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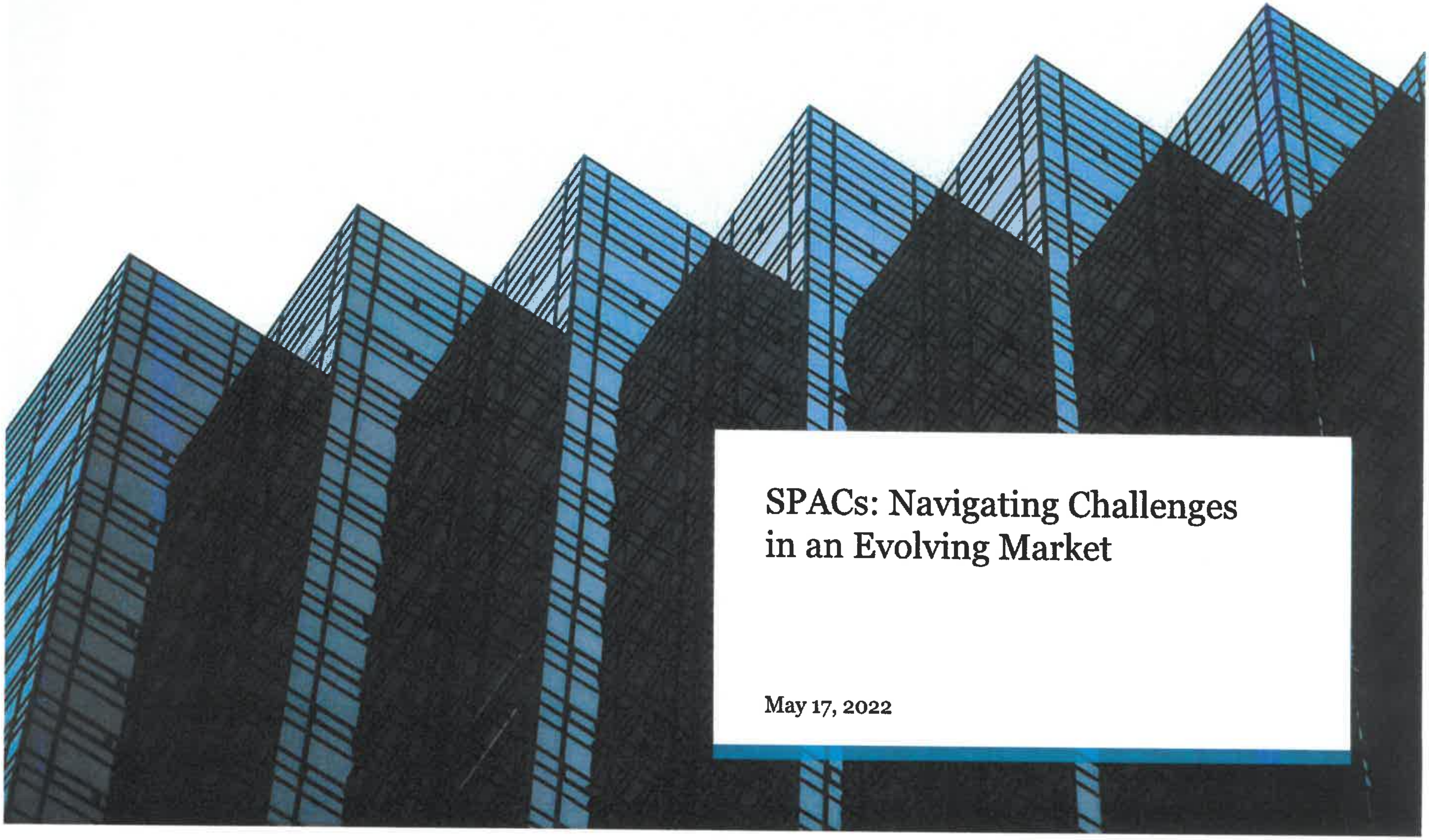
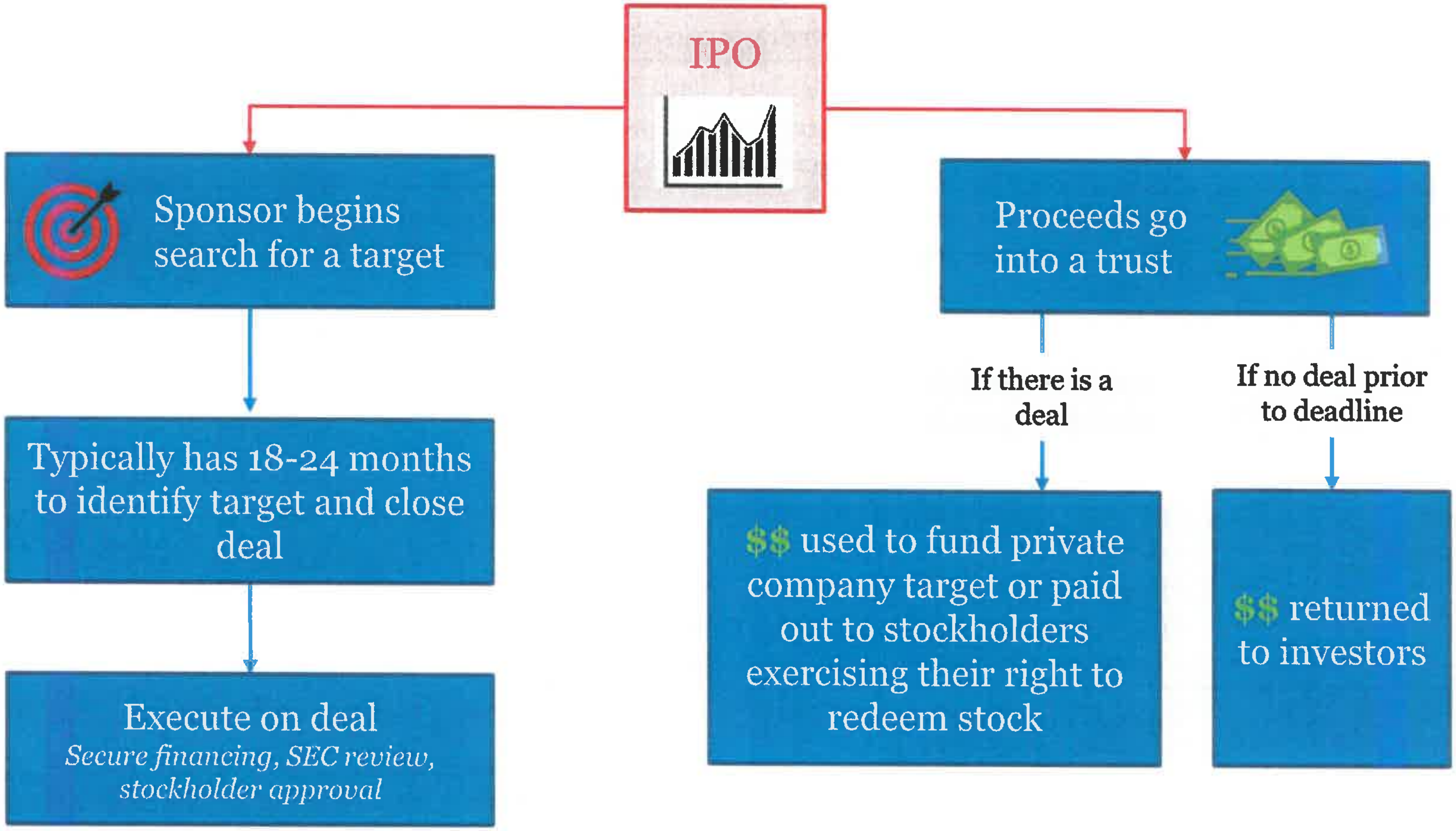


SPACs: Navigating Challenges in an Evolving Market

May 17, 2022

SPAC Structure & Transaction Considerations

How a SPAC Works



IPO

Sponsor begins search for a target

Typically has 18-24 months to identify target and close deal

Execute on deal

Secure financing, SEC review, stockholder approval

Proceeds go into a trust

If there is a deal

$$ used to fund private company target or paid out to stockholders exercising their right to redeem stock

If no deal prior to deadline

$$ returned to investors

Key SPAC Terms

IPO Unit Structure	• Each unit ($10.00 per unit) comprises one share of common stock and warrant (@ strike price of $11.50) (warrant coverage can be 1:1 or as low as 1:1/9)
Trust Proceeds	• IPO proceeds and capital received from Sponsor are placed in a trust, which is only released at closing of an acquisition transaction, liquidation of the SPAC or upon certain amendments to the SPAC's governing documents (e.g., to extend the SPAC's expiration date)
Timeframe	• Typically 18-24 months to close an acquisition transaction • SPAC may have extension rights for additional contributions to trust account or upon the occurrence of certain events
Sponsor Funding	• 2% of capital raised, plus $2m to $3m funded by the Sponsor; Sponsor loses this capital if SPAC does not close on a deal ("at risk" capital) • A portion of at-risk capital increasingly used to overfund the trust account—i.e., increase redemption price for public shareholders
Sponsor Economics	• Sponsor typically receives founders' shares equal to 20% of the total shares outstanding following IPO • Sponsor also purchases warrants struck at $11.50 • Sponsor increasingly expects to renegotiate economics at the business combination • Even with a cutback in sponsor promote, total economic value to Sponsors is compelling
Underwriting Fees	• Typically 5.5%, of which 2.0% is paid at IPO closing and 3.5% is deferred until closing of business combination
Forward Purchase Arrangement	• A forward purchase commitment or other arrangement may be entered into at the time of the IPO to help demonstrate committed capital to fund business combination

Benefits of a SPAC Transaction

- Competition between SPACs creates opportunities for SPAC targets
- Ability to structure transaction in a manner not available in IPO or a traditional exit, including cash-out to existing owners and earn-outs
- Can facilitate going public during periods of market instability
- Valuation certainty at transaction announcement and arguably less underpricing than traditional IPO
- Ability to de-risk outcome through a PIPE for some amount of committed equity capital
- Competition among SPACs is leading to better terms and lower cost of capital for targets
- Partnering with a SPAC sponsor and its affiliates may offer financing opportunities, operational expertise and investor access
- Post-combination entity has access to public debt and equity markets
- Longer marketing period (3 to 4 months) relative to a traditional IPO (1 to 2 weeks)
- Potential SPAC targets should consider a de-SPAC transaction relative to strategic alternatives, including a traditional IPO, potential sale or private capital raise

SPAC Transactions Have Special Risks

- *Deal Consummation Risk*
  - SPAC's stockholders' right of redemption creates uncertainty regarding the amount of cash that will be available to complete the transaction or fund the purchase price
    - Redemption risk can be mitigated through a **forward purchase arrangement**, a **PIPE financing** or similar arrangements
  - Redemptions can also result in stock exchange listing issues
  - SPAC's stockholders' right to vote to approve the business combination (typically required under state law or stock exchange rules)
  - Outside date for SPAC may put pressure on deal timing
- *Capital Structure*
  - Sponsor economics and SPAC warrant structures are sources of dilution not present in a traditional IPO
  - Public company will need to evaluate opportunities to clean up capital structure post-closing
  - Need to prepare for post-closing liquidity events—option/warrant exercise and expiration of lock-ups
- *Public Company Readiness and Post-Closing Compliance*
  - Target companies need to prepare comprehensive business and risk summaries, financials, similar to what is required in an IPO prospectus (in other words, target needs to be "IPO-ready")
  - Targets should begin this process as soon as possible (and often in anticipation of pursuing a SPAC transaction), including the preparation of **PCAOB-compliant financial statements**, in order to avoid delays between signing and closing
  - Build out management team, financial reporting function, and post-closing governance

Market Update & Trends

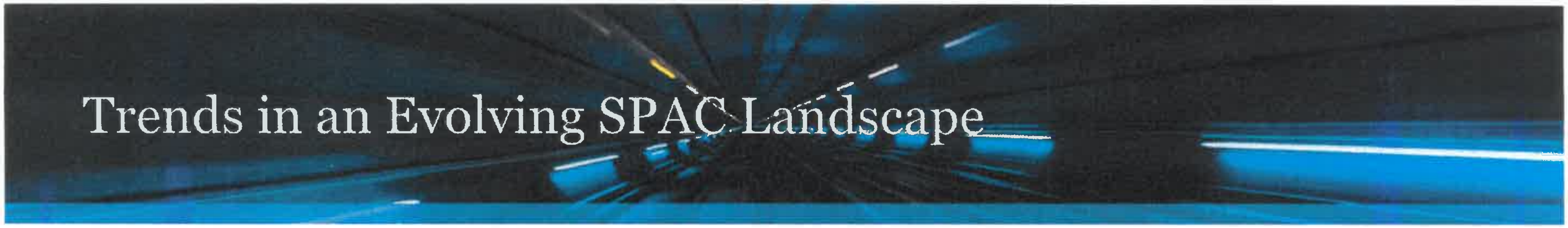
SPAC Market Update

In 2021, there were 613 SPAC IPOs, raising $162.5 billion in proceeds. Compares to 248 SPAC IPOs in 2020 and 59 in 2019.

In 2022, there have been 59 SPAC IPOs, raising $10.4 billion, with over 275 SPACs in the IPO pipeline.

Over 600 SPACs with roughly $160 billion in proceeds raised are seeking targets.

- **IPO terms have tightened in 2022**
  - Increase in warrant coverage
  - ~97% of SPAC IPOs included term shorter than 24 months
  - Most deals have featured overfunded trust accounts
- **Pace of de-SPAC transactions may be slowing**
  - 221 transactions announced in 2021 (51 in Q4)
  - 33 deals announced in Q1 2022
- **De-SPAC execution risk has increased**
  - In 2021, de-SPAC transactions became increasingly reliant on PIPE market to provide funding and to backstop redemptions
  - Redemption rates have increased as pace of common equity PIPEs has decreased
    - Redemption rates of ~85% in Q1 2022, compared to ~60% in Q4 2021 and ~10% in Q1 2021
    - Market averaged ~50 deals with PIPEs in Q2-Q4 2021, dropping to 11 in Q1 2022



Trends in an Evolving SPAC Landscape

- More pending SPAC IPOs will be withdrawn to avoid a crowded market and in light of worsening IPO terms
- With many SPACs expiring in Q4 2022 and Q1 2023, there could be an increase in liquidations and SPACs seeking extensions from their stockholders
- Pressure from redemptions and a difficult PIPE market will push SPACs to innovate and evolve
  - SPACs will pursue structured PIPE investments and other equity facilities to improve post-closing liquidity
  - High level of PIPE participation by existing target investors and sponsor affiliates
  - SPACs and targets will implement new redemption mitigation strategies—e.g., additional "bonus" payments to non-redeeming holders
- Regulatory uncertainty—including proposed SEC rules—will push some potential targets to avoid SPACs
- Additional regulatory scrutiny and financing availability will increase time needed to consummate a de-SPAC transaction and will add compliance cost and complexity
- Repeat sponsors and SPACs backed by traditional PE/investment firms may have an advantage in consummating de-SPAC transactions over SPACs formed by first-time sponsors
- De-SPAC'd companies could be targets for consolidation and even going private transactions if valuations remain depressed

Regulatory Challenges

The SEC's Concerns with SPACs

"[T]he surge of SPACs raises a number of policy questions. First and foremost, are SPAC investors being appropriately protected? Are retail investors getting the appropriate and accurate information they need at each stage — the first blank-check IPO stage and the second target IPO stage?

"Second, how do SPACs fit in to our mission to maintain fair, orderly, and efficient markets?"

SEC Chair Gary Gensler, Testimony Before the Subcommittee on
Financial Services and General Government,
U.S. House Appropriations Committee (May 26, 2021)

SEC's Proposed SPAC Rules

- ***Background* –**
  - Announced March 30th and approved by a three-to-one vote
  - Currently undergoing review and comment period
- ***Purpose***
  - Per Chair Gensler, to "strengthen disclosure, marketing standards, and gatekeeper and issuer obligations by market participants . . . helping ensure that investors in these vehicles get protections similar to those when investing in traditional [IPOs]."
  - Per Commissioner Peirce, the proposal "imposes a set of substantive burdens that seems designed to damn, diminish, and discourage SPACs . . . ." and require "significant changes to [a SPAC's] operations, economics and timeline."
- ***Impact*** – If adopted, the primary effects will be to
  - Expand liability for transaction participants, including underwriters and de-SPAC targets
  - Codify and extend existing disclosure requirements, including around SPAC sponsors and potential conflicts
  - Increase the complexity of executing a de-SPAC transaction by requiring additional disclosure and introducing new procedural elements
  - Limit—and in some cases discourage—the use of projections to market de-SPAC transactions
  - Impose time limits on a SPAC's ability to announce and close a business combination
  - If adopted, proposed SEC rules could create new avenues for litigation against already de-SPAC'd companies and future SPAC transactions

Proposed Rules – Underwriter Liability

- ***Proposed Rule*** – Underwriters in a SPAC IPO would be deemed to be underwriters in a de-SPAC transaction if they are involved, directly or indirectly, in the de-SPAC transaction
  - Advisory services, placement agent services, negotiating merger terms, identifying targets and other activities related to a de-SPAC would trigger rule
  - Proposal suggests, but does not clearly state, that receipt of a deferred underwriting fee would be sufficient to result in expanded underwriter liability
  - Brings another "gatekeeper" into de-SPAC process to benefit existing and potential investors

- ***Takeaways***
  - Certain underwriters may not participate in SPAC IPO transactions to avoid expanded liability risk
    - Goldman Sachs announced its withdrawal from the SPAC market in early May
  - IPO underwriters will need to determine (1) whether to participate as de-SPAC underwriters and (2) what additional procedural steps they will require to do so
    - Certain underwriters may choose not to participate in the de-SPAC process (and may abandon deferred fees) to avoid underwriter liability
    - Participating underwriters would benefit from a due diligence defense
    - Procedural elements will be developed over time, but will add complexity and cost
  - Where they participate, underwriters likely to seek expanded protections and procedural steps consistent with a traditional IPO, which will include independent due diligence and may include requests for comfort letters and legal opinions
  - Proposal leaves open possibility that other "statutory underwriters" may be designated in the future

Proposed Rules – Projections

- ***Proposed Rules***
  - The PSLRA safe harbor against a private right of action for forward-looking statements is not available in de-SPAC transactions
  - Modifies and expands disclosure requirements for projected financial information, including requiring
    - Material bases and all material assumptions, and factors that may materially impact the assumptions
    - Purpose for which the projections were prepared and party that prepared the projections
    - With each filing, whether the disclosed projections still reflect the view of the SPAC or target company as of the date of the filing

- ***Takeaways***
  - Greater risk of private actions against SPACs and their targets related to projections, though de-SPAC'd companies currently face lawsuits when they fail to meet projections
  - Greater focus on the scope of projections and underlying assumptions
  - Parties should prepare and review projections with an eye to future disclosure
  - Proposal will discourage the use of projections for early stage companies without an operating history
  - Deemed underwriters will need to consider risk of potential liability for projections disclosure in conjunction with expansion of underwriter liability

Proposed Rules – Fairness Disclosure

- ***Proposed Rule***
  - Requires statement from a SPAC of its reasonable belief as to the fairness of a de-SPAC transaction and any related financing transactions to the unaffiliated stockholders of the SPAC
  - Requires disclosure of the material factors supporting the fairness determination and, if a fairness opinion is obtained, background on the fairness opinion and the party delivering the opinion
  - If a director votes against, or abstains from voting on, approval of a de-SPAC transaction or any related financing, the SPAC would be required to identify the director and, if known, the reasons for the vote against or abstention
- ***Takeaways***
  - Required statement goes beyond customary board recommendation to stockholders
  - Use of fairness opinions likely would increase in de-SPAC transactions—the SEC noted that only ~15% of deals announced in 2021 referenced the SPAC obtaining a fairness opinion
  - Scope of buy-side fairness opinions could shift from the customary assessment of fairness of the transaction consideration to the SPAC, and opinions typically do not address relative fairness, i.e., fairness of consideration being paid to public SPAC stockholders vs. the SPAC's founders
    - Absent a change in the typical formulation, obtaining a third-party fairness opinion would serve as one element supporting the SPAC's fairness assessment
  - Proposal would require a SPAC to take into account PIPE and other third party financings, and the focus on "unaffiliated security holders" suggests that the dilution from the sponsor's promote should be taken into account as well
  - Parties to consider what projections will be required to render a fairness opinion, and if proposed rules on projections limit the use of projections, it may be difficult to obtain a third-party fairness opinion in certain circumstances

Proposed Rules –Target Company Status

- ***Proposed Rules –***
  - Target company will be a "co-registrant" when Form S-4 or Form F-4 is used in a de-SPAC transaction, with the target's officers and directors subject to liability under Section 11 for material misstatements or omissions in the filing, sharing liability with the SPAC and its officers and directors
  - Proposal would require the re-determination of smaller reporting company status within four business days after closing of de-SPAC transaction, with re-determination reflected in the first periodic report after closing

- ***Takeaways***
  - Co-registrant status gives targets and their advisors "buy in" for their disclosures, and though it involves an additional procedural step, liability is no different for targets than for a traditional IPO
  - Combined company would succeed to any liability of the SPAC for material misstatements or omissions in the pre-closing filings in any event
  - Re-determination of SRC status aligns de-SPAC transactions with traditional IPOs where the company going public determines smaller reporting company status at the time it files its initial registration statement (vs. a de-SPAC'd company retaining SRC status until the next annual determination date)
  - Because the average size of a de-SPAC company is greater than $1 billion, many de-SPAC targets will need to prepare to comply with the enhanced public disclosure requirements that come with a loss of SRC status

Proposed Rules – Enhanced Disclosure

- ***Proposed Rules*** – Among other changes, the proposal would
  - Clarify what financial statements are required to be provided in a business combination, including where additional businesses are acquired by SPAC targets or probable of being acquired SPAC targets
  - Require additional disclosure about the SPAC's sponsor and conflicts of interest
  - Require additional disclosure around sources of dilution, including tabular disclosure on the prospectus cover page and summary
  - Require that merger proxies be delivered to investors at least 20 calendar days in advance of a shareholder meeting (or the maximum permitted period if shorter than 20 days)

- ***Takeaways***
  - Codifies and somewhat extends much of the SEC's current guidance and practice regarding disclosures
  - Disclosures related to a transaction's dilutive impact highlights the SEC's view that there potentially is significant dilution in the traditional SPAC structure
  - Focus on giving SPAC stockholders the information they need to determine whether to remain a stockholder of the pro forma combined entity

Proposed Rules – Rule 145a

- ***Proposed Rules*** – Rule 145a would deem any direct or indirect business combination of a reporting shell company involving another entity that is not a shell company to involve a "sale" of securities to the reporting shell company's stockholders for purposes of the Securities Act

- ***Takeaways***
  - Addresses potential disparities in disclosure and liability protections available to stockholders of reporting shell companies, depending on the transaction structure deployed
  - Sales covered by Rule 145a would not be covered by the 3(a)(9) exemption
  - If no other exemption from registration is available, SPACs would need to file a registration statement in connection with the de-SPAC transaction
  - If adopted, most SPACs would not be able to seek stockholder approval using only a proxy statement
  - However, many SPACs already file Registration Statements on Form S-4 in de-SPAC transactions

Proposed Rules – Investment Company Act

- ***Proposed Rules*** – Creates a new safe harbor under the Investment Company Act. To qualify under the Safe Harbor
  - The SPAC's assets must consist solely of government securities, government money market funds, and cash
  - Assets may not be acquired or disposed of for the primary purpose of recognizing gains or decreasing losses
  - The SPAC must seek to complete a de-SPAC transaction where the surviving public company will be primarily engaged in the target business, which is not that of an investment company
  - The SPAC's board would need to adopt a resolution evidencing that the company is primarily engaged in seeking to complete a single de-SPAC transaction
  - Activities by the SPAC's directors and management must evidence that the SPAC is primarily engaged in completing a de-SPAC transaction
  - The SPAC must have at least one class of securities listed for trading
  - The SPAC would have 18 months from its IPO to enter into a de-SPAC transaction and no more than 24 months to complete its de-SPAC transaction
- ***Takeaways***
  - Most SPACs already satisfy the safe harbor requirements, and timing elements may be problematic
  - Time periods seemingly conflict with stock exchange rules requiring a SPAC to complete a transaction within 36 months after the SPAC's IPO, and note that SEC Investor Advocate Rick Fleming recently contacted stock exchanges urging more stringent de-SPAC standards such as requiring 50% or more public shares to be invested in SPAC post-combination
  - If a SPAC fails to qualify for the safe harbor, the alternative would be to make an assessment that the SPAC does not qualify as an investment company or to register as an investment company
  - Failure to qualify for the safe harbor could lead to litigation claiming that the SPAC failed to register as an investment company

Additional Regulatory Considerations

- ***Proposed Legislation*** – Multiple bills introduced that would regulate SPACs, and scope of proposed legislation overlaps with proposed SEC rules, including regarding the availability of the PSLRA safe harbor and conflicts of interest
- ***Stock Exchange Rules*** – SEC Investor Advocate Rick Fleming recently contacted stock exchanges urging more stringent de-SPAC standards such as requiring 50% or more public shares to be invested in SPAC post-combination
- ***SEC Enforcement Actions*** – The SEC brought a pre-closing enforcement action in connection with Stable Road Acquisition Corp's of Momentus, alleging fraud (negligence-based for Stable Road based on its failure to do sufficient due diligence on the target)
  - Stable Road, Momentus and Stable Road CEO to pay $8 million (penalty discounted because of cooperation)
  - SPAC sponsor to forfeit founder shares if the merger were approved
  - Original PIPE investors given right to terminate subscription agreements
  - Demonstrated that the SEC is focused on all sides of a SPAC transaction
- ***Changes in Accounting Guidance*** – The SEC has provided revised guidance regarding SPAC's accounting for warrants and the classification of a SPAC's public shares.
  - The changes led to two waves of restatements of SPAC financial statements and many SPACs missed filing deadlines for their quarterly filings following the change in guidance
  - De-SPAC'd companies that included the predecessor SPAC's financial statements in their registration statements also had to restate those predecessor financial statements

Litigation Update

In re: Multiplan Corp. S'holders Litigation

- The SPAC
  - Churchill Capital Corp. III
  - Formed in October 2019
  - IPO February 19, 2020 - $1.1 billion
- The Sponsor
  - Churchill Sponsor III, LLC
  - An entity formed and controlled by Michael Klein
- Equity Structure
  - Class A shares
  - 80% of equity held by public holders
  - Class B shares
    - 20% of equity held by the Sponsor (the "promote"). Class B shares convert to Class A at 1:1 ratio when the SPAC engages in a business combination

In re: Multiplan Corp. S'holders Litigation

- The SPAC Board
  - Board included Klein and seven others.
  - Klein had exclusive power to appoint the board.
  - Board members compensated with membership interests in the Sponsor – indirectly giving them an ownership interest in the Class B shares the Sponsor owned.
  - Directors alleged to have connections to Klein, including serving on boards of other SPACs formed by Klein.
- The SPAC Trust
  - The IPO proceeds were put into a trust.
  - The proceeds of the Trust could be paid under three scenarios:
    1. Company liquidation if no merger within the "completion window."
    2. A redemption right exercisable by a Class A holders following the disclosure of a merger, but before the vote on the merger.
       - "prior to the consummation of the initial Business Combination, [Churchill] shall provide all holders of Offering Shares with the opportunity to have their Offering Shares redeemed upon the consummation of the initial Business Combination."
    3. Consideration paid to complete the business combination or as working capital to finance the operations of the target business.

In re: Multiplan Corp. S'holders Litigation

- The SPAC Merger
  - The SPAC board chose Polaris Parent Corp. ("Multiplan") as the merger transaction for the SPAC.
  - In the merger the SPAC would pay cash and stock (valued at $10 per share) to the Multiplan stockholders.
  - The SPAC board chose The Klein Group LLC as the financial advisor for the merger.
    - The Klein Group is a wholly owned subsidiary of the Sponsor's managing member which itself is wholly owned by Klein.
- The Proxy
  - Disclosed that Multiplan depended on one customer ("UHC") for 35% of its revenue.
  - Did not disclose that UHC intended to create an in-house platform that would compete with Multiplan and cause the loss of the UHC business by end of 2022.
    - UHC had separately publicly disclosed this development.
  - Proxy did not include independent third-party fairness analysis.
  - Proxy stated SPAC shares valued at $10.04 as of the record date.

In re: Multiplan Corp. S'holders Litigation

- SPAC stockholders approved the merger on October 7, 2020, and it closed on October 8th.
- Only 10% of the Class A redeemed their stock.
- 93% of the shares voted in favor of the merger.
- On the record date the price of the SPAC shares was $11.09 per share.
- On November 11, 2020 a report issued about Multiplan included the UHC details.
- By November 12, 2020 Multiplan stock closed at $6.27 per share.

In re: Multiplan Corp. S'holders Litigation

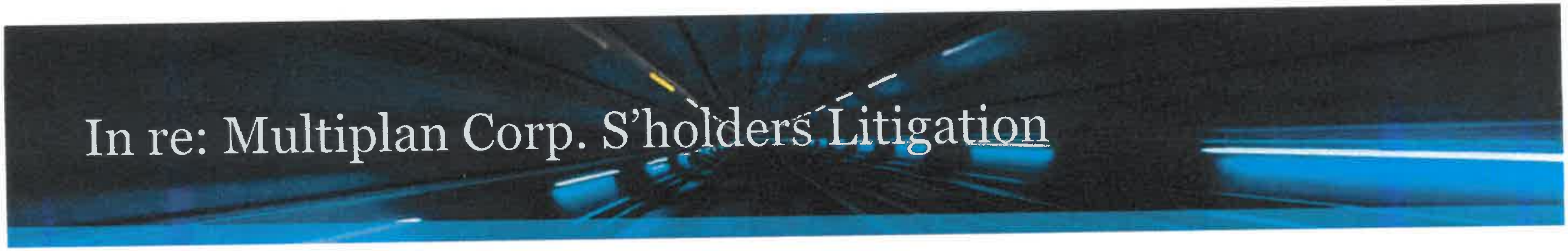
- The Litigation
  - Two cases filed in March and April 2021.
  - Cases consolidated.
  - Complaint:
    - Counts I-III- direct claim for breach of fiduciary duty against directors, officers and controller.
    - Count IV – aiding and abetting claim against advisor.
    - "[T]he crux of the plaintiffs' claims is that the defendants' actions—principally in the form of misstatements and omissions—impaired Churchill public stockholders' redemption rights to the defendants' benefit. In a value-decreasing merger, non-redemptions would be valuable to those holding founder shares. Because the public stockholders were allegedly not fully informed of all material information about MultiPlan, they exchanged their right to $10.04 per share—held in a trust for their benefit—for an interest in Public MultiPlan."
  - Defendants move to dismiss.
  - Court denies the motion to dismiss on January 3, 2022.

In re: Multiplan Corp. S'holders Litigation

- Direct or Derivative Claims?
  - Injury alleged in the complaint was to stockholders and not the entity.
    - Stockholders have a right to redeem. The board allegedly "impaired [their] informed exercise of [that right]."
    - Stockholders have a right to vote. The board allegedly impaired their right to an informed vote.
    - Any injury would be distinct to investors. The SPAC does not own the funds in the trust until the stockholder decides not to redeem.
  - Any recovery would flow to stockholders who lost the redemption right – not to the entity.
    - This is not a classic overpayment claim. It is a claim of a lost right to a guaranteed payment of $10.04 before the merger for the stockholders denied a fully informed redemption decision.
      - "The option to make an informed redemption decision has a value to stockholders independent of any injury to the Company."

In re: Multiplan Corp. S'holders Litigation

- Claims Are Not Contract Claims
  - The redemption right is contractual. But that right remained. The stockholders were not denied the opportunity to redeem.
  - The board allegedly failed to inform the stockholders about key information "which would have informed the exercise of the right."
  - Redemption right is a stockholder investment decision to which the duty of disclosure (in the context of the duties of care and loyalty) apply.
    - "It is precisely the type of collective action on which directors' obligations to engage in full and fair disclosure are premised."
- Claims Are Not Classic "Holder" Claims
  - The claim as pleaded was not premised on inaction—*i.e.*, that a stockholder held rather than sold stock.
  - The claim pleaded was that the stockholders were faced with two choices: whether to redeem and whether to approve the merger. The choice to redeem is a call for stockholder action in the form of an investment decision. The stockholders could only redeem if they voted for or against the merger.



In re: Multiplan Corp. S'holders Litigation

- Standard of Conduct
  - All parties agreed the board, officers and controller owed duties of care and loyalty to the stockholders.
- Standard of Review = Entire Fairness
  - Complaint Pleaded a Conflicted Controller Transaction
    - Undisputed Klein was a controller via his control over the Sponsor.
    - Klein also allegedly engaged in a conflicted transaction.
      - He did not stand on both sides of the transaction.
      - He did compete with the Class A stockholders for consideration.
    - How? Look to a time period when:
      - Class A holders held redemption rights. Klein did not.
        - Without the merger or redemption => $10.04/share
        - With this merger => "allegedly worthless."
      - Klein had a 70% interest in the Class B. Class A did not.
        - Without the merger => $0.
        - With this merger => $305 million.

In re: Multiplan Corp. S'holders Litigation

- Standard of Review = Entire Fairness
  - The structure of the redemption itself created a unique benefit for Klein as the controller in the choice between a bad deal and no deal.
  - In a deal where the post-merger entity shares are expected to be valued lower than the SPAC shares being exchanged, every SPAC share not redeemed (no funds taken from the trust) and exchanged for a share of the post-merger entity (a share worth $10.04 exchanged for a share worth less) enhances the value of the stock held by the other Multiplan stockholders (including Klein).
  - It harms the stockholder making that exchange.
  - "Because of his founder shares, Klein effectively competed with the public stockholders for the funds held in trust and would be incentivized to discourage redemptions if the deal was expected to be value decreasing, as the plaintiffs allege."

In re: Multiplan Corp. S'holders Litigation

- Court rejected the argument that the structure of the SPAC cannot trigger entire fairness because it is the same structure used in all de-Spac transactions.
  - "Under Delaware law, '[c]orporate acts must be 'twice-tested' – once by the law and again in equity."
- Court rejected the argument that disclosure of the structure and its inherent economic incentives should estop plaintiffs from challenging it.
  - The structure was disclosed but this transaction was not.
  - By agreeing to invest in this SPAC plaintiffs "did not agree that they did not require all material information when the time came to make [a redemption decision.]"

In re: Multiplan Corp. S'holders Litigation

- Complaint pleads majority of the board conflicted.
  - Conflicted by their Class B Holdings.
    - Board members held Class B shares that were worthless without a merger.
    - Holding these shares did not align the board with the stockholders because of the "diverging interests between insider Class B stockholders and public Class A stockholders lacking the benefit of full information when faced with the choice of a bad deal or liquidation."

- Complaint pleads that the directors breached their fiduciary duties.
  - The directors allegedly did so by "prioritizing their own personal, financial, and/or reputational interests and approving the Merger, which was unfair to public Class A stockholders" and by "issuing the false and misleading Proxy," which harmed the public stockholders who did "not exercis[e] their redemption rights."
  - The claim invoked both the breach of the duty of loyalty and disclosure duties implicating loyalty.

In re: Multiplan Corp. S'holders Litigation

- Claims held to be viable "not simply because of the nature of the transaction or resulting conflicts" but because the Complaint alleges that the director defendants failed, disloyally, to disclose information necessary for the plaintiffs to knowledgeably exercise their redemption right.
- What if disclosures had been adequate? The opinion:
  - "[did] not address the validity of a hypothetical claim where the disclosure is adequate and the allegations rest solely on the premise that fiduciaries were necessarily interested given the SPAC's structure. The core, direct harm presented in this case concerns the impairment of stockholder redemption rights. If public stockholders, in possession of all material information about the target, had chosen to invest rather than redeem, one can imagine a different outcome."

In re: Multiplan Corp. S'holders Litigation

- Complaint pleads claim that Klein breached the fiduciary duties he owed as a controller.
  - "Given Klein's control of the Class B shares and his ties to the Board, it is reasonably conceivable that he 'had the power to control, influence, and cause – and actually did control, influence, and cause – the Company to enter into the Merger."
- Complaint does not plead a claim against the Officers.
  - CFO – plaintiff plead facts about the CFO's role and ties to Klein, but did not plead actions that could expose him to liability.
- Complaint Pleads Aiding & Abetting Claim Against Financial Advisor.
  - The financial advisor is not an independent third-party advisor.
  - Klein's knowledge is imputed to the controlled financial advisor.
  - Knowing participation element plead and financial advisor not dismissed.

In re Lordstown Motors Corp. S'holder Litig.

- Opinion issued two months after *Multiplan*.
- Merger involved SPAC DiamondPeak and Lordstown Motors Corp.
- Following the Merger, analyst report identified issues with Lordstown. Lordstown's stock price dropped.
- In March 2021 multiple federal securities cases were filed in N.D. Ohio asserting various Securities Act violations.
- Related derivative actions were filed in in district courts in Ohio and Delaware and in the Court of Chancery.
- The allegations in the Chancery action were similar to *Multiplan* involving disclosure violations and impairment of the exercise of the stockholders' redemption rights.
- Defendants moved to dismiss or stay the matter pending resolution of the pending related securities action.

In re Lordstown Motors Corp. S'holder Litig.

- The Court denied the motion to stay.
  - "[T]he fundamental question is whether this Court's interest in resolving corporate governance issues under Delaware law prevails over considerations of comity and practicality. This Action concerns allegations that the defendants breached their fiduciary duties of loyalty and impaired the exercise of stockholders' redemption rights in the context of a de-SPAC transaction. Those claims raise 'novel issues' akin to those that this court was presented with in a matter of first impression earlier this year. The Court of Chancery has 'long been chary' about deferring to a first-filed action pending elsewhere 'when a case involves important questions of our law in an emerging area.'"

SPAC Litigation Trends in Delaware

- Far fewer claims challenging SPAC transactions have been brought in Delaware than in federal court.
  - Class size?
  - Damages?
  - Different bars for pleading?
- Three primary types of claims challenging SPAC transactions in Delaware:
  - Direct, *MultiPlan*-style breach of fiduciary duty claims focused on direct harm through the alleged impairment of the redemption right
  - Derivative breach of fiduciary duty claims making more traditional overpayment and disclosure arguments against the pre- and post-de-SPAC board (often following a securities action)
  - Breach of contract claim brought by the SPAC against the target
- Plus "SPAC Adjacent" Claims:
  - Section 220 litigation regarding books and records demands to SPACs
  - Advancement and indemnification actions brought by SPAC officers
  - Questioning what agreements made with a target company carry over to the post-de-SPAC entity
  - Claims challenging lockup provisions