New York University School of Law.

vi. Verity Winship is the Associate Dean for Academic Affairs and a Professor of Law at the University of Illinois College of Law. Her academic interests are in the area of business law and complex litigation, and her research focuses on corporate litigation, securities enforcement, and disputes that cross legal systems. Professor Winship's articles have appeared in the *Vanderbilt Law Review*, *Boston University Law Review*, the *Delaware Journal of Corporate Law*, and the *Stanford Journal of Complex Litigation*. She is former chair of the Association of American Law Schools (AALS) securities regulation section (2016–2017) and is on the executive committee of the AALS civil procedure section. She is a regular radio commentator for "Legal Issues in the News," on WILL-AM-FM Illinois Public Radio. Professor Winship is an honors graduate of Harvard College and Harvard Law School, where she served as an executive editor of the *Harvard Law Review*. After graduating, she clerked for Judge Lewis A. Kaplan, United States District Court for the Southern District of New York, and then for Judge Marjorie O. Rendell, United States Court of Appeals for the Third Circuit. She also practiced law with WilmerHale in New York City in the area of securities enforcement and litigation. Professor Winship began her academic career as a visiting assistant professor at Fordham and Cardozo law schools. She joined the University of Illinois College of Law faculty in the fall of 2010.

vii. Gregory F. Laufer is a partner in the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, where his practice focuses on commercial litigation matters. Greg represents clients in securities litigation, bankruptcy and restructuring matters, employment law, intellectual property matters and complex commercial disputes. He also has worked on international arbitrations, regulatory matters and internal investigations. Greg is actively involved in the firm's SPAC practice and thought leadership. Over the past year, Greg has provided counsel to several SPACs and their sponsors, including: Altimar Acquisition Corporation II in its combination with Fathom Digital Manufacturing Corporation, an industry leader in on-demand digital manufacturing services; Altimar Acquisition Corporation in its combination with Owl Rock Capital Group and the Dyal Capital Partners division of Neuberger Berman Group LLC to form Blue Owl Capital Inc. creating a stand-alone firm with over \$45 billion in combined assets under management; and Trine Acquisition Corp. in its

**PANEL THREE: HOW SHOULD SPACs BE TREATED GOING
FORWARD (IPOS, MERGERS, OR DISTINCTLY DIFFERENT?)**

Gregg A. Noel^{viii}

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Rick Fleming^{ix}

Investor Advocate, Securities and Exchange Commission

Usha R. Rodrigues^x

Professor of Law, University of Georgia School of Law

Mike Stegemoller^{xi}

Professor of Finance, Baylor University Hankamer School of
Business

combination with Desktop Metal Inc., an industry leader in mass production and turnkey additive manufacturing solutions, offering the fastest metal 3D printing technology in the market. Greg earned his bachelor's degree from Georgetown University, his master's degree from l'Institut d'Études Politiques de Paris, and his law degree from Cornell Law School. After law school, Greg served as a law clerk for Judge D. Michael Fisher of the United States Court of Appeals for the Third Circuit and former Chief Judge Curtis V. Gómez of the United States District Court of the Virgin Islands.

viii. Gregg A. Noel is the head of Skadden, Arps, Slate, Meagher & Flom LLP's West Coast capital markets practice and is recognized as one of the leading capital markets attorneys in the country, representing clients in public offerings, private placements, dispositions, corporate restructurings, and mergers and acquisitions. Gregg has an active practice representing SPACs, with his team advising on more than 325 SPAC IPOs since 2006. Among many other groundbreaking SPAC deals, Gregg handled the \$690 million IPO for Social Capital Hedosophia Holdings Corp., which was recognized as the top matter in the "Driving Value" category in *The Financial Times*' 2017 Innovative Lawyers report, as well Social Capital's subsequent IPOs. Gregg was recognized in 2021 as one of *The American Lawyer*'s inaugural Trailblazers of the West, which honors leading attorneys who have "moved the needle in the legal industry." In 2020, *The Daily Journal* recognized him as one of the Top 100 Lawyers in California. Additionally, on the strength of client and peer feedback, he repeatedly has been recognized in *The Best Lawyers in America*, which named him a 2020 Lawyer of the Year in the area of Securities/Capital Markets. Gregg earned bachelor's degrees *magna cum laude* from Loyola Marymount University, and his law degree *cum laude* from Loyola Law School, where he was a member of the St. Thomas More Law Honor Society.

ix. Rick Fleming was appointed in February 2014, to be the first director of the Office of the Investor Advocate at the U.S. SEC and served in this role until July 2022.

As the Investor Advocate, Rick built an office charged with the responsibility for assisting retail investors in their interactions with the Commission and self-regulatory organizations (SROs), analyzing the impact on investors of proposed rules and regulations, identifying problems that investors have with financial service providers and investment products, and proposing legislative or regulatory changes to promote the interests of investors. In addition, he has introduced a new program which utilizes surveys and other research methods to help the Commission understand the needs of investors. Prior to joining the Commission, Rick spent 15 years as a state securities regulator, including more than a decade as General Counsel for the Office of the Kansas Securities Commissioner. He represented the state in a broad range of disciplinary proceedings against broker-dealers and investment advisers, prosecuted criminal cases involving securities fraud, and drafted legislation and regulations to protect investors. He moved to Washington, D.C. in 2011 to become the Deputy General Counsel for the North American Securities Administrators Association (NASAA), where he advocated for investors and represented the organization of state securities regulators before Congress and federal agencies, including the SEC. Rick was raised in the small town of LeRoy, Kansas, graduated *summa cum laude* from Washburn University with a dual major in finance and economics, and holds a law degree from Wake Forest University.

x. Usha R. Rodrigues is a University Professor and the M.E. Kilpatrick Chair of Corporate Finance and Securities Law at the University of Georgia School of Law. Professor Rodrigues joined the University of Georgia (UGA) School of Law's faculty in the fall of 2005 and was named the holder of the M.E. Kilpatrick Chair of Corporate Finance and Securities Law in 2014. She was awarded the title of University Professor in 2019, an honor earned by a single UGA faculty member each year and reserved for professors who had served as "change agents" at UGA. Since 2014, she has served as the University Council's parliamentarian and, from 2015 to 2018, she served as the school's associate dean for faculty development. Additionally, she holds a courtesy appointment in UGA's Terry College of Business. Prior to joining the faculty at UGA, Professor Rodrigues was a corporate associate with Wilson Sonsini Goodrich & Rosati in Reston, Va., where she specialized in corporate law and technology transactions. She also served as a judicial law clerk to Judge Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit. Professor Rodrigues remains active in the legal profession. She has served as an expert in both litigation and transactional matters, testified before the House Financial Services Committee, and has been quoted in *The New York Times*, *The Financial Times*, *The Wall Street Journal* and other publications. Her scholarly work has appeared in the Virginia, Illinois, Iowa, Minnesota, Fordham, Emory, Florida, and Washington and Lee law reviews, among others. She has also published in online fora of the Vanderbilt, UCLA, Texas, and Harvard Business law reviews and in the peer-reviewed *Journal of Corporate Finance*. She has served as the chair of the Executive Committee of the Association of American Law Schools Business Associations Section and as the president of the Law and Entrepreneurship Association. She was elected to the American Law Institute in 2016. Professor Rodrigues earned her bachelor's degree *summa cum laude* from Georgetown University, her master's degree in comparative literature *summa cum laude* from the University of Wisconsin and her Juris Doctor from the University of Virginia, where

KEYNOTE ADDRESS

**INSIDE CHICKEN: REMARKS AT THE *FORDHAM JOURNAL OF
CORPORATE & FINANCIAL LAW* SYMPOSIUM**

Hester M. Peirce^{xii}

Commissioner, Securities and Exchange Commission

she served as editor-in-chief of the *Virginia Law Review* and was inducted into the Order of the Coif.

xi. Mike Stegemoller is the Harriette L. and Walter G. Lacy, Jr., Chair of Banking and Finance at Baylor University. Professor Stegemoller joined the faculty at Baylor University in the fall of 2010 and was named the holder of the Harriette L. and Walter G. Lacy, Jr., Chair of Banking and Finance in 2017. From 2013 to 2019, he served as chair for the Department of Finance, Insurance, and Real Estate. He is also an Affiliated Faculty member of Baylor's Great Texts Department. Professor Stegemoller is also active in community banking. He is a board member of Texas Heritage Bank and Southwestern Bancorp. His scholarly work has appeared in the *Journal of Finance*, *Journal of Financial Economics*, *Review of Financial Studies*, *Review of Finance*, *Journal of Corporate Finance*, *Financial Management*, and the Virginia and Wake Forest law reviews. He served as an Associate Editor for the *Journal of Corporate Finance* and the *Journal of Financial Research*. Professor Stegemoller earned his bachelor's degree from Abilene Christian University, master of business administration from Baylor University and Ph. D. in finance from the University of Georgia.

xii. Hester M. Peirce was appointed by President Donald J. Trump to the U.S. SEC and was sworn in on January 11, 2018. Prior to joining the SEC, Commissioner Peirce conducted research on the regulation of financial markets at the Mercatus Center at George Mason University. She was a Senior Counsel on the U.S. Senate Committee on Banking, Housing, and Urban Affairs, where she advised Ranking Member Richard Shelby and other members of the Committee on securities issues. Commissioner Peirce served as counsel to SEC Commissioner Paul S. Atkins. She also worked as a Staff Attorney in the SEC's Division of Investment Management. Commissioner Peirce was an associate at Wilmer, Cutler & Pickering (now WilmerHale) and clerked for Judge Roger Andewelt on the Court of Federal Claims. Commissioner Peirce earned her bachelor's degree in Economics from Case Western Reserve University and her law degree from Yale Law School.

WELCOME AND INTRODUCTORY REMARKS

AJ HARRIS: Hi everyone. If we can have your attention, we're going to get today's program started. Thank you, Dean Diller. Thank you everyone for joining us today. We're very excited to have you. Welcome to the *Journal of Corporate & Financial Law's* Symposium. We're very excited for today's program. And with that, I'll hand it over to the Dean, to give opening remarks.

DEAN DILLER: Thank you, AJ. And thank you for your phenomenal work on putting together today's program. I'm Matthew Diller, I have the honor of being the Dean of Fordham Law School. I want to welcome all of you.

I have in front of me a room full of fantastic Fordham students, it's great to see you all here. And then I know there are many others streaming online and viewing this on the webinar, so I want to greet you all, and welcome to our law school in the virtual sense. I'm so glad we are doing this program today around such an important set of issues, but before I get to that, let me just say I'm incredibly proud of the *Journal of Corporate & Financial Law*, it is one of the jewels of our law school. And indeed, our business law curriculum, our Center on Corporate Law, our corporate law faculty, are all crown jewels of Fordham Law. Fordham lawyers have long made a mark on corporate and financial law in this city, in this country, and around the world. And I, as Dean, am committed to supporting our school's presence and impact on the field. The *Fordham Journal of Corporate & Financial Law* is one of the leading journals in the field. It's one of the most cited journals in the field. And I'm proud to support all of your work and to all of you staff members and editors on the *Journal*, I say to you, congratulations. I applaud all of your work and I'm here to support you.

Today's Symposium is yet another in a fantastic series of symposia that the *Journal* has done over the years, and today's topic couldn't be more relevant, timely, and important. It also has not received as much attention and scholarship as it really deserves.

Today's focus is on special purpose acquisition companies, known as SPACs. Over the past two years, these corporate structures have risen to prominence as an alternative to the traditional avenues for tapping into the public financial markets. And this year, SPACs represent the largest sector of initial public offerings (IPOs). This sudden popularity has provoked scrutiny from all directions, particularly from investors, litigators, and regulators.

And in honor of today's Symposium *The New York Times* decided to have a major article on SPACs, which I hope you've all seen.¹ The hook being the fact that the new Trump social media platform is financed through a SPAC, and *The Times* says today SPACs have:

[H]ad a dubious reputation because they give struggling or untested companies that would otherwise not find backers a pathway to public markets. But in recent years, these lightly regulated entities have become all the rage because with interest rates remaining low, investors are eager for new places to put their money to work. [And] [i]n the past 2 years, such companies have raised 190 billion dollars from investors.²

I know there are a lot of contestable statements in that quote from *The New York Times*, and I know that we have among our incredibly distinguished speakers today experts on both sides and all sides of this issue, as well as regulators, providing that perspective as well. So, I applaud the *Journal*, and I want to thank all of our speakers for really enlightening us on what I know will be a fascinating discussion, and as you can just see from that sentence, is one that will be subject to hot debate, and I can't imagine a better place to do it than here with us.

In addition to our cadre of leading practitioners, scholars, and advocates at the forefront of the field, we are also honored to welcome Commissioner Hester Peirce of the SEC as today's keynote speaker, and she will be speaking later in the afternoon. I also want to take a moment, before we launch in, to thank all those who made this possible, and in particular to thank within our own Fordham administration, Shanelle Holley, who's here today. Thank you for all your work to support this event and bring it to happening. And I also want to thank the *Journal's* faculty advisors, Professors Caroline Gentile and Sean Griffith, for their guidance and support. And I particularly want to thank the *Journal's* Volume XXVII staff for all your hard work in putting together today's program, and also AJ Harris for your leadership. AJ is the Symposium

1. See Andrew Ross Sorkin, Jason Karaian, Sarah Kessler, Stephen Gandel, Michael J. de la Merced, Lauren Hirsch, & Ephrat Livni, *This Hedge Fund Manager Dumped Trump*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/business/dealbook/boaz-weinstein-trump-spac.html> [https://perma.cc/99XP-M3SC].

2. See David Enrich, Matthew Goldstein, & Shane Goldmacher, *Trump Takes Advantage of Wall Street Fad to Bankroll New Venture*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/10/21/business/media/trump-spac-social-media-venture.html> [https://perma.cc/563G-CGPD].

Editor, you'll hear from him shortly. And finally, I want to welcome back two of today's panelists who have deep Fordham ties: Doug Ellenoff, who is a fantastic Fordham alum, and Professor Verity Winship, who I remember well from her days teaching on our faculty at Fordham. It's great to have you back both with us. I wish you all a great afternoon and I'm sure you'll have great discussions. Take care, everyone, thank you.

AJ HARRIS: Thank you Dean Diller for the introduction and for your unwavering support of the *Journal*. Before getting started, I'd like to extend a round of thank you's to echo Dean Diller and to thank everyone who made today's program possible. Thank you to all of Media Services for your help with producing and broadcasting today's event. Thank you, Shanelle Holley, for organizing today's set up, especially for your help in providing snacks and sustenance to our in-person audience. Thank you to the *Journal's* faculty advisors, Professors Caroline Gentile and Sean Griffith for your support and guidance. Thank you, Alexandra Bieler, the *Journal's* fabulous editor-in-chief, and Amanda Lindner, the *Journal's* wonderful managing editor, for your support and leadership in preparation for today's event. Thank you to the Symposium Committee for your hard work and preparation leading up to today. Thank you to the panelists and to the Commissioner for joining us today. We are lucky to have you and are eager to hear from you. On behalf of Fordham's *Journal of Corporate & Financial Law*, I would like to welcome everyone to today's Symposium. You're in for a wonderful program today.

This Symposium is entitled, "Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market." The panels will examine the structural evolution of SPACs up to current best practices, discuss the present state of litigation enforcement, and debate whether SPACs deserve distinct regulatory treatment, and then we'll be joined by Commissioner Hester Peirce of the SEC for keynote remarks.

PANEL ONE: HISTORY AND EVOLUTION OF THE SPAC MARKET

AJ HARRIS: The first panel will discuss the evolution of the SPAC structure up to its current form. Doug Ellenoff is a partner at Ellenoff Grossman & Schole and is widely considered one of the preeminent SPAC practitioners. He's also a Fordham Law grad. Steve Fraidin is a partner at Cadwalader, Wickersham & Taft (CWT). Steve has worked on some of the largest and most complex SPAC transactions and is considered a legend of M&A. A full bio for each panelist can be found in our program materials. Doug and Steve, if you'd like to turn on your cameras, the floor is yours.

DOUG ELLENOFF: Thanks AJ, really appreciate the introduction and thank you Fordham for hosting this event and to Dean Diller for having us. Steve, you want to kick us off?

STEVE FRAIDIN: Sure. And AJ, thank you very much. Thank you for the kind reference to me, which I'm sure is unaffected by the fact that you were a summer associate at CWT last summer and you know that it's wise to compliment senior partners. So I thank you for your wisdom.

So, I would say that if somebody had asked me a couple of years ago whether I was a SPAC lawyer, I would have thought they were joking. Because, while I had worked on one SPAC transaction in my long career, I was surely not among the SPAC bar—and Doug Ellenoff, for example, is one of the leaders, if not *the* leader in the SPAC bar—so I would have said: “I don't know very much about SPACs, I've heard of them, they're kind of an afterthought in the capital markets, but they're not part of the main story.”

And so, what's happened? Why am I here? I'm here because, after years and years of being an afterthought in the capital markets, SPACs became an overnight success. It's sort of like the story about these rock singers who spend years being the opening act and then after 20 years they become an overnight success and they are doing platinum records. Well, there's plenty of platinum being thrown around in the SPAC area right now. So, what's happened?

Well, I think in the first place, a lot of people have been unhappy for a long time with the IPO process—the traditional IPO process—which I would suggest has gotten less user friendly over the years, as the

number of regional investment banking firms that did underwriting has shrunk and they've been acquired by the major capital markets firms. So now a company that wants to go public through the traditional IPO market has to deal with a major New York based capital markets firm, and to a lot of them that's not a whole lot of fun.

The second thing that happened was that the way SPACs are structured, investors in the IPO buy stock, that money goes into a trust fund, the SPAC then has an opportunity to identify a potential business partner, they announce the business partner, and then people have the right to get their money back out of the trust fund or to participate in the transaction. At a time of high interest rates, the amount of time that the money is stuck in that trust fund can be expensive to an investor and that makes SPACs not so attractive. During incredibly low interest rate periods, such as now, putting the money into the trust fund is not very expensive at all to investors. It gives them effectively a right of first refusal on a business combination transaction, it's entirely safe. They can get their money out, so that makes a SPAC more attractive. So we've had a proliferation of SPACs in recent years and that has done what it always does in the capital markets, it's made returns more challenging for the people who participate in that market.

The same thing happened in the 1980s, with respect to private equity. The early private equity firms, and I represented Forstmann Little, which was one of the earlier ones, but the earlier private equity firms were generating rates of return of 50 percent and 60 percent. As hard to believe as that is, but that all changed as the number of private equity firms proliferated. The same thing has happened to the SPAC market where it used to be relatively plausible that you could put together an initial business combination transaction that was highly profitable to the sponsor and the investors. It's much more challenging to do that now, with so many SPACs out there.

So what hasn't happened to SPACs in this incredible boom and the number of SPACs that have been created? Well, one thing that hasn't happened is that there hasn't been a major scandal. There hasn't been a Bernie Madoff of SPACs, there hasn't been an Enron of SPACs. And yet, despite the fact that there really hasn't been a major scandal, there have been plenty of imperfections. Plenty.

But, despite the fact that there hasn't been a major scandal it's become a major concern in a lot of areas. The first place, the SEC is clearly skeptical about SPACs. You don't have to read between the lines; you can read the lines. Chairman Gensler who's a very

sophisticated capital market person, has expressed skepticism about SPACs. And the SEC staff has raised accounting issues and disclosure issues regarding SPACs. I would characterize those issues as not central to the way SPACs operate, but they're important enough issues that they have delayed and made more complicated SPAC offerings and de-SPAC transactions, or initial business combinations. Secondly, and I think it's related, there has been academic commentary, in particular, a really great article written by Mike Klausner and Michael Ohlrogge, which points out the very, very large amount of dilution resulting from the sponsor compensation in SPAC offerings.¹ And the article is accurate; it does point out how much the sponsors make and how little they risk in SPAC transactions.² And I think the article has had a lot of impact, both at the SEC, and just generally in the marketplace, but I will point out that the focus on fees is a focus that is often heard in academia, but to investors if they have an opportunity for a significant reward, the fact that they're paying big fees is often not as much of a deterrent to their investment as academics would think it should be.

I do want to point out that this week *The New York Times* had an article about how some of the Ivy league universities, their endowments had returned over 50 percent in the case of Yale's and over 30 percent in the case of Harvard.³ Not surprising Yale would be doing better than Harvard, and that other Ivy league universities are in the 40 percent to 50 percent range.⁴ Those are amazing returns. *The Times* article also pointed out that the fees paid to the private equity managers, who were almost entirely responsible for these returns, were very big fees and, in fact, they exceeded the amount paid to scholarship recipients at these universities. A comparison that strikes me as almost 100 percent irrelevant, but the point that was being made is that, in order to get these amazing returns these university endowments were paying big fees and that's sort of the story in asset management, that to get big returns, you often have to pay big fees. Now, private equity managers have more downside risk than SPAC promoters, but the criticism of the SPAC

1. See generally Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228 (2022).

2. *Id.* at 246-48.

3. See Stephen Gandel, *Big Endowments Make Billions in Returns in a Bumper Year*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/business/university-endowments.html> [<https://perma.cc/6953-XHMM>].

4. *Id.*

compensation, which was included in that excellent Law Review article, is a criticism that I think has really resonated.⁵

The third development has been litigation—private litigation. And I think Mark Lebovitch who is going to be speaking later can discuss that. I'm not going to talk about two of the litigations that I'm involved in: one is Nikola, and the other is the Pershing Square Tontine Holdings.⁶

So I'm not going to talk about those, but I will say that, generally, one of the most interesting aspects of the litigations that have been brought is that they have focused on the buyer. Virtually all M&A litigation in the past has been focused on the target company. The claim has always been the target company didn't get enough, the target company didn't run a fair enough or efficient enough process to get enough for its shareholders. And it's been very little litigation against buyers. SPAC litigation effectively is against the buyer. That has changed the situation in what I think is an intellectually interesting way and then with all of those three things going on what we're seeing is predictively interest on the part of politicians.

Some liberal progressive politicians have written letters to a number of SPACs.⁷ I've asked for a lot of information and it's pretty clear that they're trying to understand the phenomena and trying to understand whether additional regulation is called for, under these circumstances, and I don't think I'm going to be too cynical if I say that they're also trying to position themselves in a way that if it turns out to be popular to bash SPACs, they will be among the leaders in that movement.

So where do I think things are going? Well, I think that the great boom in the number of SPACs that took place for a couple years is over.

I also think that the existence of SPACs as an afterthought in the capital markets is also over. I think people now are more familiar with them, I think they're going to be more of a presence in the capital markets, but they are not going to be as incredibly explosive in number, as they have been. I think the number of SPACs is going to slow down

5. See Klausner et al., *supra* note 1.

6. See, e.g., *Assad v. Pershing Square Tontine Holdings, Ltd. et al.*, Docket No. 1:21CV06907 (S.D.N.Y. Aug. 17, 2021).

7. Letter, Warren, Brown, Smith, and Van Hollen Request Information from SPAC Creators Amid “Astonishing” Reports of Abuse and Market Dysfunction (Sept. 22, 2021), <https://www.warren.senate.gov/oversight/letters/warren-brown-smith-and-van-hollen-request-information-from-spac-creators-amid-astonishing-reports-of-abuse-and-market-dysfunction> [<https://perma.cc/7DSP-L8BF>].

to somewhat more than a trickle but not at all to zero. I think it's going to be more challenging for existing SPACs to do their initial business combination since there's lots and lots of competition out there. I think there's got to be more disclosure—enhanced disclosure. The SEC staff is clearly focused on that and to most securities lawyers, we don't have a whole lot of problems with enhanced disclosure. You do reach a point where the disclosure becomes so prolix, where it doesn't really tell people very much, but I do think that there's an opportunity for increased disclosure. And then the final thing is one that I'm involved in: Bill Ackman from Pershing Square is trying to develop a new kind of acquisition vehicle which he calls a SPARC, a special purpose acquisition rights company.⁸ The theory of this is that there would be a distribution of rights that would give people the opportunity to participate in an initial business combination, and it would be an opt-in structure, rather than opt-out.⁹ In the current structure, if somebody doesn't want to participate in an acquisition transaction, they've got to ask for their money back and then they get it back.

In the SPARC structure, it would mean that somebody has to voluntarily put their money into the transaction rather than asking for it to come back which would make it, I think, a more attractive transaction, particularly in times of relatively high interest rates. We're going to see where that goes. The New York Stock Exchange has proposed a rule that the SEC is considering that would enable the existence of SPARCs.¹⁰ If that rule is not adopted, I don't think we can do it, but if it is adopted, I think we can. There's a lot of details that have to be worked out. We're talking with the staff about some of those details. This is far from a done deal, but it may well be that that's yet another development in the acquisition company landscape and one that I think presents some interesting opportunities.

Doug, do you want to pick up?

8. Lydia Beyoud et al., *Ackman's SPAC Twist Faces Slow Going with Risk-Wary Regulators*, BLOOMBERG LAW (Aug. 26, 2021, 6:00 AM), <https://news.bloomberglaw.com/securities-law/ackmans-spac-twist-addresses-capital-woes-but-faces-sec-hurdles> [<https://perma.cc/K256-FYZM>].

9. *Id.*

10. See Exchange Act Release No. 92876, 86 Fed. Reg. 50748 (Sept. 3, 2021). Comments received on the proposal are available on the Commission's website at <https://www.sec.gov/comments/sr-nyse-2021-45/srnyse202145.htm> [<https://perma.cc/BJ22-TCQH>].

DOUG ELLENOFF: Sure, I just think it might be helpful to go back to 1993 to level set. I think we can tackle the commercial issues which will be touched upon later by some of the professors. You obviously cite the Klausner piece, but we're here at Fordham Law School and one thing that has to be made abundantly clear is that since 1993 when the SEC adopted Rule 419, there is no sunshine between the industry and the regulators. This SPAC program has evolved, which is the title of the Symposium, over a nearly 30-year period *cooperatively* between commercial parties and regulators.

In 1993 when the SEC adopted Rule 419, there were practitioners at that time, David Miller in particular from a firm called Graubard Miller, who worked closely and cooperatively with the SEC to improve the rules in order to make the beginnings of what I call "Generation-1" SPAC. There was nothing in those rules having to do with locking up the founder shares or having a personal indemnity at that time from the sponsors.

It was the approach that both the regulators and the commercial people talk to improve the program which brings us to how a program evolves. You can look up what we've done, we are programmatic lawyers. It's not just SPACs, it's PIPEs (private investments in public equity), it's registered direct crowdfunding and NFTs (non-fungible tokens) now. We know how to start with a program and improve it over the years, to make it more commercial and regulatory acceptable. We take both of those responsibilities seriously, but the suggestion by *The New York Times* that SPACs are lightly regulated is laughable given that over the 30-year period there been over one thousand SPACs that have walked through their door, been reviewed, cleared. Then the business combination is no different than an IPO or a M&A deal that CWT works on in their regular practice. It's a 150-page book full of disclosure and audited financial statements that is reviewed by the industry groups at the SEC. They are commented upon. They are reviewed and ultimately, they are cleared to make sure that those securities are in compliance with the federal securities laws. It is inaccurate to suggest that it is lightly regulated; not only is it highly regulated and has been for 30 years, over that same number of years, there have been lots of issues that the staff has raised that we've worked on and worked through cooperatively with them.

The issue that Steve is working on with Bill Ackman on the '40 Act—again, the suggestion that this is a new issue is inaccurate. In 2006 or thereabout, I worked on several deals where the division at the SEC

that regulates the '40 Act raised issues and we worked through those issues with them. There is nothing that we have changed in our convention or practice that in any way would now make it so that they would want to start to regulate SPACs back under the '40 Act, notwithstanding the two professors who brought the litigation against Bill Ackman, one of them after leaving the SEC.¹¹ There are many other small issues that we have grappled with and try to work with the SEC to improve the program to protect investors.

I don't accept the notion at all that more disclosure is necessary. It's almost impossible to think of more disclosure that we could add. Jay Clayton, before he left the SEC, there was an initiative to ask the law firms to add more disclosure into the S-1's back in January and February 2021, which we willingly did to the extent that it was even necessary. Most of the issues that he raised are things that were already being tackled. We've now heard for 9 months that there are new issues that need to be disclosed.¹² In my way of looking at it, you have the top law firms, top investment banks, and top accounting firms in the country dutifully putting together these deals, and nobody is doing it in a manner that I think is slipshod. Up until 2 years ago, the number of litigations that there were in the SPAC industry was fewer than five. *Five*. Now because of the program has expanded, and now there are hundreds of SPACs that have been done, the plaintiff's bar, not surprisingly, has found the SPAC program. The issues that they've raised by and large are issues that I don't criticize them for because if, in fact, a deal gets done where there isn't appropriate due diligence or evaluation or they put out projections that are too fancy, there ought to be consequences in those instances, but those are the exception, and certainly not the rule, and certainly not the rule over the 30 years that we've been doing SPACs.

You then have to peel back and say what are we accomplishing here? The whole point of a SPAC is to not be an IPO. SPACs are not a backend way of getting into the public markets. It's anything but that.

11. Alison Frankel, *Law Profs Defend Theory That SPAC Is Illegal Under Investment Company Act*, REUTERS (Nov. 1, 2021, 4:27 PM), <https://www.reuters.com/legal/transactional/law-profs-defend-theory-that-spac-is-illegal-under-investment-company-act-2021-11-01/> [<https://perma.cc/29EK-74YZ>].

12. *See generally* "SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings and Risk Factors Under Regulation S-K," SEC Press Release 2020-192, Aug. 26, 2020; available at: <https://www.sec.gov/news/press-release/2020-192>.

It's fully reviewed. The point of a SPAC is there a lot of quality companies out there, historically and hopefully currently, that deserve to be public, but because of the structure of our capital markets and the size of deals that have to get done by underwriters to pay the appropriate fees to get things done, underwriters won't look at other sorts of deals that are perfectly adequate for the public markets. There's no place in our federal securities laws that says that a company has to be hatched to a certain level in order to be meritorious to be public. In fact, I sat on a panel in Congress 3 years ago, maybe 4 years ago, with one of the professors here today, and the whole subject of it was how come private companies are staying private longer and they won't go public. We have to get our narrative straight. After 30 years of practicing since I was at your great law school, we've halved the number of public companies in our market. So now we have found a way that is more interesting for target companies to go public, not because they are not providing full and fair disclosure—again they are—but because there are other things to that facilitate the transaction. There's a simultaneous financing that validates the deal and the value of the deal. There are projections, that I believe the partner from Bernstein Litowitz will focus on, that are permissible in a SPAC context, that presumably Congress is going to undo, that's not permissible in an IPO. Rather than dumb down the SPAC program in order to advantage the IPO program as if it's the holy grail of getting companies public, I think we have to sit back and ask what are the good features, what are the bad features, and what are the ways that we want to encourage private companies to be public.

I think it's an outstanding phenomenon in the last 2 years that we've gone from the SPAC program just being a vehicle for taking private equity-like deals public, and then all of a sudden with Virgin Galactic and all the electric vehicle companies that I'm sure you've all read about, we are now financing real venture-like deals. The reason the investors like those is they're tired of all that deal flow going to Silicon Valley to get venture financing and not being financed in a public market. Yes, some of them will fail. But from a totality point of view, it is good and healthy that we are repopulating the public company universe that's been decimated during my professional career. Does that mean it's above criticism from commercial analysis like Klausner or the other professors who are going to take you through some of the returns?¹³ I would disagree that it's a great report. I think it's cherry-

13. See Klausner et al., *supra* note 1.

picking data during periods of time that happen to give them returns that are pre the last 2 years—they haven't been updated as I'm aware. That doesn't mean every SPAC is going to work out. Has anyone bothered to look at how IPOs are performing this year? A very healthy percentage of them have not gone up. Are we revisiting reforming the IPO market because the Didi deal failed?¹⁴ What went wrong there? Why don't we have a panel about how IPOs don't work anymore?

So let's level set and say there are things that need to be improved in the SPAC program, potentially but not from a regulatory point of view, because there is nothing wrong with what the securities professionals do here. If you want to implement rules like are being bandied about in Congress that brokers can't recommend securities to certain investors, where there's a 5 percent promote. Okay, I don't really have a problem with that. I want to protect individual investors. I'd like the program better before we had the Reddit crowd going into the deals, but let's have an honest conversation because it's absolutely inaccurate to suggest that the disclosure in a SPAC is anything less thorough and diligent than in an IPO or a M&A transaction.

Having said that, and then I'm going to pass it back to Steve, I apologize for evangelizing, but I do get passionate about it, since I've done 350 of these and 125 business combinations and I don't see the need to stigmatize the program.

It's an evolving program. The whole point of this conference is to talk about what things we could do different or better. One of the things that I will share with you today is that I'm working with Jim Zukin from Houlihan Lokey, who did fairness opinions and solvency opinions; he and his colleague Ari Schottenstein have come up with a new certification for readiness to give comfort to the market that these private companies are ready for prime time.¹⁵ They've spent a lot of time on the program and that's just one innovation. You mentioned the SPARC. Let's not go after people who are trying to do things differently. The old way of doing them like IPOs isn't the only game in

14. *Didi Global's Rapid Ride from IPO Star to Regulatory Target*, REUTERS (Sept. 3, 2021, 8:31 AM), <https://www.reuters.com/world/china/didi-us-debut-overshadowed-by-china-cybersecurity-probe-2021-07-05/> [<https://perma.cc/SS8A-TH6M>].

15. *Zukin Partners Launches Zukin Certification Services to Support High Quality SPACs*, BUSINESSWIRE (Dec. 13, 2021, 2:03 PM), <https://www.businesswire.com/news/home/20211212005131/en/Zukin-Partners-Launches-Zukin-Certification-Services-to-Support-High-Quality-SPACs> [<https://perma.cc/F5ZE-HACD>].

town anymore. Disruption in any other industry is embraced except in the legal business.

Fifteen years ago, the PIPE industry would be criticized because it was something new and different and now it's on the main stage; it's financing companies every single day, and so I think we have to be very careful what we're doing here. I would give you the quote that I came up with from Commissioner Peirce because I think she's completely right-minded. The 1933 Act is a "disclosure based-regime."¹⁶ It is not a "merit review."¹⁷ I think we have to be very careful about what we're doing here, because the last 9 months there's been a steady drip of regulatory initiatives that could have been tackled one time if it was intellectually honest to say these are the improvements we need to make, as opposed to intentionally trying to slow down a program that largely is doing good and giving investors options. It's frustrating to see in a program that I personally have worked on for 25 years.

Steve, want to jump in?

STEVE FRAIDIN: Well first, obviously I'm not as evangelical about this. I like to think that I'm kind of objective. On the other hand, I think that your fundamental position, which is that there's nothing inherently wrong with SPACs, is right. It's as right as there's nothing inherently wrong with private equity managers charging a 20 percent carry and there's nothing inherently wrong with hedge fund managers charging a 20 percent or 30 percent carry. I know that sounds like a lot of fees and the sponsor promote tends to be 20 percent. I know that that sounds pretty expensive, but people voluntarily do it. Nobody hides it. There is full disclosure there. I will say that I think that the process that has been followed in initial business combinations for SPACs is not as highly articulated as the process that people have followed in more conventional business combination transactions, so it is the rule rather than the exception that there are investment banker fairness opinions. In typical business combinations, it is the exception and not the rule that there are fairness opinions; with respect to SPAC initial business combinations, I think that's going to be a convergence of the way these deals are done. I think we're beginning to see it. That's going to be a development that I think is probably a good one: I think it's going to be

16. Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at the University of Michigan Law School: Wolves and Wolverines (Sept. 24, 2018), <https://www.sec.gov/news/speech/speech-peirce-092418> [<https://perma.cc/U9W4-Q2WF>].

17. *Id.*

reassuring to the SPAC investors and I think it's going to result in transactions that are more favorable.

DOUG ELLENOFF: If can we go slow motion on that for one second.

STEVE FRAIDIN: Okay.

DOUG ELLENOFF: So, for 20 years, no fairness opinions. Okay, I acknowledge that. But starting about a year-and-a-half ago, things started to change. Part of that evolution is brought about by Mark Lebovitch and Bernstein Litowitz. That's fine. That's all for the good, but the suggestion that a fairness opinion is better than a simultaneous financing—a market-clearing pricing by institutional investors—just defies what I've learned in the capital markets. Now if Mark or somebody was to suggest “well they're getting other goodies,” that undermines that argument. But as a starting point to a conversation, and this is why SPACs are better than IPOs for the target company, you sign a letter of intent (LOI) with the target. And in 45 days you've introduced them to the most sophisticated institutional investors who understand that vertical and ask them, “are they in.” If they come in at \$10 a share, which is a worse deal than the public investors who are also getting a warrant, they're committing for 4 months. And you're also getting a fairness opinion, that's better than just what we do in an IPO, which is a market-clearing transaction. The trend is that way; actually, and we have recommended that for least 2 years, and I think you'll see more of it, which is your point on convergence.

STEVE FRAIDIN: Right. The second issue that I would raise is that the process on these business combination transactions has been getting closer and closer to the process used in more typical M&A transactions. I think if people really want to focus on what's wrong with SPACs, the way to focus on it is to ask why do people take companies public through a SPAC where that level of dilution is quite large. So what's wrong with the IPO process?

Doug is entirely right that for years we've all been aware that the number of public companies has been shrinking, and the number of IPOs has been shrinking. If you listen to market participants, what you hear is their own self-interest talking. You hear some people say, “well, companies aren't going public because they're afraid of activists” and then you look at who saying it and it's an anti-activist academic or lawyer. Some people have talked about the expense of IPOs, but in fact the expenses are just a really small portion of what's going on. So the question is why haven't people been going public, to the extent that they

used to? I have thought about it, but I frankly have not studied this in any careful way; but I do think that that people who are concerned about SPACs might focus on IPOs because if people wanted to go public through IPOs, they wouldn't go public through SPAC transactions. That would have the market deal with the issue that that some people are concerned about.

DOUG ELLENOFF: To that point, I welcome competition amongst regulation. I'm all for direct listings if direct listings work better. The reality is that's for a very select few companies that have the right profile. There were more quality companies looking to go public through a SPAC because as you know better than even I do, a traditional IPO takes how long?

STEVE FRAIDIN: Nine months.

DOUG ELLENOFF: Okay, how long does a SPAC acquisition take?

STEVE FRAIDIN: Five months, six months.

DOUG ELLENOFF: Okay. That's a real savings. Number one.

You have more self-determination as the private company to put in your LOI, your definitive agreement, what your valuation is, and how much capital you require. And if it's not part of the PIPE process, you can walk away from the transaction and the world is no wiser that you were looking to raise money. It's almost a market testing feature as well, and companies find that very attractive.

I think cooler heads need to prevail, and we need to say, "we need more public companies." That's what I'm evangelizing. They don't all have to go through the traditional underwriting process. You have to deconstruct the benefits that protect the public investors from that process and try to reconstruct them in new and interesting ways to make sure the public is protected, which I'm all in favor of. There should be focus on making sure that you're not getting special treatment for projections or you're avoiding some form of liability—which you're really not. I'd like to think that Mark will say that "you touch it, you own it," whether it's on projections or otherwise. He'll find some way to assign liability. But 9 months for a traditional IPO is more than a lot of companies want. They want to know how much money and is there an institutional investor interest upfront. That's why this SPAC program has been successful.

STEVE FRAIDIN: Right. The final observation I would make is that there is empirical data about how SPACs perform. The problem is that, and it's a problem with all empirical data in this area, even if the

academics developing the data really wants to get to the truth and doesn't have a preconceived idea about what he or she thinks the truth really is, the difficulty is that you're always dealing with a motion picture and not a photograph. The picture changes on a daily basis. It's way too early, in my view, to study the result of the SPAC initial business combinations of the last couple of years.

DOUG ELLENOFF: Yes. And why? I think what the why is very important there.

STEVE FRAIDIN: Well, a lot of these companies were, if not startups, they were semi-venture companies where the growth is ahead of them. We don't really know how they're going to function, and we don't really know how they're going to function in the public market. There was such a proliferation of these transactions in a relatively recent period of time. How can you say that how they've done in the first year or two after they've gone public is an indication of how those companies really are going to do?

DOUG ELLENOFF: Right. So how can you say the Klausner report was a good academic piece when you know as a professional SPACs are going after earlier stage companies that take 3 to 5 years to mature? Call it public venture. There's nothing wrong with that. Entering the public markets, not every company needs to be Facebook when it's going public.

STEVE FRAIDIN: Yeah. The problem is or the fact is that there've been a lot of SPAC transactions over the years. There's been enough that one can study them, but what's happened in recent years is sufficiently different that I don't think that it's time yet that we can study how those transactions have worked out. It's way too early to do that. The one thing that I think is clear is that despite the deep concern—at the regulator level, at the level of the Chairman of the SEC, at the Congressional level with senators writing letters, and in the PR area with the public media being highly critical of SPACs—there hasn't been a disaster. There hasn't been a scandal. There hasn't been the guy who's run off with a trust fund.

DOUG ELLENOFF: It can't happen. When Bear Stearns and Lehman went under, we moved the money and nobody lost a penny.

STEVE FRAIDIN: No. I entirely agree Doug. That hasn't happened here. We're not dealing with an Enron type situation where you say "gee, what are we going to do about the accounting at public companies?" You're dealing with a situation where I think some observers believe that the level of dilution in SPAC transactions is too

high, that the compensation of the sponsor is too great and doesn't run enough risk for the sponsor and therefore there's something we should do about it. I will point out that in that article about the incredible returns at these Ivy league university endowments, would *The New York Times* have preferred that the endowments have been invested only in index funds where returns have been a third as good but their expenses would have been incredibly small?¹⁸ The problem is in the capital markets, there is a relationship often between compensation of the manager and the result to the investor.

DOUG ELLENOFF: I'll follow up again. We're in a law school setting talking about the '33 Act where Congress, as Commissioner Peirce has pointed out, elected to go with not a merit review, but a full and fair disclosure statute.¹⁹ For 30 years, the 20 percent has been accurately and fully disclosed. I personally subscribe to the fundamental tenants of the '33 Act that I want investors making the decisions as to what they're going to support. I think it is very scary territory to start thinking in a way that we want the SEC or Congress to undo that and to start imposing what they think is and isn't a good investment.

When Apple went public, the State of Massachusetts thought it was too risky for its investors and said you can't invest in it.²⁰ That's what merit review does. I'm not going to take any issue with the return analyses done by the professors. I'm a securities lawyer and I want to protect what I learned about in law school and what I fundamentally believe: merit review is not the right purview of our regulators.

What is in fact happening is just that but hidden as if it's new issues. The warrant liability issue that you and I lived through where 700 public companies had to restate their numbers and spend millions of dollars on a non-cash charge with a very low probable outcome was telling that we are going to have a steady diet of equally small issues to frustrate the program. That's not what I signed up for. I can't practice law when things that have been conventionally accepted through different administrations of different political backgrounds are suddenly

18. See Stephen Gandel, *Big Endowments Make Billions in Returns in a Bumper Year*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/business/university-endowments.html> [<https://perma.cc/6B8H-BGXQ>].

19. Peirce, *supra* note 16.

20. Richard E. Rustin & Mitchell C. Lynch, *Apple Computer Set to Go Public Today; Massachusetts Bars Sale of Stock as Risky*, WALL ST. J. (Dec. 12, 1980), https://www.wsj.com/public/resources/documents/AppleIPODec12_1980_WSJ.pdf [<https://perma.cc/6GQ4-3FE3>].

not. We're in an environment where the rug is getting pulled out from under us. It's not appropriate. There's nothing wrong with SPACs other than the fact there have been a lot of them.

The other issue that I'll raise because you keep saying that sponsors don't put up enough: SPAC sponsors put up millions of dollars, even though the returns that they can ultimately make with a binary outcome. They either get washed out and nobody's going to write articles 9 months to a year from now, when several hundred or 100 of the 435 funded SPACs get wiped out because they couldn't get a deal done for any one of a number of reasons. They lose all that money. How much money do private equity and venture capital general partners (GPs) have to put into their funds, nowadays? Not that kind of money. They may not be getting the same sort of return leverage, I'll acknowledge that, but that is a commercial issue up to investors in my judgment.

STEVE FRAIDIN: We're in total agreement. I will observe, though, that the disclosure regime for SPACs after they go public is identical to the disclosure regime applicable to business companies. I just wonder whether we might want to rethink that because they are so different in the way they function and what they're doing and what they're supposed to be doing with the board and with their management. That's at least worth some objective rethinking because it doesn't really fit that the same disclosure for a box manufacturer is made for a SPAC. That's one area that might be productive.

DOUG ELLENOFF: I agree with you and that's where a cooperation, as opposed to from the mountain top becomes very important. I think we all want the same things: an improved program. I spent 5 years in Washington working on the crowdfunding rules meeting at least 50 times with the staff to come up with the right construct—the right balance between regulations but making sure that the crowdfunding rules worked. There's been no fraud notwithstanding all the concerns that regulators had about crowdfunding. And they've been so supportive of the results over the last 5 years that they've increased the caps from \$1 million to \$5 million. It can't be unilateral. Otherwise, there's going to be a zeitgeist where because it's easy to pick on SPACs today, as opposed to 2 years ago, where I wasn't a villain, I was the fair-haired darling.

It's amusing to me. I'm still the same guy, I just want to see our capital markets do good things. So your suggestion, which is the right one, that SPACs are not an IPO and they are not an M&A assignment, they're their own unique thing and we should sit down and go through

every single item to see what works and what doesn't work is the exact right approach. You're spot on. But it doesn't mean we're going to take all the good things away and only leave the bad.

STEVE FRAIDIN: Do we have any questions from the audience? I can see that there are little red dots appearing my laptop screen and I would love to be competent enough to know how to deal with that, but I suspect there are questions. Are there questions from the audience because I'd be happy to answer them.

AJ HARRIS: We do have questions, Steve. I was going to give you and Doug about 5 more minutes if you wanted to wrap up or at this point, we can open it up for questions, whatever you prefer.

STEVE FRAIDIN: Let's answer questions, and that will focus that discussion, probably the way the audience would like it focused.

AJ HARRIS: I will ask our in-person audience, if you have a question, please raise your hand and we'll have mic runners come hand you a microphone. To start, I'll pose one question to both you and Doug while we get this going.

It seems like today, more than ever before, SPACs are investor friendly, whether it's the elimination of warrants or Steve as you previously talked about the SPARC program. So can you just look forward and give us your thoughts on where further opportunities are to make SPACs even more investor friendly?

STEVE FRAIDIN: Well, one development this really relates to in a sense, the stickiness of the market for SPACs these days, is that the length of the life of the SPAC is beginning to shorten again. It was relatively short and then it lengthened to 2 years to 2 and a half years for some of the higher profile SPACs. I think it's beginning to shorten again, so the investors are getting better term. The amount of money that goes into the trust fund is now going above 100 percent again, making it more friendly to the investors and the amount of warrant coverage that the investors are getting is also increasing. In fact, in my view, the one term that ought to be really important to investors is one that lengthens the life of the organization rather than shrinks it. That's because a SPAC that is going to expire within a relatively short period of time has less bargaining power in dealing with potential partners than a SPAC that has a long time to live. We're going to see where that goes. The exchange rules limit term to 3 years, the proposal that we've made for a SPARC extends to 10 years which we think is going to give the entity, a lot more bargaining power and an opportunity to choose, perhaps a more appealing target so that that may occur too.

The tontine feature in the Pershing Square SPAC effectively rewards investors who do not redeem and has been copied once.²¹ That's sort of disappointing to me. I thought it was going to be copied a lot but it's only been copied once. It's a little bit complicated for investment banks to deal with so we'll see how the terms evolve. For sure, the sponsors are going to be haircut on their promote. That's been happening. It's going to continue to happen and that happens in connection with these business combination transactions. Doug, you have a different view of the stuff.

DOUG ELLENOFF: Yeah. I've been hearing that for 15 years and the reality is it's still 20 percent. People like Bill Ackman can make a lot of noise about it, but at the end of the day, it's negotiated at the time of the business combination. Everybody knows it's a term and ultimately in some cases where the deal necessitates it, it's reduced. I would suggest that in the case of the deal yesterday, there will be no reduction, and so it really is a pricing mechanism that should be left to the commercial parties and not part of regulation.

AJ HARRIS: Now we're going to hear a question from the audience. I think you have to turn the mic on, and you should be good to go.

AUDIENCE QUESTION ONE: Hi, thank you for speaking with us, and my question is related to that discussion. I was wondering where you see opportunities to further align the incentives, of the sponsor and the investing public?

STEVE FRAIDIN: Well as Doug points out, it is often the case that when you're negotiating an initial business combination, the partner insists on the sponsor either giving up some part of their promote or creating a vesting schedule for some part of their promote. That does reduce the dilution and is in the interest of investors. Then you do have the situation that Mark referred to with Pershing Square where Pershing Square took absolutely no promote, but instead made an investment in out-of-the money warrants of the entity and nothing could be more investor friendly, in my view, than not taking any compensation, but just making a significant investment at fair market value in the out-of-the money warrants of the entity.

21. Pershing Square Tontine Holdings, Ltd., Registration Statement (Form S-1) (Jun. 22, 2020), <https://www.sec.gov/Archives/edgar/data/1811882/000119312520175042/d930055ds1.htm> [<https://perma.cc/Y7XS-UWN7>].

DOUG ELLENOFF: Other than the fact that, and it's one data point, the deal didn't work. So it wasn't all that investor friendly I could argue. If you look at the history from IPOs to business combinations, and if Congress actually wants to leave keep retail out of SPAC IPOs, they will lose a lot of return. To invest in a SPAC IPO and get out before business combination, between the return from the trust and the warrant, investors do quite nicely.

STEVE FRAIDIN: But the biggest challenge for every SPAC and it's the biggest challenge for every private equity fund is, if you want to do great deals, not just good deals but great deals, it's really hard to do that. It's very difficult to do great deals. The deal that Doug is referring to that Pershing Square tried to make and then ran into all kinds of regulatory hurdles and they weren't able to make. They were able to acquire the same securities in their hedge funds and those securities went up in value by around 30 percent to 40 percent almost immediately, and I think the investing public thinks that it was a great investment. It's hard to do great deals, but that's not because of the structure of SPACs and it's not because of the structure of private equity—it's because it's hard to do great deals.

DOUG ELLENOFF: Right. The one thing I would just add is that if you want to have a better alignment, you want both the PIPE investors and the insiders to retain their shares for a longer-term period of time, since many of these deals need to gestate over a longer horizon. It's still a commercial term but there ought to be incentives in place to make it worthwhile. That's a better approach for Congress to go after: to provide incentives there, rather than to eliminate retail investors who can't go into a deal because there's a 5 percent or more promote. It's just silly.

AJ HARRIS: We'll pause and take a question from our virtual audience. This question is probably for both Doug and Steve.

Speaking of low interest rates, given the current economic outlook, how do you think that has (1) promoted the rise of stacks today, and (2) with an era of potentially inflation, stagflation and economic uncertainty and challenging times ahead, how do you think that is going to impact the use of the SPAC structure going forward?

DOUG ELLENOFF: I think Steve kind of gave you his view that SPACs will trickle or atrophy. I've lived through several generations of SPACs where they have atrophied like in 2008, before that in 2001, and there's a utility for the SPACs that people just need to understand isn't an IPO. And until we address that, it's not going away. Maybe they'll be additional regulations or disclosure, but commercial people have found a

utility because you also have to look at the broader market as to what's happened to the brokerage industry over the last 30 years. There are fewer and fewer brokerage firms willing to take companies public.

There are many more thousands upon thousands of private companies that want to go public. The SPAC phenomena if it stops tomorrow ought to send a message to folks that Sarbanes-Oxley was not a deterrent to people wanting to go public given the right dynamics. So we need to create pathways other than a traditional IPO. I think it will certainly not be as robust as it was, but serial SPAC folks are not leaving and there are dozens of them. Maybe some of the marginal people will go away and in 10 years we'll be having the same conversation unless we address the systemic issues that I've raised.

STEVE FRAIDIN: Years ago, one of my clients who has since passed away, Derald Rutenberg, he was a brilliant, brilliant investor and incredibly successful, told me that the best investments are the ones where you can't lose money, because once you can't lose money, all you can do is make money, and that makes it a really great investment. That's one of the hidden virtues of SPACs, that you can't lose money. You put your money up, you invest your thousand dollars or whatever, the money is held in trust, and it really is held in trust and there is no risk at that point, and then you have an opportunity, a right of first refusal, to invest in a transaction. If you decide to invest, then that's fine, you've chosen to invest. If you decide to get your money back, you get your money back, and you haven't lost any money making that investment. That construct is actually very appealing.

AJ HARRIS: We're going to take our last in-person question if anyone has one and I'll pause and read our last question from our virtual audience. Does the success of SPACs going forward require widespread engagement by retail investors or can SPACs continue to be popular through institutional support?

DOUG ELLENOFF: The reason I am not against the Congressional initiative on the 5 percent is the SPAC program did perfectly fine on a much smaller scale up until 2020 by largely being unknown to the retail investor. We see what's going on yesterday with the Trump deal and you see the influence of it and I'm sympathetic to regulators being worried about that. Having said that, this is the public markets, this isn't the private markets. If retail investors or Trump fans want to support the former President, I don't think that should be taken away from them, but I do not believe that the SPAC program for most of the deals is dependent upon retail investors.

STEVE FRAIDIN: If the current administration thinks that SPACs are really bad investments, they should be delighted to see the Trump fans invest in the SPAC.

DOUG ELLENOFF: Where does that go Steve, because they're going to lose money?

STEVE FRAIDIN: Right.

DOUG ELLENOFF: Right. Okay. I had a feeling that's what you were saying.

STEVE FRAIDIN: Right.

DOUG ELLENOFF: But it is an epic battle as you as you frame it.

AJ HARRIS: With that I'm going to wrap up today's panel. I want to thank you both for being here, that was awesome. We're delighted to have you and again are lucky to be joined by you.

**PANEL TWO: ENFORCEMENT AND LITIGATION TRENDS TO
REIN IN MARKET EXCESS AND MISBEHAVIOR**

AJ HARRIS: Thank you everyone, our second panel will discuss the present state of SPAC litigation and enforcement. We are lucky to be joined by Greg Laufer, Mark Lebovitch, and Verity Winship. Greg Laufer is a partner at Paul, Weiss. Greg has been actively involved in the firm's SPAC practice and the firm's excellent and thoughtful publications which are included in the course materials. Mark Lebovitch is a partner at Bernstein Litowitz and leads the firm's SPAC litigation efforts. Notably, he presented an oral argument in the leading SPAC class action suit *In re MultiPlan Corp. Stockholders Litigation*.¹ Professor Verity Winship is a Professor of Law at the University of Illinois College of Law. She's an expert in corporate litigation and securities enforcement. A full bio for each panelist can be found in the program materials.

VERITY WINSHIP: This is terrific. I will also mention that as Dean Diller so kindly said at the beginning, I spent some time as a visiting assistant professor at Fordham as well a while back. To give you a little sense of where I'm coming from in this panel, I'm interested in the enforcement piece. I think our panel's formal title is "Enforcement and Litigation Trends to Rein in Market Access and Misbehavior." I really have my eye on that SEC piece of it and we got a little sense in the last panel of why that might be really interesting to think about the role of the SEC here.

I think we've heard from Steve Fraidin that the SEC has expressed a lot of skepticism about SPACs in various statements in various ways. And then we hear from Doug Ellenoff that the implication is maybe the SEC should like SPACs, maybe this is a way of repopulating the public markets and rebalancing between private and public companies. And so, in some way, maybe the SEC should like this movement into the public markets and more supervision there. The other thing I'll add is how this connects to the things I've looked at in my own work. Some of what I've looked at recently are the SEC securities fraud actions against

1. *In re Multiplan Corp. S'holders Litig.*, Docket No. 2021-0300 (Del. Ch. argued Sept. 21, 2021).

private companies, especially big private companies. And so, especially relevant to thinking through enforcement against SPACs are the enforcement actions against companies that have gone from private to public in the traditional IPO setting and we have a lot of examples.

One of the things that we can think about is just what's new about SPAC enforcement? Is there a difference and what are we seeing in that? We don't have very many examples; we really have one or two examples to look at and we may or may not get a chance to talk about that later. But the other thing I'll mention is another ongoing project of mine that has some relevance here. It looks at investor suits against large private companies, so private litigants rather than the government enforcement piece. And we can ask some of the same questions about SPAC litigation that I asked in this project, who has the incentive to sue? Are we ever going to see founder suits in this context, for example? Certainly, cultural norms might prevent some of that. I'm also interested in the procedural limitations on these suits, particularly in comparison to investor litigation against public companies—the sort of bread and butter of securities litigation.

So that's the piece that I'm interested in from my own work, but I'm very interested to hear from the other two panelists and to talk about the various issues in this context.

GREG LAUFER: I'll start, Mark, if that's okay. Nice to meet everybody. I'm sorry I'm not there. I saw right before we all joined the panel, it looks like there are, at least, from what I can see actual people physically there in the audience. I'm delighted to see that. I hope this time next year that we see a lot more of that. I'm sorry that we're all not there with you. But we're here on the screen at least.

I'm a partner in the litigation department at Paul, Weiss. I'm just a few blocks south of you. I've never been a visiting professor like Verity was, but I did do my BARBRI class, for whatever that's worth, at Fordham, so I do have somewhat good memories of sitting there and watching the videos in the summer of whenever that was, however many years ago. I have been at Paul, Weiss for just over 11 years. I have what I would describe as a general commercial litigation practice. I have tended to do a fair amount of securities litigation, and it won't shock anybody here, mostly on the defense side. You'll hear from Mark in a minute; he's usually on the other side. I tend to also do a fair amount of work for alternative asset managers, both at the management company level and for portfolio companies, both regulatory and civil litigation. And then I do some other things here and there, so a little bit of jack of

all trades; but I have over the last year, since this surge of SPAC transactional work has emerged, gotten involved in a fair amount of SPAC litigation. I've also, like a lot of my colleagues, been monitoring what's been going on in the SPAC world and we can talk a little bit about what some of the litigation has looked like.

The only other thing I'll say is, because we're not there with you, there's a chat function. I would strongly urge people if you have been doing this throughout the day to ask questions. I know you guys have things on your mind that we may not be thinking about, so it'll be a lot more enjoyable and fruitful for everybody, if you raise your hands virtually and ask us questions. Nice to meet you all.

MARK LEBOVITCH: Alright, thanks Greg. This is Mark Levovitch. I am the co-head of the corporate governance litigation practice at Bernstein Litowitz. A little background, I believe I have guest lectured at Fordham. I think Professor Griffith, at some point, was nice enough to have me come by.

In law school, when I had no intention of being a litigator, I took a class in corporate law from former Chancellor Allen in his first year of teaching and just fell in love with Delaware law and the whole concept of fiduciary duties. It resonated. It's kind of the opposite of tax law or something else that's really rigid. It's fluid. I got lucky enough to clerk for Vice Chancellor Steve Lamb in the Delaware Court of Chancery. After that, I kind of followed him. He had been a partner at Skadden, so I clerked for him and then wanted to do hostile takeover work, which I did for several years at Skadden. Then, when the takeover market died, I decided defending securities class actions is miserable and boring, and I realized that the reason I like doing hostile takeover work is fundamentally it's about pushing for expanding investor rights. I ended up at Bernstein Litowitz, which at the time was a leading firm in the security space, not as much in the governance space. As a senior associate, I said "maybe there's an opportunity here to develop a Delaware practice." Fast forward 20 years and we have an office in Delaware. Our practice in New York does a lot of our work in the Delaware Court of Chancery, and we'll talk about the *MultiPlan* case.² That's my main focus. I've had plenty of securities experience as well.

2. Mark and his team at Bernstein Litowitz represent the plaintiffs in the *Multiplan* litigation. After the Symposium took place, the Delaware Court of Chancery denied the defendant's motion to dismiss, securing a victory for Mark and the plaintiffs.

By the way, in case it wasn't clear for anyone who's in the audience, the Mark that my friend Doug was describing that was going to tear apart the SPAC space—I was looking for my Darth Vader helmet, I just couldn't find it before the panel. But we'll talk about it, and I don't think it's quite as fatal as some people may believe, but anyway let's get into the substance, right?

GREG LAUFER: Either way, I won't take any offense at your comment about the boredom associated with defending securities class actions. Not at all. Totally fine.

MARK LEBOVITCH: There you go.

AJ HARRIS: Perhaps we can set the stage by discussing the variety of SPAC litigation at the moment, and then dive into *MultiPlan* afterwards?

GREG LAUFER: Sure. Mark, unless you're dying to jump in, I'm happy to give it a quick overview of some of the things that we've been seeing, just general categories and then, if you want to talk about *MultiPlan*.

For the most part, I would say that the litigation—there are exceptions, and we'll talk about those, *MultiPlan*, perhaps being one of them—that we've been seeing are not entirely unique to SPACs. There have been I would say, for the most part, a couple of main categories of lawsuits that have been filed over the last several months, or I guess a year at this point, against SPACs, their sponsors, officers, and directors and other related parties. I have tended to clump them into two main categories, one of which is at the de-SPAC transaction phase, so it's something about the transaction itself, whether it's misrepresentations or alleged breaches of fiduciary duty at the de-SPAC phase.

Then you've also had a separate category of claims alleging violations, also fiduciary duties, but also the securities laws in connection with some negative news, or stock drops, or something else that happens after the de-SPAC transaction, with the target company. And, as I said, a lot of these lawsuits are really not that different from claims that you can make against any public company, whether or not the company went public through a SPAC process, or whether went public through a normal IPO.

At the same time, there are certain features that Mark, and his colleagues, and other securities litigators on the plaintiff side have

leveraged, or tried to take advantage of, that are unique to SPACs. We can talk about those as well. I'll just give you a couple of examples of the categories that I just mentioned. The first one is lawsuits challenging the de-SPAC transaction itself. The kinds of lawsuits that we've been seeing here most often are claims that we see very frequently in the public M&A context. Most frequently, at least that I have seen, are allegations that the proxy materials don't have or are missing material information in violation of Section 14 of the Exchange Act. We see those lawsuits all the time. Anytime there's a public M&A transaction, there are certain plaintiff's firms that either send demand letters, or file complaints, or just send draft complaints, and say your proxy is missing information. Typically, what will happen in those contexts is the allegations will be muted out, meaning the company will issue supplemental disclosures in advance of a shareholder vote, and then pay a fee to the lawyers, referred to as a mootness fee. We've seen a lot of those. They're kind of run-of-the-mill. There's nothing particularly SPAC-centric about them.

But a couple of the SPAC transaction challenges that we've seen have been a little bit more substantive. Let me just give a couple of examples. There was one lawsuit filed earlier this year by shareholders in a SPAC called Acamar Partners.³ That was a Delaware state court lawsuit to stop a de-SPAC transaction with a target company called Carlotz and the plaintiffs, they were shareholders in the SPAC, were alleging that the SPAC officers and directors had breached fiduciary duties by rushing to sign up the deal—just before, I don't know if you probably are familiar with this, or heard it in the prior panel, but there's typically a 2-year time horizon, and it was running out and the shareholders in the SPAC said that the directors just wanted to get a deal done so they wouldn't have to return capital to investors—and they rushed headlong into the deal, bought the target without doing enough due diligence. There is something very SPAC-unique about that, because that 2-year time horizon doesn't exist in other situations.

And then there was another case earlier.

MARK LBOVITCH: Actually, just to close out that though, that didn't stick, right? They weren't able to stop the deal from closing.

3. Katryna Perera, *CarLotz Hit with Investor Suit After Post-SPAC Stock Drop*, LAW360 (July 12, 2021), <https://www.law360.com/articles/1401691/carlotz-hit-with-investor-suit-after-post-spac-stock-drop> [<https://perma.cc/EN27-3BAZ>].

GREG LAUFER: They did not. And in fact, the plaintiffs ended up voluntarily withdrawing that lawsuit, I think that there were supplemental disclosures made, and it did not go any further than that.

MARK LEBOVITCH: Right, right. Because shareholders who didn't like the deal could have redeemed and gotten their money back.

GREG LAUFER: Yes.

MARK LEBOVITCH: I totally agree with you, that fundamentally the law that applies is the same. I vaguely remember that transaction. I wasn't involved in the litigation, but I remember that people aren't catching the nuance. So it's the same law, fundamentally same types of litigation, but the nuances about SPACs do play in, and I think that example is a good one. Normally if you have a company that the executives are all going to either have to get a deal done or they're going to lose their jobs and never be paid by a deadline, I mean that's a pretty good claim to say, "hey, you've got conflicting interests."

However, the nuance of the SPAC—that I think those plaintiff's lawyers missed, frankly, they just didn't appreciate—is if shareholders don't like the deal that's being offered, if there's fair disclosures, you can just go get your money back. It's like a bank, that's it. So I'm in a way, happy to hear they didn't get far because that means we didn't get it wrong, I guess.

GREG LAUFER: Well, I think, we'll probably talk about this in a minute when we get to *MultiPlan*, but you mentioned the unique context that SPAC officers and directors find themselves in, in the sense that they *have to*, or perhaps are incentivized, to get a deal done within a certain period of time, a circumstance that you don't often see or perhaps ever see and a normal company that can just keep chugging along doing what it's doing, it can pass on a deal.

That incentive structure is fully known to everybody, because anybody who invests in a SPAC either knows, or should know that that is what's going on, because it's written all over the disclosure materials. If you can just comment as to whether there's really a viable, or a legitimate grievance to be had by shareholders, when they know going in that that is the structure that they're signing up for?

MARK LEBOVITCH: I think that's an argument that comes up. I believe on the last panel, I think it was either Steve or Doug who drew the distinction between the SEC and federal law which is really focused on disclosure, and state law which is focused on substance. And so the reason that we brought the *MultiPlan* case and other SPAC cases in Delaware is because that law looks at the substance.

So you can have a disclosure, for example of a controlled company, and you can say “hey, this person owns 15 percent of the economic interest and through super voting stock owns 80 percent of the vote.” The person’s clearly a controller, right? I don’t think it’s just assumed that. And that could be disclosed, but that doesn’t mean the person doesn’t have fiduciary duties, and so I do very much agree with you that when there is disclosure of conflicts, someone cannot bring a federal securities claim complaining about bad disclosure about the fact of the conflicts.

But one of the points that we made in many of our SPAC cases is no one’s forcing people to set up a structure that has embedded conflicts in it; you can disclose the fact of the conflict but having done so you kind of have to live with the consequence of the conflict. And again, to be clear, the fact that someone has a potential conflict doesn’t mean they’re acting on it, doesn’t mean they’re doing anything wrong, it’s just you have an incentive that I guess, if you really want to dig into the legal paradigm, it prevents the judge from automatically applying the business judgment rule and assuming that people did the right thing. Because, if you have a conflicting interest, the judge has to kick the tires and say “wait, did you do the right thing or not?”

VERITY WINSHIP: You say embedded conflicts and a deal deadline was the one example I think that Greg gave, although he didn’t label it that way, but what other SPAC specific characteristics that we’re either seeing in the litigation that you’re describing, Greg, or that you would flag, Mark and these structures?

GREG LAUFER: Well, I think we’ll talk about this when, we keep saying *MultiPlan*, so maybe we should just get to it pretty soon, but I think, when we do talk about it in a moment, you’ll see, at least as alleged there, that there are, and this can happen by the way in any company, but as alleged, there were cozier ties there between the sponsor and the board of the SPAC then some might want or some might think is desirable. So that’s something that I think we probably have tended to see more of in this context, where sponsors have stronger relationships with the members of the board that are supposed to be answering or answerable to the shareholders or the SPAC but that’s not necessarily unique to SPACs. It’s not required, but I think as a matter of practice, we’re probably seeing that more frequently. Mark, I don’t know if you have an answer to that?

MARK LBOVITCH: Yeah, I think that’s well put. Look, there’s conflicts where you have outside directors that are too cozy with the

controller and there's that issue. What we see in SPACs generally, and then I'll actually apply it in *MultiPlan* and I'll try to give a quick overview, but what we're seeing in SPACs generally and kind of at the heart of the areas of improvement, that's how I'll put it because I thought Doug and Steve had a really interesting discussion about it. And I thought Steve was saying, look there's things that are evolving and maybe we're looking at fairness of things, maybe we're looking at a different way to compensate directors. And so I do think the SPAC space is evolving and frankly that's what we understood about the space and that's what we wanted to see.

Our fundamental conflict is not just the 2-year time horizon, but really the use of sponsors shares to compensate supposedly outside directors. If I'm the founder or the sponsor of a SPAC and I'm getting the 20 percent carry—that's not 20 percent of profits, that's 20 percent carry. I have no problem people getting very wealthy, that's America, that's capitalism. But again, there's consequences. So when you are going to get 20 percent of a company or a zero, that means a sponsor has a conflict.

If you then compensate directors, even if they're strangers, you can either put your brother on a board, or your best friend on a board, or people who are beholden to you on a board, and then they're conflicted. Or you can, for example, compensate them in a way that tells them "I'm going to give you what could be worth \$3 million each in equity in this company, or it'll be worth zero if we don't get a deal through."

What we've alleged and what really applies in a lot of SPACs is the use of contingent compensation for supposedly outside directors impairs their presumptive independence, because they have to get a deal, not only for the 2-year deadline but if they publicly announce a deal and it gets rejected, they're going to get nothing for their efforts. So we just said, it should make a judge be suspicious of the motive of the directors and really kick the tires that they make good disclosures.

Should I just give the outline of *MultiPlan*?

GREG LAUFER: Sure. I had two questions, two reactions to that; but since we keep saying we're going to get to it, why don't you give an outline of it, since you know it better than anybody, and then we can dive in.

MARK LEBOVITCH: Right, the case, it's like the Wizard of Oz.

GREG LAUFER: People are going to stop believing that it actually exists.

MARK LEBOVITCH: Right, so it does exist. So MultiPlan is the name of a company that was acquired through a SPAC.⁴ It was a SPAC that was created by a gentleman named Michael Klein, who is, as I think that either Doug or Steve said, a serial SPAC sponsor. Michael Klein has at least six, maybe more, different entities that are called Churchill entities.

What you had was a board comprised of his brother and the other four members who are all on additional SPACs that Michael Klein created. And he pays his directors with sponsors shares. Again, to be clear there's nothing wrong with doing that.

I personally believe the reason we're going to see evolution is there was a dullness, and I don't mean to say that pejoratively as I think people seem to think SPACs were different. I think that what happened is the idea of doing SPACs and calling people independent directors while they're getting contingent compensation, not necessarily getting fairness opinions, not necessarily having the same rigor of diligence as you'd have at a public company, does reflect that fundamentally a SPAC is just a bank account. It's just a trust of cash looking for a deal, and the only way anyone makes money is if they find a deal. And there's no ill intent, but I do think there was some level of people maybe being a little cavalier about coming to deals.

What happened in *MultiPlan*: MultiPlan is a good business, but 35 percent of its revenues comes from one vendor, one customer. And before the deal was announced, the board learned or should have learned that this customer was creating its own in-house option. If they had disclosed that, there would be no case and that goes to something that Greg and I touched on.

Unlike with a normal operating company where shareholders are stuck if the board says we're going to do a deal, you have an operating company that you're in and you can't just opt out for a certain cash value; it doesn't work that way. In SPACs, there *is* a redemption right and that's the deal. That is the disclosed deal you put your money in; it's like a bank account that accrues interest. If you don't like the deal that's proposed, you can just say I want my money back with interest. And so fundamentally if a board approves a bad deal, but makes good disclosure and says, just so you people know we have a 35 percent customer who's

4. *In re Multiplan Corp. S'holders Litig.*, Docket No. 2021-0300 (Del. Ch. argued Sept. 21, 2021).

taking their business in-house, it's fair to say that shareholders just take their money back.

What we're seeing now, as disclosures are getting better on some bad deals, is staggering redemption rates, like over 80 percent on some deals. The *MultiPlan* case where they didn't make that disclosure and then there were some other financial reporting problems, it was like a sub 10 percent redemption rate.

So all these people would put their money into the SPAC. They viewed the MultiPlan acquisition as a big opportunity. They wanted more than just the redemption value. And so what you have is, what at the time was one of the bigger SPACs doing one of the bigger deals, in a multibillion-dollar deal, in what we consider a kind of an ill-advised acquisition. But worse, not disclosing to the shareholders what they're really buying at the time that they have the option to redeem. So when the truth comes out, or the alleged truth comes out, 6 weeks after the deal closes and the stock drops to half its redemption value, you have essentially people who are saying "hey, 6 weeks ago I could have gotten \$10 plus interest and now I'm looking at something that's only worth \$5 in the market." So that's the fact pattern.

What we brought to Delaware, and then I'll stop and kind of open it up but, what we saw under Delaware law is really a simple concept. The sponsor is a controller, and that's admitted in the papers, the sponsor has full control of the SPAC entity. Normally under Delaware law, if a controller does a deal in which the controller has a divergent interest, a self-interest in the deal, you apply entire fairness. The business judgement rule doesn't apply because the controller's interests aren't inherently aligned with the shareholders.' So we looked at it and said "okay, well if this is a regular corporation, with a controller and didn't have an independent committee approve it, there was no majority of the minority vote, you're going to apply entire fairness." So we brought a complaint saying this deal was not done the right way, the disclosures were not good and importantly, the shareholders, had they've been told the truth, could have gotten out at 10 bucks a share, plus interest. And they were denied that. Therefore, under standard Delaware law, this should be treated as an entire fairness case where you go into discovery and see what happened and figure out is the deal nevertheless fair.

That was obviously opposed by the defendants.⁵ They argued that the business judgment rule should apply. They argued it's really a derivative suit. And again, this goes to one of the thoughtful comments Steve made, you have to appreciate that the normal M&A litigation is on the target side. It's the target saying, I didn't get enough money. You don't often see acquiror side litigation, and when you do, it often is a derivative litigation.

We argued at least, that it doesn't work here, because the lawsuit is about the disclosures made to specific shareholders who had an option to redeem. We equate the redemption right to more of a corporate self-tender offer, for example. Some shareholders do redeem. Some shareholders accept the tender offer. Some people don't accept a tender offer. If a board deceives investors into not accepting a tender offer, then that's clearly a class claim, it's not a derivative litigation. And it matters because, even though the directors of the SPAC itself are conflicted, we allege because of their compensation and their close ties with the controller, they go away when the deal closes, right. So they're in there to get a deal done. Once the deal gets done, they leave.

And so, almost invariably, if not invariably, once a de-SPAC transaction has happened, you're going to have a new board because the previously private operating company that's been acquired invariably takes over control of the company since they're the ones who know how to run the business. And so if the court were to say these are derivative suits notwithstanding the existence of the redemption right, you basically would have no SPAC litigation after the de-SPAC deal because the boards are different. So anyway, I went on a while.

GREG LAUFER: No, that's fine. A quick question, you said that it was admitted in the *MultiPlan* case by the defendants the sponsor controlled the SPAC, pre de-SPAC transaction. I just wanted to understand that. So they did not take the position that the board was independent, they did not challenge that?

MARK LEOVITCH: They said the Board was independent.⁶ They absolutely said the Board was independent. Their brief said that the sponsor, not that Michael Klein, but the sponsor entity was the

5. Opening Brief in Support of Defendants' Motion to Dismiss at 26-41, *In re MultiPlan Corp. S'holders Litig.*, (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW).

6. *Id.* at 36-41.

controller.⁷ But I think it was in their proxy, because what you have is this contingent interest in 20 percent of the equity.⁸

You have absolute control of every single aspect of the business and there's no elections even. In other words, if you only own 20 percent of a company, you can and would credibly argue, 20 percent doesn't give a person control because there's still an election process.

It's the SPAC entities, and maybe it's not all, but at least every SPAC I've looked at, there were older SPACs, they don't really have a vote. The sponsor selects the board members for the entire 2-year period, and so it's not just the equity. But it's the other control of every aspect of the operations, the board, the search for a target. So they did concede that. They argued that the directors were independent.

And our answer was, they're getting \$3 million each for sponsor shares, that alone doesn't mean, we also talked about the relationships, but really if the director is getting \$3 million, contingent on doing what the controller wants, that at least gets you past the business judgment rule.

GREG LAUFER: I know this came up, I'm not asking you to comment specifically on that particular lawsuit since you're involved in it, but how do you evaluate the argument that if you have a principal sponsor or the sponsor being locked up for some period of time, post de-SPAC transaction, that that mitigates the bad or adverse, or perverse incentive, that the complainant seems to be suggesting exists?

MARK LEBOVITCH: That's a very fair question Greg. I suppose a corporate planner maybe one day someone will say "hey Mark, you sue on all these, maybe you should help us plan." But if a corporate planner were to put those lockups in up front, it's kind of a creative thing to do, to say we've mitigated the conflicts *ex ante* here. In reality, what happens when you're going to finance your deal and that's the PIPE—I mean there may be other sources of financing, but typically it's the PIPE financing then there will be essentially negotiation about lockups and delays.

We had two answers in *MultiPlan*.⁹ When you pay \$25,000 in order to buy your sponsor shares, which are worth 20 percent of the equity, we

7. *Id.* at 4.

8. *See generally* Churchill Cap. Corp III, Definitive Proxy Statement (Schedule 14A) (Sept. 18, 2020).

just showed the math; the equity at the time the deal closed, the 20 percent of the entity was worth I think over \$300 million to the sponsor. And so, even when the stock drops by half, it's still worth roughly \$150 million. That's still a lot more than \$25,000. Now you're locked up. If the stock goes to zero, you're in trouble. But what we're saying is look, the whole conflict is because you're paying virtually nothing. Your only job is to find a deal.

You're arguably the most highly compensated M&A investment banker in the universe. And maybe you're someone like Alex Rodriguez, who's now running a SPAC and is not an M&A investment banker.¹⁰ Michael Klein obviously was and was very good. But he's getting a lot of pay if he can land the deal and so he's still better off with locked up shares that are worth five bucks a share rather than as compared with the \$25,000 he paid to buy it than the zero he would get if the deal didn't close. That's kind of the fundamental answer.

And the other thing is, when people decide to hide something, and obviously this is a little loaded, but the argument you see in securities cases is "yes, the CEO is locked up and has a lot of equity, so why would he lie?" I think the answer is most people think they're going to get away with it. So it's almost harder when it's a lie that is inevitably going to come out within weeks. In *MultiPlan*, a short seller made public information that has since, I think at least debatably, proven true shortly after the deal closed. But if you're locked up for 6 months or a year, you might think that you can keep things under wraps and not have the stock drop at all, and then you can go cash out. So that's our fundamental answer.

VERITY WINSHIP: Isn't the general question just about to what extent this is a challenge to the industry, given the specific structure of SPACs, and to what extent this is a cleanup job? Is it fixable? This is related to Greg's point about the lockup. Are there ways that this could be fixed? What we're really talking about is best practices and litigation against sloppy companies, but the industry as a whole is not going to be

9. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss at 32-33, *In re MultiPlan Corp. S'holder Litig.* (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW).

10. Alex Rodriguez, former shortstop for the New York Yankees. *See Alex Rodriguez*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/t/rodrial01.shtml> [<https://perma.cc/9UVQ-QUQL>] (last visited Nov. 21, 2021).

affected, you'll still have SPACs come out the other end, even after successful litigations.

MARK LBOVITCH: Paragraph one of our *MultiPlan* complaint says effectively the current version of SPACs is deeply conflicted and it's not serving the interests of investors well enough.¹¹ Call it SPAC 1.0. If the Chancery Court says entire fairness will apply to our analysis of SPAC deals based on this structure, it's not the death knell of the SPAC space, it's actually going to lead to SPAC 2.0, which is again consistent with some of the things I thought Steve was referencing, maybe have a better process, maybe have more diligence going on.

Whether it's the SEC, which I admit should not be governing substantive conduct, or the Delaware courts saying to the boards "look, whatever your incentives are you really need to be kicking the tires, you really should not be recommending a deal unless you have good reason to believe that it's a good deal for the shareholders to do, and you should have made the correct disclosures." So I think the SPAC space will survive.

We've had other litigations that also raised different types of problems in the SPAC space that are pretty widespread. And I think that also the answer is people can talk, people can get creative, and people can solve problems, whether it's a common law issue or otherwise.

There are solutions to avoid the legal problems. You can't avoid being sued. I'm a plaintiff's lawyer, but I try to be selective, we're not who Greg was talking about, people with whom every deal gets sued, that's not us. But there are people who do it. It's unfortunate. So you can't avoid being sued but you can have a structure that doesn't automatically get you into entire fairness. You can have a structure that complies with statutory obligations.

I guess what I'd say is not every Wall Street innovation should be accepted as a good thing. Sometimes a Wall Street innovation is profitable for some, but it has to be shaped so that it's actually beneficial for the investors as well. So that's what I hope happens here.

GREG LAUFER: What I would say in reaction to that—Verity you said, it is fixable—I think that presumes that it's broken, which I'm not sure that I would necessarily adopt as a premise.

But putting that aside, I do agree with Mark that the SPAC space will survive, as I think he put it. The other thing is there is, or at least

11. Complaint ¶ 1, *In re Multiplan Corp. S'holders Litig.* (Del. Ch. filed Apr. 9, 2021) (No. 2021-0300-LWW).

has been (it may have tapered off a little bit), an enormous appetite for these vehicles over the last year. People seem to think that it's only the last year, but they have existed for several years, obviously there's been an enormous surge. So the fact that you have such longevity and that you have such widespread interest all across the investing public is a meaningful data point. I don't think you can just disregard that.

People are interested and people want this, so I think it's just important to keep it in mind. This is not so bespoke and it's not something that's available only to the privileged classes. There's a huge array of investors who are eating this up and have been for some time.

The other thing, and I know we haven't talked about enforcement, is although the SEC has said things about how disclosures should evolve and how they should look—and I know a lot of senior people at the SEC have expressed interest in focusing on SPACs and whether there are perverse incentives affiliated with them—there hasn't been, with one exception which was at least as alleged obviously fraud, any enforcement proceedings. So, I think that's another data point. The government itself has not taken the position that these things are somehow wrongful.

But I will say, over the last year, there has been an incremental evolution in people making disclosures about conflicts of interest, about some of the compensation arrangements that you may not have seen a year ago, when this recent surge began. And as time has gone on, I think people have thought about these things a little bit more intelligently and so you have seen enhancements in some of the disclosures and I think you'll continue to see that as more of these lawsuits are brought.

MARK LEOVITCH: One of the things that I thought about in kind of really focusing on the SPACs space is what Greg just said: maybe it's not Mom and Pop, but it could be Mom and Pop investors and there are a lot of retail investors. And that's something that I actually like. There's a lot of money to be made in the private equity space, but the typical investor can't benefit from that and so there is a social good in giving retail investors an opportunity to profit from essentially investing in private companies. Now, you're taking them public through the transaction, but the concept works. SPACs were around for a long time, but there's a technical change that I understand happened pretty recently and that's relevant to any consideration of SPAC space. And then there's what happened in the last year, year-and-a-half.

Frankly, the fact pattern of MultiPlan is pretty benign: you're losing 35 percent of your customers.

I'm going to start at the back, not the end. We've seen deals with people going public, companies going public with an electric car that doesn't actually work.¹² Literally, they plugged in a car and make it look like it could drive but it's not an electric car. There are people doing electric trucks.¹³ There are people doing airplane delivery systems that when you look under the hood are nonsense.¹⁴ Spaceships.¹⁵ We're seeing it every day. I mean, we're seeing a lot of SPAC deals that have been closed and then the disclosures that are coming out are not close calls. It's like how did anyone look at this and think that we should buy this company? And so I think that's adding fuel to the fire of the SEC and others saying, "did this SPAC space go too far?"

Unfortunately, I think, part of it may be the ease of getting money out of retail investors. It was a frenzy. Tulip bulbs are great, but you didn't have to have a frenzy on that. I won't criticize the internet bubble because Amazon now is worth more than most planets, but we have a history in economies of frenzy. I think the SPAC space did pick up in the last year-and-a-half, 2 years just objectively. And you probably had people chasing deals that they shouldn't chase, you probably did have a loss of discipline, at some point. I'll leave it at that, maybe we'll get to the kind of technical stuff later.

VERITY WINSHIP: I was just going to jump in because Mark had mentioned very few enforcement actions and the one we see is exactly what you just described, which is a technology company that has a

12. Peter Campbell & Claire Bushey, *Nikola Admits Rolling Truck Down Hill as It Counters 'Fraud' Claims*, FIN. TIMES (Sept. 14, 2020), <https://www.ft.com/content/a875fe3f-f59e-4dcb-aebc-ee54280122be> [<https://perma.cc/L3V3-476T>].

13. *Electric Truck Maker Xos To Go Public Via \$2 Billion SPAC Merger*, REUTERS (Feb. 22, 2021, 8:02 AM), <https://www.reuters.com/article/us-xos-m-a-nextgen-acqsn/electric-truck-maker-xos-to-go-public-via-2-billion-spac-merger-idUSKBN2AM1DM> [<https://perma.cc/YBF3-DWUM>].

14. See, e.g., Lora Kolodny & Leslie Josephs, *Electric Air Taxi Start-Up Joby Aviation Surges in Trading on NYSE After SPAC Merger*, CNBC (Aug. 11, 2021), <https://www.cnbc.com/2021/08/11/joby-aviation-begins-trading-on-nyse-after-spac-merger.html> [<https://perma.cc/F4FU-SBVQ>].

15. Michael Sheetz, *Rocket Lab Begins Trading on the Nasdaq, with SPAC Merger Growing Its Cash Pile*, CNBC (Aug. 25, 2021, 10:34 AM), <https://www.cnbc.com/2021/08/25/rocket-lab-begins-trading-on-nasdaq-as-rklb-after-spac-merger.html> [<https://perma.cc/GY29-YNB7>].

rocket that doesn't actually do what it says it does.¹⁶ The one thing I wanted to flag about that, besides just the low number of enforcement actions, is that you do have embedded in that a message to the SPAC that they need to be doing due diligence. Embedded in the enforcement action in part of the allegation is that they didn't do the due diligence on whether they have actually tested product and that they didn't do the due diligence on some other national security concerns about the CEO of the acquired company. To me, that is a little different than what you're seeing in some sort of run-of-the-mill IPO enforcement actions.

MARK LEBOVITCH: Think about that Verity, I mean, what do you think about the SEC using a disclosure enforcement action to focus its energies on diligence practices?

VERITY WINSHIP: I guess I think a lot of the picking and choosing is signaling to the industry about what they're going clean up. And so that's a strong signal.

Underlying your question, I think, maybe the Delaware piece of this is this sort of stepping on the toes of the Delaware law. Is it that where you're headed with that?

MARK LEBOVITCH: Yeah. There's been a decades long dialogue between the Delaware courts and the SEC, the former Chief Justice used to talk about "staying in your lane." My view is that the Delaware courts haven't yet spoken directly on what they're going to do in the SPAC space, and so, if they were to step back and say "no, SPACs are different, we're not going to regulate SPACs," then maybe that changes my view of the SEC regulating. But it is maybe appropriate to say there was no diligence on this spaceship that can't get off the ground. Maybe it's just an observation, but I think the SEC is deliberately sending even a warning signal to Delaware.

Because it's really not the SEC's job to regulate underlying business decisions or diligence practices. It's supposed to say, "is there disclosure?" If not, consequences.

VERITY WINSHIP: Yeah, although I think it's also the way it comes up and folds into what they do. The misstatements and whether they knew that even though they actually were lied to by the company

16. See *In the Matter of Momentus, Inc.*, SEC Release Nos. 10955 and 92391 and Administrative Proceeding No 3-20393 (July 13, 2021), <https://www.sec.gov/litigation/admin/2021/33-10955.pdf> [<https://perma.cc/L6XH-VSWG>].

they were acquiring, they didn't inform them not about the rocket test, but about the national security concerns.¹⁷

And so I think they fold it in a way to say, "you were reckless in not finding this out" and that's leading to the statements which is more of their usual ground.

GREG LAUFER: Yeah. I think what Mark was saying, well I don't know, Mark will tell us what he was saying. But there's a line of cases saying that you can't wrap up a mismanagement claim as a securities claim or as a misrepresentation claim. And that I get. I mean they're saying that there were specific disclosures made about this company's ability to secure licenses but the government and the viability of its technology and apparently that just turned out to be wrong.

So I get why the SEC would feel entitled to bring—well, it looks like everybody's settled at this point, except for the CEO of the target—but it could have potentially been a defense in that case.

MARK LBOVITCH: Verity, do you have any sense, other than that one order, that the SEC is going to get more active in the space? Or do you think that the SEC, maybe is content with senior people making proclamations and assuming the market will respond as needed?

VERITY WINSHIP: It is something they've done in other areas where you see the public statement and then a couple of selected cases that are sending the lawyers a message, and so I wouldn't be surprised by that. I don't have a good sense, about the SPAC specific steps.

Greg, I know we talked about *MultiPlan*, and you started out by trying to sort of giving an overview of the different pieces of litigation. Were there other things that you wanted to highlight?

GREG LAUFER: Just in a nutshell. I said that the first category is the de-SPAC transaction phase, and the second category or main category is following the de-SPAC transaction. And there you have what we're talking about right now, with the SEC enforcement action, which is: the SPAC buys a target, some period of weeks or months goes by, and then there's a bad disclosure about how the target, now the company, is doing. And the allegation is that inadequate due diligence was done on the target. One of the best examples is: there's a pharmaceutical company that was bought, called Immunovant, where

17. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination (July 13, 2021), <https://www.sec.gov/news/press-release/2021-124> [<https://perma.cc/5DWJ-WYRZ>].

the drug trial failed some period of months after the de-SPAC transaction, and it led to a colossal, I think something on the order of 40 percent, stock drop.¹⁸ And the claim was that, among other things, the board didn't adequately vet the company and knew, or should have known, that this clinical drug trial would have problems.

There's another category, which we did not talk to, and which frankly would be too meaty to get into now, but I'll just mention. And I know Mark is involved in this as well. These are the somewhat recently filed trio of, not consolidated but perhaps coordinated, cases in the Southern District challenging SPACs on the basis that they violate the Investment Companies Act (ICA) because they invest in securities for longer than the transient Investment Company rules allow for.¹⁹ These things tend to invest in treasuries or other securities while they're waiting to do a deal, and so the allegation is that they should have been registered and should have been governed by the ICA. But that's probably a topic for another day.

AJ HARRIS: I think Greg's going to get an audience question on that point, exactly. So at this time, we're going to pause and open it up to questions from the audience, both in-person and virtually. I think we have a couple in-person questions to start.

AUDIENCE QUESTION ONE: If mere investment of SPAC IPO proceeds in securities was considered sufficient to label a SPAC as an unregistered investment company under the ICA, how should SPAC acquisitions, which don't result in active control of the acquisition targets, be treated given the resemblance of such a transaction to a mere securities purchase? If so, could or should a control investment, be considered a safe harbor for SPACs to avoid ICA liability?

MARK LBOVITCH: Greg, I think the question was as follows. It seems like a loaded question. I think Steve's asking the question. If a SPAC is violating the ICA if it uses their powder to buy a minority stake in the company, can they protect themselves from a liability by buying a majority stake? That's a nuanced question.

18. Complaint, Pitman v. Immunovant, Inc., 1:21-cv-00918 (E.D.N.Y. filed Feb. 19, 2021).

19. Complaint, Assad v. Pershing Square Tontine Holdings, Ltd., 1:21-cv-06907 (S.D.N.Y. filed Aug. 17, 2021); Complaint, Assad v. E.Merge Technology Acquisition Corp., No. 21-cv-7072 (S.D.N.Y. filed Aug. 20, 2021); Assad v. GO Acquisition Corp., No. 21-cv-7076 (S.D.N.Y. Aug. filed 20, 2021).

GREG LAUFER: Got it. First of all, I'm aware of only one example of what you're describing and it's not even really a perfect example; it's the Pershing Square example where the deal ultimately was not consummated. But the idea, and again Mark knows this better than anybody, yet again, is that the SPAC was supposed to buy a minority equity stake in the target company, as opposed to a majority of the company. I think that's part of the allegation; I know that's not the key allegation, but that was one of the allegations in the complaint.

It's a little bit tough for me in this forum to articulate any propositions of law that might come back to haunt me frankly in another context, so I'll avoid doing that, but I can see an argument that if the SPAC intends to and does in fact make a securities investment and maintains that structure for forever, the question could be raised whether the ICA is implicated.

But again, I think nobody has done that probably for the reason that your question suggests, which is that people have thought about this and it's really not the way that it's done for that reason, among others. I hope that answers the question. It was a little bit cagey, I'll be totally candid about it.

AJ HARRIS: The student was curious where do you draw that line if Pershing is perhaps such a low threshold.

GREG LAUFER: The allegation in Pershing, and the other two cases, does not hinge on that fact. By the way, this circumstance did not even exist in the other two cases and the allegations are materially the same. The allegation there was that the mere investment in treasuries for that 1-year plus period was a violation because you exceeded what is typically regarded as a 1-year threshold before you start to veer into ICA land.

And that existed in all three cases. And the other two examples, the non-Pershing complaints, those are circumstances where the SPAC was not intending to do a securities purchase. They were actually intending to do a straight up asset deal just like any other SPAC. So I'm not sure that ultimately made a difference. I think that probably the plaintiffs in the Pershing case made the allegation because it atmospherically helps but it's not a *sine qua non* of the claim.

MARK LBOVITCH: Greg, that's a good summary of it.

There's a unique fact in the Pershing situation because they tried to do a deal or wanted to do a deal where they would be investing in a minority stake. That would have been a completely different and perhaps interesting litigation, but that would not be raising questions

that apply to other SPACs. Let's put it that way. If Pershing had gone through with their deal, there would be at some point, maybe from the SEC or otherwise, a question of "how are you not in violation of the ICA?" But that deal fell through. I think that the other litigations were summed up well, as the point is really if you're going to collect investor money and place it into securities under a provision that doesn't distinguish treasury securities from investment securities for a period of more than a year, then aren't you an investment company? That's really the common theme in the cases.

I see, by the way, a question which I think others will have experienced too. I just looked at the Q&A session. There's a question about the number of litigations on SPAC voting rights.

I'll just say, I think from the time we started our process to prepare for this panel until today, I believe, maybe I had already filed, but I'm involved in two cases now where in addition to voting on the SPAC merger, the SPAC needs to authorize an increase in the number of class A shares. That's not uncommon because of the nature of the SPAC transaction. Because you have to convert the class B shares into class A, the sponsor shares have to become class A and you often are using class A shares to compensate the PIPE investors.

And so we have a couple of statutory claims where SPACs are seeking one vote amongst all classes, including the founder shares, and we're just saying under the Delaware statute you just can't do that. You need to have a separate class vote. I think we have an injunction hearing set for November 5th or 15th on one of those, but time will tell whether the company opposes.

People oppose us all the time and say we're wrong. I think this is black and white law. I don't think there's an argument that they're allowed to do a combined vote. I don't think they're going to fight. I wouldn't fight it. I don't think Greg would fight it. Although maybe Greg will show up in the case now. But I think it's a problem. So there are voting problems, whether they reflect sloppiness or an effort to slip something by, who knows, but there are issues like that about voting rights.

Other than that, there's not really a vote. In other words, the litigation about the validity of the franchise doesn't apply to SPACs because, and this goes to the new ones where I think the industry changed, it used to be that if you redeem you couldn't vote for the deal. Which makes sense, because if you're not staying invested, why are you voting for the deal?

For various reasons—and it has to do with preventing hedge funds from using hold up value, because there are funds who would only invest in stocks and take their money back, no matter what unless the sponsor made concessions. I think in the last few years, there’s been a change that’s allows people to invest in a SPAC, redeem and get their money back, and still vote in favor of the deal. So I don’t think voting litigation on SPACs is very interesting because I don’t think the vote has any purpose. I don’t know, maybe that’s pejorative, but anyway.

Greg, have you seen any voting litigation?

GREG LAUFER: No. I’m not aware of any. It doesn’t mean it doesn’t exist but I’m not aware.

MARK LEOVITCH: Right. I mean other than saying the shareholders get to vote on the charter amendment, I don’t see a vote on the deal, and again that’s why I think there’s a lot of lawyers out there who are bringing lawsuits without thinking them through. I mean, I think you might have had people file lawsuits to try to stop a vote, and quite frankly what’s a judge going to do if you say, “well, you’re going to do this vote, but I understand that the vote is not indicative of anything because people are redeeming in numbers and still voting for the deal.” Why would I stop this vote from happening? People can do what they want to do and redeem. So again, I think disclosure matters but I don’t think the vote is particularly significant.

GREG LAUFER: That sounds right to me, but I also have no experience with those lawsuits. I haven’t seen any.

AJ HARRIS: We’ll take our last question and then we’ll finish the panel.

AUDIENCE QUESTION TWO: I wanted to ask what are the main differences between companies who choose this process to go public over a traditional IPO—if it’s about sophistication, internal controls, or something else—and if these differences make SPAC targets more vulnerable to litigation?

GREG LAUFER: Well, it’s a difficult question but the basic answer is that it’s just a less clunky, less cumbersome, less expensive way to raise capital and that’s why a lot of people are opting to do that. I think that’s probably the nub of it. Whether it exposes people to more or less litigation, for all the reasons we’ve been discussing over the last hour, there are certain elements or features or characteristics of SPACs that have opened them up to somewhat nuanced spins on claims that have long existed. There are a couple of examples of different claims

like what we were just talking about with the alleged violations of the ICA.

But beyond that, as I said, most of the cases have been mill-run complaints in the wake of stock drops based on bad news about the company's performance, which happens all the time with public companies. The only other difference is you don't have pure IPO litigation; with a public company, if the company goes public through a traditional IPO, you can have securities lawsuits right after the IPO if something bad happens. Here, the IPO is not really an event because the actual IPO where there are just investors coming in takes place before the de-SPAC transaction.

You may have seen some months ago John Coates, who was then the Acting Director of Corporation Finance then, now I think he's the General Counsel, made statements that a de-SPAC transaction should be considered the economic equivalent of a traditional IPO for public companies.²⁰ But other than that, I'm not sure that I see orders of magnitude of enhanced exposure for SPACs.

MARK LEBOVITCH: There's exposure and there's what kinds of companies are doing it. I'll say it, because this is going to be a little unpopular with the SPAC crowd, but I do think SPACs are good: historically, when you saw reverse mergers into an empty public shell, which is fundamentally the SPAC space, it was companies that wouldn't survive the IPO diligence. And historically, you have weak companies. I think the SPAC frenzy happened because we started having really legitimate companies, bigger private entities, doing SPAC deals. And that's just fine. I know it's quicker and easier to do it. But I think, historically, you had some weak companies doing SPACs, going public through reverse merger into an empty shell, and then you had some very good legitimate companies do it. That expanded the business. And I think what you've seen in the last year, year-and-a-half, are these spaceships and electric trucks, all these companies that honestly, I can't believe that they would have made it through the IPO process. So maybe it's faster and that's nice, but the reality is for every one good company that was efficiently brought to market through the SPAC process and not

20. See John Coates, Acting Director, Div. Corp. Fin., Public Statement, SPACs, IPOs and Liability Risk under the Securities Laws (Apr. 8, 2021), <https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws> [<https://perma.cc/UW2M-Y5SQ>].

the IPO process, there may be a multiple that probably, arguably shouldn't be public companies.

VERITY WINSHIP: Valuation was mentioned earlier about the difference in who's doing the evaluation and how that or how a company is valued. Does that have an impact on the attractiveness of SPACs? The attractiveness to certain companies?

GREG LAUFER: What do you mean? That in an IPO some underwriters just price the stock?

VERITY WINSHIP: Do we care, and I guess I'm drilling down, and I know we're almost out of time, so I'll just pose the question. Why they're so attractive? What is attractive about SPACs? Is it just timing, is it the limited downside? And it will vary depending which actor you talk to. But I wonder to what extent the valuation and who's doing the valuing of the company has in how attractive it is. Is that part of the weeding out process with some of these companies? I may be wrong, I just I know it came up earlier discussion.

GREG LAUFER: I don't know. Mark, what do you think?

MARK LEBOVITCH: Yeah. I think it depends on who you're asking about it. Would investors differentiate based on who's doing the evaluation? Maybe. I think the reason why so many sponsors like the SPAC space is that you can run a hedge fund and you're getting paid on a two-and-twenty basis at best. You can run a SPAC and get twenty basis. That's not two-and-twenty. You don't have to profit. You just get 20 percent if you do it. I think that there's a big reason why you had celebrities and pop culture icons going into the SPAC space. Because if you can get your deal done, you just made a lot of money very quickly and easily.

So I'd love to run a SPAC, maybe get sued, but whatever. But for investors, I just think that there wasn't a lot of information, and I don't know that investors differentiated. I think in the future, they might. Maybe there'll be a law firm or a financial advisor that comes out and says, "we are able to do kind of the strongest SPAC deals," maybe that's going to be a branding thing.

AJ HARRIS: To answer your question, Professor, I think you're going to hear on the next panel why it's so attractive. A few things that come to mind: price certainty, you know at what price you're going public, you have more control over who your investors are. As you'll hear, you often see companies running a triple parallel process between a SPAC, IPO, and a sale. Like anything else, price pressure and

competition are always better in the capital markets. So if you stick around for our next panel, maybe you'll hear a little bit more.

And with that, please join me in thanking the panel for a terrific discussion today.

PANEL THREE: HOW SHOULD SPACS BE TREATED GOING FORWARD (IPOS, MERGERS, OR DISTINCTLY DIFFERENT?)

AJ HARRIS: Our third and final panel will address and examine the policy concerns around SPACs. We're lucky to be joined by Rick Fleming. Rick is the Investor Advocate at the Securities and Exchange Commission. The Investor Advocate is a congressionally appointed, independent position created through the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹ Gregg Noel is a partner at Skadden Arps. Gregg leads the firm's West Coast Capital Markets practice. Behind Gregg's leadership, Skadden has one of the leading SPAC practices in the country. We're likewise lucky to be joined by Gregg. Usha Rodrigues is a professor of law at the University of Georgia School of Law. Professor Rodrigues is a leading academic on SPACs. She has published several pieces on the structure and has given congressional testimony on the matter as well.² Mike Stegemoller is a professor of finance at Baylor University's Hankamer School of Business. Professor Stegemoller is the co-author of several pieces with Professor Rodrigues, both of which are in today's course materials.³ We're also lucky to be joined by both of them. A full bio for each panelist can be found in the program materials.

USHA RODRIGUES: Thanks, AJ. I think I'm going to kick off and I'm going to mix things up by sharing some slides. In person, I'm not really much of a slide person but, you know, on Zoom you don't want to just be looking at me, so my research assistant has helped me with these PowerPoints. Let's see how it goes.

People have already mentioned some excitement with celebrities with SPACs, Alex Rodriguez and others but, I mean AJ, thank you for having me, and I think that you win the all-time award for most timely

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (codified as 12 U.S.C.A. § 5301).

2. See generally Usha Rodrigues & Michael A. Stegemoller, *Redeeming SPACs*, (Univ. Ga. Legal Stud., Res. Paper No. 2021-09, 2021); Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACS*, 37 DEL. J. CORP. L. 849 (2012).

3. *Id.*

Symposium ever, with WeWork going public this week,⁴ and also this Trump SPAC.⁵ You all know something about SPACs, which is exciting. And, of course, we've also already talked about how the SEC is getting involved. So, the life cycle, I think probably everyone has gleaned this, but I thought a slide might help a little bit.

The SPAC IPO occurs and it's really just raising a pile of cash. It searches for an acquisition target, then the target and the SPAC negotiate terms, a deal is announced, and this begins the de-SPAC process, which is a merger. The SPAC shareholders have a chance to vote for the deal. We've heard some questions as to whether that vote is necessary, but they can also importantly redeem their shares, that is, get the money back that was raised in the IPO. The merger transaction is consummated and now we have a publicly traded operating company.

So, SPACs versus IPOs. The main differences that we've discussed are investment banks have Section 11 liability and cannot make forward projections in a typical IPO, but SPACs don't have those constraints and generally lead to faster deals and more certain deals. We've gotten pushback on those points, but I actually think they're accurate. Some of the concerns that we have with SPACs are that there are a lot of incentives to force deals, so the sponsors only receive their promote, their 20 percent, if there's an acquisition. The investment banks, this actually hasn't been discussed, get the full portion of their fees only if the deal is completed. And there are warrants, which are issued along with the common stock, and those warrants are only profitable if the merger executes. So everything is sort of tending towards making sure that there's a deal done—*any* deal.

And so I'll take you through a quick tour of what we talked about in our recent paper, which are how SPACs have evolved.⁶ I say *evolved* with some emphasis because there's been mention of how we're moving maybe to SPAC 2.0, I think we're in at least SPAC 4.0. SPACs have been around for a longtime and they had some constraints in place that have gone by the wayside as we'll discuss. So it used to be, when

4. Samantha Subin, *WeWork Shares Jump More Than 13% in Public Markets Debut After SPAC Merger*, CNBC (Oct. 21, 2021, 9:04 AM), <https://www.cnbc.com/2021/10/21/wework-goes-public-through-spac.html> [<https://perma.cc/ENE3-NJNQ>].

5. See Andrew Ross Sorkin et al., *This Hedge Fund Manager Dumped Trump* (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/business/dealbook/boaz-weinstein-trump-spac.html> [<https://perma.cc/7Q7X-WVT3>].

6. See Rodrigues & Stegemoller, *supra* note 2.

SPACs were originally presented, the SPAC program is the term that Doug Ellenoff used, it used to be pretty intuitive, right, you could explain it with: you raise a bunch of money and then you go out and look for a target and then the shareholders get a chance to either get their money out or stay with the proposed company. And if too many shareholders took their money out, there wouldn't be enough money to fund the acquisition, so there used to be a threshold that was set at 20 percent. If more than 20 percent of shareholders took their money out, then the deal wouldn't go forward. Which makes lots of sense until it didn't, and we can talk about why the regulations changed, but they did.

So now the consummation of the merger is not contingent on a certain amount being in the trust, or a certain amount being redeemed or not redeemed, but instead on the shareholder vote and we've already seen that there's a lot of incentives to have a positive shareholder vote. So the regulations changed and PIPEs (Private Investments in Public Entities) stepped in to make sure that there was enough money to fund the transaction, even if a lot of shareholders took their money out. And so, this leads to what we call in the paper "empty voting." That is that, in our study, over half of shareholders vote for the deal, but also take their money out. And this is sort of extraordinary, because it used to be originally that the SPAC organizer said "look, we're going to raise this money, and then let us go hunt for a target and we will propose it to you, the market, and if the market doesn't like it, the deal won't go forward," which seems pretty fair. But now, we have a situation where over half of the shareholders can walk out and, indeed, recent redemption numbers have been as high as 80 percent and higher, but the deal still goes forward because there are all those incentives. We also touch on some liquidity issues and there's a somewhat cryptic picture here that I will not discuss unless people want to in the Q&A, and so I'll move to what we think the harms are.

The thinly traded stock, diluted shares, which have already been discussed, and the fact that firms, unvetted firms, are entering the public markets. And that, I understand, is contested, and certainly a lot of people have made the argument to me that the diligence process is the same in an IPO and in an M&A transaction. There also have been others who have said that is not the case.

This brings me to reforms. And I also want to say that I listened with a lot of interest to all of the panels because I've been immersed in SPACs for years—over 10 years—and I actually don't know if Doug remembers this, but we had a conversation, maybe several

conversations, back in 2011 about SPACs, because I really like the form, and I think that's a failing in the paper, as we don't express enough how positive we are about the form overall. But we've seen it evolve over time and we think there are some directions that it's evolved in that are more problematic now. So, our reforms that we propose are enhanced disclosures. I know that the lawyers are rolling their eyes and saying, "we're already disclosing so much." I'll tell you, I'm reading these filings and there's a lot that's disclosed, but there isn't a lot of context and it's hard to compare. So when you see the transactions, there's a lot of vehicles that are clearly associated with each other, right, you'll see like RHV I and Realty Holdings III and, are those related? I'm not sure. Who owns them? Is it the CEO? Who is the CEO? Who are the sponsors? All of that information is probably disclosed, but in disparate places. That means it's really hard to understand exactly what is going on. We also advocate for equalizing regulation with IPOs. Either everybody can make forward-looking statements or nobody can, and the same thing with liability. And we argue that if more than a majority of existing shareholders redeem their shares then the deal should not go forward.

I have plenty more to say, but I'm excited to hear from my fellow panelists and also hear from Mike what I left out. But I do want to say, because I felt like when Doug was talking, I think he was talking about our paper, so that was exciting, right? An academic is always excited when somebody has actually read their work. And I think it made him mad, which was also kind of exciting, but also kind of alarming, so I'm going to say a couple of things. First of all, he said early on that we cherry-picked the data. We did not. We feel like it's very important to look at the full life cycle of a SPAC, so we can compare exactly how all of these transactions play out, which takes 2 years. Which means that we haven't updated the data, because the data hasn't played out for SPACs that went public in 2019—we're almost at a point where we can get a good look—and certainly not in 2020, so we are being careful and we are seeing what the whole picture looks like. Secondly, I don't know where this merit review idea comes from, but it's certainly not something that we are proposing, we do not propose that the federal government or anybody be engaged in a merit review. I feel like, as I said, that the 50 percent threshold gets you some kind of real market test, whether it's by way of recoupling the economic interest in the vote, or just focusing on the redemption, I don't really care, but there's no way in which I'm advocating for a merit review. That's all. I have some more notes and

lots to say because I'm pretty excited, but I am going to stop sharing and hear from my fellow panelists. Thank you.

AJ HARRIS: Do we want to open it up and talk about the SPAC ecosystem?

GREGG NOEL: I was hoping Mike was going to fill in the places that Usha had left out.

MIKE STEGEMOLLER: No, Gregg, I don't have much, I mean she's kind of nailed it. It wasn't clear to me what paper was being referenced earlier when the lob of cherry-picking came in. But even if it's the Ohlrogge and Klausner paper,⁷ data is data and one of the issues that you have, I think, with papers, is that, as a financial economist, you have data and you've got hypotheses, right? Now, your hypotheses could be cherry-picked or whatever, but the data is either consistent with the hypotheses or they're not consistent with them. And so, to the extent that any paper is not saying something that somebody likes to hear, it's either because the hypotheses are wrongly construed or there's some kind of mischievousness with the data in terms of collecting it. And so, I know our paper very well, and I know the Klausner paper fairly well and would say that's a pretty harsh claim, I think, but nonetheless.⁸ I was taking a lot of notes and I look forward to actually hearing what Gregg and Rick have to say so, back to you Gregg.

GREGG NOEL: Alright, well, I'll take a little bit of the bait that you've thrown out there, if that's okay. I will say, on the data points, that I don't think there's anything nefarious. I mean, there's a statistic that says that 85 percent of all auto accidents occur within a 10-mile radius of your home. Which in some level is interesting, like do people pay less attention as they get close to home? Or is it the fact that you do 85 percent of your driving within a 10-mile radius of your home? So the data can prove a lot of different things.

One thing that I, and I've mentioned this before, is the data isn't, if you've looked at it as SPACs—quality SPACs—and then overlaid market size because, generally, if you look and I'll say this anecdotally, the larger the company, the better it trades in the marketplace. So you get mutual funds that are interested in investing blank amount of money and they want to make sure there's a certain amount of liquidity. So forget whether it's a SPAC or IPO, or a de-SPAC or regular IPO, you tend to

7. See generally Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228 (2022).

8. *Id.*

get better trading and better values the larger the company is. And so I think that's one of the things that, and I didn't hear the prior panels, but I will say that could influence the pricing and could affect some of the results. And so if you were able to overlay the data based on the size and the trading market, that might be interesting to see how it works. Then the other place to overlay, if you can, is take the data according to the traditional industry silos, whether it's healthcare, tech. You know I mentioned the cruise line industry, I think, had the best year ever at the end of 2019. I think almost every one of the cruise lines was near top performance, values near top, and then March of 2020 hit and cruise lines, every one of their stores was closed if you treat each ship as a store. And they weren't sailing at all and the values plummeted. So I'm just saying it'd be interesting to see the same data overlaid with industry silos, and then see how the industry silo itself was performing during the same period of time.

So I think part of it is, and obviously I think to Usha's point, when you look across the form, I think form is the frame she used but I'll just call this the SPAC product because she knows I like product better than the form, if you look across the product and how it gets used, it gets used inside of industry silos. They're buying companies. Whether it's mining, or it's tech, or financial services, whatever it is, how is the silo performing simultaneously, and look at entity size. Now one of the things that might have been to Doug's point is that the newer SPACs, as they've been larger, I think you get a larger market cap, and generally larger market cap companies trade better than lower market cap companies, particularly as you enter into times of economic distress. People will tend to go to names that they're familiar with, and I'll give you a silly example what I mean by that.

There was a period of time when a lot of different companies were doing 100-year bonds, and Coca Cola did them and Disney did them and all these people did 100-year bonds. And the reason that almost every one of the 100-year bonds was done by a household name is because people thought "well, you know, they're going to be around 100 years," but if you did Gregg Inc.—and I realized there was a Greg [Laufer] on the prior panel, so I figured it's fair game—and said "hey Greg [Laufer], you want to buy bonds, 100-year bonds in Gregg Inc.?" everybody was going to go "who's that?" And so I think there is some movement just generally in the macro sense in distressed times—and not necessarily just distressed times but distressed economic situations—where people will move their invested assets to household names versus names that they're

less familiar with. So I think all of that plays in, and I don't know that it's a criticism of the data, but I'd love to see the data spread over different items so that you can actually see how it's doing vis-à-vis the silo itself and how it's doing vis-à-vis market caps. And it may come out exactly the same. I don't know because I haven't seen it, but I just throw that out, not so much as a criticism at all, just maybe more of a validation point of the thesis that's out there.

And I will say that I have done regular-way IPOs with projections. There's nothing that prevents you from doing that, and if you go back in time when people were—I'll call them debt IPOs—they weren't equity, but people did financings of casinos, and what you were building was going to be the only state-permitted casino in a particular location, there was nothing to say because the use of proceeds was going to be to build a casino. P.S., they had to have projections, and those are regular-way debt IPOs where in fact there are projections. So it's not that you can't do it, and then we certainly talked about one of the reasons for projections in the de-SPAC situations and John Coates actually pointed out in his April 8th piece about *SPACs, IPOs and Liability Risk and the Securities Laws*.⁹ He actually put in one of the things I mentioned to people—it's footnote eight in case you're an avid reader—there are certain situations in Delaware law under a duty of disclosure where you do have to disclose the projections that the board used in reaching their decision that the acquisition was important.¹⁰ So I think it's a little bit of an overstatement to say that you can't use projections in regular-way IPOs. P.S. I've done and I will admit there was a debt IPO. And I do think it's a little bit of an overstatement to say that people are putting in projections because they *want to* versus in many cases, that they *have to*. Frequently you do have to put them in, and I do think it makes sense to.

Obviously, any disclosure you put out there should be subject to some sense of reasonableness. You're not putting in your pie-in-the-sky projections but if you do have them, you're labeling them as such. We are pretty careful about the type of projections we put in. So, for what it's worth, I throw that out as a possible counterpoint again, not a

9. John Coates, Acting Director, Div. Corp. Fin., Public Statement, *SPACs, IPOs and Liability Risk under the Securities Laws* (Apr. 8, 2021), <https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws> [<https://perma.cc/UW2M-Y5SQ>].

10. *Id.*

criticism at all. And Rick's been off mute for a while, so I should be quiet and let him go.

RICK FLEMING: Well, thanks Gregg. I actually I think that last point was well worth the time. It's not that you can't do projections, you just have to be careful about it when you do it.

So, first of all, let me just say thanks for the invitation to participate in this event. I enjoy doing things like this, so thank you for that. Sorry for the ambulance in the background, if you can hear that. Second, since I am from the SEC, I have to give the standard disclaimer that my views are my own. They don't necessarily represent the views of the Commission, the Commissioners, or any of my colleagues on the Commission staff. Third, I just wanted to give a little shout out to, especially the students in the Securities Litigation and Arbitration Clinic at Fordham. I know those students are doing really important work on behalf of investors of limited means and just wanted to say, thanks for that, thanks to Fordham for that program that you have there.

When it comes to reacting to the paper, I'm on the side that thinks it's a really valuable contribution to this discussion. I read a lot of academic papers and I wouldn't say this about all of them, but this one I think should be basically required reading for anybody at the SEC that's thinking about what to do with SPACs, and largely because it does provide data. I'm a big believer in data driven policymaking and this gives us some real facts with which to try to grapple with some of these issues that we'll talk about.

A couple of general observations from my perspective on the world of SPACs: one is if you step back and you look at this, it's a little bit of an unusual kind of investment, and I think it makes things a little complicated for your average retail investor when they're getting into this space. And that's because when you make your investment decision, you're basically deciding to purchase a unit of a SPAC for \$10, or something close to \$10 probably, but your most important financial decision actually comes later—it's separated from that initial purchase. So it comes later when the SPAC finds a merger target and it starts going through the de-SPAC, and you the investor have to decide whether to stay in the deal or to redeem your shares. And that is a decision that has really big consequences for you. As some of the other papers have shown, there's a fair amount of dilution that can occur and all sorts of things that that an investor has to take into consideration. Now what that means is that it's pretty tricky to try to come up with disclosures that work during that initial investment decision that inform

the investor about these later choices that they're going to be expected to make. So it really is a tricky area to come up with good disclosure that works for the investors. So that's one issue that I wanted to raise.

Another is just involving conflicts of interest—you've probably talked about some of those earlier today—obviously every investment involves some level of conflict of interest, but here again I think it's a little bit more complicated in SPACs than in most of the other types of investment products or the environment. The most obvious conflict is between the sponsors and the shareholders, and the 20 percent promote or whatever the promote is, and how those work and all of that. There can also be conflicts between the PIPE investors and the shareholders in the SPAC, because the PIPE investors might get significantly different terms for their shares than the earlier shareholders, so that creates issues.

But also, I think here you can have some pretty significant conflicts between just different types of investors, different shareholders in the SPAC, and especially between the more sophisticated and the less sophisticated. And part of what this paper shows, it sort of highlights this particular dynamic, because if you're in the know and you're sophisticated, you might be a hedge fund, institutional investor, or just a smart individual investor, but you know that you can invest in a SPAC in these units and you can redeem your shares. Well let's assume that that the SPAC goes out and finds a merger target and you think it's a dog, you don't think it's a good company, so if you're smart and in the know, you know that you can redeem your shares and get your \$10 back, but you should go ahead and vote for the merger because you're sitting there holding these warrants that go along with the deal. Right? So you've got the stock and you've got the warrants, so you redeem the stock, you keep the warrants, and you vote for the merger to go through, because if you don't vote for the merger to go through and it doesn't go through then your warrants aren't worth anything.

But if the merger does go through, well, even if you think the company's a dog, then maybe the Redditors will get excited about this company or something will happen and the warrants will become very valuable.¹¹ So it's worth it for you to redeem your shares and go ahead

11. See, e.g., Brandon Kochkodin, *How WallStreetBets Pushed GameStop Shares to the Moon*, BLOOMBERG (Jan. 25, 2021), <https://www.bloomberg.com/news/articles/2021-01-25/how-wallstreetbets-pushed-gamestop-shares-to-the-moon#xj4y7vzkg> [<https://perma.cc/KVG8-VK5P>]; Eric Platt & Colby Smith, *Reddit Traders Wage Battle*

and vote to approve the merger anyway. So, if you know that, that's what you do! But if you're a retail investor and you don't understand that dynamic, then you stay in through the merger and might be left with what everybody considers to be a dog, and the merger was approved so you have no idea that everybody thought it was a dog. So that's an issue.

The last thing I would say before we turn it over for more discussion is that one of the other things that I worry about given this dynamic, and sort of all the pressures and incentives for these deals to go through, even if people think it's a dog, is just the danger of some onslaught of lower quality companies entering the public markets and what that will do to the markets broadly speaking. So I'm happy to talk about what my thinking is in terms of what the SEC should be doing. I'm sure we'll have some of that discussion. In general, I agree with what Usha has already outlined, we can talk through some of that more, but I will yield the floor for now, thanks.

AJ HARRIS: So perhaps we can open it up and take the other side of the position and talk about some of the virtues that SPACs bring and the benefits that SPACs bring to the capital markets. I know Gregg alluded to this, and on our last panel this question was raised, so perhaps Gregg could share with our audience some of the benefits that SPACs bring.

GREGG NOEL: Happy to. A lot of the target companies out there—especially that the larger SPACs are looking for—are pretty large companies, at least the ones that we're seeing, and they can reside in private equity portfolios of companies. And so one of the benefits to the private equity firms out there is that when they're looking to sell one of their portfolio companies and AJ, you mentioned earlier the triple—I think you had a different term—but I use “triple track transactions,” where if the typical way a PE company was sold was either in regular-way IPO, to a strategic or maybe to another private equity fund, the what I call “the fourth leg on the stool” is the SPAC.

It's a way to get out of the product or get out of their portfolio company and give a return to the investors in the PE fund. And one of the differences I'll give you—I won't name the name, but this actually happened, and I'll leave out the name of the PE fund—the PE fund looked at doing different ways of reducing their exposure in the company and start having returns to their fund investors. They looked at

a number of different situations, and they ultimately ended up selling to a SPAC. The SPAC shareholders got about 28 percent of the stock, the sponsors got less than 5 percent of the stock, and the PE fund kept about 40 percent of the stock. I'm not sure if I added up to 100 percent there, but I know I got close to 100 percent, and that was the principal play—the PIPE was another 20 percent, so that was that was my missing number. That was the capital structure post deal. The stock traded up pretty quickly to \$11 and then \$12 but dropped again, which is one of the things that I think is good for Mike and Usha to have a look at because you do see as lockups come off—just like in a regular IPO the stock drops, you've got to make sure you're not hitting that dip. Within 6 months, the stock was trading at about between \$18 and \$20, and so the PE sponsor of the PE portfolio company sold down again. So in less than a year, they reduce their stake in the company from 100 percent to about 20 percent. That's an option, and the reason that's valuable to the PE fund, and it can be to any company, is because the usual way if you did a 20 percent carve-out—for an IPO, you take 20 percent public and you continue to hold 80 percent—that's probably a 5-year period before you get out entirely, which lengthens the period of time for a return to the investors in the PE fund. Here, they got a huge return pretty quickly, and within a year went from 100 percent to 20 percent.

Why was that good for everybody? Because in fact it was a good company—and is a good company—and they were able to do a secondary sell pretty quickly. So that goes back to why I call it a product, you can use the product in really advantageous ways for people and bring really nice companies to the public market in an efficient capital means of doing it. And people were completely satisfied with that transaction, the way that played out. That's just an example of one of the ways that the SPAC product can be used to accomplish people's objectives and the same thing happens in a regular-way IPO.

When we're talking to our clients about whether they want an IPO if it's what I'll call founder-driven, which will also have the venture capital people involved at some level, but the founder has an issue on how much money they want to take off the table, and their estate planning purposes, and how they view the company going forward. And for them it's similar to the PE fund in that they're looking at “when's my return?” They've been taking \$1 a year in salary for the last 10 years and now the company's doing really well. They're thinking, “I'd like to get a return for all of my work, how much can I sell on the IPO?” In the typical regular-way IPO, they can't sell much if anything at all—now that

varies but typically on say a tech IPO they're not selling much if anything at all. So again the SPAC might be a better vehicle for them where they can take more money off the table sooner which will meet their personal goals and allow a really attractive company to go public.

Maybe I went on too long, AJ, but just a couple of examples of how the product can be used to benefit not only the holders of the public stock, but also the innovators and the people who started the companies. If you go straight to public through the SPAC process, the people who could have taken a lot of the cream off the top, maybe the public gets some of that. So just a couple of examples.

RICK FLEMING: I'll jump in next. It's probably from my initial comments that everybody thinks I'm down on SPACs. But I'm not especially down on SPACs. I do think there are improvements that can be made, but when I think of SPACs, one of the things I think about it actually is our keynote speaker that's about to come up, Commissioner Peirce. One of the things that she has said that really rings in my ear is the regulators tend to undervalue investor opportunity. I think that's right. I think there's a lot of truth to that, so we have to keep that in mind. I also have personally worried for a long time about how the private markets have started to dominate the public markets in terms of capital raising. And so it's been a good thing to see that pendulum swinging back. There's been more IPO activity, more SPAC activity bringing these companies into the public markets, hopefully at an earlier stage when they're still in a good growth cycle.

I think I would agree with Gregg that we've seen some good successes through SPACs of bringing good companies to the public markets maybe faster than they might otherwise have come. On the other hand, in some of the discussion around SPACs, people talk about democratizing access to capital and giving small investors the opportunity to basically do private equity. I do think Usha and Michael's paper shoots holes in that idea. With some of the issues around the lack of liquidity, there's not tons of investors that are in some of these companies, especially the smaller ones. But in this discussion, none of us would advocate for throwing the baby out with the bathwater. We agree that there are things that can be done to improve this ecosystem without sort of destroying it. Usha, I don't want to speak for you so jump right in.

MIKE STEGEMOLLER: I would only add a minor point in in terms of advantages. One of the best S-1's you could ever read is probably Social Capital Hedosophia's.¹² They make a very clear-headed argument for why SPACs belong. One of the important points—which I heard a little bit in what you were talking about, Gregg, and in an earlier session—is that one of the problems that you have in an IPO is evaluation. So one of the things you could do when you have a complicated firm or when there's asymmetric information is to get informed investors. So a really good SPAC with great managers that know their stuff are able to value an asset in ways that public markets can't.

One additional advantage here is the valuation process itself for a subset of these firms. SPACs in this sense wouldn't make sense for grocery stores but would maybe make sense for some kind of biotech firm. If I'm able to convey to a group of investors, not particularly private information but information that's difficult to understand, a SPAC might actually in addition to all these other benefits that SPACs provide—in terms of quickness to market in certain aspects, a reduction of uncertainty—be preferable.

I would also recognize that we're treating SPACs as all equal and they certainly are not. You can read these prospectuses and some clearly seem high quality, even before there's an acquisition in the picture, versus some that seemed really kind of thrown together at best. We are taking averages here which can be deeply problematic.

GREGG NOEL: And that's I think your point about the differences in the SPACs—I do think you see that in IPOs of companies generally. The smaller ones tend to not have the same backing, if you will, behind them. But you see it. I would say that's true generally across the spectrum of all IPOs, as you know. And SPACs and de-SPACs occur in the same environment that regular IPOs do.

USHA RODRIGUES: I have one shameful reason to care for SPACs, which is that they give us a lot of data to look at. And that's awesome! That's again specific to my concerns as a scholar and researcher, but also the other half of that is that they shine the light.

The typical IPO is this sort of black box right where the investment banker says “well I'm going to do this valuation, I'm going to make the market, it's very complicated and no you can't see in, and then here's

12. See e.g., Social Capital Hedosophia Holdings Corp., Registration Statement (Form S-1) (Aug. 23, 2017).

the price which is going to pop.” But SPACs offer a different model and I really like that. I like that we get to see and think about the question of how we deal with this problem of moving a private company that hasn’t been valued by the public markets into the public sphere in a different way. I think that’s exciting and useful to have that kind of alternate path.

But it’s a concern. At some point, somebody has to make that valuation, and somebody has to make sure that there’s a market out there, and I don’t think that the investment banks should have a monopoly on that function. I think right now the SPACs aren’t doing as good a job at that as they can, but this this whole problem of birthing of the public company, moving the private company into the public markets, is a really interesting one for sure.

GREGG NOEL: I agree with the point. And Rick, you made the same point about the number of public companies. There’s statistics out there and I don’t have them handy which show that the number of public companies in the U.S. has decreased from the 1970s to today by some incredible percentage.¹³ And so the direct listings, and the different ways to go public, is really helpful because it gives the entrepreneurs, the people who are starting these companies, different ways to get to the marketplace that may be better seat suit their needs. And they’re all different, whether it’s a direct listing or de-SPAC transaction our regular-way IPO. Those are all very, very different transactions. I think it is helpful to have different ways to your point to allow people to choose a path that fits better with their personal goals.

USHA RODRIGUES: Thanks Gregg. I will add on to this a little bit. I have a reason, when the first panel raised this question as to you know why aren’t there as many public companies, maybe not since the 1970s but even in the past 30 years. People like to talk about Sarbanes-Oxley and Dodd-Frank, but I think a lot of it or at least some of it is the Jobs Act, which made it easier for companies to stay private longer which was what Silicon Valley wanted. It was also a case of “well, be careful what you wish for” because companies were allowed to grow bigger, longer and I think that was that was a little problematic.

13. “The market is half the size of its mid-1990s peak, and 25 percent smaller than it was in 1976.” Jeff Sommer, *The Stock Market Is Shrinking. That’s a Problem for Everyone*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/2018/08/04/business/shrinking-stock-market.html> [<https://perma.cc/W89T-FBRF>].

I also wanted to say Doug communicated to me that he isn't mad at me, and he didn't think that we were cherry-picking data so that was a big relief and thank you Doug for that.

But he did say something that I am chewing over and will continue to chew over for a while—he said he doesn't believe that the SPAC program is dependent on retail investors and that is really interesting. Because of course retail investors are at the end when the SPAC is successful—at the end, the retail investors are there in the public markets, no matter what, because they are the public markets, or at least part of them, and now with Robinhood they are there on the front lines. So that role, and what role should the retail investor play in this information gathering mediating of information asymmetries process is ultimately the question the SPAC is asking. Because in the traditional IPO, it's just the banks and the institutional investors and the big rich guys that are talking about the valuation. And in the retail piece of SPACs, often it's just the hedge funds, but sometimes the retail investors get in and they can get in in a big way. And then certainly once it goes public or once it de-SPACs, then the retail investors are there. So I don't have any conclusions. Mike and I have a lot to talk about with that, as we revise our paper. That's something that's been interesting me a lot well.

GREGG NOEL: If you're going down that path, here's one thing to think about, and I think it would be interesting to see this. The larger SPACs which you don't see a lot of at the moment, but when you get up to the larger sizes of the SPACs, I do think you see a lot of retail investors come in on the IPO side, so if you're looking at say \$700 million or more.

But I also think, and it would be interesting to see if the data backs it up, I suspect that those do a little bit worse in performance because the enthusiasm for the product was built in on the front end before they knew what it was. If you look at some of the performances, and it was brought up on the last panel for one of the larger SPACs where there was a lot of retail investors. It was brought up for '40 Act-context, but that retail enthusiasm was notable. There's been SPACs that have traded up to like \$50 before there was a deal almost. And so that's retail not institution driving that price up. So retail is there, but they tend to be on the bigger SPACs and it's interesting to see how the performance of those work.

Just like a regular-way IPO when the bankers bring the book to you, there's what I call three buckets that people put the book that's been brought to them. There's the guys and institutions that will be with

you, through thick and thin; the price will definitely go up and it will definitely go down, and you want people to stay with you. When the price goes down, there's people that in my second bucket that are sort of in between, they are price sensitive, and they will sell at certain levels but they'll stick with it as long as you can. And there's the third bucket which are the people who are just there playing the money. So when you're allocating your stock to it in a regular-way IPO, you're thinking about how much you want in bucket A, how much you want in bucket B, and how much you want in bucket C. And you want stuff in bucket C because you do want it to be trading. It's not that you look at bucket C and say there should be no long allocation there. So you definitely want people in bucket C, but it is interesting to see how it plays out, and I think your point's a good point.

AJ HARRIS: So this wouldn't be a policy panel, after all, if I didn't get your thoughts on the role of the regulator and perhaps what can or should be done to further improve the product. Or if like Professor Rodriguez said, we're in version 4.0 and the market is sorting itself out. I'm curious where you stand on this, and perhaps what you think can be done going forward.

RICK FLEMING: Who do you want to start?

AJ HARRIS: Whoever's brave enough.

RICK FLEMING: I can jump in there. I think, first of all, we need to pause and just say that the existing rules get us a fair amount down the road, and I've got to give the Commission credit—they've used their enforcement authority, they've used their ability to make statements and get statements into the marketplace and that's had a real impact. In particular, I can think of some things from the Office of the Chief Accountant where they put out a statement in late March, early April reminding people that these merger targets when they do the de-SPAC,¹⁴ they have to up their game in terms of their ability to do financial reporting (do the 10-Qs on time, have an audit firm that can do audits of public companies, etc.). They came out and said that they thought that a lot of the accounting for the warrants was being done improperly. I think those statements that were made by the Office of the Chief Accountant

14. John Coates & Paul Munter, *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs")*, U.S. SEC. & EXCH. COMM'N (Apr. 12, 2021), <https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs> [<https://perma.cc/2GGD-DR7F>].

had a real impact on the market and took some of the froth off which I thought was a positive thing. So a lot can be done within the existing rules to deal with abuses or problematic issues.

I think one of the things that the Commission ought to be trying to do is enhance disclosure. Again, that's tricky because the disclosure needs to be made on sort of the front end when you're making your investment decision, but a lot of the important facts don't actually occur until later with the de-SPAC. But to the extent that you can possibly have great, more understandable disclosure about the promote and the promoter's interests and the conflicts and things of that nature, the better.

I don't think disclosure fixes everything necessarily. I agree with Usha that there needs to be some threshold at which, if a certain number of shareholders redeem their shares and basically take their money and walk away, they shouldn't be able to vote to approve the merger. That ought to tell us something about whether this is a good deal for the marketplace or not.

And finally, my thinking is that while I like having an alternative that gives companies more specificity in terms of pricing and that sort of thing that they get from the SPAC process, I don't like to see the choice between SPAC and traditional IPO be just a matter of regulatory arbitrage and different types of liability attached depending on which process you use. So I would probably harmonize those to the extent possible.

GREGG NOEL: Yeah. I agree with your last point. Getting the rules the same for everybody makes a ton of sense. I would also point out that people redeem for various reasons, and I'll give you an example what I mean by that. It doesn't mean that they don't approve of the deal. We've had situations where people were large shareholders in the SPAC IPO and held a lot of shares and then they thought the de-SPAC company was great. And so they signed up for a big portion of PIPE. Then the markets changed a little bit, and they got orders from on-high to decrease their exposure to the industry. The only way they could decrease their exposure to the industry was to redeem out their shares at the bottom of the IPO because they were committed on the PIPE.

So I just would point out that the fact that people are doing redemptions might be for a host of reasons including hedging and arbitrage that they're doing for buying the shares later on, and I wouldn't just assume it's a binary "we're in or we're out". There are people that have various, different motivations that can be influenced by

market factors. So as people think about that, they should understand that it is not a binary place and people who really, really like the company a lot are actually redeeming but actually buying a lot more in the PIPE. So it's just not a one-way street.

USHA RODRIGUES: I've already talked about what our general recommendations are. I think the comments made me note that I forgot to say something which was that over 50 percent redemption recommendation comes from the data. It comes from the fact that we look at returns 10 trading days out from the de-SPAC and find an inverse correlation. That is, the higher the redemption rate, the worse the stock does even just 10 days after.

That leads me to a question we got in the Q&A that asked about exploring data on SPAC performance 5 to 10 years out. We don't want to go out anywhere near that far in terms of evaluating performance of de-SPAC companies versus private equity companies, for example, because we're nervous about intervening events that mean that we can't really make any definitive conclusions with that long-time horizon.

GREGG NOEL: Yeah, it's a long time, you're absolutely right. It's long. I will say the 10 days is really, really short because some of the trading strategies that have gone on. If you look at the volatility of a SPAC stock right around the time of the vote, and when you can redeem, it's huge. It just dwarfs everything that goes on before that point in time. Some of that unwind is going on in the 10 days following, so I actually think that's too short a period because of what people have done on the front end on their trading strategies.

Maybe it's worth having a conversation with a hedge fund about when do you clear through that that period of time. And P.S., you see a lot of volatility obviously in regular-way IPOs, like you price it at \$70, then the first trades at \$90 and that's huge volatility in that time period, which would be in your 10-day time period, even on a regular way account for what it's worth.

MIKE STEGEMOLLER: Yeah, Gregg, the data are poor in terms of price. They're all over the place. The reason you run statistics is to cover all that up. But even though we find significance there, I'm in agreement. It's not clear what frame you should use. 5 years is too long. And probably too short. So yeah, it's a good point.

AJ HARRIS: So with that, I was going to take a pause and take questions from our audience either in person, or virtually. I think we have an audience question.

AUDIENCE QUESTION ONE: My question is actually for Usha and Mike because it is about their recent paper.¹⁵ In your paper and today, you've suggested a few reforms, mostly around disclosures, redemptions, and projections. I'm curious how you reconcile those reforms with the future of the SPAC form. Do you think it's possible to make these regulatory changes and still have a SPAC? Or at that point does it become a traditional IPO again and eliminate all the benefits of a SPAC since the benefits are largely related to the projections and these differences?

USHA RODRIGUES: Yes, as far as the redemptions go, the form did exist with a more draconian version of that for years. And one of the exciting things about SPACs is that you can see this evolution in a form or product or program play out. So you can see how the market adapts. The market might adapt with a 50 percent threshold to having more of that PIPE money than institutional money come in and actually buy shares—which I think would be a good thing, because there's been some allusion to the fact that, perhaps improperly, PIPE investors are getting a sweeter deal than the typical SPAC investor. If the PIPE has to go in cheek by jowl with the with the investors in the SPAC, I think that's a good thing. So if there's one lesson that SPAC evolution teaches us, it's that the form is quite adaptable. In terms of equalizing with the IPO in terms of liability and forward-looking statements, I think similarly that it will, to the extent that there is still some deal certainty, not as much admittedly with the threshold. And perhaps with speed, I think that it will still be an attractive form. What do you think Mike?

MIKE STEGEMOLLER: Yeah, to say that there would be pullbacks is obvious, but I don't think anybody would feel comfortable with the early spring of 2021. Some of it was just nuts, and so to say that the reform would kill it is selling short the kind of the investment genius of the idea itself. And so I think financial market makers will make it happen and smart people at the SEC and rulemakers will make it. I don't see the fom going away, it just needs to get better.

AJ HARRIS: I think we have time for one or maybe two more audience questions.

AUDIENCE QUESTION TWO: Hi. Thank you for coming. So, we've heard from a pretty wide variety of perspectives here. Aside from the sponsors, who are making that sweet 20 percent promote, who do

15. Rodrigues & Stegemoller, *supra* note 2.

you think has gained the most from the flurry of activity over the last few years?

MIKE STEGEMOLLER: Alex Rodriguez.¹⁶ Gregg, I think this is your question actually.

GREGG NOEL: It's such a good question because like any investment, it depends on where you are and which ones you've invested in. And obviously I'm still working, so my crystal ball's not as good as, as you know, some George Soros; and so I'm not sure I could tell you who's done the best, but if you had bought in the IPO for the SPAC that did DraftKings, you got warrants and you got stock and you did quite well. There's quite a number of them where you did super well. So I'm probably not the best person to ask because I'm still working.

USHA RODRIGUES: I think to that point it's hedge funds, not to the you're-still-working point, Gregg. Hopefully, it's just for the joy, for the love of the practice. But the hedge funds, largely the IPO investors are hedge funds, and they have this guaranteed return with the redemption right, and then they have this exposure to the upside, which is the warrants and particularly as has been mentioned, often in this low interest environment that appears to have been a pretty attractive proposition within at times what looks like an almost risk-free investment with some potential for an upside.

AJ HARRIS: One final question and then we're going to close today's panel. Go for it.

AUDIENCE QUESTION THREE: So in the past year or so we've had a lot of influence from social media and various celebrity figures, especially on the retail investor side. I'm wondering whether that influence can be regulated or if it's just going to be a facet of the market going forward?

RICK FLEMING: I don't know if it can be regulated, I would point out that the Commission issued an Investor Alert, back in the spring, maybe last winter talking about this very issue to try to let, basically tell investors, "Look, don't make your investment decision just because

16. Alex Rodriguez, former shortstop for the New York Yankees. See *Alex Rodriguez*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/r/rodrial01.shtml> [<https://perma.cc/9UVQ-QUQL>] (last visited Nov. 21, 2021).

some celebrities involved in the deal.”¹⁷ That might be the best we can do for this particular type of circumstance. It’s hard to craft a rule around that, but I think getting that message out there, from reputable sources, is maybe the best we can do.

GREGG NOEL: It if you want to read it, it came out on March 10th from the Office of Investor Education of the Commission.¹⁸

AJ HARRIS: It’s also the program materials. So with that I want to thank all of our panelists. Please join me in giving them a round of applause for a wonderful discussion.

17. *See Celebrity Involvement with SPACs – Investor Alert*, U.S. SEC. & EXCH. COMM’N (Mar. 10, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert> [<https://perma.cc/4WKQ-QRY7>].

18. *Id.*

KEYNOTE ADDRESS

INSIDE CHICKEN: REMARKS AT THE *FORDHAM JOURNAL OF CORPORATE & FINANCIAL LAW* SYMPOSIUM: “HERE TO STAY: WRESTLING WITH THE FUTURE OF THE QUICKLY MATURING SPAC MARKET”

AJ HARRIS: We are thrilled and honored to be joined by Commissioner Hester Peirce of the SEC for today’s keynote. Hester Peirce was appointed by President Donald J Trump to the U.S. Securities and Exchange Commission and was sworn in on January 11th, 2018. Prior to joining the SEC, Commissioner Peirce conducted research on the regulation of financial markets at the Mercatus Center at George Mason University. She was senior counsel on the U.S. Senate Committee on Banking, Housing, and Urban Affairs, where she advised Ranking Member, Richard Shelby and other members of the Committee on securities issues. Commissioner Peirce served as Council to SEC Commissioner, Paul Atkins. She also worked as a staff attorney at the SEC’s Division of Investment Management. Commissioner Peirce was an associate at Wilmer Cutler Pickering, now WilmerHale, and clerked for Judge Roger Andewelt on the Court of Federal Claims. Commissioner Peirce earned her bachelor’s degree in Economics from Case Western Reserve University, and her JD from Yale Law School. Please join me in welcoming Commissioner Peirce to Fordham Law School.

COMM’R PEIRCE: Thank you, AJ Harris. It is a pleasure to be part of the *Fordham Journal of Corporate & Financial Law* conference. I have to start with the standard disclaimer. My views are my own and not necessarily those of the Securities and Exchange Commission or my fellow Commissioners.

A family I know recently acquired a flock of mail-order chickens to produce free-range eggs. A baker’s dozen—thirteen little chicks—have now grown up into 12 egg-producing hens. The 13th is still holding out for an egg-stra egg-laying incentive, I guess. Each of these hens has her own look and personality. My favorite is the chicken who desperately wants to move out of the hen house, which is actually quite a functional dwelling, and into her featherless family’s house. This would-be inside

chicken, in an effort to ingratiate herself with her “peeps,” runs up to greet any family member who comes out of the house. She also has a habit of walking up onto the deck and looking longingly through the sliding glass doors when the family is sitting inside at the dining room table. If I were part of the family, I certainly would have caved by now to the hopeful bird pleading with me from the outside, but the family has not been moved by her fowl pleas.

Also on the lookout for a better perch is Journey, thus renamed because the family found her trying to cross the road in front of the house. With a bit of effort, they managed to catch her and return her to the coop before she made the trek. Why did this chicken try to cross the road? Maybe she thought that the chicken coops are more luxurious on the other side or maybe there is a handsome rooster waiting there for her. Along with the would-be inside chicken, Journey is not content to remain in the hen house. The 11 other chickens, however, seem quite content with their coop. The food is good and plentiful; the sleeping accommodations are cozy; and the structure keeps predators out. Accordingly, as the sun goes down in the evening, these 11 hens happily take refuge in their coop.

The chickens, of course, got me thinking about companies and specifically about companies’ decisions around going public or staying private. Why is it that some companies want to go public and others are perfectly content to remain private? For those that decide to go public, how do they select a time and method for going public? Is there anything we at the SEC can do to make it more likely that private companies will choose earlier in their lives to become publicly listed companies so that retail investors can share in their growth? Is there anything we can do to assist them as they think about whether public markets or private are best for them? To that end, I will put in a shameless plug for a new interactive tool created by our Office of the Advocate for Small Business Capital Formation, which helps companies explore their options for raising funds in the private and public markets.¹

Average retail investors have very limited access to the private markets. The standards that keep retail investors low in the investor pecking order and thus confined to the public markets are protective—in my view overly so. Even retail investors’ indirect exposure is limited because retail funds typically have not placed many private companies

1. *Navigating Your Options*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/capitalraising/navigator> [<https://perma.cc/MMU6-3EW5>] (last visited Oct. 28, 2021).

in their portfolios. Our regulations prohibit more than 15 percent of open-end fund assets being held in private investments,² and our staff's admonitions have prevented even closed-end funds, which do not have the same liquidity demands, from holding more than that amount in private investments.³ Incidentally, our Asset Management Advisory Committee recommended we reconsider that staff limitation on closed-end funds.⁴ To give you a sense of how small the retail exposure to private investments is, one study indicated that private company investments accounted for only 0.15 percent of U.S. large-cap equity

2. See Dalia Blass, Director, Div. Inv. Mgmt., Speech: PLI Investment Management Institute (July 28, 2020) (citing Investment Company Act Rule 22e-4, which "formalized a longstanding SEC guideline that generally limited registered open-end funds' aggregate holdings of 'illiquid assets' to no more than 15 [percent] of the fund's net assets"), <https://www.sec.gov/news/speech/blasse-speech-pli-investment-management-institute> [<https://perma.cc/372B-PSJH>].

3. *Id.* As-then Director Dalia Blass explained:

[w]hile a few closed-end funds of private funds exist in today's marketplace, the staff of the Division has historically raised investor protection concerns if these products were to be offered to retail investors. For this reason, closed-end funds with more than 15 [percent] of their assets in private funds have, in the past and at the Division's urging, limited their offerings to accredited investors.

Id.

4. *Final Report and Recommendations for Private Investments*, U.S. SEC. & EXCH. COMM'N (Sept. 27, 2021), <https://www.sec.gov/files/final-recommendations-and-report-private-investments-subcommittee-092721.pdf> [<https://perma.cc/VZL5-YBXC>]. Recommendation 1 states:

The SEC should consider whether its staff's current position that a closed-end fund that holds more than 15 [percent] of its assets in private funds should only be offered to Accredited Investors is appropriate. Investors in such funds already have the benefit of comprehensive investor protection under the [Regulated Investment Company] rules including having an investment adviser, independent directors and extensive disclosure and reporting requirements. In addition, this requirement is an impediment to closed-end funds listing and creating a secondary market (and thus liquidity) for investors in closed-end funds.

Id.

funds' \$5.1 trillion in assets as of December 2017.⁵ Private companies may be too small for a large retail fund to gain adequate exposure to justify an investment, but as larger companies are staying private longer, some funds are defying this trend by crossing over into the private markets.⁶ Still, generally only companies that go public have broad access to both institutional and retail money. And retail investors are able to invest in only a small subset of companies.

As with the chicken ratio I described earlier, the ratio of companies that even contemplate going public versus those content to remain private is low. No one formula works for every company in determining whether and when to go public. Even if Journey does not decide to cross the road, being free-range and having the option to do so, has some value to her. Companies likewise benefit from having the option of remaining private or becoming public.

Most companies stay private for their entire lives. Compare, for example, the estimated 31.7 million small businesses in the United States last year to the approximately 4,000 public companies.⁷ The private market is the right place for many companies focused on serving their local communities or filling a small niche demand.⁸ Moreover, for

5. Dan Lefkovitz et al., *Where Public Meets Private: Accessing Private Markets Through Listed Equities*, MORNINGSTAR, https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/private-equity-finalpdf.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=20170 [https://perma.cc/CB2Y-AAYN] (last visited Oct. 29, 2021).

6. See Cameron Stanfill et al., *Crossing Over Into Venture: A Look at Crossover Investors' Impact on US VC Dealmaking*, PITCHBOOK, <https://pitchbook.com/news/reports/q2-2021-pitchbook-analyst-note-crossing-over-into-venture> [https://perma.cc/2AM8-YQXD] (last visited Oct. 29, 2021). See also TRANSCRIPT, SMALL BUSINESS CAPITAL FORMATION ADVISORY COMMITTEE MEETING 69-109 (2021) [hereinafter SBCFAC MEETING TRANSCRIPT], <https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-092721.pdf> [https://perma.cc/93TS-KLYH] (last visited Oct. 29, 2021).

7. Cf. *2020 Small Business Profile*, SBA OFF. ADVOC. (stating that there were 31.7 million small businesses in the U.S. in 2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf> [https://perma.cc/A8JG-PN4H] (last visited Oct. 29, 2021) with *Annual Report for Fiscal Year 2020*, OFF. ADVOC. FOR SMALL BUS. CAP. FORMATION (stating that there were 3,559 U.S. publicly-traded companies in 2020) [hereinafter *2020 Small Business Annual Report*], <https://www.sec.gov/files/2020-oasb-annual-report.pdf> [https://perma.cc/A5YT-KQM6] (last visited Oct. 29, 2021).

8. See *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, 85 Fed. Reg. 17956, 17957 (Mar. 31, 2020) (explaining that the private market “supports the capital needs of many small and

a company whose founders do not want to give up control, the private markets are generally a better fit.⁹ Companies that stay private may find that their funding needs are well-satisfied through founders' personal funds, reinvested income, bank loans, or funds available in the private markets.¹⁰

For other companies, however, going public is a natural and even necessary phase of their corporate journey. They may want to go public to maximize their capital-raising options, provide liquidity to their owners, benefit from robust secondary markets, or enjoy the reputational benefits associated with being publicly listed and traded. A company that needs to raise large amounts frequently will have an easier time doing so as a public company. A company may view being public, with all of the attendant transparency and listing requirements, as a way to signal its quality.

Going, and being, public, of course, come with costs, which have to be weighed against the benefits. Public companies face greater scrutiny from the general public, short sellers, and regulators than their private counterparts. A whole set of rules governs public company financial reporting and other disclosures. Public companies in the United States often face costly shareholder litigation. And, increasingly, public companies are subject to disclosure demands related to any manner of topics of interest in social and political conversation. Moreover, sometimes the benefits of being public are elusive as liquidity for small public companies and research coverage may not meet expectations. Living inside the human house would bring greater comfort and better food, but would come with a whole array of uncomfortable rules that might be ill-suited for the average chicken.

Many companies doing the cost-benefit analysis are concluding that the benefits of going public do not justify the costs. Consequently, a lot of growth is happening outside of the public markets and thus outside of the nest eggs of most retail investors. Over the years, the number of public companies in the United States has declined, rather than

medium-sized companies that contribute substantially to our economy but that are unlikely to become public companies due to their size, the nature of their capital needs, or other factors”).

9. See *2020 Small Business Annual Report*, *supra* note 7 (listing the costs and benefits founders and their investors typically weigh in deciding whether to become a public company).

10. See *id.* (detailing common sources of capital for small and emerging businesses).

increased as one might expect with a growing and increasingly prosperous population. After the dot-com boom's peak of more than 7,000 public companies in the United States in the 1990s, the number quickly dropped to more than 5,000 in the 2000s, and has been below 4,000 since 2010.¹¹ Companies that go public tend to be larger than they used to be because they are waiting longer to go public. For example, the median age and sales of a technology company initial public offering ("IPO") in 2001 was 9 years and \$24.6 million; in 2020, those figures were 12 years and \$201.7 million.¹²

An initial public offering is the most common method for a company to go from being private to being listed on an exchange. Last year, 218 IPOs raised \$78.2 billion, compared to 160 IPOs raising \$46.3 billion in 2019, and 192 IPOs raising \$46.9 billion in 2018.¹³ Companies generally ponder and plan for an IPO over a period of years. Once a company has decided to go public, it hires a raft of professionals—including investment banks, auditors, lawyers, and consultants—to shepherd it through the process and ensure the company can meet the demands of being public. Internal controls over financial reporting, risk and compliance management procedures, corporate governance structures, tax planning, and internal structures to handle ongoing reporting obligations all demand attention. Only after the company has all its chickens on the roost is it time to file a registration statement with the SEC and go through the iterative process of responding to comments raised by accountants and lawyers in the SEC's Division of Corporation Finance. A company traditionally sells its stock through a firm commitment offering. The issuer and underwriters agree on the terms of the deal, including, importantly, the price based on the underwriters' due diligence. The underwriters purchase the securities at an agreed-upon discount to the price at which they subsequently resell the securities to dealers and institutional investors. From there, secondary trading on an

11. *See id.* Note 126, at 93, details how the estimates were calculated by the SEC's Division of Economic and Risk Analysis.

12. *See* JAY R. RITTER, INITIAL PUBLIC OFFERINGS: UPDATED STATISTICS 11-12 (2021), <https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf> [<https://perma.cc/N3QF-A3Q9>].

13. *US IPO Market 2020 Review*, RENAISSANCE CAP. (Jan. 5, 2021) (data excludes SPACs), https://www.renaissancecapital.com/review/2020USReview_Public.pdf?utm_source=2020AnnualReveiwPDF1&utm_campaign=2020AnnualReview&utm_medium=email&inf_contact_key=579a51fa0580ec1a58148b39b76c02d409c74070ac2bf3cfa7869e3cfd4ff832 [<https://perma.cc/8VFB-8EH5>].

exchange begins at market prices based on orders to buy and sell the securities. The IPO process is a good one because it helps to ensure that companies are ready for the attention, scrutiny, and regulatory obligations that public markets inevitably bring.

The expense and time involved in the IPO process, concerns over underpricing, and the varying needs of companies going public have led some companies to explore alternatives to the traditional IPO. Specifically, the standard IPO is facing competition from direct listings and SPACs. A direct listing offers a company a way to list its shares on an exchange without an underwritten offering. Given the absence of underwriters, a designated market maker, in consultation with the company's financial advisor, sets the opening price. Thereafter, the shares trade on an exchange at market prices based on orders to buy and sell the securities. The direct listing model allows existing shareholders, including employees, to benefit from public market liquidity. Companies have not yet used direct listings to raise capital, but new exchange rules allow them to do so.¹⁴

Despite their limited use—only twelve companies have availed themselves of this option¹⁵—direct listings are a promising innovation for mature, financially strong companies that want to provide liquidity to their shareholders. Direct listings may be attractive to issuers seeking to avoid paying underwriter commissions or experiencing an “IPO pop” in their share price, which might signal that money has been left on the table. Direct listings also may be attractive to the investors who in a traditional IPO would only be able to buy shares in aftermarket trading; in a direct listing, they can purchase shares in the initial public offering. On the downside, the absence of underwriters may mean less due diligence and one fewer deep pocket to sue. Some critics are concerned

14. Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Allow Companies to List in Connection with a Direct Listing with a Primary Offering In Which the Company Will Sell Shares Itself In the Opening Auction on the First Day of Trading on Nasdaq and to Explain How the Opening Transaction for Such a Listing Will be Effected, 86 Fed. Reg. 29169 (May 25, 2021); Self-Regulatory Organizations; New York Stock Exchange LLC; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings, 85 Fed. Reg. 85807 (Dec. 29, 2020).

15. Jay R. Ritter, *Initial Public Offerings: Direct Listings Through September 29, 2021*, UNIV. FLA. DEP'T FIN., INS., & REAL EST. (Oct. 1, 2021).

that primary direct offerings, in which registered and unregistered shares trade simultaneously, could eliminate Section 11 liability given the difficulty of tracing shares purchased to the relevant registration statement, but others point to a decision by the Ninth Circuit last month that shares purchased in a direct listing can be traced back to the registration statement.¹⁶

Rather than engaging in an IPO or conducting a direct listing, a company wanting to be part of the public markets may simply be acquired by a public operating company. By doing so, the company sidesteps the process of going public through an initial public offering, but nevertheless gains exposure to the benefits and burdens of being public. Of course, those benefits and burdens are borne with the assistance of the acquiring company and its established network of advisors.

Alternatively, a private company can engage in a merger transaction with a Special Purpose Acquisition Company (“SPAC”). A SPAC sponsor takes a shell company public without any operations and then sets out to find an operating company with which to merge. The SPAC model is no spring chicken, but it is newly popular. Through three quarters of 2021, 489 SPAC IPOs have raised \$137 billion; in 2020, 248 SPAC IPOs raised \$83.4 billion, and in 2019, 59 SPAC IPOs raised \$13.6 billion.¹⁷ In stark contrast, in 2009 SPACs were rare as hen’s teeth with only one SPAC IPO that raised \$36 million.¹⁸ SPACs have been around since 1993¹⁹ and were developed as the SEC was overhauling its rules relating to blank check companies as mandated by the Penny Stock Reform Act of 1990.²⁰ Those legislative and regulatory efforts were reactions to widespread abuses in blank check offerings in the 1980s. At the time, such offerings were prime vehicles for pump and dump schemes, complete with unscrupulous brokers in boiler rooms

16. Pirani v. Slack Technologies, Inc., 13 F.4th 940, 946-49 (9th Cir. 2021).

17. *SPAC IPO Transactions: Summary by Year*, SPACINSIDER (2021 figures as of Oct. 26, 2021, 3:04 PM), <https://spacinsider.com/stats/> [<https://perma.cc/PKJ5-6FLW>].

18. *Id.*

19. Amrith Ramkumar, *SPAC Pioneers Reap the Rewards After Waiting Nearly 30 Years*, <https://www.wsj.com/articles/they-created-the-spac-in-1993-now-they-reaping-the-rewards-11615285801> [<https://perma.cc/P22K-DXDJ>] (last updated Mar. 9, 2021, 4:53 PM).

20. See generally Derek K. Heyman, *From Blank Check to SPAC: The Regulator’s Response to the Market, and the Market’s Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L.J. 531 (2007).

cold-calling retail investors. SPACs have since risen and fallen in popularity depending on market conditions, but it is only recently that SPACs became the subject of dinner-table conversation.

Dinner-table chatter about SPACs may have to be accompanied by, in addition to the obligatory butter chicken, a white board because the SPAC structure is not simple. As I mentioned, a SPAC is a company with no operations, but with plans to find and merge with an operating company within a preset time frame. It raises money through an IPO. It offers shares and warrants to investors and holds the offering proceeds in a trust account for use in a later acquisition. After the IPO, the SPAC's securities are freely tradeable on an exchange at market price. Investors rely on the SPAC's sponsors to identify, value, and propose an acquisition of a promising private operating company. In exchange for these services, the SPAC sponsor receives a significant stake in the SPAC and has a number of economic incentives to complete an acquisition, incentives that at times may conflict with the interests of the SPAC shareholders. While SPAC investors rely heavily on the SPAC sponsors, the shareholders typically have the right to vote on the proposed acquisition and to redeem their shares for the original SPAC IPO share price. This second stage, often referred to as the de-SPAC transaction, involves the completion of the business combination. Investors in the SPAC receive disclosures about the target company upon which to make their decision of whether they want to stay in or want out. Institutional or wealthy investors may supply additional cash in a concurrent private investment in public equity ("PIPE") transaction. In spite of the complexity inherent in the structure, SPACs are so popular that celebrities have gotten into the game. Or maybe they are so popular because celebrities have gotten into the game.²¹ A chicken and egg question.

SPACs are celebrities in their own right. They have enthusiastic fans and passionate detractors. The fans argue that SPACs offer private companies a quicker and in some ways easier avenue to the public markets, a path that makes going public possible for companies that might otherwise not have had a viable way of doing so and that gives retail investors a chance to participate in the growth of promising companies. Professor Steven Davidoff Solomon notes that "SPACs[]

21. *Celebrity Involvement with SPACs – Investor Alert*, U.S. SEC. & EXCH. COMM'N (Mar. 10, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert> [<https://perma.cc/4WKQ-QRY7>].

have single-handedly revived the market for initial public offerings, taking small companies public by the dozens.”²² While not exactly a neutral observer, a sponsor of SPACs puts it this way: “SPACs . . . can give a large swath of investors access to the kind of high-growth companies the well-connected have been making billions of dollars off of for years.”²³

SPAC critics argue that SPACs are not what they are cracked up to be. While SPACs are a way of getting more companies into the public markets earlier in their lives, SPACs likely are not appropriate for retail investors not inclined to monitor their investment closely to determine whether to redeem.²⁴ More specifically, critics contend that the complexity, opacity, and mechanics of the process and the slimmed down protections work to the detriment of retail investors and the benefit of the sophisticated parties involved in these transactions. In what has become a seminal research paper on this recent flurry of SPAC activity, the authors identified substantial dilution of the post-merger shares that stems from the sponsor’s promote fee, underwriting fees, and warrants and rights and observed that these costs are primarily borne by the SPAC shareholders.²⁵ The authors conclude that the median SPAC costs as a percentage of post-merger equity are 14.1 percent, which means that the transaction must generate significant surplus value for the SPAC and target shareholders to merely break even.²⁶ Moreover, the

22. Steven Davidoff Solomon, *In Defense of SPACs*, N.Y. TIMES (June 12, 2021), <https://www.nytimes.com/2021/06/12/business/dealbook/SPACs-defense.html> [<https://perma.cc/D6KZ-SAF6>].

23. Chamath Palihapitiya, *SPACs Need More Regulation and Oversight*, BLOOMBERG (May 27, 2021), <https://www.bloomberg.com/opinion/articles/2021-05-27/spacs-can-take-away-the-insiders-advantage-in-ipos-and-markets> [<https://perma.cc/KH93-3MRW>].

24. *See generally Securities and Exchange Commission Investor Advisory Committee (IAC) Meeting Webcast*, YOUTUBE (Mar. 11, 2021) (Panel Discussion Regarding Special Purpose Acquisition Companies) [hereinafter *IAC Meeting Webcast*], <https://youtu.be/qjCet2Dx04k> [<https://perma.cc/JEF9-DRX2>].

25. *See generally* Michael Klausner et al., *A Sober Look at SPACs* (Eur. Corp. Governance Inst. ECGI, Finance Working Paper No. 746/2021, 2021), https://ecgi.global/sites/default/files/working_papers/documents/klausnerohloggeruanfinal.pdf [<https://perma.cc/YK5L-ARD6>]. Note that citation refers to the April 2021 version of the paper, which contains figures that were omitted in the version later published in 2022. *cf* Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228 (2022).

26. *Id.* at 27.

authors find that the median cost of a SPAC is 50.4 percent of the amount raised in the offering, which is far higher than the total IPO costs of approximately 27 percent of cash raised.²⁷ Others, such as the CFA Institute, also have pointed with concern to the competing incentives embedded in the SPAC structure: the economic incentives for an IPO investor may differ from those of an investor who purchased later in the secondary markets, and PIPE investors who receive discounted shares may have different incentives than the SPAC shareholders.²⁸ An article by two professors who spoke earlier today identifies problems arising from so-called empty voting when investors both redeem and vote for the merger.²⁹ In other words, they egg the merger on even though they are not committing their own capital to it. Moreover, what is good for the SPAC sponsor may not be good for the SPAC investors. Heightening these dynamics is the fact that, given how many SPACs are looking to merge with targets within the next couple years, finding a suitable target at a good price may be hard. While a rushed deal may be beneficial for the sponsor running up against the SPAC's pre-set termination date, the investors who do not redeem may be left holding the bag. In other words, the arrangement may set up an unhealthy dynamic—a sort of game of chicken as the sponsor races to find a target before the preset clock runs out and runs the SPAC off the cliff.

On balance, however having more than one way for companies to get into the public markets is good. As Jennifer Schulp of Cato observed, “Direct listings and SPACs may encourage companies to go public that otherwise have spent their high growth years private, out of reach of most retail investors.”³⁰ Having multiple roads to the public markets may not mean a chicken in every retail investor's pot, but could

27. *Id.* at 31.

28. *Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections: Hearings on H.R. Before the H. Comm. On Financial Services, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, 117th Congress* (May 24, 2021) (statement of Stephen Deane, Senior Director of Legislative and Regulatory Outreach, CFA Institute).

29. *See generally* Usha Rodrigues & Michael A. Stegemoller, *Redeeming SPACs*, (Univ. Ga. Legal Stud., Res. Paper No. 2021-09, 2021).

30. Jennifer J. Schulp, *IPOs, SPACs, and Direct Listings, Oh My!*, CATO INST. (May 21, 2021), <https://www.cato.org/commentary/ipos-spacs-direct-listings-oh> [<https://perma.cc/Q7XR-84BG>].

make it more likely that retail investors will get to invest in a broader swath of growing companies.

Accepting that different companies will prefer different routes to the public markets, the Commission should focus its efforts on (1) prior to engaging in rulemaking, understanding who the investors are and what incentives they have at each stage of the SPAC process, (2) against that backdrop, ensuring that disclosures are clear and accurate, (3) maintaining a sensible substantive regulatory framework for SPACs, and (4) paring back unnecessary requirements on going and being public. The goal of this exercise would be to ensure that companies have workable options for getting into the public markets and investors, including retail investors, have the ability to invest in a wide variety of companies during their growth stages.

The first order of business should be to understand investor incentives and behavior at each stage: the IPO, pre-acquisition secondary trading, PIPE, and post-merger. If retail investors are being fleeced, as some critics assert, then I agree we need to evaluate how to level the playing field and ensure appropriate protections. However, the limited evidence thus far suggests that retail investors may play a limited role in SPACs. Building upon the research conducted by Professor Klausner and others, the Committee on Capital Markets Regulation (“CCMR”) finds that institutional investors contribute the vast majority of investment dollars at the IPO stage.³¹ Moreover, institutional investors typically redeem their shares, which means the shares are removed from trading and not available for purchase by retail investors.³² Finally, the CCMR finds that public secondary market trading is extremely limited, which suggests little retail activity. Specifically, it concludes that the 30-day average trading volume for all SPACs was approximately 0.08 percent of outstanding shares.³³ More studies by academics and the Commission staff would be helpful in informing us about retail investor participation in SPACs.

Second, we should continue to ensure that disclosures are providing investors with material information. The large number of SPACs has

31. See generally COMM. ON CAP. MKTS. REGUL., NOTHING BUT THE FACTS: RETAIL INVESTORS AND SPECIAL PURPOSE ACQUISITION COMPANIES (2021), <https://www.capmktreg.org/wp-content/uploads/2021/10/CCMR-NBTF-SPACs-Retail-Investors.pdf> [<https://perma.cc/MX9V-3F4H>].

32. *Id.* at 2-3.

33. *Id.* at 3.

given the staff of the Division of Corporation Finance, under the leadership of Renee Jones, an unrelenting flow of work and many opportunities to think about disclosures during the SPAC and de-SPAC processes. The lessons our staff is drawing from these reviews will inform any future SPAC rulemaking. Indeed, early lessons were already reflected in staff guidance issued in December 2020.³⁴ In addition, both the Investor Advisory Committee (“IAC”) and the Small Business Capital Formation Advisory Committee have held helpful discussions of SPACs.³⁵ The IAC produced a recommendation that included a number of potential disclosure enhancements.³⁶

Drawing from both the staff guidance and the work of the advisory committees, we can identify some areas where clear disclosure is important. As an initial matter, SPACs are not all identical, so disclosure needs to enable investors to understand each SPAC on its own terms. Disclosure also needs to lay out the economics of the transactions. The IAC recommends tabular disclosure of cash per share contingent on specified levels of redemption to aid investors in understanding the impact of de-SPAC dilution. The IAC similarly suggests requiring disclosure of the sponsor’s total investment in the transaction, the value of that investment if a merger closes, and the break-even post-merger price for the sponsor. Standardized tabular disclosures could help to address one criticism of existing disclosures, which is that investors need to comb through disclosures from disparate places to put together a picture of what is really going on in a transaction.

Not surprisingly, the wave of SPACs has led to certain structural modifications in SPACs. For example, it is becoming more common for these transactions not to include warrants, which some observers have criticized as harmful to retail investors.³⁷ In addition, PIPE investors are increasingly pressuring sponsors to retain skin in the game post de-

34. *Special Purpose Acquisition Companies*, U.S. SEC. & EXCH. COMM’N (Dec. 22, 2020), <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies> [<https://perma.cc/CLL6-WV5T>].

35. See *IAC Meeting Webcast*, *supra* note 24; SBCFAC MEETING TRANSCRIPT, *supra* note 6.

36. IAC, *Recommendations of the Investor Advisory Committee regarding Special Purpose Acquisition Companies*, U.S. SEC. & EXCH. COMM’N (Sept. 9, 2021), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210909-spac-recommendation.pdf> [<https://perma.cc/24FQ-WUE2>].

37. See *IAC Meeting Webcast*, *supra* note 24.

SPAC and to modify the size and nature of the sponsor promote fees.³⁸ If incentives are properly aligned, sponsors would not be able to count their chickens before the de-SPAC hatches. In any case, disclosures should be designed to convey the specific mechanics of the SPAC and de-SPAC clearly. If disclosure rulemaking is necessary, we should avoid prescriptive requirements regarding features that may be obsolete by the end of the notice and comment period. We also should make sure to retain disclosures that are working.³⁹

Third, the SEC should maintain a sensible substantive regulatory framework for SPACs. Most importantly, the SEC has a role in reminding companies considering going public through a SPAC that no matter the route you take to go public, being a public company is a serious commitment. Firms need to make sure they are ready for public company obligations. To help, staff in the Division of Corporation Finance issued a statement on certain accounting, financial reporting, and governance issues that a private operating company should carefully consider before a it enters into a business combination with a SPAC.⁴⁰

Guidance of that sort is very important, but as with any other area, we should be mindful of the effect our pronouncements can have in the market. If the staff believes fundamental changes are necessary, they should bring recommendations for proposed rules to the Commission that we can consider and issue for public comment. Over the past year, the staff took a couple of steps outside the rulemaking process that concern me precisely because they represented sweeping changes for the industry without notice and comment rulemaking or even a meaningful opportunity to provide input. The former Acting Director of the Division of Corporation Finance, for example, issued a statement questioning

38. *Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections: Hearings on H.R. Before the H. Comm. On Financial Services, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, 117th Congress* (May 24, 2021) (statement of Scott Kupor, Investing Partner, Andreessen Horowitz).

39. *See, e.g., IAC Meeting Webcast, supra* note 24 (Jocelyn Arel comments arguing against the proposition that there is less regulation for SPACs and detailing disclosure requirements, due diligence, and regulatory review throughout the life of a SPAC).

40. *Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies*, U.S. SEC. & EXCH. COMM'N (Mar. 31, 2021), <https://www.sec.gov/corpfin/announcement/staff-statement-spac-2021-03-31> [<https://perma.cc/4JBS-A6B2>].

conventional thought on the availability of the PSLRA⁴¹ safe harbor for projections used in de-SPAC transactions.⁴² A subsequent staff statement on accounting for warrants in SPACs⁴³ seemingly caught the industry by surprise and led to a notable slowdown in the SPAC IPO market and ultimately resulted in approximately 571 restatements, representing over 85 percent of all SPACs.⁴⁴

A recent well-publicized legal challenge seems to be inviting us to jump into the fray yet again by departing from more than 2 decades of practice and treating SPACs as investment companies. In August of this year, lawsuits were filed against three separate SPACs.⁴⁵ The gist of the complaints is that SPACs are investment companies under Section 3(a)(1) of the Investment Company Act of 1940 because their primary business is investing in securities.⁴⁶ Although the facts and circumstances of the SPAC at issue in at least one of those suits were unusual, some SPAC critics have latched on to this argument to attempt to apply it to all SPACs. Many in the industry and in the securities bar disagree.⁴⁷ SPACs are not investment companies, they argue, because, unlike actual investment companies as defined by the Investment Company Act, SPACs are not “primarily engaged ... in the business of

41. Private Securities Litigation Reform Act of 1995, 109 Stat. 737, 749, codified at 15 U.S.C. § 78u-5.

42. See John Coates, Acting Director, Div. Corp. Fin., Public Statement, SPACs, IPOs and Liability Risk under the Securities Laws (Apr. 8, 2021), <https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws> [<https://perma.cc/UW2M-Y5SQ>].

43. John Coates & Paul Munter, *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”)*, U.S. SEC. & EXCH. COMM’N (Apr. 12, 2021), <https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs> [<https://perma.cc/2GGD-DR7F>].

44. Robert Freedman, *Almost 90% of SPACs have had to restate financials*, CFO DIVE (Aug. 2, 2021), <https://www.cfodive.com/news/almost-90-percent-spacs-rewrite-financials/604267/> [<https://perma.cc/NPM5-VPKD>].

45. See, e.g., *Assad v. Pershing Square Tontine Holdings, Ltd.*, No. 1:21-CV-06907 (S.D.N.Y. filed Aug 17, 2021).

46. *Id.*, ECF No. 1, Complaint ¶ 3 (contending that “investing in securities is basically the only thing [the SPAC] has ever done”).

47. See *Over 60 of the Nation’s Leading Law Firms Respond to Investment Company Act Lawsuits Targeting the SPAC Industry*, ROPES & GRAY (Aug. 27, 2021), <https://www.ropesgray.com/en/newsroom/alerts/2021/August/49-of-the-Nations-Leading-Law-Firms-Respond-to-Investment-Company-Act-Lawsuits> [<https://perma.cc/XD47-QRYZ>].

investing, reinvesting or trading in securities,”⁴⁸ nor do they propose to be. In fact, SPACs state quite clearly in their prospectuses that their sole purpose is to bring about a merger, in one fashion or another, with an existing business, and to do so within a set period of time. Essentially, then, a SPAC, unlike an investment company, is typically designed to put all its eggs into one basket, albeit a basket to be identified at a later date. If the SPAC fails to bring about such a merger within the period of time described (usually 18 to 24 months), it will liquidate and cash investors out. While it may make some sense to put some parameters around SPACs to make sure they do not morph into something that does look like an investment company, applying the Investment Company Act regime to SPACs as currently structured would not serve investors. It would catch them by surprise. SPAC disclosures are clear about what the purpose of the SPAC is and that purpose is not to be an investment company.

Fourth, the SPAC wave is an opportunity for us to think about a bigger question: Why are so few companies going public? At last month’s Small Business Capital Formation Advisory Committee meeting, Sara Hanks keenly observed: “it seems to me like the very existence of SPACs . . . is an indictment on the complexity of going and being a public company, and shouldn’t we . . . address the issue of why SPACs exist in the first place, which is it’s really difficult to become a public company.”⁴⁹ Similarly, J.W. Verret noted that we should stop treating the traditional IPO as if it is the gold standard.⁵⁰ The Commission should consider whether the rules governing IPOs, direct listings, and SPACs are appropriately calibrated. For example, the interplay of GAAP and certain exchange listing rules may be limiting the ability of SPACs to merge with small companies with a value of less than \$300 million.⁵¹ We should consider whether there are ways to make SPACs, with appropriate investor protections, a viable vehicle for smaller companies to go public. We also could explore ways to enhance potential stepping stones to the public markets, such as Regulation A. Additionally, the extent to which SPACs rely on the PSLRA safe harbor for forward-looking statements when disclosing projections has

48. See Investment Company Act of 1940, Section 3(a)(1)(A); 15 U.S.C. § 80a-3(a)(1)(A).

49. SBCFAC MEETING TRANSCRIPT, *supra* note 6, at 171.

50. See *IAC Meeting Webcast*, *supra* note 24.

51. SBCFAC MEETING TRANSCRIPT, *supra* note 6, at 162.

garnered significant attention. Should SPACs be able to rely on this safe harbor when a company conducting a traditional IPO would not have the same ability? If projections are so important to companies going public through the SPAC process and if the safe harbor is a motivating factor of using the SPAC vehicle, then perhaps we should re-visit the policy considerations that have led to the prohibition on a new public company conducting a traditional IPO from relying on the safe harbor. Such a question, of course, would be a matter for Congress because the IPO prohibition is written into the statute.

The problems and solutions lie not just in the process of going public, but in the rules companies face once they are public. We have to make sure not to burden public companies unnecessarily. Allowing for scaled compliance with regulations by small and emerging companies, for example, can make being public less daunting. In addition, we should stick to the standard practice of tying the obligations imposed on public companies to the objective of providing material information to investors. Requiring companies to disclose information that is not material to an investment decision increases the costs associated with being a public company. If we expand beyond that into required disclosures on social and political matters, the chickens will come home to roost; fewer companies will be public.

While I do not want to sound like Chicken Little, the falling number of public companies over the last 20-plus years does cause me some concern. As I mentioned earlier, the fewer the companies in the public markets, the more limited is retail investors' ability to diversify across a broad range of companies since they have only limited access to private company investments. Society benefits from active and attractive public capital markets, but the Commission must remain neutral as to whether and how any particular company decides to go public. We can build sensible routes to, and rules for, public markets and do our best to keep costs down for public companies. Having a diverse array of options for companies to go public therefore helps; it enables companies to find the route to going public that works for their unique circumstances.

Thank you for listening today. I look forward to your comments and questions. Only I am too chicken to answer questions about particular SPACs.

AUDIENCE QUESTIONS

AJ HARRIS: I'll kick it off then. I'll ask, what do you think your role or what do you think the role of the regulator is when it comes to SPACs? We've heard a lot today from both sides, where some individuals believe the market itself is reforming the SPAC, whether it's the elimination of warrants and new offerings, lockup periods, or whatever inventions they come up with. To what extent should the market really dictate these evolutions versus the regulator, to say what should or shouldn't happen to the structure?

COMM'R PEIRCE: I mean my preference is to let the market sort of work this out, and I think it's really helpful to have a lot of people doing SPACs at the same time, so we can compare and see what works and what doesn't. And then the markets can produce; people won't buy them if they don't like the structure. And I think there's also a reputational piece that sometimes gets, I didn't mention it either, but gets forgotten, which is: if you're a SPAC sponsor, you can go in there and try to fleece your investors, but if you want to do another SPAC, that's not going to be forgotten. So I think there's that disciplining mechanism as well.

We do need to have rails within which SPACs operate, and I think that's what some of the questions that people are raising around "is this an investment company?" touch upon. You don't want to set up a system that allows a SPAC to effectively be an investment company that's not compliant with our '40 Act, but at the same time, you want to have as broad an ability for people to experiment and figure out what works. And then, of course, disclosure—the core SEC obligation is to make sure that whatever structure you're using, you're clear about it, and I think that's the area where we're going to spend a lot of time thinking to see whether the existing disclosures work.

AUDIENCE QUESTION ONE: Thank you for joining us today. Can you speak more about material disclosures and what you think are the differences between just any information that's disclosed and what's material? Are you thinking about the financial literacy of the investor, especially when there's so many different types of investors? You've mentioned PIPE investors and also celebrities that have come up.

COMM'R PEIRCE: That's a good question, and I confess that I'm mixing things a little bit. When I talk about disclosures and materiality, I'm really thinking about once a company is public, what is it disclosing? What we've traditionally done is we've said, "we want you

to be companies. We want you to be disclosing things that are material to an investor's sort of understanding of the long-term value of the company," which means that investors can care about lots of different things, but the one thing that they all care about is making returns, that and trying to understand the financial picture of the company. And so we're thinking about it more from sort of this neutral, objective perspective of what does the reasonable investor need to know in order to assess that company.

Now, of course, as we're looking at SPACs and disclosures around SPACs, I think one of the reasons that I said we need to step back and make sure we understand who the investors are is because if this is a heavily retail market, we're going to think about disclosure around the SPAC process a bit differently than if it's a very sophisticated set of investors. So we do take it into account in those kinds of contexts, but generally once the company is public, we're thinking through that lens of materiality which is objective.

AUDIENCE QUESTION TWO: So one of your concerns, as I hear it, is that retail investors won't have enough companies to invest in if fewer companies go public. But I think studies have shown that for retail investors, the best investments especially over time are really broad index funds, S&P500, and even the mutual fund industry barely beats the S&P500 over long terms—and taking into account taxes and fees over that longer period, almost none of those alternatives do. So that's the best real way for retailers, especially less sophisticated, the non-Warren Buffett's of the world, to invest. Is that still a concern, or is there something else that I'm missing?

COMM'R PEIRCE: No, it is still a concern. My thinking is I like to have that pool from which the S&P500 index is drawn to be as big as possible. So if you have a super big company that's in the private markets that if it were public would be in the S&P500 I think that's better. It's a better result to have more from which to diversify your investment pool, and the other thing you and I are probably in a different place on this in the sense that I think there's value to investors having the opportunity to invest in as many companies as possible. Even if I think most investors are going to be very content to just have an index fund that's a broad-based index fund and set it and forget it, I still think there's value to other people who are more interested in doing research on companies and maybe finding a few companies they want to have direct ownership of. I think that's beneficial for them as well.

From someone in my standpoint, who sees day-to-day and week-to-week a lot of people really being hurt by investing in all kinds of things, part of me wants to say that let's just tell people "invest in this range of things and don't mess with that other stuff." But I think that's a dangerous thing for me as a regulator to do because I just don't know people's circumstances. I don't know their sophistication. I don't know, maybe their grandfather worked for a particular company and they want to have an investment in that. There are all kinds of reasons, but generally, I think having that pool of public companies from which the indexes are built to be as big as possible is beneficial. And it's again, for any particular private company going public, we have no idea whether that's going to be a success or a failure. But I do think a lot of the growth is happening outside the reach of retail.

AJ HARRIS: On that point, can I ask a follow up? Even if these opportunities for growth are outside of the realm of retail, to what extent should the regulators or even the capital markets be looking to make those opportunities available? Is that something that a regulator should be saying investors can or cannot have access to?

COMM'R PEIRCE: Well, we need to rethink our accredited investor limitations right now. It's mostly only people who have a lot of wealth or income that can participate in private markets, so I'd be in favor of rethinking that.

But you're asking a good question, too, and that you're challenging me and saying you know, "is it any of the regulator's business anyway?" And in some sense, it isn't. Right? We have two models available to companies. You can raise money in the private markets. You can raise money in the public markets. Public markets have a broader investor base, they have more requirements, private markets smaller investor base fewer requirements. Why should I care what you choose? In some ways, it's good for us to have that bifurcated system because the fact that people can raise money in the private markets holds our feet to the fire a bit on how we set up our public market rules. If we do a bad job, everyone's going to stay in the private markets, and it can be a little bit of a check for us, and that's good. It's a fair point that in some ways it's really none of my business. But I do worry about it for the reason that we are telling a certain subset of investors that you only get to invest in the companies in the public markets.

AUDIENCE QUESTION THREE: My question concerns the promotion of SPACs and how that can lead to market manipulation cases. When you're promoting the search of a specific target company,

at the end of the of the day, there are projections of what you're going to sell at or what they knew the target company is going to be valued at. Promoters could present different projections that can pull the stock up or down in the prices, right?

COMM'R PEIRCE: Yeah, I mean I think that's why some people say they shouldn't be able to do projections, but I think investors find those projections useful. They're probably reading them with a little bit of a cynical eye.

I would say too that companies that do that are taking a great risk. As soon as you pop over into the public market, you're going to have short sellers looking at what you're doing and what your projections are. And again there's a reputational problem for you if you've had these great projections out there that turn out to be totally inaccurate. But no, there is definitely room for bad behavior here and I think that's why some people would like to constrain it more.

COMM'R PEIRCE: Thank you all for your patience today.

AJ HARRIS: I'll say a few closing remarks, and then we'll adjourn for the day. I would like to thank everyone in attendance for a wonderful discussion today. Thank you, Commissioner Peirce for joining us and sharing your wisdom and perspective, thank you to our panelists for participating and sharing your expertise. Thank you to the Fordham Law administration, for your support of the *Journal of Corporate & Financial Law* and for hosting us today.