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Special Purpose Acquisition Companies and the PSLRA's Safe Harbor for Forward Looking Statements

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I. INTRODUCTION

Many, especially those with experience in the service industry, will be familiar with the phrase, *do it right or do it twice*, meant to discourage expediency that comes at the cost of quality. But whether government regulators share the same sentiment when under pressure to act remains to be seen.[1] The nearly two-year surge in transactions involving Special Purpose Acquisition Companies ("SPACs") as a method to bring private companies onto a public exchange has, thus far, resulted in little action from the Securities and Exchange Commission ("SEC") or legislators.[2] Given the speed at which SPAC transactions have grown in popularity, it is understandable that regulatory requirements have not caught up.[3] In June of 2021, however, the SEC announced that its regulatory agenda for the year includes proposing SPAC-related rules by April of 2022.[4] Thus, with at least some action by the SEC all but certain, speculation about the content of these proposed

1. *See* Steven Bertoni & Antoine Gara, *Hot SPAC Market Could Freeze After Potential SEC Rule Change*, FORBES (Apr. 12, 2021, 1:02 PM), https://www.forbes.com/sites/stevenbertoni/2021/04/12/hot-spac-market-could-freeze-after-potential-sec-rule-change/?sh=6c794a49444c [https://perma.cc/F6BU-W2J9] (sharing the opinion that the SEC is likely to significantly increase oversight); *but see* U.S. SEC. & EXCH. COMM'N, RECOMMENDATIONS OF THE INVESTOR AS PURCHASER AND INVESTOR AS OWNER SUBCOMMITTEES OF THE SEC INVESTOR ADVISORY COMMITTEE REGARDING SPECIAL PURPOSE ACQUISITION COMPANIES, DRAFT AS OF AUG. 26, 2021 (2021), https://www.sec.gov/spotlight/investor-advisory-committee-2012/draft-recommendation-of-the-iap-and-iao-subcommittees-on-spacs-082621.pdf [https://perma.cc/5KND-YS74] [hereinafter SEC DRAFT RECOMMENDATIONS] (showing that the IAC's proposed rules are, at this point, fairly minimal).

2. ROBERT M. COOPER ET AL., KING & SPALDING LLP, CLIENT ALERT: NOT SO SPECIAL – SECURITIES AND ANTITRUST REGULATORS MAY INCREASE ATTENTION TO SPACS IN THE COMING YEAR (2021), https://www.kslaw.com/news-and-insights/not-so-special-securities-and-antitrust-regulators-may-increase-attention-to-spacs-in-the-coming-year [https://perma.cc/UQX5-8RXP].

3. *Id.*

4. Press Release, The Office of Information and Regulatory Affairs, SEC Announces Annual Regulatory Agenda (June 11, 2021), https://www.sec.gov/news/press-release/2021-99 [https://perma.cc/XC7D-K9B8].

rules abounds.[5] In addition to public speculation surrounding these expected rules, in 2021, both the U.S. House Committee on Financial Services and the SEC's Investor Advisory Committee voted on proposals related to SPAC activities, further fueling anticipation surrounding the SEC's April 2022 announcement.[6]

Statements from SEC officials as well as the SEC's first enforcement action under the new administration[7] signal what additional regulatory actions may hold.[8] Thus far, the primary aim of the SEC's statements has been on increasing disclosure requirements for all stages of the SPAC transaction.[9] However, one SEC statement stretches beyond mere disclosure requirements to a more fundamental change that could impact both the availability and attractiveness of SPACs to one of their key demographics: early-stage, pre-revenue tech companies.[10] As discussed in greater detail below,[11] Acting Deputy Director John Coates'

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5. *See* Bertoni & Gara, *supra* note 1 (sharing the opinion that the SEC is likely to significantly increase oversight); *but see* SEC DRAFT RECOMMENDATIONS, *supra* note 1 (showing that the IAC's proposed rules are, at this point, fairly minimal).

6. SEC DRAFT RECOMMENDATIONS, *supra* note 1; Holding SPACs Accountable Act, H.R. 5910, 117th Cong. (2021); Protecting Investors from Excessive SPACs Fees Act, H.R. 5913, 117th Cong. (2021).

7. Complaint, *Jensen v. Stable Rd. Acquisition Corp.*, C.D. Cal. (2021) (No. 2:2021-cv-05744).

8. *See* Al Barbarino, *FINRA Probes Firms' SPAC Dealings as Part of New Sweep*, LAW360 (Oct. 8, 2021) https://www.law360.com/compliance/articles/1429815/finra-probes-firms-spac-dealings-as-part-of-new-sweep?nl_pk=5b80455a-0611-4834-a321-42a3832b8d43&utm_source=newsletter&utm_medium=email&utm_campaign=compliance [https://perma.cc/5SH5-PYN3] (showing FINRA's support for the SEC's likely action based on prior statements).

9. *See* Public Statement, Division of Corporation Finance, Securities and Exchange Commission, CF Disclosure Guidance: Topic No. 11 (Dec. 22, 2020), https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies [https://perma.cc/G9PD-8J9E]; Public Statement, Paul Munter, Acting Chief Accountant, SEC, Financial Reporting and Auditing Considerations of Companies Merging with SPACs (Mar. 31, 2021), https://www.sec.gov/news/public-statement/munter-spac-20200331 [https://perma.cc/7XDN-K679] (conveying recent SEC concern regarding the accounting practices of SPACs); Public Statement, John Coates, Acting Director, Division of Corporation Finance, SEC and Paul Munter, Acting Chief Accountant, SEC, Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs") (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs?utm_medium=email&utm_source=govdelivery [https://perma.cc/TY3F-HHGE] (expressing SEC opinion that warrants should be treated as liabilities rather than equity).

10. Public Statement, John Coates, Acting Director, Division of Corporation Finance, SEC, 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/6HN2-JNNY].

11. *See infra* Part III.C.

April 2021 announcement calls into question whether the Private Securities Litigation Reform Act ("PSLRA")'s safe harbor should apply to forward-looking statements made in connection with a target company using a SPAC to go public.[12]

One of the SEC's core tenants[13] is to protect investors by ensuring that they receive proper disclosure about prospective investments[14]—rather than guaranteeing that an investment option is financially desirable.[15] Former Deputy Director Shelley Parratt illustrated that this broad mission applies specifically to SPACs when she said that the SEC's role is not "to say people can't do [SPAC] deals. [The SEC's] role is full disclosure."[16] Taking Former Deputy Director Parratt at her word, this note considers the likely impact on SPAC deals if Deputy Director Coates' recent statement regarding the PLSRA's application to forward-looking statements[17] for SPAC transactions were to become law; and argues that, while the SEC's involvement in SPAC affairs is likely unavoidable,[18] the Commission's rule proposal should not limit safe harbor protections for SPACs as doing so would reduce the number of SPAC deals, without meaningfully increasing disclosures.

This note proceeds in four parts. Part II[19] provides a brief history of the SPAC entity and how SPACs take a private company onto a public exchange. Part III[20] examines how the availability of forward-looking statements to SPACs is a key difference between SPACs and a traditional IPO, including how the *Stable Road*[21] matter protected investors notwithstanding safe harbor. Part IV[22] concludes by recommending that the SEC uphold the PSLRA's safe harbor for forward-looking statements associated with the de-SPAC transaction, as excluding it would be a

12. *Id.*

13. Irrespective of a specific Administration's agenda.

14. *See* CORY KIRCHERT & ADRIAEN M. MORSE JR., SEC AS ENFORCER OF SPAC MERGERS AND ENABLER OF SPACS, ARNALL GOLDEN GREGORY LLP: NEWS AND INSIGHTS (Aug. 10, 2021) https://www.agg.com/news-insights/publications/sec-as-enforcer-of-spac-mergers-and-enabler-of-spacs/ [https://perma.cc/7HTA-7357] (concluding that the SEC does not rely on "merit-based" investor protections (i.e. evaluating a company's business model for profitability), but rather focuses on ensuring full disclosure of relevant information).

15. *Id.*

16. U.S. SEC. & EXCH. COMM'N: *Corporation Finance Reviewed 6K Issuers Over Past Year*, Deputy Director Announces, 37 REG. & L. REPT. 1881 (Nov. 14, 2005).

17. Coates, *supra* note 10.

18. But not necessarily uncalled for, given the right focus of the SEC's actions.

19. *See infra* Part II.

20. *See infra* Part III.

21. Complaint, *supra* note 7.

22. *See infra* Part IV.

quick, but ultimately ineffective, fix for reforming SPACs. A regulatory distraction that, on the surface, appears to increase investor protections, while in reality provides little benefit to investors, runs counter to the goal of the PSLRA's safe harbor, and diminishes the attractiveness of SPACs as an alternative to a traditional IPO.

II. A BRIEF HISTORY OF SPACS AND HOW THEY WORK

A. A Brief History of SPACs

A Special Purpose Acquisition Company ("SPAC") is a type of blank check company[23] formed and taken public for the sole purpose of seeking out a private company, acquiring it, and merging that private target company into a public corporation as a result of the acquisition.[24] Despite the recent skyrocketing in SPAC popularity, blank check companies have been around for decades, primarily trading for low dollar amounts in the penny stock market because of their speculative nature.[25]

Prior to the 1990 Penny Stock Reform Act ("PSRA"), these types of securities fell below the SEC and states' radars, leaving blank check companies largely unregulated.[26] The lack of regulation enabled infamous fraudulent schemes such as the "pump and dump"[27] craze of the late 1980s, in which schemers boosted the price of securities through misleading, exaggerated statements and then sold those securities at the

23. While SPACs originated as a type of blank check company, SPACs do not meet the definition of a "blank check company" under the Private Securities Litigation Reform Act as that term is limited to companies that issue penny stock, which a SPAC by definition does not issue. This distinction is important when discussing the PSLRA's safe harbor exclusions as blank check companies are excluded from safe harbor under the PSLRA but not SPACs. 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, 532 (2007).

24. U.S. SEC. & EXCH. COMM'N INTRODUCTION TO INV. GLOSSARY: *Blank Check Companies*, https://www.investor.gov/introduction-investing/investing-basics/glossary/blank-check-company [https://perma.cc/5FFG-Z8CB] (last visited Oct. 4, 2021).

25. *See id.* (explaining that a blank check company is a publicly traded corporation that has no business plan or purpose other than to raise funds either for its own eventual operations or to fund a merger between itself and an existing operating company).

26. Heyman, *supra* note 23.

27. *See* U.S. SEC. & EXCH. COMM'N INTRODUCTION TO INV. GLOSSARY: *Pump and Dump Schemes*, https://www.investor.gov/introduction-investing/investing-basics/glossary/pump-and-dump-schemes [https://perma.cc/PJB9-42QF] (last visited Oct. 4, 2021) (defining a pump and dump scheme as activities undertaken to create a "buying frenzy" of a particular security, artificially inflating its price, and then selling those shares to duped investors at the higher price).

inflated price, only for the stock to become worthless after the sale.[28] Blank check companies were the primary vehicles for these types of fraudulent schemes that were estimated to have lost investors nearly $2 billion annually.[29] Due to their misuse, blank check companies had a poor reputation until the PSRA[30] created strict regulations that tempered the fraud occurring prior to its adoption.[31]

Through the authority of the PSRA, the SEC implemented Rule 419,[32] which had two main goals: first, to place stricter controls on blank check company offerings and, second, to allow investors in blank check companies the opportunity to reconsider their investment once additional knowledge became available about the target company.[33] Rule 419 served as the impetus and model for a new type of blank check company, the SPAC.[34]

For the first several years following their inception in 1992, SPACs were not a popular option because of regulatory scrutiny and the relatively low cost of going public via the traditional IPO.[35] Interest in SPACs has fluctuated over the last thirty years based on market factors such as the difficulty of and increased expenses associated with the IPO process, exchanges' acceptance of SPACs, and investor wariness.[36] For example, the early 2000s dot com crash led to decreased IPO activity and left companies looking for a cheaper way to go public.[37] SPACs took off

28. Heyman, *supra* note 23 at 533.

29. *See* H.R. REP. NO. 101-617 (discussing the impetus for the PSRA).

30. And subsequent SEC Rule 419.

31. *See* Penny Stock Reform Act of 1990, H.R. 4497, 101st Cong. (1990) (requiring penny stocks to be listed on a marketplace, where they could be quoted, rather than solely on a pink sheet. This practice increased the amount of information available to potential investors, theoretically making fraud less likely to occur).

32. Heyman, *supra* note 23 at 533.

33. 17 C.F.R. § 230.419(b) (2021). *See* Heyman, *supra* note 20 at 538 (listing the objectives of SEC Rule 419 as "placing strict[er] controls" and "giving investors a chance to reconsider their investment").

34. § 230.419(b).

35. Kelsey Syvrud*, Should SPACs Be Back? Part Two*, FIRE CAP.: INSIGHTS (Apr. 27, 2021), https://www.firecapitalmanagement.com/fire-capital-blog-posts/should-spacs-be-back-part-two [https://perma.cc/PFS3-5QN2] (providing explanation to the ebbs and flows of SPAC popularity since its inception in the early 1990s).

36. *See* David A. Miller & Jeffrey M. Gallant, *SPACs: Rebuilt and Here to Stay?*, FINANCIER WORLDWIDE (Dec. 2010), https://www.graubard.com/wp-content/uploads/sites/1400405/2020/08/FinancierWorldwideArticle122010.pdf [https://perma.cc/6MYY-BVGJ] (discussing the receding popularity in SPACs when traditional IPOs are less expensive and more readily available); Syvrud, *supra* note 35.

37. Syvrud, *supra* note 35.

with 160 SPAC IPOs from 2003 until the 2008 financial crisis[38]—at which time the NYSE & NASDAQ changed their rules to allow SPACs to be traded on their exchanges[39]—leading to another increase in SPAC popularity that continued throughout the late 2010s and exploded in 2020.[40]

The current interest in SPACs is thanks to a number of factors.[41] At the top of the list is the COVID-19 pandemic, which added to the cost of the traditional IPO process[42] and made the extensive travel involved in investor roadshows impractical, if not impossible.[43] Another factor contributing to the rise in SPAC popularity is the influx of pre-revenue tech companies that have discovered the unique possibilities SPACs can provide.[44] SPACs are the perfect option for many of these "investor-propped"[45] companies with high growth potential but lacking consistent revenues, making them unsuited for a traditional IPO as IPOs prohibit reliance on financial projections as a selling point, whereas the SPAC route allows for these statements.[46] The success of these pre-revenue companies has created an influx of tech startups, in need of capital but

38. *Id.*

39. *See* GUSTAVO A. PAUTA & DAVID H. HUNG, REEDSMITH CLIENT BULLETIN 08-090: THE SEC APPROVES THE NYSE'S PROPOSED RULE CHANGE TO ALLOW LISTING OF SPACS (June 4, 2008), https://www.reedsmith.com/en/perspectives/2008/06/the-sec-approves-the-nyses-proposed-rule-change-to [https://perma.cc/QG52-Y5K4] (describing the process by which Special Purpose Acquisition Companies became traded on the NYSE. Prior to this rule change, blank check companies could only be traded in the OTC market and the American Stock Exchange).

40. SPAC ANALYTICS, https://www.spacanalytics.com/ [https://perma.cc/2YPE-3JYC] (last visited Sept. 18, 2021).

41. *See* Joseph Williams & Stefen J. Rasay, *Tech and SPACs: SEC Regulation Could Result in Fewer, but Better SPACs*, S&P GLOBAL MKT. INTEL. (May 13, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/tech-and-spacs-sec-regulation-could-result-in-fewer-but-better-spacs-64000801 [https://perma.cc/G7Y5-H3QB] (arguing that while there was a slight decrease in SPAC popularity in April of 2021, SPACs are more popular than they have ever been because of certain regulatory benefits); *see also* James Woodbridge, *The Evolution of SPACs*, HEDGEWEEK: NEWS (Aug. 12, 2020), https://www.hedgeweek.com/2020/12/08/293262/evolution-spacs [https://perma.cc/3JCH-GZ8W] (detailing the differences between SPACs and the traditional IPO that are making SPACs popular currently).

42. The additional costs associated with taking an operating company public are discussed at length below, but primarily include the substantial difference in investment bank fees as well as the timing of when those fees are paid.

43. Woodbridge, *supra* note 41.

44. Williams, *supra* note 41.

45. Meaning corporations with high growth potential, but that are in the pre-revenue stage. The traditional IPO path is not available for these companies.

46. Williams, *supra* note 41.

not ready for an IPO, going public via a SPAC, further increasing SPAC popularity.[47] Additionally, many retail investors, seeing the success of technology startups using SPACs to go public, have sought a way to invest earlier in the lifecycle of a lucrative company and SPACs have provided the ideal opportunity for such involvement.[48] High profile SPAC founders—like famous athletes Shaquille O'Neal[49] and Alex Rodriguez[50]—as well as high-profile companies—like Virgin Galactic[51] and DraftKings[52]— have also contributed to the recent interest in SPACs. Finally, as the number of SPACs has increased, so has the market's positive perception of SPACs as a vehicle for going public, leading to SPAC popularity begetting more SPAC popularity.[53]

B. How SPACs Work

In order for a SPAC to accomplish its mission of taking a privately held operating company public, there are two distinct phases or transactions that must take place – an IPO and a merger.[54] First, the

47. *Id.*

48. *See* Nikolai Roussanov, *Why SPACs Are Booming,* WHARTON: KNOWLEDGE @ WHARTON (May 4, 2021), https://knowledge.wharton.upenn.edu/article/why-spacs-are-booming [https://perma.cc/Y6NG-EP8X] (discussing how SPACs provide an earlier entry point to emerging companies than does the traditional IPO).

49. Kori Hale, *Shaq Moves into SPACs with Former Disney Execs & MLK Jr.'s Son*, FORBES (Oct. 20, 2020, 7:50 AM), https://www.forbes.com/sites/korihale/2020/10/20/shaq-moves-into-spacs-with-former-disney-execs--mlk-jrs-son [https://perma.cc/QB42-CU88].

50. Noor Zainab Hussain, *Alex Rodriguez-Backed SPAC Looks to Raise About $500 Million in IPO*, REUTERS (Feb. 4, 2021, 4:24 PM), https://www.reuters.com/article/us-slam-corp-ipo/alex-rodriguez-backed-spac-looks-to-raise-about-500-million-in-ipo-idUSKBN2A42WL [https://perma.cc/Y3W7-LFDP].

51. Press Release, Virgin Galactic, Virgin Galactic and Social Capital Hedosophia Announce Merger to Create the World's First and Only Publicly Traded Commercial Human Spaceflight Company (July 9, 2019), https://www.virgingalactic.com/articles/virgin-galactic-and-social-capital-hedosophia-announce-merger-to-create-the-worlds-first-and-only-publicly-traded-commercial-human-spaceflight-company/ [https://perma.cc/576W-T4KZ].

52. Jesse Pound, *Fantasy Sports Company and Bookmaker DraftKings to Become Public Company*, CNBC, (Dec. 23, 2019, 7:19 AM), https://www.cnbc.com/2019/12/23/draftkings-to-become-public-company-forgoing-traditional-ipo.html [https://perma.cc/TZ86-YYSW].

53. *See* Rani Molla, *SPACs, the Investment Term You Won't Stop Hearing About, Explained,* VOX (Mar. 4, 2021, 2:50 PM), https://www.vox.com/recode/22303457/spacs-explained-stock-market-ipo-draftkings [https://perma.cc/3DXW-LWBE] (illustrating that the more SPACs are discussed as a popular investment option, the more that investors are seeking SPACs out to invest in).

54. U.S. SEC. & EXCH. COMM'N*, What You Need to Know About SPACs – Updated Investor Bulletin*, INTRODUCTION TO INVESTING: INVESTOR ALERTS AND BULLETINS (May 25, 2021), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/what-you [https://perma.cc/5MDU-G5XY].

SPAC itself must be publicly traded, which it accomplishes by going through the IPO process as a newly formed shell company.[55] Investor funds raised during the SPAC's IPO[56] are placed in a trust and are untouchable until the SPAC merges with its target.[57] As a way to further protect investors, SPAC investment funds are also fully redeemable[58] until the merger is completed. The SPAC's status as a shell company means that there are fewer historical financial statements and disclosures for the SEC to evaluate as part of the SPAC's IPO than there would be with an operating company.[59] SPAC sponsors[60] often cite these reduced reporting requirements as one of the key factors in making the SPAC process faster than the traditional IPO.[61]

After the SPAC goes public, it has approximately two years[62] to identify a target company and merge with it in what is referred to as either the business combination phase[63] or a "de-SPAC"[64] transaction.[65] SPAC investors must approve a prospective target before the de-SPAC transaction with that company can take place.[66] Until recently, this vote was binding on investors – meaning if they voted to approve the merger,

55. A shell company does not have any underlying operating business, nor does it have any assets aside from cash and other investments. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

56. But before the SPAC identifies a target.

57. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

58. After the target is announced and a merger approved by investors at the IPO price, which is typically set at $10 per share.

59. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

60. Refers to the management team that formed and operates the SPAC. *Id.*

61. *See Understanding SPAC IPOs Versus Traditional IPOs*, WOODRUFF-SAWYER & CO., https://woodruffsawyer.com/industries/spacs/spac-ipos-traditional-ipos-difference/ [https://perma.cc/Y5SB-52UZ] (last visited Sept. 21, 2021) (explaining that the differences in disclosure requirements for SPACs means that the process to go public typically takes a "matter of months" compared to the traditional IPO process that can take "anywhere from nine months to several years").

62. Also known as the liquidation window, which typically ranges from 18-24 months, depending on the SPAC's bylaws. If the SPAC does not merge with a target company within the liquidation window, it must return all funds raised to its investors. The liquidation window can be extended pending a vote of the shareholders of the SPAC. However, all SPACs listed on the NASDAQ or NYSE risk delisting if they exceed 36 months without a business combination. Nasdaq IM-5101-2(b); N.Y.S.E Guide § 119(b).

63. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

64. *See* Andrew R. Brownstein et al., *The Resurgence of SPACs: Observations and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 22, 2020), https://corpgov.law.harvard.edu/2020/08/22/the-resurgence-of-spacs-observations-and-considerations/ [https://perma.cc/64LX-SRUW] (illustrating the differences between "modern" SPACs and pre-2019 SPACs).

65. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

66. Nasdaq IM-5101-2(d); N.Y.S.E Guide § 119(d).

they were not permitted to redeem their investment.[67] Recent rule changes, however, have eliminated that requirement and now investors are permitted to vote to approve the merger without any skin in the game.[68] If the SPAC fails to identify a target and complete the merger within that two-year window then the SPAC is liquidated, and all of the funds held in escrow are returned to investors.[69] Assuming that a target is identified and merged with the SPAC, however, the SPAC's sponsors receive a substantial amount of equity in the new company, typically referred to as the sponsor's "promote."[70] If a merger is not effectuated within the liquidation window, sponsors do not benefit as there is no new company equity for them to receive.[71]

The SPAC's IPO and the de-SPAC transactions together[72] complete the process of taking a privately held company onto a public exchange, circumventing portions of the traditional IPO route.[73] While both the SPAC and traditional IPO process accomplish the same end result, that is, both processes bring a privately held company onto a public exchange, each presents distinct benefits, drawbacks, and legal implications that will be discussed further below.[74]

III. FORWARD-LOOKING STATEMENTS – A KEY DIFFERENCE BETWEEN SPACS AND TRADITIONAL IPOS

A. The PSLRA

In the early 1970s, the SEC began a decades-long journey away from its prohibition on financial projections in company filings in an

67. Sheppard Mullin, *SPACs 2.0: New SPAC Rules Changes Approved by NASDAQ And NYSE AMEX and New Market Features Make SPACs a More Attractive Investment Vehicle in 2011*, SHEPPARD MULLIN: CORP. & SEC. L. BLOG (Mar. 21, 2011), https://www.corporatesecuritieslawblog.com/2011/03/spacs-2-0-new-spac-rules-changes-approved-by-nasdaq-and-nyse-amex-and-new-market-features-make-spacs-a-more-attractive-investment-vehicle-in-2011 [https://perma.cc/4DNM-5FYA].

68. Nasdaq IM-5101-2(e); N.Y.S.E Guide § 119(e).

69. Nasdaq IM-5101-2(b); N.Y.S.E Guide § 119(b).

70. *See* Brownstein et al., *supra* note 64 (describing the method and terminology for how Sponsors make money on SPAC deals).

71. *Id.*

72. The SPAC's IPO and the SPAC's merger with the target company.

73. Brownstein et al., *supra* note 64.

74. *See* COOPER ET AL., *supra* note 2 (highlighting the regulatory and structural differences that exist in the SPAC and traditional IPO process); *infra* Part III.B.

attempt to provide more complete financial information to investors.[75] Prior to that time, the Commission did not allow this type of forward-looking information to be included in company filings as it was concerned that investors might place too much weight on unsubstantiated projections when making investment decisions.[76] The first several attempts by the SEC to encourage companies to report financial projections were unsuccessful until Congress passed the Private Securities Litigation Reform Act ("PSLRA") in 1995.[77]

In part, the PSLRA protects companies by barring private actions relating to forward-looking statements made by executives[78] that turn out to be false or include material omissions despite the issuer's good faith.[79] This protection is more commonly known as providing a "safe harbor" from private litigation relating to these forward-looking statements.[80] Notably, the PSLRA's safe harbor does not protect executives or companies from enforcement actions by the SEC.[81] The protection afforded is only against private actions.[82]

The goal of the PSLRA's safe harbor is to ensure increased availability of forward-looking information so as to benefit investor decision-making.[83] The safe harbor afforded to companies and their executives from private litigation is not unlimited, however, and comes with a few notable exceptions.[84]

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75. *See* Amanda M. Rose, *SPAC Mergers, IPOS, and The PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage* at 29-32, (Oct. 19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945975 [https://perma.cc/4NUE-75MX] (chronicling the journey that the SEC took in its acceptance and revere for forward-looking statements).

76. Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 MD. L. REV. 1114, 1118 (1987) (explaining the SEC's original hesitation in allowing forward-looking statements to be included in a company's financial disclosures).

77. Rose, *supra* note 75.

78. Provided that the executive did not have knowledge at the time that the statement was misleading and that the statement was accompanied by "meaningful cautionary language." 15 U.S.C. §§ 77z-2 (2010), 78u-5 (1995).

79. 15 U.S.C. §§ 77z-2, 78u-5.

80. COOPER ET AL., *supra* note 2.

81. 15 U.S.C. §§ 77z-2, 78u-5.

82. 15 U.S.C. § 78u-5.

83. *See* Rose, *supra* note 75 (providing a thorough analysis and interpretation of the legislative intent behind the PSLRA).

84. 15 U.S.C. §§ 77z-2, 78u-5.

B. Safe Harbor – A Key Benefit of SPACs to Certain Targets

One of these safe harbor exceptions is for false statements or material omissions made in connection with a company's IPO.[85] Due to this exclusion from the PSLRA's safe harbor and Securities Act Rule 169, typically only historical financial information is shared as part of a company's IPO.[86] The traditional IPO's heavy reliance on historical financials limits the number and type of companies that are able to go public via this route.[87]

As the de-SPAC transaction is not an IPO, however, some have suggested that SPACs can take advantage of the PSLRA's safe harbor in relation to forward-looking statements made during the de-SPAC transaction.[88] As there is no specific exclusion from the PSLRA's safe harbor for the de-SPAC transaction, SPACs have assumed that safe harbor applies.[89] As a result, many de-SPAC transactions currently rely on forward-looking projections, rather than historical financials, as part of proxy statements soliciting SPAC stockholder approval of the de-SPAC transaction.[90]

The availability of forward-looking projections provides a significant opportunity to market companies without a proven track record, history of success in the markets, or that is investment-hungry but pre-revenue like many early-stage technology startups.[91] One of the key differences between the traditional IPO and going public via a SPAC is the availability of forward-looking statements for soliciting approvals in the de-SPAC transaction.[92] This difference in treatment of forward-looking statements is also part of what makes SPACs attractive to earlier stage companies that would likely be excluded from a traditional IPO due

85. 15 U.S.C. § 77z-2(c)(2)(D) (2010).

86. Simon Moore, *Why SPACs Are Exploding, A CEO's Take*, FORBES, (Oct. 5, 2020, 1:55 PM), https://www.forbes.com/sites/simonmoore/2020/10/05/why-spacs-are-exploding-a-ceos-take [https://perma.cc/CX5F-U9WS].

87. *Id.*

88. Coates, *supra* note 10.

89. Moore, *supra* note 86.

90. Davina K. Kaile et al., *Congressional SPACtivity Continues: Draft Legislation Proposes to Eliminate Safe Harbor Protection for Projections in SPAC Transactions,* JD SUPRA, (June 1, 2021), https://www.jdsupra.com/legalnews/congressional-spactivity-continues-2513817 [https://perma.cc/T8JR-Z26M].

91. Roussanov, *supra* note 48.

92. *Id.*

to their lack of historical financials.[93] However, in his April 2021 statement, SEC Acting Deputy Director of Corporation Finance, John Coates, called that particular SPAC advantage into question.[94] Private targets that go public via a SPAC could lose this benefit if the SEC or Congress amend the PSLRA's safe harbor provisions to explicitly exclude the de-SPAC transaction from its protection.[95]

C. The Availability of Safe Harbor Called into Question for SPACs

In April of 2021, Acting Deputy Director Coates, issued a statement cautioning SPAC sponsors about their potential liability under securities law and calling into question whether the PSLRA's safe harbor[96] should apply to the de-SPAC transaction.[97] Coates stated that while some practitioners believe the PSLRA's safe harbor extends to companies that choose to enter the public market via a SPAC, that interpretation was far from unanimously held.[98] Coates argued that despite the business combination—or, de-SPAC transaction—technically being a merger, there was reason to believe that the PSLRA's safe harbor should not apply.[99] Coates' statement explained that the application of PSLRA's safe harbor to the de-SPAC transaction was "uncertain at best"[100]—reasoning that, because the de-SPAC transaction is the moment in which a "private operating company itself 'goes public'" the de-SPAC transaction is actually the moment when the target company "engages in its initial public offering" and thus should be included as an exception to the PSLRA's safe harbor protections.[101]

While the immediate effect of this statement, were it to be used as the basis for proposed rule changes, would be to restrict SPACs from benefiting from the PSLRA's safe harbor, this change would significantly limit the use of forward-looking statements as part of the de-SPAC

93. Sophia Kunthara, *Why Are SPAC Targets So Young?*, CRUNCHBASE NEWS (Dec. 9, 2021), https://news.crunchbase.com/news/vc-backed-spac-targets-vs-ipo/ [https://perma.cc/HUV9-QTAU].

94. Coates, *supra* note 10.

95. Kunthara, *supra* note 93.

96. 15 U.S.C. §§ 77z-2, 78u-5.

97. Coates, *supra* note 10.

98. *See id.* ("Some – but far from all – practitioners and commentators have claimed that an advantage of SPACs over traditional IPOs is lesser securities law liability exposure for targets and the public company itself.").

99. COOPER ET AL., *supra* note 2.

100. Coates, *supra* note 10.

101. *Id.*

transaction, a significant comparative benefit of using a SPAC over a traditional IPO.[102]

Coates suggests that removing SPACs from the PSLRA's safe harbor would increase investor protections from untested and potentially fraudulent forward-looking statements.[103] Removing the de-SPAC transaction from safe harbor only limits the availability of private litigation when forward-looking statements meet a number of requirements,[104] it does not provide a free pass to SPACs and their targets to commit fraud.[105] In fact, removing safe harbor still provides a number of investor protections against misleading forward-looking statements, including the availability of the SEC to step in directly with litigation of its own.[106]

D. Protecting Investors Without Removing Safe Harbor – The Stable Road Settlement

According to Stanford Law's Securities Class Action Clearinghouse, 21 of the 22 SPAC-related securities claims brought so far in 2021[107] have raised a Section 10(b)[108] violation of the Exchange Act of 1934.[109] Section 10(b) sets restrictions on the types of statements anyone can make in relation to the purchase or sale of any security.[110] Specifically, section 10(b) prohibits making any untrue statement of material fact or omitting a material fact necessary to prevent the statements from being misleading.[111]

These types of claims by private parties, relating to forward-looking projections, are the type that the PSLRA's safe harbor prevents.[112] Despite safe harbor preventing a private action from

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102. *See infra* Part IV.B.

103. Coates, *supra* note 10.

104. 15 U.S.C. §§ 77z-2, 78u-5.

105. Coates, *supra* note 10.

106. Complaint, *Jensen v. Stable Rd. Acquisition Corp.*, C.D. Cal. (2021) (No. 2:2021-cv-05744) (showing that the SEC is actively pursuing claims against SPACs for potential violations of securities laws).

107. As of August 31, 2021.

108. 17 C.F.R. § 240.10b-5.

109. *Current Trends in Securities Class Action Filings: SPACs*, STANFORD L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, https://securities.stanford.edu/current-trends.html [https://perma.cc/4A2E-4QU5] (last visited Aug. 31, 2021).

110. 17 C.F.R. § 240.10b-5.

111. *Id.*

112. *Id.*

succeeding, the SEC may still bring an enforcement action against forward-looking statements made in connections with the de-SPAC transaction.[113] The SEC took similar action in a claim it brought directly against Stable Road Acquisition Corp. ("Stable Road") for false claims it made during the de-SPAC transaction that were intentionally misleading.[114]

In the SEC's enforcement action brought against Stable Road,[115] the claim alleged that Stable Road's target company, Momentus, informed investors it had successfully tested its space technology, when in reality the only test performed had failed.[116] The SEC also alleged that Momentus misrepresented national security concerns involving their CEO and that Stable Road was negligent for not performing the appropriate due diligence on the target company prior to announcing their combination.[117] On July 13, 2021, the SEC announced that it had settled its claim against Stable Road for violations of the Securities Act and in August of 2021 Stable Road was able to proceed with the de-SPAC transaction of acquiring Momentus, after the appropriate disclosures were made to investors.[118]

The SEC's enforcement action against Stable Road signals its willingness to pursue misleading statements made in the de-SPAC transaction and encourages SPACs and their targets to make appropriate disclosures, which in turn protects investors.[119] Whether intentional or not, the SEC's pursuit of the Stable Road matter demonstrates that safe harbor does not preclude SPACs from being held accountable for misleading forward-looking statements.[120] While safe harbor would make private action unavailable to investors,[121] the SEC would still be

113. *Id.*

114. Chris Prentice, *U.S. SEC Charges Blank Check Firm Stable Road, Space Startup Momentus with Misleading Claims*, REUTERS: BUS. (July 13, 2021, 6:03 PM), https://www.reuters.com/business/us-sec-charges-blank-check-firm-stable-road-space-startup-momentus-over-2021-07-13/ [https://perma.cc/74WL-4V78].

115. Complaint, *Jensen v. Stable Rd. Acquisition Corp.*, C.D. Cal. (2021) (No. 2:2021-cv-05744).

116. *Id.*

117. *Id.*

118. Press release for 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/78DK-QF56].

119. Prentice, *supra* note 114.

120. *Id.*

121. Like those in Stable Road if the Stable Road claims had been about forward-looking statements.

able to intervene as they did in Stable Road to protect the interests of SPAC investors.[122] The SEC's intervention allowed Stable Road's de-SPAC transaction to move forward with the appropriate disclosure, further protecting investors' interests.[123]

IV. ELIMINATING THE PSLRA'S SAFE HARBOR FOR SPACS IS A RED HERRING FOR SUBSTANTIVE REFORM

Acting Deputy Director Coates relies on two key benefits that removing the de-SPAC transaction from the benefit of the PSLRA's safe harbor would provide.[124] First, Coates claims that removing safe harbor will protect investors by reducing the number of unsubstantiated financial projections that investors might rely on in making their investment decisions.[125] And, second, Coates claims that removing safe harbor will create a "level playing field"[126] for SPACs and the traditional IPO, which is justified because both transactions have the same ultimate effect of offering shares of a company for the first time on public markets.[127] As discussed in the following two sections, however, neither of these purported benefits are likely to materialize as a result of removing safe harbor protections for SPACs.

A. Removing Safe Harbor is Unlikely to Increase Investor Protections

Acting Deputy Director Coates claims that removing SPACs from the PSLRA's safe harbor protections will increase investor protection because there will be fewer unsubstantiated financial projections that investors might rely on when making investment decisions.[128] This argument presumes that investors rely blindly on financial projections when making decisions, rather than weighing that information as one piece of the decision-making process. However, in

122. Prentice, *supra* note 114.

123. *Id.*

124. Coates, *supra* note 10.

125. *Id.*

126. Creating a level playing field is also a stated objective of Congress in presenting legislation that would remove safe harbor protections from the de-SPAC transaction. H.R. 5910, the Holding SPACs Accountable Act (2021) (Conf. Rep.); H.R. 5913, the Protecting Investors from Excessive SPACs Fees Act (2021) (Conf. Rep.).

127. Coates, *supra* note 10.

128. *Id.*

reality, studies show that investors are unlikely to rely on optimistic projections due to skepticism about the veracity of those statements.[129] In fact, a 2021 study on investor behavior relating to SPACs finds that while SPAC retail investors are more influenced by forward-looking statements than are institutional investors by the same information, [130] there is no indication that those retail investors are actually harmed by this information.[131]

The primary objective of the SEC is to protect investors.[132] When the SEC itself describes how it accomplishes that goal, the first example it lists is that it ensures the full disclosure of financial and other relevant information so that investors are able to make their own decisions, with a full picture in front of them.[133] Similarly, the goal of the PSLRA's safe harbor provisions is to ensure greater access to forward-looking information for the benefit of investors.[134] Excluding SPACs from safe harbor will almost certainly result in SPACs and their targets releasing less information on which investors can make their decisions, without proof that investors are being harmed by that information.[135] Whereas officially extending safe harbor to SPACs and their targets would result in continued sharing of forward projections, enabling investors to make a well-informed decision.

B. Removing Safe Harbor Alone Will Not Create a "Level Playing Field"

The second benefit that Acting Deputy Director Coates relies on in justifying the removal of safe harbor protections from SPACs is to

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129. *See* Robert Jennings, *Unsystematic Security Price Movements, Management earnings Forecasts, and Revisions in Consensus Analyst Earnings Forecasts*, 25 J. ACCT. RES. 90 (1986) (showing that investors are more likely to rely on negative projections than positive projections); *see also* Amy P. Hutton et al., *The Role of Supplementary Statements with Management Earnings Forecasts*, 41 J. OF ACCT. RES. 867, 883 (indicating that investors only believe good news when it is accompanied by verifiable forward-looking projections).

130. Michael Dambra et al., *Should SPAC Forecasts be Sacked?,* 1, 10 (Sept. 29, 2021), https://ssrn.com/abstract=3933037 [https://perma.cc/WBL9-MEAE].

131. *Id.* at 20.

132. *See* U.S. SEC. & EXCH. COMM'N, *About the SEC*, https://www.sec.gov/about.shtml [https://perma.cc/G8FQ-6QWN] (last visited Sept. 18, 2021) (showing that the SEC's first priority in its mission statement is "protecting investors").

133. U.S. SEC. & EXCH. COMM'N, *What We Do*, https://www.sec.gov/about/what-we-do [https://perma.cc/6ELR-YQTG] (last visited Nov. 15, 2021).

134. Rose, *supra* note 75.

135. *Id.*

create a level playing field between SPACs and traditional IPOs.[136] Yet, because of the differences that are inherent between the two avenues of taking a private company onto the public exchanges, this is an unlikely outcome.[137] The result of excluding traditional IPOs from safe harbor protections is that companies that choose that route, simply do not disclose financial projections as part of their IPO.[138] This is unfortunate as it leaves investors without insight into the future projections of a company prior to investing, but is an understandable result of limiting the protections offered to those companies as they wish to avoid liability.

SPACs, on the other hand, do not have the ability to simply stop sharing all forward-looking projections.[139] State corporate law[140] requires SPAC targets to release forward-looking projections to shareholders that the board of directors relied on in approving the transaction.[141] As financial projections are a key component to merger decisions, SPAC boards almost certainly rely on this information and therefore it is required to be disclosed, regardless of the availability of safe harbor.[142] Removing safe harbor, therefore, would not result in SPACs and their targets going silent on forward-looking projections, because they are required to disclose this information to investors.[143]

Without amending these disclosure requirements for SPACs and their targets, removing safe harbor alone would not create a "level playing field" in regard to SPACs and traditional IPOs.[144] Further regulatory action would be required if the SEC decided to exclude SPACs from the

136. Coates, *supra* note 10.

137. Rose, *supra* note 75.

138. *See* Brendan F. Quigley & Travis J. Wofford, *SPAC Update: Congress's Proposal to Eliminate Forward-Looking Statement Safe Harbor for SPACs,* BAKER BOTTS: THOUGHT LEADERSHIP (June 11, 2021), https://www.bakerbotts.com/thought-leadership/publications/2021/june/spac-update-congress-proposal-to-eliminate-forwardlooking-statement-safe-harbor-for-spacs [https://perma.cc/PE2G-3GWE] (arguing that making safe harbor unavailable to SPACs would, in practice, make SPACs less likely to share financial projections).

139. *See* George Casey et al., *SEC Considering Heightened Scrutiny of Projections in De-SPAC Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 17, 2021), https://corpgov.law.harvard.edu/2021/05/17/sec-considering-heightened-scrutiny-of-projections-in-de-spac-transactions/ [https://perma.cc/KXG6-6G43] (showing that Delaware corporate law requires information that the board of directors relies on when approving a transaction to be disclosed to shareholders).

140. At least in Delaware. *Id.*

141. Casey et al., *supra* note 139.

142. *Id.*

143. Rose, *supra* note 75.

144. *Id.*

PSLRA's safe harbor in order to create a level playing field.[145] In fact, removing safe harbor alone, without these additional modifications to disclosure requirements would put SPACs at a clear disadvantage to the traditional IPO route because IPOs have the ability to avoid making these kinds of statements that are unprotected by safe harbor whereas SPACs are left without protection and yet are still required to make disclosures of this information.[146]

So, if neither of the benefits that Acting Deputy Director Coates relies on in justifying the removal of safe harbor from SPACs are likely to occur, why are regulators and legislators so eager[147] to take this action?[148] There is likely no single reason, but one scholar suggests it may be politically advantageous to do so.[149] Specifically, providing private citizens the ability to sue target companies or SPACs for violating the Securities Act is something that, on the surface, seems like a common-sense reform, requiring little background understanding.

Whereas more impactful reforms of SPACs are not as straightforward.[150] SPACs, as an alternative to the traditional IPO, are not without flaws.[151] As noted by multiple scholars and practitioners, conflicts of interest abound, sponsors are excessively compensated compared to investors,[152] and investor approval of prospective targets is close to meaningless.[153] These maladies, for example, provide ample opportunities for legislative and regulatory fixes to make SPACs a safer investment option.[154] Yet, in order to understand the benefits that reforming these concerns could bring, one must also have a deeper

145. Casey et al., *supra* note 139.

146. Rose, *supra* note 75.

147. SEC DRAFT RECOMMENDATIONS, *supra* note 1; H.R. 5910, the Holding SPACs Accountable Act (2021) (Conf. Rep.); H.R. 5913, the Protecting Investors from Excessive SPACs Fees Act (2021) (Conf. Rep.).

148. Rose, *supra* note 75.

149. *Id.*

150. *See* Michael Klausner et al., *A Sober Look at SPACs* 1, 48 (Stan. L. and Econ. Olin Working Paper No. 559, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720919 [https://perma.cc/V9H9-RG2M] (providing a detailed analysis of the pitfalls of the SPAC process as compared to a traditional IPO).

151. *Id.*

152. Dane Bowler, *Beware The SPAC: How They Work And Why They Are Bad*, SEEKING ALPHA (Jan. 5, 2021, 5:23 PM), https://seekingalpha.com/article/4397498-beware-spac-how-work-and-why-are-bad [https://perma.cc/DKN3-U8HP].

153. Usha Rodrigues & Michael Stegemoller, *SPACs: Insider IPOs* (Aug. 19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906196 [https://perma.cc/ZW8R-Z8G9].

154. Klausner, et al. *supra* note 150; Bowler, *supra* note 152; *id.*

understanding of how SPACs work and how they can be manipulated by savvy insiders – which requires investing time, rather than resorting to a seemingly quick fix like removing safe harbor protections from SPACs.

V. CONCLUSION

The recent surge in transactions involving Special Purpose Acquisition Companies as the method to bring private companies onto the public stock exchanges, rather than by going through the traditional initial public offering process has impacted investors and markets for nearly two years.[155] This boom in activity has left little time for regulation to catch up, despite calls for quick action.[156] In an attempt to find a simple solution, the SEC and Congress have floated the idea of removing the de-SPAC transaction from the protections of the PSLRA's safe harbor, without fully examining the costs and benefits to such an action.[157] Excluding SPACs from the PSLRA's safe harbor might provide a speedy response to the calls for more regulation in the SPAC space, but one that will not result in meaningful reform.[158] Instead, it will lead regulators and legislators down a path of appearing to improve SPACs as an alternative to the traditional IPO, while providing no substantive improvements.

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155. Hale, *supra* note 49.
156. COOPER ET AL., *supra* note 2.
157. Coates, *supra* note 10.
158. Rose, *supra* note 75.

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