PROGRAM MATERIALS
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SPACs: Emerging Litigation and Regulatory Risks

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SPACS – EMERGING LITIGATION & REGULATORY RISKS

June 1, 2021

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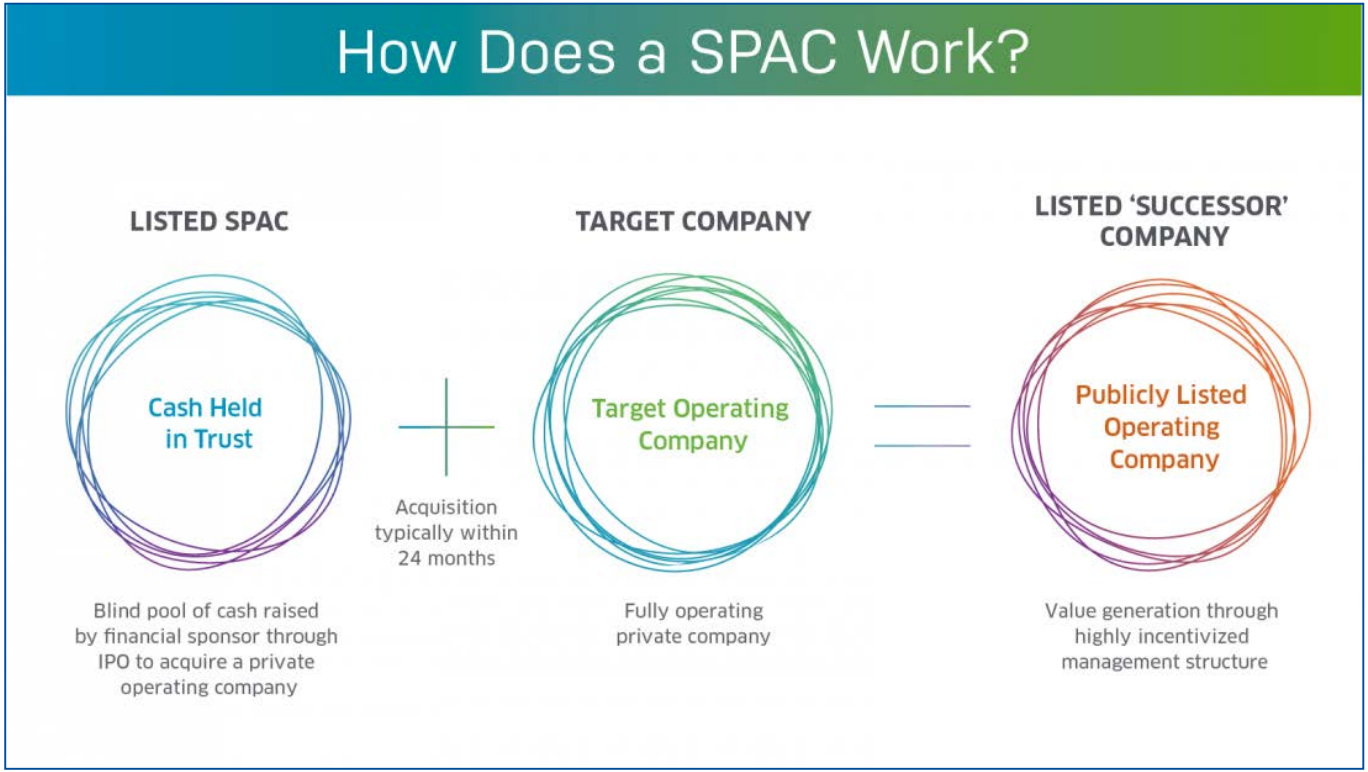
WHAT IS A SPAC?

- Special Purpose Acquisition Company or “SPAC”
- A “blank check” company that raises funds via IPO with goal of acquiring a private company at a later date
- An alternative to a traditional IPO or direct listing

THE BASICS



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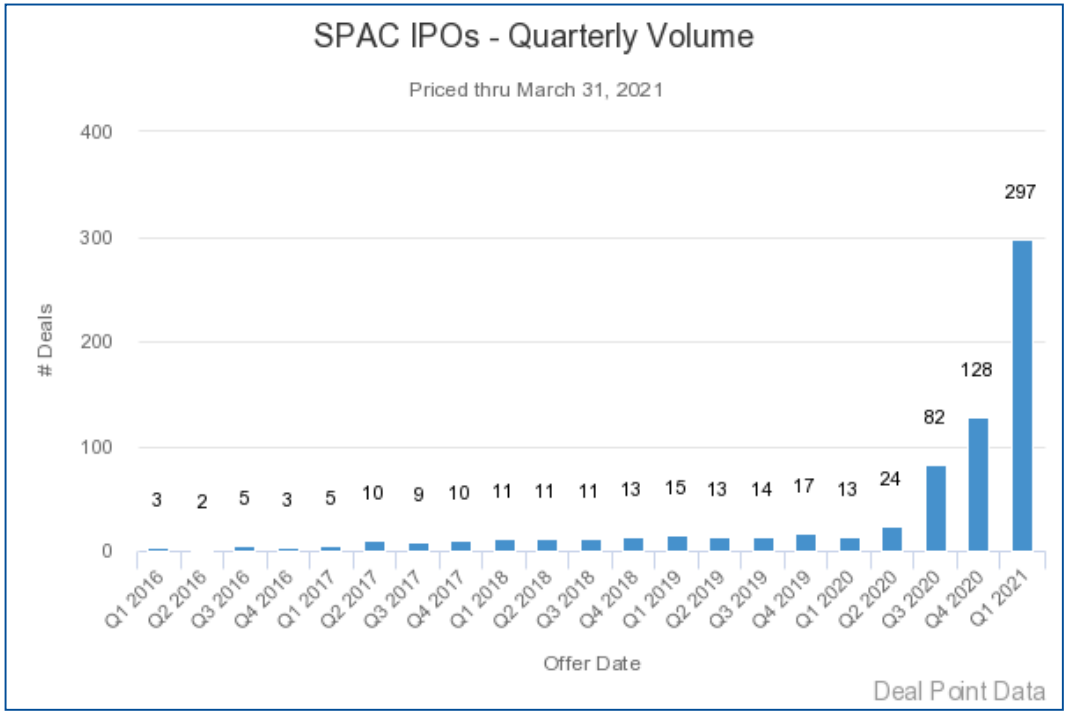
BOOM OR BUBBLE?



BOOM OR BUBBLE?

SPAC IPO Summary (as of February 28, 2021)	Number of SPACs	Total Gross Proceeds ($B) / Equity Value ($B)
SPACs Seeking a Target:	**433**	**$126.1** (Total Gross Proceeds $B)
SPAC IPOs in Registration:	**255**	**$63.8** (Total Gross Proceeds $B)
SPACs Pending Acquisition: (as of 3/31/21)	125	$260.4 (Total Equity Value $B)
SPACs Completed Acquisition: (Completion Date: 1/1/16 – 3/31/21)	160	$176.9 (Total Equity Value $B)

Data courtesy of Deal Point Data, current as of 3/31/21

BOOM OR BUBBLE?

SPAC Bubble Pops: Deals Drop 90% in April After SEC Warns of Crackdown

Watch Out, Chamath Palihapitiya! The SEC Is About to Pop the SPAC Stocks Bubble

New SEC guidelines shed more light on SPAC accounting

By Joanna Makris, InvestorPlace Markets Analyst May 6, 2021, 3:59 pm EDT

SPAC Bubble Bursting?

SPAC stocks got hit again today alongside the broader equity markets, bringing premium levels to their lowest in months. Some will see this as a rare buying opportunity while others will see the bubble bursting?

DAVID DRAPKIN · APR 20, 2021

VOICE

Tulipmania in Space

SPACs are creating a space bubble that will eventually come crashing back to Earth along with cosmic junk launched during the current frenzy.

By Elisabeth Braw, a fellow at the American Enterprise Institute

SPAC BUBBLEHEADS HIT A BRICK WALL ON SLOWING RETAIL DEMAND AND SEC REGULATORY SCRUTINY

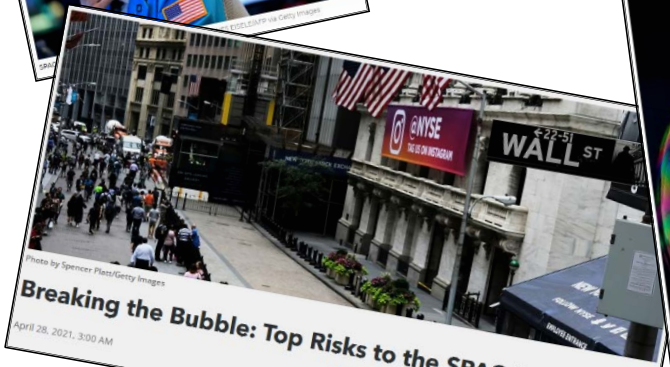


Photo by Spencer Platt/Getty Images

Breaking the Bubble: Top Risks to the SPAC Surge

April 28, 2021, 3:00 AM

Listen

April 20, 2021
1:55 PM CDT

Breakingviews

Chancellor: Regulators will kill the SPAC frenzy

7 minute read

Reuters

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WHY SPAC? ISSUER POINT OF VIEW

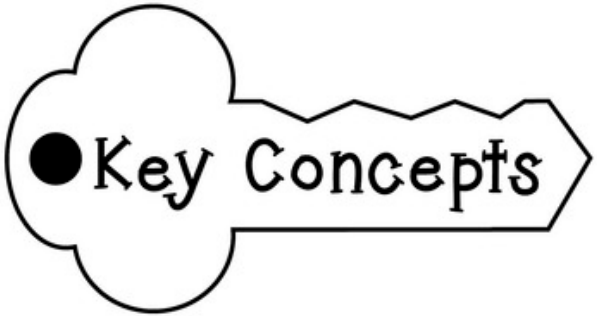
Pros

- Often less *direct* costs than traditional IPO (e.g., bankers, lawyers, auditing fees)
- Avoid *indirect* costs of "leaving money on the table"
- Earlier access to public markets
- **Ability to provide projections and forward looking statements?**

Cons

- Dilutive
  - Promote fees
  - Warrants
- Less control over longer term shareholder base
- Cash voids caused by redemptions (usually filled by PIPE financing)

WHY SPAC? INVESTOR POINT OF VIEW



- The pros and cons (i.e. the risks versus rewards) of a SPAC investment are highly dependent on the category of investor.
- Two of the three categories of investor are likely to be SPAC winners.
- The third category of investor is likely to be SPAC loser.
- **Litigation and enforcement risk centers around this third category of investor.**

THE SPAC INVESTOR: THE USUAL WINNERS

- Investor Category 1: The "SPAC Mafia" institutional investors
  - Typically receive warrants with common shares
  - If market price is higher than $10 before de-SPAC transaction they will typically sell common shares, but clip warrants
  - If market price is lower than $10 at time of de-SPAC transaction they typically redeem shares and receive return of $10 with interest

Studies show this group of SPAC investors outperform the market

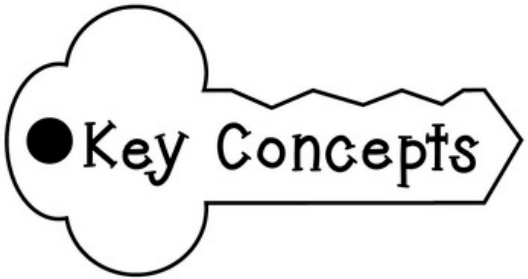
THE SPAC INVESTOR: THE USUAL WINNERS

- **Investor Category 2: The Promoters**
  - **Typically receive 20% of shares along with warrants at nominal cost**
  - **If a de-SPAC deal is completed, they profit from their shares (and possibly warrants) regardless of the stock price.**
  - **If a de-SPAC deal is not completed, they must redeem their shares and warrants**

- In theory, this group of investors earn their 20% interest by finding and putting together the de-SPAC deal, serving on board, and/or lending their "name" for credibility

THE SPAC INVESTOR: THE USUAL LOSERS

- **Investor Category 3: After-market investors who hold through merger (usually retail investors)**
  - **Studies show that this group of SPAC investor typically underperforms the market by a wide margin**

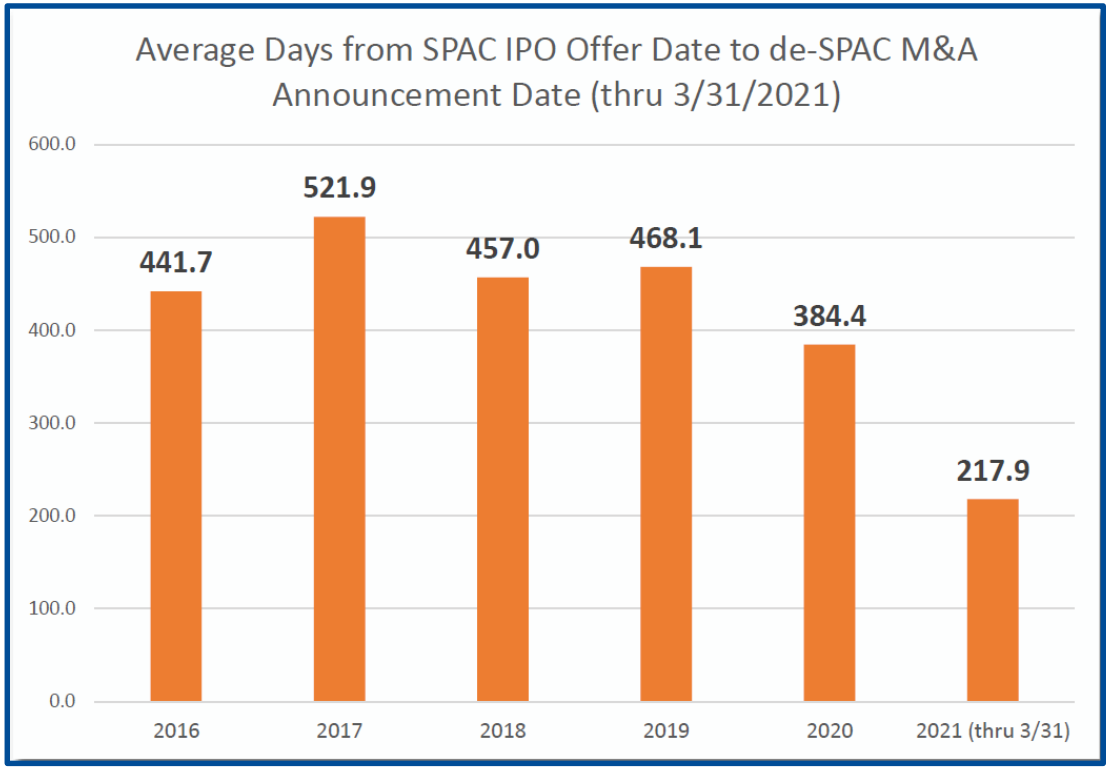


To understand the litigation and enforcement risk, it is important to understand the possible reasons (i.e. allegations) why this category of SPAC investor (i.e. plaintiff) usually underperforms.

LANDMINES FOR SHAREHOLDERS HOLDING THROUGH MERGER

- Promoters' inherent conflict of interests
- Dilution caused by 20% promoter shares
- Dilution caused by pre-announcement redemptions
- Potentially unfavorable terms of PIPE financing
- Potentially more macro SPAC money raised recently than exist good targets
- Promoters may or may not remain active in merged company's operations
- Emerging trend of Chinese company targets with lesser controls and compliance
- Possibility of materially misleading projections and forward looking statements in connection with de-SPAC merger

INCREASING SPEED FROM IPO TO DE-SPAC. RED-FLAG?



Data courtesy of Deal Point Data, current as of 3/31/21

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THE ENFORCEMENT AND LITIGATION LANDSCAPE: THE BIG PICTURE

Potential Legal Claims Against Issuers and Promoters

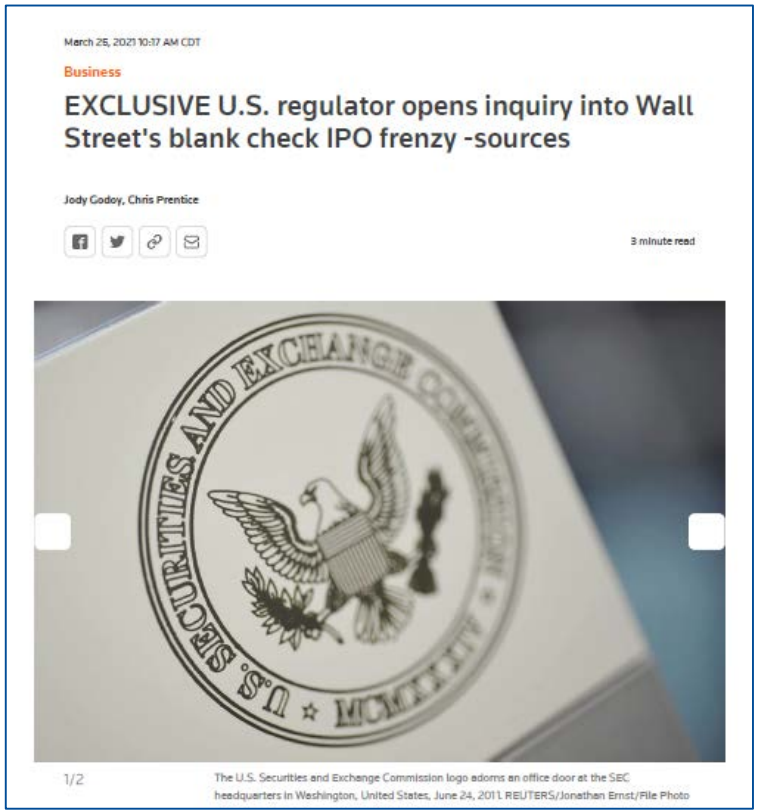
- **Violations of Federal Securities Laws**
  - Section 10/ Rule 10(b)(5): Intentional false and misleading statements (scienter)
  - Section 11: Material misstatement / omission in registration statement (strict liability)
  - Section 14(a) / Rule 14a-9: Material misstatement / omission in proxy statement (negligence)
  - Section 14(e): Material misstatement in connection with tender offer
  - Section 15(a) / Section 20(a): Control person liability
- **Breaches of fiduciary duties under state law**
  - Conflict of interests = entire fairness vs. business judgment rule

THE ENFORCEMENT AND LITIGATION LANDSCAPE: THE BIG PICTURE

- **SEC Enforcement**
  - Rejects commonly held idea that a de-SPAC merger subjects issuers and promoters to less legal exposure than in a typical IPO.
  - Rejects idea that the PSLRA "safe harbor" protects forward looking statements and projections made in de-SPAC transaction.
  - SEC's view on applicability of safe harbor has not been tested in private litigation.
  - In all events, the PSLRA applies only to private litigation such that "safe harbor" will not protect issuers and promoters in SEC enforcement action.
  - We expect SEC will actively investigate and prosecute SPACs – especially under new SEC leadership.

SEC ENFORCEMENT LANDSCAPE

- March 2021: Reuters reports that Enforcement Division is seeking information from banks concerning their SPAC-related transactions
  - SPAC deal fees and volumes
  - Compliance, reporting and internal controls
- Requests are voluntary



March 26, 2021 10:17 AM CDT

Business

EXCLUSIVE U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy -sources

Jody Godoy, Chris Prentice

3 minute read

1/2

The U.S. Securities and Exchange Commission logo adorns an office door at the SEC headquarters in Washington, United States, June 24, 2011. REUTERS/Jonathan Ernst/File Photo

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SEC ENFORCEMENT LANDSCAPE

April 8, 2021 and April 12, 2021 statements

Staff Statement on Accou
Reporting Considerations
Issued by Special Purpo
Companies ("SPACs")

John Coates
Acting Director, Division of Corp

Paul Munter
Acting Chief Accountant

April 12, 2021

Introduction[1]

In a recent statement, Acting Chief
reporting considerations for SPAC
associated with the accounting fo
Additionally, CF staff also issued
SPACs.

We recently evaluated fact pa
SPAC's formation and initial
understand that certain featu

SPACs, IPOs and Liability Risk under the Securities Laws

John Coates
Acting Director, Division of Corporation Finance

April 8, 2021

Over the past six months, the U.S. securities markets have seen an unprecedented surge in the use and popularity of Special Purpose Acquisition Companies (or SPACs).[1],[2] Shareholder advocates – as well as business journalists and legal and banking practitioners, and even SPAC enthusiasts themselves[3] – are sounding alarms about the surge. Concerns include risks from fees, conflicts, and sponsor compensation, from celebrity sponsorship and the potential for retail participation drawn by baseless hype, and the sheer amount of capital pouring into the SPACs, each of which is designed to hunt for a private target to take public.[4] With the unprecedented surge has come unprecedented scrutiny, and new issues with both standard and innovative SPAC structures keep surfacing.

The staff at the Securities and Exchange Commission are continuing to look carefully at filings and disclosures by SPACs and their private targets. As customary, and in keeping with the Division of Corporation Finance's ordinary practices, staff are reviewing these filings, seeking clearer disclosure, and providing guidance to registrants and the public. They will continue to be vigilant about SPAC and private target disclosure so that the public can make informed investment and voting decisions about these transactions.

The basics of a typical SPAC are complex, but can be simplified as follows. A SPAC is a shell company with no operations. It proceeds in two stages. In the first stage, it registers the offer and sale of redeemable securities for cash through a conventional underwriting, sells them primarily to hedge funds and other institutions, and places the proceeds in a trust for a future acquisition of a private operating company.[5] Initial investors also commonly obtain warrants to buy additional stock as at a fixed price, and sponsors of the SPAC obtain a "promote" – greater equity than their cash contribution or commitment would otherwise imply – and their promote is at risk if the SPAC fails to find and acquire a target within a period of two years; the promote is forfeited and the SPAC liquidates. About ten percent of SPACs have liquidated between 2009 and now.[6]

But most SPACs since 2009 have gone on to identify acquisition candidates. In their second stage, SPACs complete a business combination transaction, in which the SPAC, the target (i.e., the private company to be acquired), or a new shell "holdco" issues equity to target owners, and sometimes to other investors. SPAC shareholders typically have a vote on the so-called "de-SPAC" transaction, and many investors who purchased securities in the first stage SPAC either sell on the secondary market or have their shares redeemed before or shortly after the de-SPAC. After the de-SPAC, the entity carries on its operations as a public company. In this way,

"Any simple claim about reduced liability exposure for SPAC participants is overstated at best, and potentially seriously misleading at worst. Indeed, in some ways, liability risks for those involved are higher, not lower, than in conventional IPOs, due in particular to the potential conflicts of interest in the SPAC structure."

"The PSLRA safe harbor should not be available for any unknown private company introducing itself to the public markets. Such a conclusion should hold regardless of what structure or method is used to do so. The reason is simple: the public knows nothing about this private company. Appropriate liability should attach to whatever claims it is making, or others are making on its behalf."

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SEC ENFORCEMENT LANDSCAPE

April 8, 2021 and April 12, 2021 statements

Indexation: *"Because the holder of the instrument is not an input into the pricing of a fixed-for-fixed option on equity shares, OCA staff concluded that, in this fact pattern, such a provision would preclude the warrants from being indexed to the entity's stock, and thus the warrants should be classified as a liability measured at fair value, with changes in fair value each period reported in."*

Tender Offer: *"In other words, in the event of a qualifying cash tender offer … all warrant holders would be entitled to cash, while only certain of the holders of the underlying shares of common stock would be entitled to cash. OCA staff concluded that, in this fact pattern, the tender offer provision would require the warrants to be classified as a liability measured at fair value, with changes in fair value reported each period in earnings."*

Restatement? *"If, after considering this statement, a registrant and its independent auditors conclude that there is an error in previously-filed financial statements, the registrant would then need to evaluate the materiality of the error*

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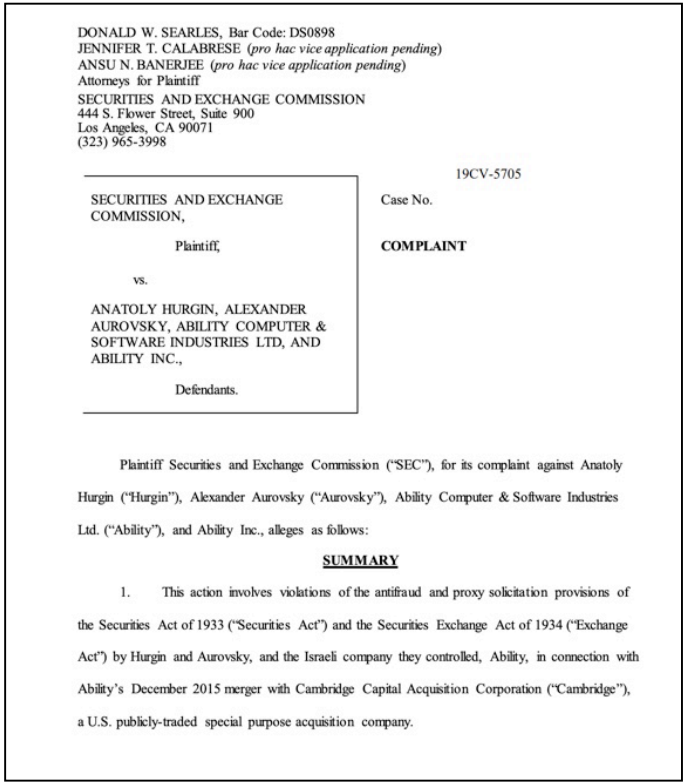
SEC ENFORCEMENT LANDSCAPE

- *SEC v. Hurgin* (S.D.N.Y., filed 2019)
  - Israeli citizens and entities charged with fraud in connection with merger with SPAC
  - Defendants allegedly lied about ownership of "game-changing" cellular product and related revenue, as well as revenue "backlog"; after merger, truth disclosed and SPAC investors lost $60 million
  - Section 10(b) / Rule 10b-5, Section 17(a), and Section 14(a) / Rule 14a-9 claims
  - Case remains pending



DONALD W. SEARLES, Bar Code: DS0898
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ANSU N. BANERJEE (*pro hac vice application pending*)
Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
444 S. Flower Street, Suite 900
Los Angeles, CA 90071
(323) 965-3998

19CV-5705

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

ANATOLY HURGIN, ALEXANDER AUROVSKY, ABILITY COMPUTER & SOFTWARE INDUSTRIES LTD, AND ABILITY INC.,

Defendants.

Case No.

COMPLAINT

Plaintiff Securities and Exchange Commission ("SEC"), for its complaint against Anatoly Hurgin ("Hurgin"), Alexander Aurovsky ("Aurovsky"), Ability Computer & Software Industries Ltd. ("Ability"), and Ability Inc., alleges as follows:

SUMMARY

1. This action involves violations of the antifraud and proxy solicitation provisions of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") by Hurgin and Aurovsky, and the Israeli company they controlled, Ability, in connection with Ability's December 2015 merger with Cambridge Capital Acquisition Corporation ("Cambridge"), a U.S. publicly-traded special purpose acquisition company.

THE ENFORCEMENT AND LITIGATION LANDSCAPE: THE BIG PICTURE

- **Private Litigation**
  - SPAC litigation fits squarely into the plaintiff bar's long standing playbook
    - State M&A litigation alleging breaches of fiduciary duties
    - Early 2000's reverse merger litigation
    - Federal "stock drop" class actions
  - The plaintiffs' bar is already very active with private SPAC litigation
  - We expect a continued uptick in private litigation – especially as media optics around the SPAC "bubble" poisons the well, and if SPACs continue to underperform the market on average after de-SPAC.

PRIVATE LITIGATION ON THE RISE

Reuters, May 5, 2021

Legal

The new 'deal tax': SPAC defendants are paying plaintiffs lawyers to drop N.Y. state suits

Shareholder lawyers have apparently figured out how to cash in on the SPAC fad.

In the last seven months, lawyers from a handful of shareholder firms have filed more than 60 lawsuits in New York State Supreme Court in Manhattan against board members of special purpose acquisition companies, accusing SPAC directors of breaching their duty to investors by omitting important information from public filings about their proposed acquisitions.

PRIVATE LITIGATION ON THE RISE

- Federal securities / proxy fraud class actions
- State law breach of fiduciary duty claims (direct and derivative)
- Data suggests that SPAC-related claims being filed quicker than traditional IPO
- Cases often follow adverse report from analyst or short seller concerning post-merger company's financial condition
- Possible D&O insurance complications

REPRESENTATIVE CASE STUDY: FEDERAL SECURITIES LAW

- *In re Akazoo S.A. Sec. Litig.* (E.D.N.Y. 2020): Putative class action on behalf of SPAC shareholders against SPAC, its D&O's, certain former D&O's of target and auditor, concerning statements about target media streaming company
  - De-SPAC deadline extended twice; significant number of SPAC shareholders redeemed shares which depleted trust account; PIPE financing required
  - Approx. 7 months after de-SPAC transaction closed, analyst report revealed that target overstated it users, revenues and profit; target had had been closing offices and conducting layoffs; did not have lucrative deals, as touted
  - Special committee investigation confirmed allegations; stock de-listed
  - April 2021: Partially settled for $35 million
- Related case in Georgia state court (1933 Act) and related action on behalf of PIPE investors

OTHER REPRESENTATIVE CASES: FEDERAL SECURITIES LAWS

- *In re Stillwater Capital Partners, Inc.* (S.D.N.Y. 2012): SPAC shareholders assert post-merger Section 10(b) & 20(a) claims based on alleged failure to disclose related-party nature of de-SPAC transactions, failure to accurately value target's assets, and failure to disclose inability to honor SPAC shareholder redemption requests; motions to dismiss denied
- *Camelot Event Driven Fund et al. v. Alta Mesa Resources* (S.D. Tex. 2019): Court denied motions to dismiss section 10(b), 14(a) and 20(a) claims for allegedly false/misleading statements about financial health of two, related target companies; motions to dismiss denied
- *Welch v. Meaux* (W.D. La. 2019): Investors in post-SPAC company assert that target and SPAC conspired to inflate target's financials; claims include Section 14(a), 10(b) / 20(a), and Section 11 related to registration statement for 2nd stock issuance; also claims against auditor; motions to dismiss pending
- *Phillips v. Churchill Capital Corp.* (E.D. Ala. 2021): Pre-merger putative class action asserting section 10(b) & 20(a) claims against SPAC, SPAC's officers and Target's CEO for allegedly false and misleading statements regarding target's future production of EV's

OTHER FLAVORS OF FEDERAL COURT SPAC LITIGATION

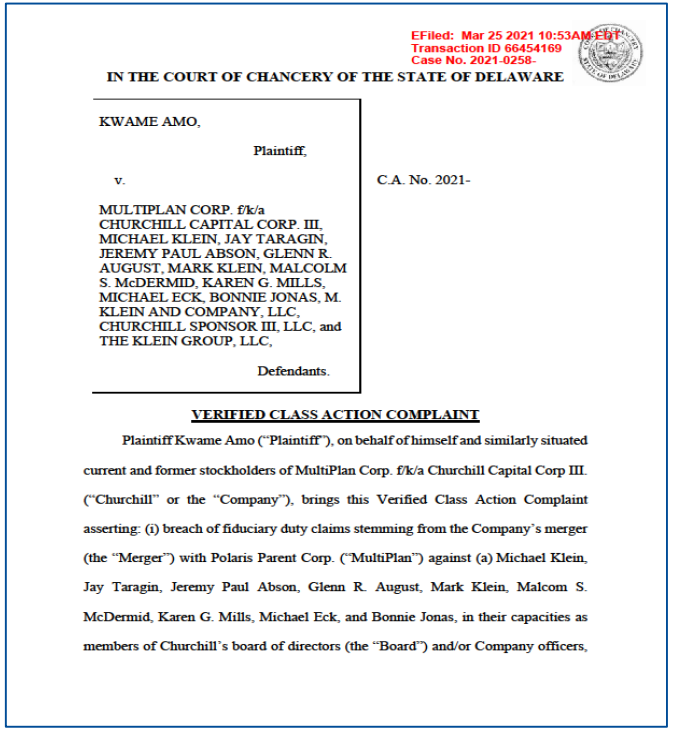
- *OpenGov., Inc. v. GTY Technology Holdings, Inc.* (N.D. Cal. 2019): Target (software) company asserts that SPAC and related entities misappropriated target's proprietary, confidential and trade secret information
- *Bogart v. Israel Aerospace Indus., Ltd.* (S.D.N.Y 2010): SPAC sponsor / CEO sued target's largest shareholder after failed de-SPAC transaction; claims dismissed for lack of standing
- *Vogel v. Boris & Kiev* (S.D.N.Y. 2021): Dispute between SPAC founders / partners regarding terms of Operating Agreement

STATE FIDUCIARY DUTY CLAIMS

- SPAC shareholder claims related to de-SPAC transaction: State Law
  - Breach of Fiduciary Duty
    - Typical allegations: SPAC's directors breached their fiduciary duties by (i) prioritizing their personal interests in approving an unfair merger and/or (ii) providing inadequate disclosures to shareholders regarding de-SPAC transaction
    - Direct or derivative claims
    - Business judgment rule likely applies unless directors acted in bad faith or have conflicts of interest; if so, "entire fairness" standard of review likely applies
  - Aiding & Abetting Breach of Fiduciary Duty
    - SPAC, Target, Target's directors, and/or affiliated companies

REPRESENTATIVE STATE COURT CASE (DELAWARE)

- *Amo v. Multiplan Corp., f/k/a Churchill Capital Corp. III* (Del. Ch. filed 3/25/21)
  - Filed by putative class of SPAC shareholders
  - Related to merger of SPAC with MultiPlan Corp.; follows negative report by short sellers
  - Alleges that transaction conflicted and unfair to SPAC shareholders
  - Asserts breach of fiduciary duty claim against SPAC board members, certain officers and related parties
  - Asserts aiding & abetting claims against other related parties



EFiled: Mar 25 2021 10:53AM EDT
Transaction ID 66454169
Case No. 2021-0258-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KWAME AMO,

Plaintiff,

v.

C.A. No. 2021-

MULTIPLAN CORP. f/k/a CHURCHILL CAPITAL CORP. III, MICHAEL KLEIN, JAY TARAGIN, JEREMY PAUL ABSON, GLENN R. AUGUST, MARK KLEIN, MALCOLM S. McDERMID, KAREN G. MILLS, MICHAEL ECK, BONNIE JONAS, M. KLEIN AND COMPANY, LLC, CHURCHILL SPONSOR III, LLC, and THE KLEIN GROUP, LLC,

Defendants.

VERIFIED CLASS ACTION COMPLAINT

Plaintiff Kwame Amo ("Plaintiff"), on behalf of himself and similarly situated current and former stockholders of MultiPlan Corp. f/k/a Churchill Capital Corp III. ("Churchill" or the "Company"), brings this Verified Class Action Complaint asserting: (i) breach of fiduciary duty claims stemming from the Company's merger (the "Merger") with Polaris Parent Corp. ("MultiPlan") against (a) Michael Klein, Jay Taragin, Jeremy Paul Abson, Glenn R. August, Mark Klein, Malcom S. McDermid, Karen G. Mills, Michael Eck, and Bonnie Jonas, in their capacities as members of Churchill's board of directors (the "Board") and/or Company officers,

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OTHER FLAVORS OF STATE LAW CLAIMS

- Redemption Rights: *Oliveira v. Quartet Merger Corp.* (S.D.N.Y. 2015): SPAC shareholder sued SPAC for failure to honor redemption right (shareholder made proper request but failed to deliver his shares to SPAC for redemption); court permitted shareholder to enforce terms of SPAC's COI (affirmed by 2nd Circuit)
- Annual meeting: *Opportunity Partners LP v. Transtech Serv. Partners* (Del. Ch. 2009): Court grants SPAC shareholder demand for shareholder meeting to elect directors but permits meeting to occur after vote on proposed de-SPAC transaction
- Challenging Fees Paid: *Ruffalo v. Transtech Serv. Partners, Inc.* (Del. Ch. 2010): After SPAC failed to identify business combination, shareholder challenged fees paid out of trust account to creditors and sponsors; court dismissed claims as to fees paid to creditors but did not dismiss claims about fees paid to sponsors
- Statutory Appraisal Action: *Manichaean Capital LLC v. Sourcehov Holdings, Inc.* (Del. Ch. 2020): Target shareholders asserted statutory appraisal rights under Delaware law

HOW TO LIMIT ENFORCEMENT AND LITIGATION EXPOSURE

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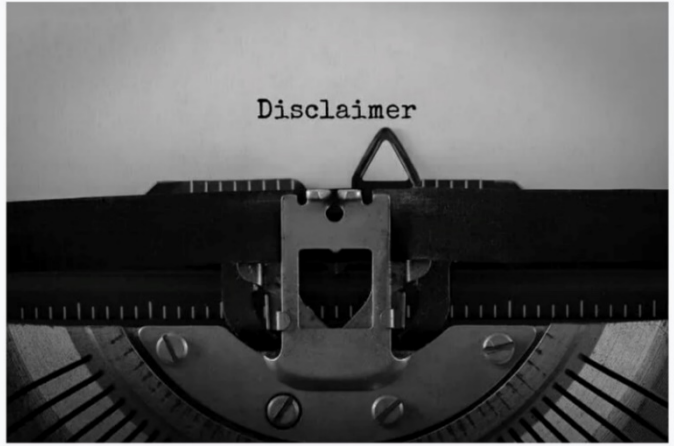
TO PROJECT OR NOT TO PROJECT?

- The PSLRA safe harbor for forwarding looking statements does not apply to IPOs.
- IPO is undefined in PSLRA
- SEC considers de-SPAC as the “real IPO” making safe harbor inapplicable.
- Issue will need to be ultimately decided by the courts or Congress.
- Eliminate safe harbor for de-SPAC? Extend the safe harbor to IPOs?



Absent future case law or legislation to the contrary, issuers and promoters should not assume that that the safe harbor will apply to forward looking statements made in connection with de-SPAC.

OTHER STEPS TO MITIGATE SPAC LITIGATION EXPOSURE

- Obtain fairness opinions
- Use reputable accounting firm for de-SPAC due diligence
- If decision to make projections, use cautionary language
- Assess SOX and Dodd-Frank Act controls and compliance environment of target company (especially for Chinese and other foreign targets)
- Avoid mergers that are rushed or close to SPAC expiration date
- Disclose potential conflicts of interest
- Assess D&O insurance protection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