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Spotlight on SPACs in the Fintech Sector: Evolving Market Trends and Recent Regulatory Developments for SPACs in the United States, the United Kingdom and Europe

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Abstract

Recent years have seen significant market developments and increased innovation in capital markets. The path to enter these markets has rapidly transformed as a stronger and clearer desire to innovate on the traditional initial public offering ("IPO") process has arisen, with alternative structures being utilized to take private companies public and to raise capital. Among them, special purpose acquisition companies ("SPACs") have recently emerged to dominate the capital markets scene, with the volume and size of SPAC IPOs and business combinations completed by SPACs reaching record high levels in 2020 and the first half of 2021.

A SPAC is a shell company with no commercial operations, which is formed by a sponsor to raise capital through an IPO for the purposes of financing the acquisition of a private operating company within a specified timeframe, typically 18 to 24 months following the SPAC's IPO. The target company being acquired is taken public via the business combination of the two entities. If the SPAC fails to close the business combination before its expiration date or permitted extension, the investors' capital will be returned and the SPAC will be liquidated. Whilst to date SPACs have mostly been a U.S. phenomenon, SPAC activity has gradually gained traction in other geographic areas including Europe and the United Kingdom, with financial centers like Amsterdam, Frankfurt and London positioning themselves to best capture this emerging trend. From a sector perspective, SPACs have increasingly targeted acquisitions in high-growth industries and have rapidly become an integral part of fast-evolving sectors, including the fintech sector. A few high-profile fintech companies have recently gone public via a SPAC, and a growing number of fintech companies have reportedly been considering the SPAC route when weighting their options to go public. Many SPACs view the fintech sector as ripe for successful business combinations due to the large supply of mature and highly valued fintech companies eyeing the public markets, as well as the accelerated growth of many fintech companies and the increased demand for fintech services and products driven by rapid changes in customer behavior in the aftermaths of the recent Covid-19 pandemic.

The surge in popularity of SPACs and the significant growth in SPAC activity have brought heightened scrutiny from regulators in the United States, the United Kingdom and Europe. In recent months, the U.S. Securities and Exchange Commission has initiated a number of SPAC-related enforcement actions and has issued several public statements and regulatory investor guidance on issues pertaining to SPACs, while the U.S. Congress has begun to hold hearings on SPACs. In parallel, the European Securities and Markets Authority has published disclosure and investor protection guidance on SPACs. The regulatory framework for SPACs in the United Kingdom has also rapidly evolved during the last few months as UK regulators have gone to great lengths to demonstrate their commitment to ensuring their public markets remain competitive listing venues, while at the same time introducing various measures aimed at strengthening the protection for investors in SPACs and increasing market efficiency and transparency in connection with SPAC activity.

Despite the recent slow-down in U.S. SPAC transactions driven in part by growing concerns around SPAC-related litigation risks and increased regulatory scrutiny, the pace of SPAC activity is expected to remain at a high level in the months to come, with more SPACs launching and expanding internationally into non-U.S. markets including in the United Kingdom and Europe. SPAC activity in the fintech sector, in particular, is expected to progress at a steady pace in light of the sector's strong revenue and growth projections, the anticipated wave of fintech companies reaching profitability, as well as a renewed appetite for a variety of fintech products and services.

Interestingly, latest SPAC issuances have broadened the range and improved the makeup of the sponsors to include more institutional and high-reputable market participants, thus further legitimizing the SPAC process. The influx of large private equity and venture capital firms and seasoned managers with well-proven track records, coupled with better alignment of sponsors' incentives and investors' returns, has contributed to boost investor confidence, thus enabling SPACs to raise significant capital to use for acquisitions of larger and more mature target companies. Additionally, the high-profile companies that have recently gone public via a SPAC have helped accelerate the momentum and have lent increased credibility to the SPAC structure. The SPAC market has also benefitted from a more diversified and larger pool of institutional investors, which have progressively entered the space showing increased interest in growth industries and significant appetite for suitable returns in volatile markets.

More recent SPACs have started targeting a wider range of acquisitions. A number of sophisticated SPACs' sponsors are now increasingly looking for larger and more mature companies, are progressively reducing the equity they receive in exchange for striking a merger and are planning to use a sizeable portion of the equity raised to fund growth. These sponsors tend to remain more closely involved with

their target companies to provide ongoing support post-closing and to strategically partner with them on the longer term. Many SPACs are also seeking to be more transparent to promote a better understanding of, and increased confidence in, their structure, including among non-traditional SPAC investors.

Looking further ahead, SPACs are expected to continue to evolve and to drive innovation in a way that will likely lead to further market practice changes, which in turn could improve markets efficiency and promote competition. More regulation of various aspects of the SPAC structure, disclosures and activities may also be coming. The deal terms of SPACs themselves are likely to continue to evolve. As SPAC transactions grow in volume and popularity and the competition increases, SPACs are expected to adopt more company-friendly structures to entice potential acquisition targets and remain an attractive option for private companies looking to go public. Moreover, as larger and more sophisticated players enter the market, more SPAC structural enhancements and variations of the typical SPAC structure are expected to be adopted with the aim of increasing investor protection, reducing closing risks and improving the alignment of interests among the parties involved.

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PREFACE

Although they have been used for decades, SPACs have taken hold of public markets and their activities have exponentially increased over the last eighteen months, with the year 2020 being a record-breaking year for SPAC IPOs and business combinations completed by SPACs, and the first half of 2021 already exceeding the year 2020's record performance. Various factors have contributed to make SPACs more appealing and to accelerate their growth in recent months, including the influx of high-profile sponsors, the increased number of private companies seeking exit opportunities, the rising investor appetite for growth opportunities, interest rates at record lows and high degrees of volatility and uncertainty in the public markets driven by the Covid-19 pandemic.

The recent boom in SPAC activity is creating a new breed of public companies across a number of high-growth sectors, including the fintech sector. The emergence of the Covid-19 pandemic has significantly accelerated the digitization of banking and finance and has put a renewed attention on fintech products and services, thus driving explosive growth and innovation at global scale across the payment, banking, savings, lending and investments segments among others. After demonstrating strong resilience during the Covid-19 pandemic with key verticals recording double-digit growth despite various operational and financial challenges, the fintech sector is now maturing and more fintech companies are approaching their next milestone - profitability. The rapid evolution of the fintech sector and the growing number of fintech companies eyeing the public markets create a fertile ground for SPAC activity.

A variety of companies, including high-profile fast-growing fintech companies, find certain features of SPACs particularly compelling, including the flexibility inherent in negotiating with a SPAC, the increased stability and certainty of price, the enhanced speed of execution and unique strategic partnership opportunities. SPACs can bring significant benefits to investors as well, who can typically split their units in a SPAC and can generally redeem their shares in a SPAC before completion of the proposed business combination, while at the same time retaining their warrant portion of the unit and thus enjoying the related potential upside. Investor interest in SPACs is often driven by the reputation, industry expertise and network of the sponsors, directors and management teams of the SPACs, which are a primary selling point and a key factor contributing to the success of SPAC transactions. Despite these positives, SPACs come with their own set of risks at various stages of their life cycle and is therefore critical for the parties involved to assess the relevant risks and complexities and to fully understand the dynamics at work as a SPAC raises funds and seeks an acquisition target.

As SPAC activity continues to grow and SPACs gain more popularity as an alternative to the traditional IPO process, SPACs face increasing regulatory scrutiny and litigation challenges. Regulators across the United States, the United Kingdom and Europe are raising concerns about the recent boom in SPAC transactions and are more carefully investigating certain legal and regulatory issues concerning SPACs, their disclosures, structures and activities. The regulatory frameworks for SPACs are also rapidly evolving, as regulators seek to strike a delicate balance between strengthening investor protection and enhancing market transparency and integrity on the one hand, while also promoting innovation and competition on the other hand.

Against the described background, this paper takes a closer look at SPACs, with focus on SPACs operating in the fintech sector, and analyses recent market trends and regulatory developments relating to SPACs across three main geographic areas – the United States, the United Kingdom and Europe. The paper is organized as follows:

- Chapter 1 provides a brief overview of the life cycle of a SPAC, its typical structure and main activities and examines key benefits and relevant risks of SPACs.
- Chapter 2 highlights recent market trends driving SPAC activity and delves into the raise of SPACs in the fintech sector.
- Chapters 3 to 5 analyze recent legal and regulatory developments relating to SPACs in the United States, the United Kingdom and Europe.
- Chapter 6 discusses SPAC trends which are likely to shape the market going forward and highlights key takeaways and important steps to mitigate relevant risks in the context of SPAC transactions.

CHAPTER 1

INTRODUCTION TO SPACS

1.1. What is a SPAC?

1.1.1. The SPAC's Formation Phase

SPACs are public 'blank-check' companies with no existing operations that are formed to raise capital in an initial public offering ("IPO") for the purposes of financing the acquisition of one or more private operating companies ("target companies") within a specified timeframe, usually 2 years from the SPAC's IPO. The target company is taken public through the acquisition and combination of the two entities ("initial business combination" or "de-SPAC transaction").[1]

When a SPAC is launched and prior to its IPO, the entity or management team that forms the SPAC (the "sponsors") pays a nominal amount for an equity stake in the SPAC ("founder shares" or "promote"), which usually represents c. 20% of the stock in the SPAC after its IPO. The sponsors have typically a demonstrated track record in successfully sourcing, acquiring and operating growth businesses. The founder shares are intended to reward them for identifying a promising target company and consummating a merger. The nominal consideration used to purchase the founder shares is held in a trust account. Founder shares are not redeemable and are generally subject to post-initial business combination lock-up restrictions. In addition, the sponsors do not generally receive management fees until the initial business combination is finalized.

Most SPAC structures provide that the founder shares shall automatically convert into shares of the same type as those sold to the public in the SPAC's IPO ("public shares") on a 1-for-1 basis at the time of the de-SPAC transaction. However, some SPACs allow for an adjustment to the conversion ratio by giving founder shares anti-dilution protection to preserve a minimum ownership percentage and/or downward ratchet to maintain their c. 20% ownership. Thus, for example, if additional public shares or equity-linked securities are issued in connection with the closing of the de-SPAC transaction (other than the securities issued to the sellers of the target company), then the exchange ratio upon which the founder shares convert to public shares will be adjusted to gross the founder shares up to c. 20% of the total shares and equity-linked securities outstanding in the SPAC.

In addition to founder shares, the sponsors often purchase warrants ("founder warrants") in a private placement occurring in conjunction with the SPAC's IPO to fund the costs associated with the SPAC's

[1] For an overview of SPACs see, e.g., PicthBook, What's special about a venture capital SPAC? (PitchBook Report, September 14, 2017); Seeking Alpha, A Primer on SPACs (Seeking Alpha, April 25, 2018); Carol Marie Boyer and G. Glenn Baigent, SPACs as Alternative Investments: An Examination of Performance and Factors that Drive Prices, The Journal of Private Equity, Vol. 11 No. 3, pp. 8-15 (2008); Yochanan Shachmurove and Milos Vulanovic, SPAC IPOs, Oxford Handbook of IPOs, edited by Douglas Cumming and Sofia Johan, Forthcoming (January 17, 2017); Ramey Layne and Brenda Lenahan, Special Purpose Acquisition Companies: An Introduction, Harvard Law School Forum on Corporate Governance (July 6, 2018); Ramey Layne, Brenda Lenahan and Sarah Morgan, Update on Special Purpose Acquisition Companies, Harvard Law School Forum on Corporate Governance (August 17, 2020); Andrew R. Brownstein, Andrew J. Nussbaum, and Igor Kirman, The Resurgence of SPACs: Observations and Considerations, Harvard Law School Forum on Corporate Governance (August 22, 2020); Michael D. Klausner, Michael Ohlrogge and Emily Ruan, A Sober Look at SPACs, Yale Journal on Regulation, Forthcoming, Stanford Law and Economics Olin Working Paper No. 559, NYU Law and Economics Research Paper No. 20-48, European Corporate Governance Institute – Finance Working Paper No. 746/2021 (October 28, 2020); Kirkland & Ellis, Dissecting the SPAC Mania (Kirkland & Ellis LLP Event, June 22, 2021 – July 6, 2021); Latham & Watkins, PE Views, A Closer Look at SPACs (Latham & Watkins LLP Report, December 9, 2020).

IPO (e.g., the up-front portion of the underwriting fees and certain offering expenses). The purchase price paid by the sponsors for the founder warrants is often referred to as the "at risk capital" of the sponsors in the SPAC. The founder warrants are similar to the public warrants discussed below, except that they may be net settled (i.e., they may contain a cashless exercise feature), often have transfer restrictions and are usually not redeemable by the post-closing company.

During the formation phase of the SPAC, the sponsors may lend the SPAC money to fund ongoing expenses and working capital. Often, these loans are convertible upon completion of the initial business combination into one or more of the SPAC's securities. For example, certain SPAC structures provide that warrants can be issued to the sponsors at the time of the de-SPAC transaction on conversion of any loans from the sponsors to the SPAC.

1.1.2. The SPAC's IPO

After formation, a SPAC begins its IPO activities. Similar to traditional IPOs of operating companies, the sponsors go on a roadshow to find interested investors. The SPAC then files an initial registration statement, responds to relevant comments if any, and complete the required listing. However, because the SPAC has no existing business operations, the IPO process is slightly simplified and can be completed in a relatively shorter period of time. SPACs' financial statements tend to be simpler and faster to prepare compared to those of operating businesses. There are no key historical financial results to be disclosed or relevant assets to be described, and the business risk factors are generally minimal. The SPAC is in essence its sponsor team and it markets itself based on its founders, management and directors, their professional experience and network, and what they can bring to a potential target. Most SPACs launched to date have been backed by teams with extensive proprietary deal sourcing networks, as well as in-depth private equity, capital markets and M&A experience and a demonstrated successful track record in value creation. As SPAC activity grows in volume and relevance, sponsors in the market are, and are increasingly expected to be, serial SPAC sponsors, while investors and target companies pay increased attention to any history a SPAC's sponsor has with previous SPAC transactions.

It is critical that no M&A activities be undertaken, or external relevant discussions occur, on behalf of the SPAC prior to its IPO, as this would trigger public disclosure requirements to the detriment of the acquisition negotiations. In fact, if the SPAC had potential investments under consideration at the time of its IPO, the SPAC's IPO prospectus would need to provide an accurate disclosure of the target company and the proposed acquisition.[2] Regulators may require disclosure in the SPAC's IPO prospectus that the SPAC does not have any specific initial business combination under consideration and that the SPAC's officers and directors have not selected or considered a target company for the initial business combination and have not had any discussions regarding possible acquisitions of target companies.[3]

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[2] See, Layne, Ramey and Brenda Lenahan, Special Purpose Acquisition Companies: An Introduction, cit., p. 11 (noting that "[i]f the SPAC had a specific target under consideration at the time of the IPO, detailed information regarding the target IPO registration statement, potentially including the target's would be required to be included in the financial statements, thus delaying the IPO and rendering it similar in form and substance to a traditional IPO").

[3] Id., p. 11 (noting that "[i]f there is unsolicited interest from potential targets, the SPAC and its officers and directors should refuse to engage and should respond that they will not consider the potential target until after the IPO is completed. If the SPAC is affiliated with a private equity group, the IPO prospectus will typically include disclosure indicating that members of the SPAC

In the context of a SPAC's IPO, public investors are sold units in the SPAC. Units are typically priced at $10 per unit, and each unit consists of one share of common stock of the SPAC ("public shares") and a fraction of a warrant to acquire additional common stock in the future (e.g., 1/3 warrant) ("public warrants"). The public shares and founder shares generally vote together as a single class and have similar voting rights, with certain exceptions including that founder shares usually have sole right to elect the SPAC's directors. The public warrants are typically priced "out of the money" – e.g., $11.50 per warrant, a 15% higher price than the $10.00 IPO offering price of the unit.

A number of SPACs that went public in 2020 and the first half of 2021 have provided anti-dilution protection to warrant holders (the "crescent term"), which allows an adjustment of the warrant strike price if additional securities are issued below a specified threshold in connection with an initial business combination. Among them, certain SPACs have also required that the gross proceeds of any such additional issuances exceed 60% of the IPO proceeds held in the SPAC's trust account for the adjustment to apply.[4]

Shortly following the SPAC's IPO, the units become separable so that the public can trade units, shares or warrants, with each security separately listed on a securities exchange. Once the SPAC goes public and trades on an exchange, investors can purchase shares on the open market. These investors are buying on the strength of the sponsors and the promise of a successful future acquisition which is still unknown.

Warrant holders do not tend to have voting rights and only whole warrants are exercisable. The public warrants typically become exercisable on the later of 30 days after the de-SPAC transaction and 12 months following the SPAC's IPO. Their exercise period is typically 5 years post-business combination, with no-cashless exercise (ie., they must be cash settled). Once exercisable, the company resulting from the de-SPAC transaction may call the public warrants at a set price if the stock price exceeds specified thresholds (e.g., $18.00), which has the effect of capping the upside of public warrants and forcing the warrant holders to exercise prior to redemption.[5]

SPACs' IPOs have specific structures and terms relating to the green-shoe, lock-up and underwriting discount arrangements. The green-shoe in a traditional IPO generally extends for 30 days from pricing, whilst in a SPAC's IPO the green-shoe tends to cover a period of 45 days.

Moreover, the lock-up period typically extends for 180 days from the pricing in a traditional IPO. On the contrary, the lock-up period in a SPAC's IPO can run until 1 year from the closing of the de-SPAC transaction, subject to early termination if the common shares trade above a set price for a certain period of time after closing of the de-SPAC transaction.

Furthermore, in a traditional IPO, the underwriters typically receive a discount of 5% to 7% of the gross IPO proceeds, which they withhold from the proceeds that are delivered at closing. On the contrary, in a

management team are employed by the private equity group, which is continuously made aware of potential business opportunities, one or more of which the SPAC may desire to pursue for a business combination. Additionally, the IPO prospectus will typically include a statement that the SPAC will not consider a business combination with any company that has already been identified to the private equity group as a suitable acquisition candidate.").

[4] See, Ramey Layne, Brenda Lenahan and Sarah Morgan, Update on Special Purpose Acquisition Companies, cit.

[5] More recently, a few SPACs have also allowed the company resulting from the de-SPAC transaction to call public warrants if the stock price exceeds $10.00 per share, subject to make-whole and concurrent redemption of the founder warrants.

SPAC's IPO a portion of the gross proceeds (c. 2%) is typically paid to the underwriters at the closing of the SPAC's IPO, and a deferred portion (c. 3.5%) is deposited into a trust account and paid to the underwriters only upon closing of the de-SPAC transaction. If the de-SPAC transaction doesn't occur, then the deferred discount is not paid to the underwriters and instead is utilized along with the remaining balance of the trust account to redeem the public shares.

Following its IPO, the SPAC places the IPO proceeds in an interest-bearing trust account, which remains segregated throughout the SPAC's search for an initial business combination. The funds are typically invested in short-term government securities or held as cash, and are released only to (i) fund and complete an initial business combination between the SPAC and the target company, (ii) redeem shares sold to investors in the SPAC's IPO in connection with the de-SPAC transaction, the liquidation of the SPAC and an extension of the date to complete an initial business combination, (iii) pay the deferred underwriting spread, and (iv) if any amounts remain, cover transaction expenses and working capital of the company post-de-SPAC transaction. The trust arrangements sometimes allow withdrawals of interest earned on the funds held in the trust account to pay franchise and income taxes, as well as withdrawals of limited amounts of interest to fund working capital.

1.1.3. The Initial Business Combination or de-SPAC Transaction

While the proceeds from the SPAC's IPO are held in an interest-bearing trust account, the SPAC's sponsors begin the search for a target company to acquire. Some SPACs focused on target companies in a particular geographic area or industry, while some have no such mandate. Importantly, as previously indicated, SPACs cannot identify specific private companies as targets pre-IPO.

SPACs must use their IPO proceeds to acquire one or more target companies within a fixed timeframe, which typically ranges from 18 to 24 months following the SPAC's IPO. Many initial business combinations involve a single target company, but some SPACs pursue a multi-investment rollup strategy. Although some SPACs provide contingent extension features,[6] most SPACs require a shareholder vote to extend the runway. SPAC will typically give their shareholders an opportunity to redeem their shares for cash at the shareholder meeting held to approve any amendment to the SPAC's charter. In the absence of extension provisions or a shareholder approval as applicable, the SPAC must liquidate the trust account and redeem its investors if it does not acquire a target company within the specified timeframe. The SPAC is then delisted and wound up. Note the founder shares cannot be redeemed for cash when the SPAC liquidates, which creates the incentive for the sponsors to find a target company and to complete its acquisition timely.

When the sponsors identify a suitable target company, they negotiate the terms of the acquisition, including the purchase price, valuation, and type of consideration. De-SPAC transactions are hybrid deals containing features customary to both private and public M&A transactions. When pursuing a de-SPAC transaction, a target company goes through a transformative M&A deal (that includes negotiating

[6] See, Ramey Layne, Brenda Lenahan and Sarah Morgan, Update on Special Purpose Acquisition Companies, cit. (noting that "some SPACs include contingent extension provisions that can lengthen the SPAC's life upon the occurrence of certain triggering events, which are most commonly the signing of a definitive purchase agreement or letter of intent or the contribution of additional funds into the trust account by the SPAC's Sponsor.").

a business combination agreement, conducting extensive due diligence, preparing schedules and conducting a host of other activities that would normally be completed in a traditional sale process), and at the same time accesses the public markets for the first time (which involves, among others, developing a marketing story, making relevant disclosures, and preparing the whole organization to be a public company). It is vital for the target company to take a holistic approach to the de-SPAC transaction and to plan accordingly to ensure the organization is well-prepared and has the support required to successfully navigate the process, while remaining focused on continuing its performance and driving its business activities forward.[7]

The terms of a de-SPAC transaction vary and are informed by whether the transaction is structured as a "cash-out" deal, a "reverse IPO" transaction or a combination of the two. If the goal of the target company is to maximize cash out to its existing shareholders and to provide them with a significant return on their initial investment, then the parties involved will need to consider, among other things, what features and structures could be implemented to disincentivize redemption and to provide increased certainty of available funds to pay the required consideration. On the other hand, the target company may approach the de-SPAC transaction more as a "reverse IPO" deal, whereby the target company will look to take advantage of an accelerate route to public markets enabled by the de-SPAC transaction and its existing shareholders will become majority shareholders in the post-closing public company. In this scenario, the deal will involve predominantly share consideration and the negotiation will typically focus on key terms, including the number and type of stock that the target company's existing shareholders will receive in the post-closing company, the post-closing rights that significant shareholders will be granted (e.g., registration rights and governance rights), the arrangements to be implemented to adequately capitalize the post-closing company, as well as the restructuring of the sponsors' lock-up restrictions to align them with post-closing lock up restrictions applicable to the target company's existing shareholders.[8]

After agreeing the relevant terms, the sponsors propose the acquisition target to the SPAC's shareholders whose approval is typically required to complete the transaction.

Shareholders are generally given the right to redeem their public shares for their pro-rata portion of the cash held in the trust account (i.e., a per share amount equal to the IPO price plus interest earned thereon) at the shareholder meeting to approve the initial business combination, or to sell their public shares to the SPAC in a tender offer. Investors can typically redeem their public shares regardless of whether and how they vote on the de-SPAC transaction, and they can usually continue to hold their warrants (and retain the associated upside) even if they decide to redeem their public shares. Once the initial business combination is approved and the redemption process is completed, the SPAC can proceed to acquire the target company.

The redemption process discussed above would reduce the cash proceeds available to consummate the initial business combination. SPACs typically enter into additional equity and/or debt arrangements to help finance the de-SPAC transaction and the operating capital of the target business, thus mitigating the risk of funding shortage due to excessive redemptions. At the time of the IPO, SPACs may also enter

[7] See, Kirkland & Ellis, Dissecting the SPAC Mania, cit.
[8] Ibidem.

into forward purchase agreements with institutional investors or affiliates of the sponsors in which the forward purchaser commits to purchase equity in connection with the de-SPAC transaction and agrees to certain limitations on redemption or transfers. In addition, in advance of signing an acquisition agreement, SPACs often arrange committed financing as a private investment in public equity ("PIPE") from existing and/or new institutional investors to finance part of the purchase price for the initial business combination, and thereafter publicly announce the acquisition agreement and the committed financing. SPAC's sponsors sometimes relinquish part of their founder shares as an inducement to attract investors entering into forward purchase agreements or providing PIPE financing. In addition to equity, debt financing may also be provided by traditional banking and non-traditional direct lenders.

The importance of complementary PIPE financing and its size has increased over time as de-SPAC transactions have grown in volume and frequency.[9] It is now common for the PIPE financing to exceed the proceeds raised in the SPAC's IPO.

A well-established PIPE financing market provides significant benefits for SPACs. First, SPACs can raise additional cash proceeds to complete the initial business combination and can use the PIPE financing to replace the capital from the SPAC's IPO investors that choose to redeem their shares, thus reducing the uncertainty regarding the amount of funds available to pay the shareholders of the target company and to support post-closing operations. Second, PIPE investors can play an important role in validating a price and valuation for the target company and the de-SPAC transaction. Third, financing from PIPE investors is often vital to backstop "minimum cash" conditions required to complete the initial business combination, to provide upfront liquidity to the shareholders of the target company, and to optimize the capital and liquidity structure of the public company resulting from the proposed de-SPAC transaction.[10] Fourth, the PIPE financing can help expand the group of investors in SPACs to include investors that may not be able to participate in the SPAC's IPO due to, for example, the requirement to place the funds in an interest-bearing vehicle for roughly two years until the merger is completed. Lastly, unlike the proceeds raised in the SPAC's IPO, the PIPE financing can be raised without the parallel sponsor promote. For these reasons, SPAC acquisitions often include a simultaneous PIPE financing upon consummation of the proposed merger, and a smaller SPAC's IPO combined with a larger de-SPAC PIPE financing can often be more attractive to a potential target company and public shareholders than a larger SPAC's IPO with a smaller or no de-SPAC PIPE financing.

1.1.4. The Post-Business Combination Company

If the initial business combination is approved by the SPAC's shareholders and following the final capital raise, the SPAC can take the target company public.[11] At that point, the de-SPAC transaction will be consummated, and the SPAC and the target business will combine into a publicly traded operating

[9] By way of illustration, the largest-ever de-SPAC PIPE transaction of $2.6 billion announced in 20201 was c. twice the size of the prior record PIPE raise announced in late 2019. For more information, see, e.g., Sullivan & Cromwell, Market Trends 2020/21: PIPEs (Sullivan & Cromwell LLP, Practical Guidance, 2021); Skadden, Arps, Slate, Meagher & Flom, The Year of the SPAC (Skadden, Arps, Slate, Meagher & Flom LLP, January 26, 2021), pp. 2-3; Allen & Overy, The role of Private Investment in Public Equity (PIPE) in financing SPACs business combinations (Allen & Overy LLP Insights, June 1, 2021).
[10] See, e.g., KPMG, SPAC insights: Sellers' market (KPMG Publications, April 2021).
[11] See, e.g., Douglas Cumming, Lars Helge Haß and Denis Schweizer, The Fast Track IPO–Success Factors for Taking Firms Public with SPACs, Journal of Banking and Finance, 47, 198-213 (2014) (investigating the voting process and the factors that influence SPAC approval probability).

company. This transaction is often structured as a reverse merger, in which the operating company merges with and into the SPAC or a subsidiary of the SPAC. When going public via a de-SPAC transaction, the target company is required to make the relevant filings and gain approval from regulators. Once approved, the ticker is updated to reflect the name of the acquired target company and the surviving company begins trading as a typical public company. The surviving company must be able to meet public company reporting obligations on an ongoing basis, and to implement the necessary processes, procedures and technologies to support the demanding requirements of a public company.

The board of the surviving company typically consists of a combination of designees of the selling shareholders, sponsors and independent directors. More recently, a number of SPACs have also implemented high-vote, low-vote dual class structures to enable the founders of the target company to maintain control post-closing of the de-SPAC transaction.[12]

1.2. Key Benefits of SPACs

1.2.1. Target Private Companies

There are a number of favorable dynamics for private companies when exit via a SPAC as opposite to a traditional IPO, including stability and greater certainty of price, increased speed of execution and unique strategic partnership opportunities.

In a traditional IPO, the company's share price is not certain and can be subject to significant volatility. Private companies are largely reliant on bankers and financial advisers when pricing their IPO. Valuations in traditional IPOs are derived from roadshow meetings with potential investors, investment bank guidance, prior financing rounds and comparable company offerings. The share price can be materially affected by rapid changes in investor appetite and market forces, as much as by the company's underlying business operations and activities. The recent Covid-19 pandemic has injected even more uncertainty into public markets. Given the increased volatility, the traditional IPO path appears less enticing for late-stage private companies which are looking to public markets for liquidity, as they have limited control over the amount that they will be ultimately able to raise.[13]

On the contrary, a de-SPAC transaction is appealing because it provides for price discovery between the target company and the SPAC, which can help drive higher and more certain target valuations and avoid price uncertainty.[14] Although a repricing may be possible as a result of market volatility or for other

[12] See, e.g., Freshfields, 2020 De-SPAC Debrief - A comprehensive review of all de-SPAC transactions that closed in 2020 (Freshfields Bruckhaus Deringer LLP Insights, January 2021), pp. 25-27.

[13] See, e.g., PitchBook, SPACs Resurface in a Volatile Market (PitchBook, May 5, 2020); Goldman Sachs, The IPO SPAC-Tacle (Goldman Sachs Global Macro Research, No. 25, January 28, 2020), p. 5 (quoting Jay R. Ritter noting that "[t]he costs of a traditional IPO are both the direct fees that companies pay to investment banks—as well as legal fees, auditing fees, etc.—and the indirect costs that can come from underpricing companies' shares in the IPO process, or "leaving money on the table" for the issuing company. Historically, this underpricing has been manageable, but in 2020 it was very large. The average first-day return on operating company IPOs was 41.6% last year. Including over-allotment options, $34 billion was left on the table, which works out to about $200 million per IPO. And for some companies like Airbnb it was substantially higher— in the billions of dollars."). See also Jay R. Ritter, Initial Public Offerings: Updated Statistics, Warrington College of Business, University of Florida (updated as of June 16, 2021).

[14] See, e.g., CB Insights, What Is A SPAC?, (CB Insights Research, October 14, 2020), pp. 11-12; Aswath Damodaran, The Rise Of SPACs: IPO Disruptors Or Blank Check Distortions?, Seeking Alpha (June 10, 2021); Skadden, Arps, Slate, Meagher & Flom, The Year of the SPAC, cit., p. 3; Wharton University, Why SPACs Are Booming (Knowledge@Wharton, May 4, 2021); Kirkland & Ellis, Legal Scrutiny for SPACS on the Rise (Kirkland & Ellis LLP Insights, April 29, 2021); KPMG, SPACs: A big deal again (KPMG Report, 2020), pp. 4-5; KPMG, Why so many companies are choosing SPACs over IPOs (KPMG Report, January 2021), p. 1.

reasons, the parties in a de-SPAC transaction are generally able to negotiate and lock in the merger consideration and the value of the target company at signing, without this being subject to sudden pricing fluctuations and market risks when the target company goes public.[15] In addition, the target company can negotiate with only one party rather than a large group of investors on a road show, and this can help simplify and smoothen the deal pricing process. The parties in a de-SPAC transaction can also utilize earn-outs and similar arrangements to resolve differences in price, which may not be available in a traditional IPO. Further, the flexibility to negotiate within the confines of an acquisition agreement gives the parties involved additional areas of compromise to ensure that all parties can maximize value to the extent possible and get comfortable with the counterparty with whom they will be working closely for an extensive period of time following completion of the de-SPAC transaction.[16]

Greater certainty of price and valuation associated with de-SPAC transactions is particularly attractive to target companies that are not traditional IPO candidates. In fact, the customizability of these transactions caters well to private companies that would be a more difficult sell to traditional public market investors due to the novelty of their business model or key metrics, their new or evolving industry, the complexity of their story, their growth profile or their path to profitability.[17] Among them, de-SPAC transactions could be of particular interest for fintech companies. This is because, although an increased number of companies operating in the fintech sector have gone public more recently, fintech companies are still relatively new to the public markets compared to consumer or enterprise software companies. Moreover, fintech companies employ a large variety of business models and some may be relatively novel for public markets investors. In addition, the metrics utilized to value fintech companies in private markets deals may diverge from traditional metrics utilized to assess the performance of companies in the public markets. As a result, there is a fair amount of uncertainty as to how fintech companies are valued on the public markets and predicting their performance is anything but straightforward.

In connection with the de-SPAC transaction and the PIPE financing raise, a SPAC has also the opportunity to communicate more effectively with its shareholders and other market participants regarding the proposed merger and the target company's story. Because these are business combination-related discussions as opposite to communications related to an IPO, there may be greater flexibility on the content and timing of these communications, which in turn can contribute further efficiency to the process and can help mitigate uncertainty.

The reduced time commitment is a further advantage of SPACs for companies pursuing a path to the public markets. A traditional IPO can take years from start to finish and the time, costs and arduous process of an IPO may represent a huge burden for certain private companies. On the contrary, SPACs provide a faster alternative for companies in need to go public and raise additional capital. A de-SPAC

[15] See, Ramey Layne and Brenda Lenahan, Special Purpose Acquisition Companies: An Introduction, cit.
[16] See, e.g., PitchBook, The 2020 SPAC Frenzy (PitchBook Report, September 1, 2020), pp. 3-4; Skadden, Arps, Slate, Meagher & Flom, The Year of the SPAC, cit., p. 3.
[17] See, e.g., Max H. Bazerman and Paresh Patel, SPACs: What You Need to Know (Harvard Business Review, July – August 2021); Matt Johnson, Beyond the fanfare and SEC warnings, SPACs are here to stay (TechCrunch, May 5, 2021); Mike Murphy, The SPAC boom isn't just here to stay, it's changing consumer tech (TechCrunch, April 29, 2021); Chris Metinko, SPACs May Cast Wider Net As Competition For Targets Increases (CrunchBase, April 13, 2021); PitchBook, The 2020 SPAC Frenzy, cit., pp. 4-5; Goldman Sachs, The IPO SPAC-Tacle, cit., pp. 3, 8, 11-13; NYSE, SPAC Growth and Sector Trends (NYSE Data Insights, February 17, 2021).

transaction has the potential to move more efficiently and much faster than a traditional IPO process, taking as little as 3 to 5 months if the target company is well prepared to present itself as a public company.[18]

Moreover, SPACs can serve as a highly interesting mechanism for private companies in search of strategic partners to take them through the next phase of growth and expansion. A target company can enter the public markets in partnership with a SPAC's management team composed of seasoned and well-known professionals who can enhance its value and overall business prospects.

Although not all SPACs plan on being strategic partners to their target companies, the strategic SPAC model is becoming a very appealing route for many companies that are looking to go public and the sponsors' strong credibility, experience, network and track record are increasingly key enablers for an acquisition.[19] A strategic SPAC can leverage its sponsors' experience, knowledge and network and often takes a board seat and works closely with the target company's management team on the post-exit strategy. Because of this, the target company can benefit not only from the investment itself, but also from a high-quality sponsor team's expertise and investment track record.[20] The entry of well-known professionals and established firms in this space can benefit the SPAC's investors as well, by offering a very experienced management at the helm of the SPAC in both identifying an excellent target company and guiding the operating company resulting from the de-SPAC transaction in the longer term.

1.2.2. Sponsors

From a sponsor's point of view, SPACs present very attractive opportunities to make significant financial returns from the proposed transactions. A sponsor usually invests a relatively limited capital at risk, with significant potential upside in the form of promote and founder warrants if the de-SPAC transaction is successful. Moreover, SPACs typically require less initial capital, can tap a broader base of potential investors and can be relatively simpler and quicker to take to market for a sponsor compared to a commercial company or a private equity fund.

Interestingly, several large private equity firms played a starring role in driving the SPAC IPO market in 2020 and the first half of 2021, including Apollo Global Management, KKR, Bain Capital and TPG Capital. More private equity firms are now expected to launch their own SPACs in the months to come and are increasingly looking at SPACs as a viable alternative for their deal-making activities.[21]

[18] See, e.g., CB Insights, What Is A SPAC?, cit., p. 13. See, also, PitchBook, The 2020 SPAC Frenzy cit., pp. 2-3; Freshfields, 2020 De-SPAC Debrief - A comprehensive review of all de-SPAC transactions that closed in 2020, cit., pp. 2, 8-10 (based on a review of 64 SPAC business combinations that closed in 2020, noting that "[t] he median amount of time between signing and the initial filing with the SEC was 21 days (just 3 weeks), with 8 deals filing within 5 days of signing […] [t]he median amount of time between signing and closing was 3.5 months, with the quickest deal closing only 51 days after signing".); Latham & Watkins, PE Views, Our Insights on the World of Private Equity (Latham & Watkins LLP Report, December 2020), p. 3.

[19] Id., pp. 13-14. See, also, Goldman Sachs, The IPO SPAC-Tacle, cit., pp. 11-12 and 15; McKinsey & Company, Earning the premium: A recipe for long-term SPAC success (McKinsey Insights, September 23, 2020); Skadden, Arps, Slate, Meagher & Flom, What Am I Getting Myself Into? Five Questions Prospective SPAC Directors Should Ask (Skadden, Arps, Slate, Meagher & Flom LLP, April 13, 2021); Kirkland & Ellis, Dissecting the SPAC Mania, cit.; Latham & Watkins, PE Views, A Closer Look at SPACs, cit.

[20] Examples of prominent financial services industry professionals who have recently helped launch SPACs include Douglas L. Braunstein (former CFO of JPMorgan Chase), Betsy Z. Cohen (former CEO of The Bancorp, Inc), Robert E. Diamond Jr. (former CEO of Barclays), Xavier Rolet (former CEO of the London Stock Exchange), Jean-Pierre Mustier (former CEO at Unicredit), and Chinh Chu (previously Senior Managing Director and Co-Head of Private Equity at Blackstone).

[21] See, e.g., Adam Lewis, Private equity plays a starring role in 2020's SPAC boom (PitchBook, September 17, 2020); PitchBook, US PE Breakdown Q1 2021 (PitchBook Report, April 9, 2021).

In parallel, SPACs are also rapidly emerging as a logical expansion for venture capital firms in the United States, particularly those with successful growth and late-stage investment programs, as well as great brand names and focus on specific verticals. A number of high-profile U.S. venture capital investors and firms have begun to launch SPACs, including Ribbit Capital, Lux Capital, FirstMark Capital and SoftBank Vision Fund among others.[22] On the contrary, although the SPAC wave is slowly catching hold in Europe, most European venture capital investors are still hesitant in forming SPACs and only a handful of them have dived into the space.[23]

1.2.3. Investors

In addition to private companies and sponsors, SPACs can create significant benefits for investors, who get the opportunity to be part of an investment process, and benefit from the financial upside of taking a target company public, while enjoying some downside protection.

The investor base for SPACs has significantly evolved over the last few months. Historically, SPACs appealed to a very niche group of investors, whilst more recently SPACs have proved to be attractive to a wide range of institutional investors (including pensions funds, hedge funds and mutual funds) because of a number of features that limit the risk that these investors would face when investing in SPACs. For example, if the investors prefer to exit prior to the initial business combination, they can sell their units in the market. Additionally, investors can redeem their shares for their pro-rata portion of cash from the IPO that is being held in the trust account (plus interest) before closing of the proposed business combination, while retaining their warrants. Investors can also get their money back if the SPAC doesn't acquire a target company within the specified timeframe. On the other side, investors that prefer to remain shareholders after the initial business combination is completed can enjoy the potential upside of continuing to hold the shares and/or warrants and the ability to leverage their investment. These features, among others, have driven a boom in demand for SPACs, with more typical IPO investors willing to allocate capital to SPACs in the hope of backing the most exciting and successful growth opportunities.

Retail investors (individuals making investments through traditional or online brokerages firms) are not typically allowed to invest in a traditional IPO and are often left out of the upside available from an IPO. For these investors a SPAC offers a unique, although not without risks, opportunity to invest in growth businesses alongside sponsors with proven track records and institutional investors, and thus enjoy the potential increase in value once the target company acquisition is announced.

1.3. Relevant Risks and Complexities of SPACs

Despite the positives discussed above, SPACs come with their own set of challenges and complexities. Therefore, it is imperative for the parties involved to fully understand the SPAC transactions and to carefully assess the risks associated with SPACs.

[22] See, e.g., Connie Loizos, Why are VCs launching SPACs? Amish Jani of FirstMark shares his firm's rationale (TechCrunch, October 13, 2020); Marina Temkin, VC firms sat out the early SPAC craze. Now many are changing their tune (PitchBook, March 9, 2021); PitchBook, What's special about a venture capital SPAC?, cit.

[23] See, e.g., Isabel Woodford, European VCs are still wary of joining the SPAC goldrush (Sifted, March 16, 2021).

1.3.1. Target Private Companies

Private companies going public via a SPAC can benefit from an accelerated route to public markets compared to a tradition IPO. However, the time crunch also means that these companies must prepare to be public companies much faster, and the required process is not always less burdensome than in a traditional IPO. In fact, the negotiation of a merger agreement and related ancillary documents can be time consuming. In addition, as part of the de-SPAC transaction and in connection with the solicitation of shareholder approval for the merger transaction, the target company is typically required to prepare relevant disclosures about its business, including risk factors, operating results and management, and must compile relevant financial information and statements. Following completion of the de-SPAC transaction, the resulting company is required to comply with public company corporate governance requirements, stock exchange rules and ongoing disclosure and reporting obligations and needs to put in place processes, controls and technologies necessary to operate as a public company. The size of this task should not be underestimated. All this preparation needs to be carefully planned and commenced sufficiently in advance, and often involves relevant costs and infrastructure investments.[24]

Moreover, when considering a SPAC transaction, private companies need to carefully investigate the track record and strategic plans of the SPAC's sponsors to ensure the right strategic fit. It is important to confirm that the interests and goals of the SPAC are aligned with the interests and goals of the target company and its shareholders. The acquisition should tie in closely with the stated investment strategy of the SPAC and its sponsors. The closer the alignment, the more likely it is that the acquisition will obtain shareholder approval, redemptions will be limited and the transaction will be one of the SPAC successful stories. [25]

1.3.2. Investors

Concerns may arise in relation to potential misalignments of interests between the SPAC's sponsors and its shareholders.[26] As indicated above, the sponsors generally receive 20% of a SPAC's share capital for nominal compensation at the time of the SPAC's IPO (which can result into a c. 1-5% stake in the acquired target company after the de-SPAC transaction)[27] and they may profit even in the event a future acquisition proves unsuccessful and the acquired company performs poorly. This, in turn, may disincentivize appropriate due diligence on target companies or lead to a sub-optimal acquisition. It may also have a significative dilutive impact on the target company, as the de-SPAC transaction may turn out

[24] See, e.g., Deloitte and Cooley, Private-Company CFO Considerations for SPAC Transactions (Deloitte and Cooley LLP Report, September 2020); Deloitte, Accounting and SEC Reporting Considerations for SPAC Transactions (Deloitte Financial Reporting Alert 20-6, October 2, 2020); Deloitte, Taking stock: How to assess SPACs and other IPO options in a post-pandemic market (Deloitte CFO Insights, November 2020); KPMG, I'm going public…Now what?! SPAC IPO Readiness for Controllers and CFOs (KPMG Insights, May 31, 2021); KPMG, SPACs: Are You Really Ready To Commit? (KPMG Insights, March 2021); KPMG, SPACs: Questions for the board with a SPAC in sight (KPMG Insights, December 2020); KPMG, SPAC insights: Public company readiness (KPMG Insights, December 2020); KPMG, 2020: year of the SPAC (KPMG Report, 2020); PWC, The SPAC spree: Current state (PWC Insights, May 20, 2021); Kirkland & Ellis, Dissecting the SPAC Mania, cit.; Latham & Watkins, PE Views, A Closer Look at SPACs, cit.

[25] See, e.g., Baker McKenzie, SPACs cross the Atlantic (Baker McKenzie Publications, December 21, 2020), pp. 2-4.

[26] See, e.g., CB Insights, What Is A SPAC?, cit., p. 18; Ortenca Aliaj, Sujeet Indap and Miles Kruppa, Can Spacs shake off their bad reputation? (Financial Times, August 13, 2020); Mayer Brown, Special Purpose Acquisition Companies ("SPACs") - What's The Deal? (Mayer Brown International LLP, August 10, 2020), pp. 6-7; Skadden, Arps, Slate, Meagher & Flom, The Year of the SPAC (Skadden, Arps, Slate, Meagher & Flom LLP, January 26, 2021), pp. 2-3.

[27] See, e.g., KPMG, SPAC insights: Sellers' market, cit. (noting that "based on a sample of deals from 2020 to 2021, the average promote appears to be dropping, likely due to higher deal values requiring sponsors to give up more equity to attract PIPE investors.").

to be more expensive from the seller's perspective than a traditional IPO. Although more recently there have been some changes in the SPAC structures to help mitigate these concerns as further discussed below, sponsor-friendly SPAC structures are still the norm, and the process remains particularly attractive for well-known individuals and firms acting as sponsors.

Some sponsors have recently started using alternative promote structures to align incentives and distinguish themselves in the market, with the goal of making their SPACs more attractive to potential target companies and investors. For example, some SPACs have made a portion of the founder shares subject to vesting, forfeiture requirements [28] and/or "earn-out" mechanisms, so that these shares will vest only if certain post-closing trading price targets are achieved. Certain SPACs have seen sponsors agreeing to longer lock-up periods.[29] Other SPACs have chosen to forgo founder shares altogether. Most notably, Pershing Square Tontine Holdings Ltd., the high-profile SPAC sponsored by Bill Ackman, has forfeited the typical 20% founders shares stake, and instead the sponsor and directors of the SPAC have purchased warrants exercisable three years after the closing of the initial business combination for c. 6% of the equity of the post-business combination company, at an exercise price 20% above the IPO price. In addition, Bill Ackman's affiliated funds have agreed to provide $1-3 billion of its own capital to complete the merger ($1 billion under a committed forward purchase agreement and another $2 billion under options with the forward purchase subscribers).[30] The IPO has been very successful raising $4 billion in July 2020, with about 3x more interest in the offering than was available.[31]

Another potential headwind is the SPAC's time constraint. The sponsors typically have 18 to 24 months from the SPAC's IPO to find and acquire a target company, or otherwise the SPAC is liquidated and the proceeds from the SPAC's IPO (with interest) are returned to investors. If the deadline is approaching and is not extended, the sponsors need to act quickly and may have the incentive to rush to acquire any willing target company, potentially lowering their quality standards or performing limited due diligence. The time constraint may also incentivize the SPAC's management to propose acquisitions with poor economics or to overpay for a target to the detriment of the SPAC's shareholders in an effort to beat the clock. The target company itself may leverage the proximity to the relevant deadline against the SPAC

[28] See, e.g., White & Case, 5 things you need to know about...SPACS (White & Case LLP Publications, September 3, 2020); Freshfields, 2020 De-SPAC Debrief - A comprehensive review of all de-SPAC transactions that closed in 2020, cit., pp. 2, 19-24 (noting that "SPAC sponsors are under pressure to give up a portion of their equity in order to sign and close deals […] 59% of the deals imposed vesting and/or forfeiture requirements with respect to all or a portion of the SPAC sponsor's equity […] For deals requiring forfeiture of sponsor equity, 47% required forfeiture of both stock and warrants, 40% for stock only, and 13% for warrants only."); Kirkland & Ellis, Dissecting the SPAC Mania, cit.; Kirkland & Ellis, Blank-Check Sponsors Get Creative In Crowded Market (Kirkland & Ellis LLP Insights, September 28, 2020).

[29] See, e.g., Andrew Ross Sorkin, How to Fix SPACs: Keep Their Backers Locked In Longer (The New York Times, March 31, 2021); Chris Bryant, Lucid Provides a Sobering Look Under the SPAC Hood (Bloomberg, February 23, 2021); Deal Point, Special Purpose Acquisition Company (SPAC) Market Study 2021 (Deal Point Data, April 2021), pp. 15-16.

[30] See, Ramey Layne, Brenda Lenahan and Sarah Morgan, Update on Special Purpose Acquisition Companies, cit. (noting that "The SPAC has a number of notable aspects/features, which distinguish it from typical SPACs: [i]t is considerably larger than existing SPACs; [i]t does not have the typical founder share structure, equal to 20% of the post-IPO shares. Instead the sponsor and directors purchase warrants to buy roughly 6% of the shares of the company (calculated on a fully diluted basis as of the closing of the de-SPAC. The warrants are exercisable at $24.00 (20% above the IPO price) after 3 years; [t]he public warrants are a collective 1/3 warrant, but with a 1/9 warrant included in the unit having typical terms and a 2/9 warrant per IPO share having a "tontine" structure […]; [u]nderwriter compensation is considerably lower than typical, and there is no green-shoe; [t]he Pershing Square Tontine SPAC was marketed as having competitive advantages over other SPACs due to its (1) larger amount of committed capital, (2) willingness to acquire a minority stake in a company, (3) ability to give a private company access to the public equity markets and (4) lower cost of capital compared to other blank check companies."); Preston Brewer, SPAC Deal Terms & IPO Market Are Changing Fast (Bloomberg Law, August 6, 2020).

[31] See, e.g., Ortenca Aliaj, Ackman raises $4bn in blank-cheque IPO (Financial Times, July 22, 2020); Svea Herbst-Bayliss, As Ackman hunts blockbuster deal, he counts on big backers (Reuters, November 17, 2020); Michelle Celarier, Behind Bill Ackman's $4 Billion Day (Institutional Investor, July 23, 2020).

in the negotiation process. The limited timeframe may lead to acquisitions that are ill considered, rushed through at the last moment, or fall far afield from the initial target industry.[32]

Moreover, potential conflicts of interest should be carefully scrutinized in relation to additional roles being performed by the underwriters of a SPAC's IPO once the SPAC has completed its IPO process. This is particularly important as the underwriters typically stand to receive a portion of their underwriting discount only if the SPAC completes an initial business combination. For instance, the underwriters may be asked to underwrite or arrange debt financing or to act as a placement agent in a PIPE financing needed to complete an initial business combination. Underwriters may also bring potential acquisition opportunities and act as M&A financial advisor to the SPAC. In any of these additional roles, the underwriters should clearly disclose that they stand to collect their deferred compensation should the SPAC complete its initial business combination and the resulting potential conflict of interest.

Furthermore, SPACs may create arbitrage opportunities that could indirectly impede long-term investing. For example, a number of hedge funds have traditionally invested in SPACs because they are allowed to keep their warrants even if they redeem their common stock.[33] Although redemption rights are a very attractive protection for investors in SPACs, they create uncertainty and may even threaten a proposed acquisition. Unpredictability of the number and size of redemptions creates uncertainty about how much funding raised will be available for use on the proposed acquisition and for the resulting operating target company to fund its continued growth. If many investors redeem their shares, then the proposed deal will be left with a large funding shortfall to be bridged in a relatively short period of time via a further investment by the sponsors or outside investors. This has the potential to distract the SPAC's management and could result in the transaction being delayed or even withdrawn if additional capital in form of debt, PIPE or equity cannot be raised on time. In that scenario, if more equity is issued, the conversion ratio for the SPAC's sponsors' class of shares will typically adjust to maintain their ownership percentage, while common shareholders will be diluted. If the deal is completed without new equity being issued, the number of publicly traded shares will be reduced, which could result in thin trading volumes and heightened volatility.

To mitigate the concerns of funding gaps due to the exercise of redemption rights, certain SPACs have raised debt financing, issued additional equity or equity-linked securities contingent upon the merger closing in a private placement or PIPE transaction, and/or enter into forward purchase agreements at the time of listing. More recently, there has also been a tendency for SPACs to utilize structures aimed at disincentive redemption. For example, Bill Ackman's SPAC, Pershing Square Tontine Holdings Ltd., discussed above has issued warrants to investors that would be forfeited if the investors choose to redeem their shares and would be subsequently re-distributed pro-rata to the remaining non-redeeming shareholders in the SPAC at the time the initial business combination is completed.

In addition to the risks discussed above, investors may unduly rely on the reputation and skills of the SPAC's management team and sponsor to identify and complete a value-creating merger transaction. In

[32] See, e.g., Ernst & Young, Three SPAC M&A risk factors and ways to mitigate them (Ernst & Young, May 19, 2021).
[33] See, e.g., Antoine Gara and Eliza Haverstock, How SPACs Became Wall Street's Money Tree (Forbes, November 19, 2020); James Thorne, SPACs face increasing hurdles in race to get deals done (PitchBook, January 4, 2021).

so doing, investors may excessively focus and favor the sponsor and the management team, rather than the company to go public, and this may contribute further risks to the transaction.[34]

Investors that purchase SPAC securities after the SPAC's IPO on the open market should be aware of whether they are purchasing units, common stock or warrants. Unlike a traditional IPO of an operating company, the SPAC's IPO price is not based on a valuation of an existing operating business. When the units, common stock and warrants begin trading, their market prices may rapidly fluctuate, and these changes may have little relationship with the ultimate economic success of the SPAC transaction, thus creating further risks for investors. Additionally, if an investor purchases shares in the SPAC on the open market, the investor will only be entitled to a pro-rata share of the trust account which may be different from (and sometimes significantly lower than) the price at which it bought the shares in the SPAC on the open market.

Additional challenges may arise due to the quality and performance of the target companies. Research points to significant risks for investors in this regard. For example, an interesting study has found that over half of the companies that merged with SPACs between 2003 and 2013 experienced poor aftermarket performance.[35] A more recent study has analyzed 47 SPACs that merged between January 2019 and June 2020 and has found that, although SPACs issue shares at a uniform price of \$10, the median SPAC holds cash of only \$6.67 per share when it merges with the target company.[36] This means that SPAC dilution amounts to roughly 50% of the cash that SPACs ultimately deliver to the companies that they bring public. These costs are much higher than those for IPOs, even factoring in the underpricing of a company's initial offer price in a traditional IPO, or the first day "pop". Further, the study has also shown that the post-merger performance of a SPAC is closely correlated with the size of the described cash shortfall. Specifically, SPAC shares tend to drop by one third of their value or more within a year following a merger, thus leaving investors that hold shares at the time of SPAC mergers and for a period of time post-merger to bear the costs and absorb price declines and losses.[37] Lastly, the study has evidenced two different sets of shareholders in a SPAC – SPAC's IPO shareholders and the de-SPAC investors. The former are generally institutional shareholders, including hedge funds, who often exit at the time of the de-SPAC transaction (by redeeming their shares at the time of the merger or selling them for at least the merger price) while keeping their warrants. These investors have done well over the period of the study, with a mean annualized return as high as 11.6%. The latter are shareholders

[34] See, e.g., J.P. Morgan, Making sense of SPACs: What investors need to know (J.P. Morgan Insights, March 10, 2021).
[35] See, Milos Vulanovic, SPACs: Post-merger survival, Managerial Finance, DOI (June 25, 2016). For an in-depth analysis of SPACs' pre- and post-merger performance see, e.g., Vijay M. Jog and Chengye Sun, Blank Check IPOs: A Home Run for Management, SSRN Research Paper (August 2007); Stefan Lewellen, SPACs as an Asset Class, SSRN Research Paper (March 24, 2009); Anh L. Tran, Blank Check Acquisitions, SSRN Research Paper (November 16, 2010); Usha Rodrigues and Mike Stegemoller, Exit, Voice, and Reputation: The Evolution of SPACS , 37 Del. J. Corp. L. 849 (2012); John Howe and Scott O'Brien, SPAC Performance, Ownership and Corporate Governance, Advances in Financial Economics, 15, 1-14 (2012); Milan Lakicevic and Milos Vulanovic, A Story on SPACs, Managerial Finance, 39(4), 384-403 (March 8, 2013); Tim Jenkinson and Miguel Sousa, Why SPAC Investors Should Listen to the Market, Journal of Applied Finance, Vol. 21, No. 2, 2011 (November 16, 2015); Dimitrova, Lora, Perverse Incentives of Special Purpose Acquisition Companies, the 'Poor Man's Private Equity Funds', Journal of Accounting & Economics (JAE), Vol. 63, No. 1, 2017 (October 12, 2016); Robert Huebscher, How SPACs Destroy Investor Wealth, Advisor Perspective (December 21, 2020); Minmo Gahng, Jay R. Ritter and Donghang Zhang, SPACs, SSRN Research Paper (January 29, 2021); Chen Lin et al., SPAC IPOs and Sponsor Network Centrality, SSRN Research Paper (May 29, 2021); Eason Chong et al., Comprehensive Study of Special-Purpose Acquisition Company (SPAC): An Investment Perspective, SSRN Research Paper (June 8, 2021); Haoyun Hung et al., Factor Analysis of SPACs: Impact on SPACs Performance by Management Factors, SSRN Research Paper (June 14, 2021).
[36] See, Klausner, Michael D., Michael Ohlrogge and Emily Ruan, A Sober Look at SPACs, cit., pp. 31-38
[37] Ibidem.

that hold on their shares at the time of the de-SPAC transactions and thereafter. These investors have done very poorly over the period of the study, bearing most of the costs and absorbing the post-merger underperformance. The median three-, six-, and twelve-month post-merger returns for this group of shareholders were -14.5%, -23.8%, and - 65.3%, respectively, as of October 2020.[38]

It is worth noting that more recently certain SPACs with high-quality sponsors (including high-profile private equity firms and/or former CEOs or senior officers of Fortune 500 companies) have performed better than others, and a number of companies that have recently gone public through a de-SPAC transaction have maintained stock prices well above the SPAC's IPO price.[39]

However, even if the companies resulting from the de-SPAC transactions don't fail outright, some negative press may have outsize impact on the reputation of SPACs for companies considering this process in the future and potentially push private companies away from SPAC structures.[40] Moreover, even in those scenarios where performances have moved in a more positive direction, a substantial dilution remains in the SPAC structures as discussed below, thus imposing a significant cost that is borne almost entirely by post-merger shareholders.

Recent studies have shown that the dilution embedded in the traditional SPAC structure constitutes a primary source of SPACs' high cost and a potential cause of their poor post-merger performances.[41] According to these studies, there are four main sources of dilution built into a typical SPAC structure – the promoter, the warrants, the redemption rights and the underwriter fees. As indicated above, the sponsors usually receive a promote consisting of shares equal to c. 20% of post-IPO equity in exchange for a nominal consideration. In addition, the SPAC typically issues fractional warrants to IPO investors as an incentive to invest in the SPAC, as well as founder warrants to sponsors in private placements. IPO investors can then redeem their shares in the SPAC in exchange for the full price paid in the IPO (with interest) and they can usually keep their warrants regardless of whether and how they vote on the proposed business combination and whether they redeem their shares in the SPAC. At the time of its IPO, the SPAC also pays an underwriting fee based on IPO proceeds although most shares sold in its IPO may end up being redeemed at the time of the merger. These structural elements have the effect of

[38] Id., pp. 11-18 and 31-39.

[39] Id., pp. 32-35 (noting that SPACs with "high quality" sponsors tend to do better than other SPACs in two respects: first, their dilution is generally lower primarily due to fewer redemptions; and second, they tend to produce higher six-month post-merger returns for SPAC shareholders, which are in part a function of the value the 'high quality' sponsors create through their ongoing engagement with the post-merger company and their ability to drive a harder bargain when negotiating with the target companies.); Max H. Bazerman and Paresh Patel, SPACs: What You Need to Know, cit. (noting that "[f]or the 70 SPACs that found a target from July 2020 through March 2021, the average redemption rate was just 24%, amounting to 20% of total capital invested. And over 80% of the SPACs experienced redemptions of less than 5%" and observing." Further, the study highlights the volatility of the SPAC market and the need to pay attention to the timing and limitations of market analyses and notes that "[t]he recent results are encouraging. For all deals closed from January 2019 through the first quarter of 2021, the average stock price for SPACs postmerger is up 31% - a figure that trails the S&P 500, which is up 36%, on average, over the same time period. But a more recent snapshot - January 2020 through the first quarter of 2021 - shows that postmerger SPACs are outperforming the S&P 500 by a wide margin, up 47% versus 20%. And for SPACs with an announced deal but no merger as of March 2021, stocks are up 15% since IPO, on average, compared with 5% for the S&P 500 over the same time period.").

[40] See, e.g., CB Insights, What Is A SPAC?, cit., p. 19 (noting that "[f]or example, electric truck company Nikola went public via SPAC in March 2020, despite not earning any revenue in 2019 and lacking a clearly viable truck model. It saw its market cap jump to $29B - higher than Ford's - before its CEO resigned and the SEC opened an investigation into the company for fraud" and arguing that "[s]tories like this could taint the reputation of SPACs in the future, potentially pushing other companies away from the structure."); Rana Foroohar, Spacs are falling short of their promises (Financial Times, July 11, 2021).

[41] See, Klausner, Michael D., Michael Ohlrogge and Emily Ruan, A Sober Look at SPACs, cit., pp. 3-4, 18 seq; Tim Jenkinson and Miguel Sousa, Why SPAC Investors Should Listen to the Market, cit., pp. 4-5, 9; Chen Lin et al., SPAC IPOs and Sponsor Network Centrality, cit., pp. 22-25; Minmo Gahng, Jay R. Ritter and Donghang Zhang, SPACs, cit., pp. 25 seq.

diluting share value at the time of the de-SPAC transaction, and may create a steep cost on the SPAC's shareholders and the shareholders of the target company being taken public.[42]

[42] Ibidem. See, also, Matt Levine, SPACs aren't cheaper than IPOs yet (Bloomberg Money Stuff, July 27, 2020); Alex Rampell and Scott Kupor, In Defense of the IPO, and How to Improve it (Andreessen Horowitz, August 28, 2020); Richard Beales, The house always wins with SPACs (Reuters, February 26, 2021); Aswath Damodaran, The Rise Of SPACs: IPO Disruptors Or Blank Check Distortions?, cit.

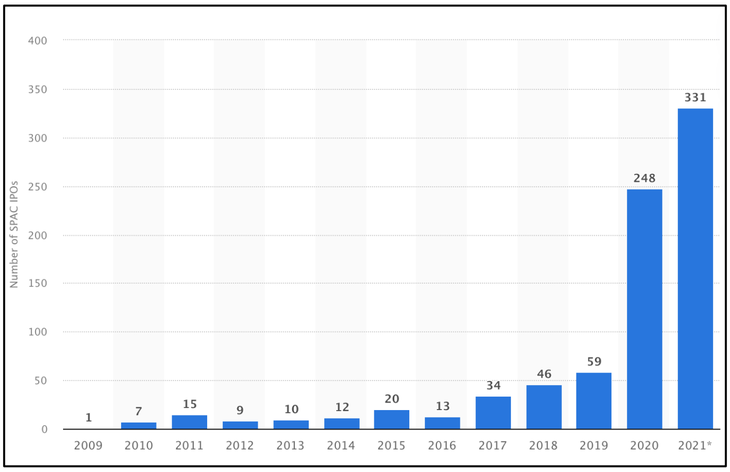
CHAPTER 2

SPAC MARKET UPDATE

2.1. SPAC Activity and Market Overview

While they have been used for decades,[43] SPACs have gained increased attention and have rapidly become an attractive alternative to a traditional IPO for private companies looking to access the public markets over the past 18 months.

Number of SPAC IPOs in the United States from 2009 to June 8, 2021



Source: Statista (as of June 2021).

The increased use of SPACs is the result of a confluence of factors. First, the abundance of uninvested capital, or "dry powder", that bolstered the supply of capital and was largely sitting on the sidelines in the first part of 2020. Second, the need to mitigate market volatility exacerbated by several events including the recent Covid-19 pandemic and the U.S. presidential election, which prompted many companies with increased appetite for liquidity and exit opportunities to seek a faster and less uncertain track to public markets than a traditional IPO. Third, the influx of high-profile investors and well-experienced management teams launching SPACs, as well as the evolution of SPAC structures and the improvement of sponsor-investor alignment features. Fourth, increasing investor sophistication and comfort with SPAC transactions. Fifth, a more mature funding environment to help finance de-SPAC transactions and to provide post-merger operating funds. Lastly, some recent high-profile successful SPAC acquisitions, which have lent increased credibility to the SPAC structure as a reputable investment vehicle and have boosted investor confidence in SPACs. The combination of these factors, among others, has contributed to the recent surge in SPAC activity, which has accelerated to unprecedented levels both in the IPO and M&A markets between 2020 and the first half of 2021.[44]

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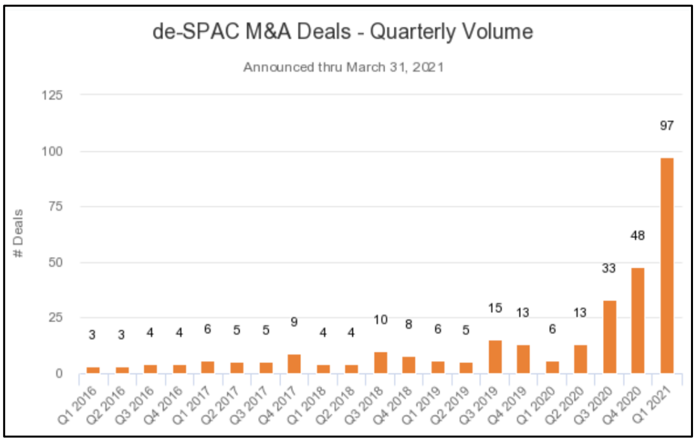
[43] See, e.g., Deloitte and Cooley, Private-Company CFO Considerations for SPAC Transactions, cit., p. 2 (noting "[e]ntities with characteristics similar to those of SPACs have existed for decades in various iterations as "blank check companies" or "public shells." The term "SPAC" was coined in the 1990s, with sponsors focusing on the technology, media, and health care industries. Since then, the popularity of SPAC offerings has ebbed and flowed, depending on economic conditions, capital trends, and the general health of the IPO market. For example, SPACs gained popularity in the oil and gas industry in the mid-2010s as depressed commodity prices drove investors toward experienced management teams that were increasingly likely to find existing operating companies or mineral rights for a discount.").

[44] See, e.g., Deloitte and Cooley, Private-Company CFO Considerations for SPAC Transactions, cit., pp. 2-3; SIFMA, Spotlight: 2020, the Year of the SPAC: Explaining SPACs and Analyzing Issuance Trends (SIFMA Insights, August 2020), pp. 2-3; Goldman

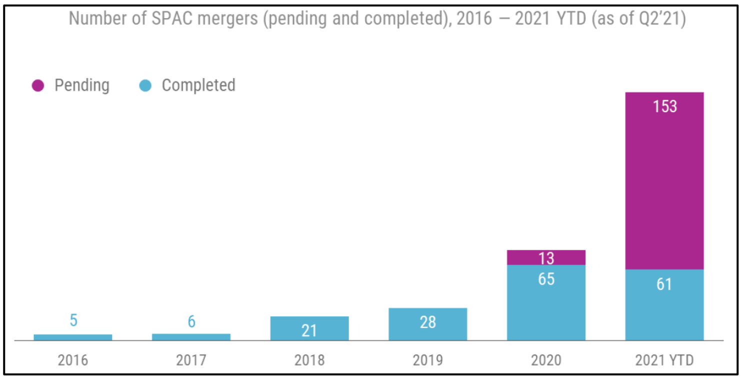
SPAC IPO issuances have enjoyed an extraordinary run in the United States, with over $83 billion raised across 248 SPAC IPOs in 2020. This represents an all-time high and a remarkable increase compared to c. $13.6 billion across 59 SPAC IPOs and c. $10.7 billion across 46 SPAC IPOs completed in 2019 and 2018 respectively.[45] This momentum is not showing signs of slowing down at the date of writing, with 2021 on track to have the highest issuance of SPAC IPOs on record. The first six months of 2021 have already recorded over $107.9 billion raised in 345 SPAC IPOs.[46]

After raising an abundance of capital, SPACs are on the hunt to acquire target companies. SPAC merger activity has significantly accelerated in 2020, with 100 de-SPACs deals announced in the United States in 2020.[47] The craze has continued in 2021, with 97 deals announced in the United States in Q1 2021.[48]



Source: Deal Point, Special Purpose Acquisition Company (SPAC) Market Study 2021 (Deal Point Data, April 2021).

By the end of Q2 2021, the aggregate number of U.S. SPAC mergers in 2021 (including both announced and completed acquisitions of target companies) more than doubled 2020's full-year total.[49]



Source: CB Insights.

Sachs, The IPO SPAC-Tacle, cit.; Ortenca Aliaj, James Fontanella-Khan and Aziza Kasumov, Spac dealmaking sets new record (Financial Times, March 1, 2021); Richard Henderson, Eric Platt and Ortenca Aliaj, The Spac race: Wall St banks jostle to get in on hot new trend (Financial Times, August 11, 2020).

[45] Sources: SpacInsider.com; Statista.com.

[46] Sources: SpacInsider.com (as of June 20, 2021).

[47] See, Deal Point, Special Purpose Acquisition Company (SPAC) Market Study 2021 (Deal Point Data, April 2021).

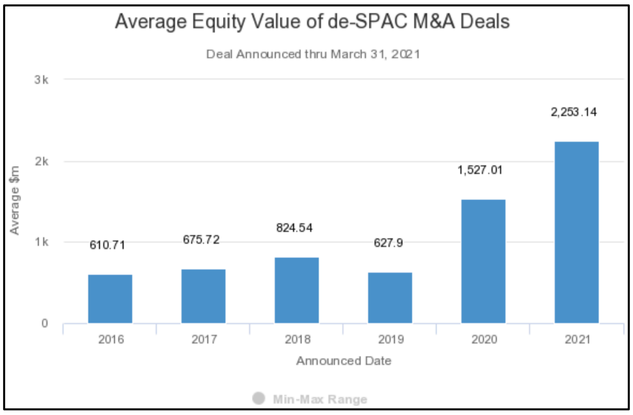
[48] See, PitchBook, SPAC Market Update: Q2 2021 (PitchBook Report, April 29, 2021).

[49] See, CB Insights, What Is A SPAC? (CB Insights Research, July 14, 2021), pp. 4-5.

The average size of SPAC IPOs and de-SPAC transactions in the United States has also increased over time.[50]

Year	IPO Count	Gross Proceeds(mms)	Average IPO Size(mms)
2021	349	108,540.9	311.0
2020	248	83,354.0	336.1
2019	59	13,600.3	230.5
2018	46	10,751.9	233.7
2017	34	10,048.5	295.5
2016	13	3,499.2	269.2
2015	20	3,902.5	195.1
2014	12	1,749.8	145.8
2013	10	1,455.3	145.5
2012	9	490.5	54.5
2011	15	1,081.5	72.1
2010	7	502.5	71.8
2009	1	36.0	36.0
Total	823	239,012.8	

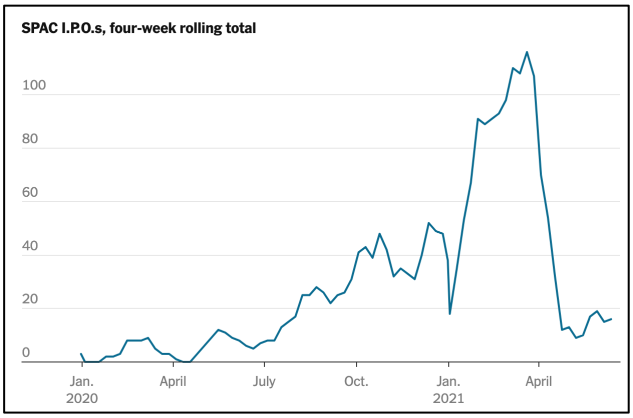
Source: SpacInsider (as of June 24, 2021). Includes over-allotment proceeds.



Source: Deal Point, Special Purpose Acquisition Company (SPAC) Market Study 2021 (Deal Point Data, April 2021).

As discussed in greater detail below, the rapid growth in SPAC activity in the United States brought litigation challenges and heightened scrutiny from U.S. regulators in the first half of 2021.[51] Following news of increased enforcement activities and the publication of various regulatory investor guidance and public statements focused on SPACs, the wave of new SPAC issuances came to an abrupt halt in the United States in April 2021.[52]

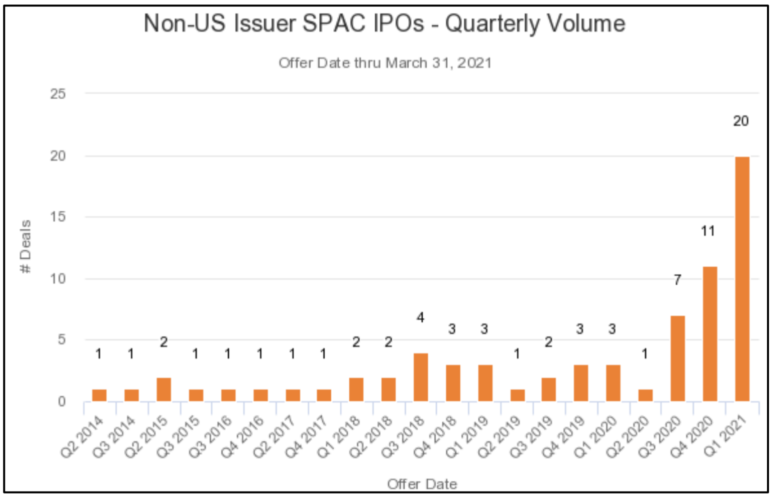
[50] Ibidem. See also, e.g., Kaye Wiggins and Ortenca Aliaj, Spac boom fuels strongest start for global mergers and acquisitions since 1980 (Financial Times, March 31, 2021).
[51] See Section 3.
[52] See, e.g., Chris Bryant, SPACs Get Smacked Down by a More Assertive SEC (Bloomberg, April 13, 2021); Dave Michaels, Amrith Ramkumar and Alexander Osipovich, SPAC Hot Streak Put on Ice by Regulatory Warnings (The Wall Street Journal, April 16, 2021); PYMNTS, More SEC Scrutiny Threatens To Slow SPAC Pace (PYMNTS, April 12, 2021); Nicola M. White, SPAC IPO Market Slowly Resurfaces With Play-it-Safe Accounting (Bloomberg Tax, June 15, 2021); Nicholas Jasinski, 5 Things We Learned From the Latest SPAC Conference - An Actual In-Person Event (Barron's, June 24, 2021); Steven Davidoff Solomon, In Defense of SPACs (The New York Times, June 12, 2021).



Source: Dealogic. The New York Times.

Despite a cooling market in Q2 2021, U.S. SPAC issuances have started to recover in Q3 2021. The hundreds of active SPACs will continue to be a tailwind for public listings and the SPAC structure is expected to remain a primary option for private companies looking to access public equity markets in the United States in the months to come.[53]

Following the remarkable growth in SPAC activity in the United States, the SPAC craze is expected to go increasingly global. The year 2020 recorded an increased uptick both in SPAC IPOs by non-U.S. issuers and in business combinations between non-U.S. target companies and SPACs listed in the United States, which is continuing in 2021.

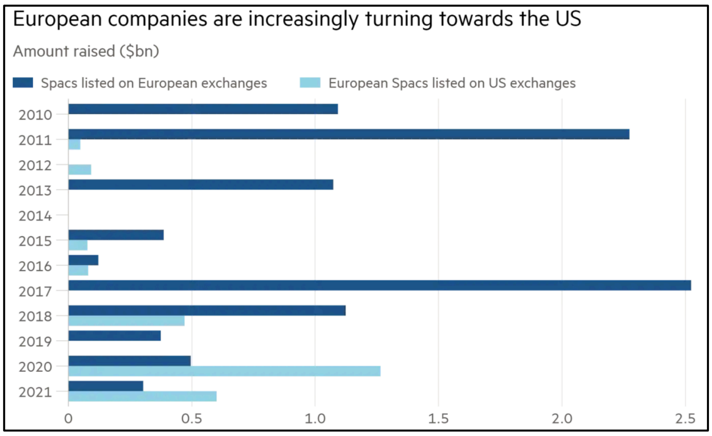


Source: Deal Point, Special Purpose Acquisition Company (SPAC) Market Study 2021 (Deal Point Data, April 2021).

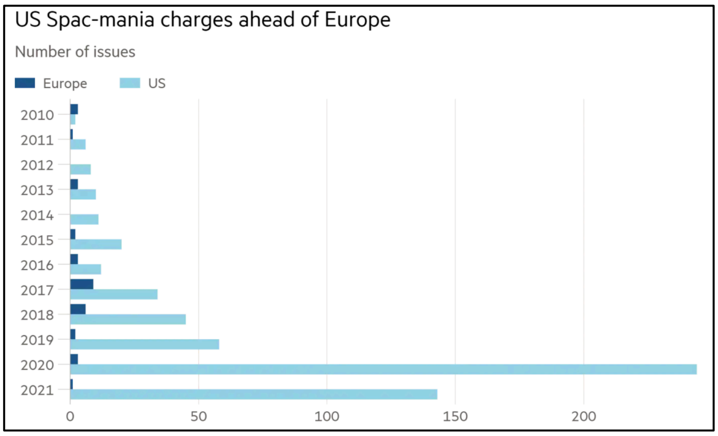
In particular, SPACs are becoming an increasingly relevant part of the European capital markets and M&A landscape. European companies have been able to capitalize on the SPAC momentum by attracting high-profile SPACs listed in the United States over the past 18 months, and this trend is expected to

[53] See, e.g., PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021 (PitchBook and NVCA Report, July 13, 2021), pp. 26-27.

continue. [54] In addition, SPAC IPOs have grown in popularity across Europe, with Amsterdam emerging as regional SPAC capital. [55]



Source: Refinitiv (as of February 2021).



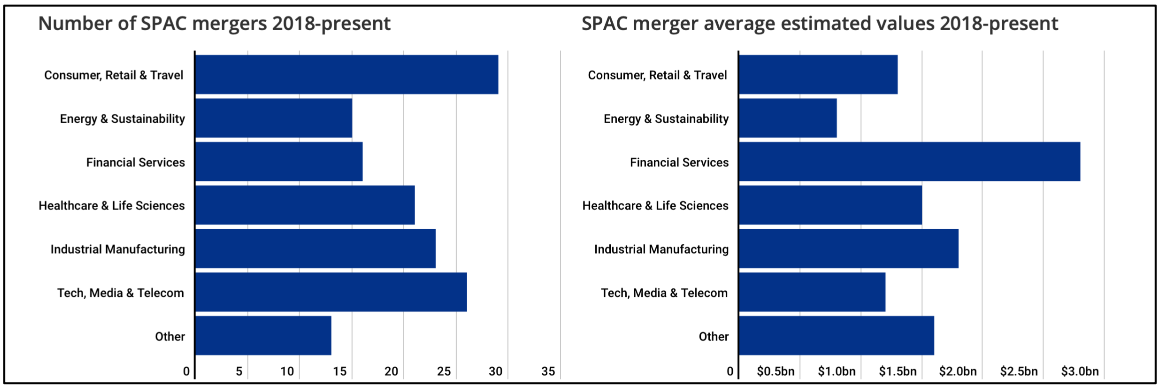
Source: Refinitiv (as of February 2021).

Although SPACs have straddled multiple sectors, the technology, consumer goods and healthcare sectors are leading the way in the SPAC frenzy. Among them, technology has emerged as the dominant sector for SPAC transactions. [56]

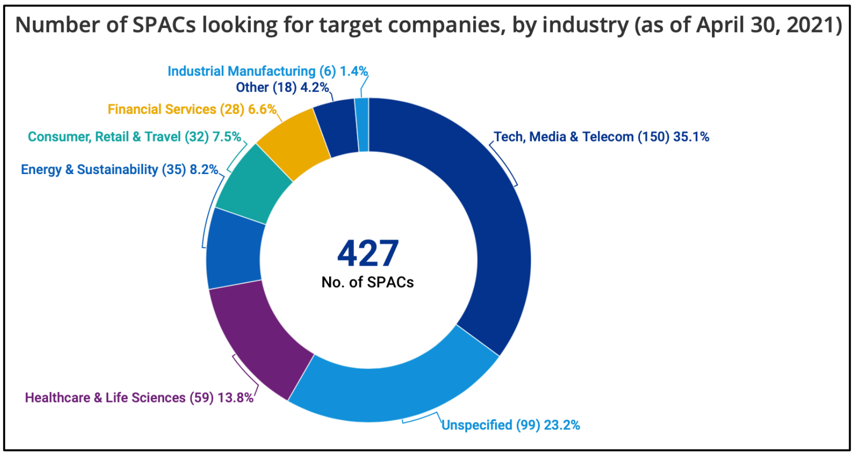
[54] See, e.g., Nikou Asgari and Stephen Morris, European bankers set sights on Amsterdam as regional Spac capital (Financial Times, February 17, 2021); Karam Filfilan, Founders: Here's what you need to know about European SPACs (Sifted, March 26, 2021); PWC, European Companies Showing Strong Interest in a US SPAC Merger (PWC Insights, March 19, 2021); White & Case, US SPACs look beyond their backyard to Europe (White & Case LLP Publications, March 12, 2021); Nikou Asgari, Tim Bradshaw and Arash Massoudi, US Spac boom lures UK tech companies in blow to London (Financial Times, February 26, 2021).

[55] Ibidem.

[56] See, e.g., J.P. Morgan, What is a SPAC? (J.P. Morgan Insights, March 12, 2021); KPMG, SPACs market report: April 2021 (KPMG Report, April 2021); KPMG, Why so many companies are choosing SPACs over IPOs (KPMG Report, January 2021), pp. 2-5; Goldman Sachs, The IPO SPAC-Tacle (Goldman Sachs Global Macro Research, No. 25, January 28, 2020), pp. 11-13 (noting that "SPAC trends have really been following broader IPO market trends, with activity concentrated in the TMT and healthcare sectors. One area of differentiation has been in the ESG space—we've seen many SPAC transactions involving mobility and clean energy companies. These are businesses that are either in their earlier stages of growth or require more marketing to sell in terms of explaining the future of the underlying technology. So it's not surprising that such companies are using the SPAC process, which, again, allows them to share growth projections and have that deeper layer of diligence that has been instrumental in allowing these types of companies to go public.").



Source: KPMG, SPACs market report: April 2021 (KPMG Report, April 2021).
KPMG data analytics based on SEC filings, Capital IQ, Thomson ONE and SPACInsider data.



Source: KPMG, SPACs market report: April 2021 (KPMG Report, April 2021).
KPMG data analytics based on SEC filings, Capital IQ, Thomson ONE and SPACInsider data.

SPAC sponsors have shifted their focus from value to growth, both in terms of completed de-SPAC transactions and new capital raising.[57] Between 2010 to 2019, most de-SPAC transactions were concentrated in the industrials, financial and energy sectors. On the contrary, during the past 18 months most SPACs completed their acquisitions in the fast-growing technology, consumer goods and healthcare sectors. Moreover, investors are increasingly showing a growth mindset and appetite for hyper-growth prospects. SPAC sponsors targeting acquisitions in fast-growing industries have been more successful in raising capital, with the majority of SPAC IPOs closed during the past 18 months seeking mergers in the technology, consumer goods and healthcare sectors.[58]

2.2. SPAC Transactions in the Fintech Sector

Venture capital funding stayed strong in Q2 2021, following a robust Q1 2021 and setting a record trajectory for the full year.[59] Investors established a new high-water mark in Q1 2021 by investing $75 billion in portfolio companies, and their enthusiasm remained high in Q2 2021 with $75 billion in capital deployed to finance high-growth U.S. startups.[60] The growth in venture capital funding was not limited

[57] Ibidem.
[58] See, Goldman Sachs, The IPO SPAC-Tacle (Goldman Sachs Global Macro Research, No. 25, January 28, 2020), pp. 11-13.
[59] See, e.g., PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021, cit.; CB Insights, What Is A SPAC? (CB Insights Research, July 14, 2021), cit.
[60] See, PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021, cit., pp. 3 and 5.

to the United States. In fact, global venture funding was up 157% in Q2 2021 compared to Q2 2020, reaching a remarkable new high.[61]

Large late-stage funding rounds were on the rise throughout the first half of 2021, recording an aggregate \$108.8 billion in the United States, almost reaching the full-year 2020 total of \$109.8 billion.[62] This momentum in deal count was even more pronounced with mega-deals (i.e., rounds at or exceeding \$100 million), which reached a record high of \$85.5 billion of capital investment across 385 deals in the United States in the first half of 2021.[63] The trend continues to cement the dominance of the largest and more mature companies in aggregate capital raised.[64]

Large investment rounds have driven increasingly high valuations. In Q2 2021, 136 companies reached 'unicorn' status globally, nearly 6 times the 23 unicorns born a year ago in Q2 2020, and already higher than the 128 unicorns born in 2020. Companies achieved 'unicorn' status at an average valuation of \$1.6 billion in the first half of 2021, up 33% from \$1.2 billion in 2016.[65]

Looking at the fintech industry in particular, the Covid-19 pandemic has acted as a catalyst by further accelerating the digitization of a variety of financial and banking services, including mobile and online payments, banking, lending and trading. Many fintech companies are now focused on building and scaling technologies that address the needs of a renewed and different post-Covid-19 environment and economy. This rapid evolution has boosted the growth and development of many private companies operating in the fintech space, thus enabling them to raise large funding rounds over the past few months.

Global fintech funding reached a new high of \$33.7 billion in Q2 2021, up 191% year-on-year. Fintech companies represented 22% of total global funding in Q2 2021, receiving \$1 out of every \$5 invested in that quarter.[66] By the end of the first half of 2021 the total volume for 2021 reached over \$67 billion, a figure which is larger than all historical full year totals and more than triple the volume raised in the first half of 2020.[67] Furthermore, maturation and wider adoption of fintech services and products was evident with late-stage deals.[68] Deal sizes continued to grow larger and median and average pre-money valuations increased further.[69]

The fintech industry was well-represented in the top mega deals in the United States during Q2 2021, with Brex and Plaid raising some of the largest rounds of the quarter, each deal coming in at more than \$400 million.[70] Similarly, a number of high-profile fintech companies closed mega deals in the United Kingdom and Europe in Q2 and early Q3 2021, including Mollie, wefox, Trade Republic and Revolut, with deals coming in at between \$650 million and \$900 million.[71]

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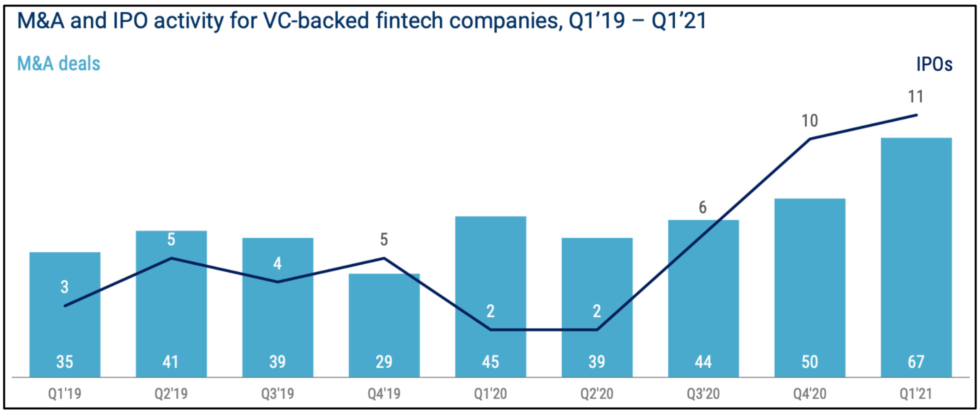
[61] See, CB Insights, What Is A SPAC? (CB Insights Research, July 14, 2021), cit., p. 9.
[62] See, PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021, cit., pp. 11-12.
[63] Id., pp. 3, 5 and 11-12.
[64] Ibidem.
[65] See, CB Insights, What Is A SPAC? (CB Insights Research, July 14, 2021), cit., pp. 5 and 8.
[66] Id., pp. 9 and 13.
[67] See, FT Partners, Q2 2021 Quarterly Fintech Insights – Global Financing and M&A Statistics (FT Partners Report, July 2021), p. 9.
[68] See, PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021, cit., p. 18.
[69] Ibidem. See also FT Partners, Q2 2021 Quarterly Fintech Insights – Global Financing and M&A Statistics, cit., pp. 14-17.
[70] See, PitchBook and National Venture Capital Association (NVCA), Venture Monitor Q2 2021, cit., p. 12.
[71] See, CB Insights, What Is A SPAC? (CB Insights Research, July 14, 2021), cit., p. 160.

From an exit perspective, whilst for much of the past two decades fintech companies have been relatively quiet on the public markets, the trend began to change in the mid-2010s with an increasing number of high-profile fintech companies going public since 2015. The past 18 months have shown no sign of slowing down in this regard, with more fintech companies getting ready to access the public markets in 2020 and 2021. [72]



Source: CB Insights, The State of Fintech Q1'21 Report: Investment & Sector Trends to Watch (April 28, 2021).

A growing number of fintech companies have reportedly been considering the SPAC route when weighting their options to go public, and SPACs have increasingly become attractive listing vehicles for them.[73] Fintech-focused SPACs now view the fintech industry as ripe for de-SPAC transactions due to the large supply of mature and highly valued privately held fintech companies that are well positioned to access public markets, [74] as well as the growing demand for fintech services and products fueled by the recent Covid-19 pandemic.[75]

The increased interest in the fintech sector led to the launch of over 30 fintech-focused SPACs and the completion of 15 SPAC mergers with fintech companies for an aggregate valuation of US$57.539 billion in the United States in 2020. [76]

Fintech related SPAC activity has further increased in 2021. During the first half of 2021, 21 SPACs announced plans to merge with fintech companies for a combined valuation of over US$75.5 billion in the United States, which represents a new record for the industry and largely surpasses those for the whole 2020 year. [77]

The boom in SPAC transactions is expected to continue in the second half of 2021 and beyond. In fact, the surge in SPAC IPOs has resulted in several SPACs actively seeking to identify business combination

[72] See, e.g., Allen Miller and Tess Munsie, Amid the IPO gold rush, how should we value fintech startups? (TechCrunch, April 30, 2021).
[73] See, e.g., Efi Pylarinou, Fintech catching up on the recent SPAC IPO boom (Daily Fintech, August 11, 2020); Todd Anderson, SPACs Become the Go To Listing Vehicle for Fintech Companies (Lend Academy, February 3, 2021); Jonathan Cardenas, Special Purpose Acquisition Company (SPAC) Transactions in the Fintech Sector (American Bar Association, Business Law Section, January 6, 2021); Lex Sokolin, The 2020 guide to Fintech SPACs (Medium, December 16, 2020).
[74] Source: CBInsights.com
[75] See, e.g., McKinsey, How US customers' attitudes to fintech are shifting during the pandemic (McKinsey Insights, December 17, 2020); Deloitte, Beyond COVID-19: New opportunities for fintech companies (Deloitte Insights, 2020); Cambridge Centre for Alternative Finance, World Bank Group and the World Economic Forum, The Global Covid-19 FinTech Market Rapid Assessment Study (Cambridge Centre for Alternative Finance, World Bank Group and the World Economic Forum Research Study, 2020).
[76] Sources: SpacInsider.com; SPACalpha.com; Nasdaq.com; Ftpartners.com.
[77] See, e.g., FT Partners, CEO Monthly Market Update & Analysis – Global Fintech Coverage (FT Partners Report, June 2021), p. 42, 45-46; FT Partners, Q2 2021 Quarterly Fintech Insights – Global Financing and M&A Statistics, cit., p. 40.

partners and deploy capital. As of June 2021, 571 SPACs with over $178 billion of capital were actively searching for transactions.[78] Of them, at least 38 large SPACs were reportedly in search of companies in the financial and tech sectors.[79]

Across various fintech segments, banking and lending made up for the largest part of fintech SPAC deals with several transactions announced through to June 2021 - LoanMe,[80] LibertyTax, MoneyLion,[81] OppFi,[82] Better Mortgage,[83] Sunlight Financial,[84] Social Finance (SoFi)[85] and Dave.[86] Insurtech was another active segment with a few SPAC transactions announced during the same period - Hippo,[87] States Title[88] and CCC Information Services.[89] The capital markets segment also gained traction with a number of high-profile SPAC transactions announced during the first half of 2021 - eToro,[90] APEX Clearing,[91] Acorns[92] and Bakkt.[93] Further, a number of payment companies have announced their merger with SPACs during the same period - Payoneer[94] and CompoSecure.[95] Other active segments include financial

[78] Source: Spactrack.net (as of June 2021).
[79] Ibidem.
[80] See, e.g., Newswire, NextPoint Acquisition Corp. to Acquire Liberty Tax and LoanMe to Create One-Stop Financial Services Destination for Consumers and Small Businesses (Newswire, February 22, 2021); Newswire, NextPoint Files Final Prospectus and Adds Directors to Proposed Board (Newswire, June 7, 2021).
[81] See, e.g., Finextra, MoneyLion joins Spac party (Finextra, February 12, 2021); Alex Wilhelm, Inside Rover and MoneyLion's SPAC-led public debuts (TechCrunch, February 16, 2021); Colin Kellaher, Financial Platform MoneyLion to Combine With SPAC Fusion Acquisition (The Wall Street Journal, February 12, 2021).
[82] See, e.g., Miriam Cross, OppFi is the latest fintech to go public via SPAC (American Banker, February 11, 2021); Finextra, OppFi takes the Spac route to go public (Finextra, February 12, 2021).
[83] See, e.g., Alex Wilhelm, Digging into digital mortgage lender Better.com's huge SPAC (TechCrunch, May 11, 2021); Maureen Farrell and Peter Rudegeair, Mortgage Lender Better to Go Public in SPAC Deal (The Wall Street Journal, May 11, 2021).
[84] See, e.g., Jonathan Shieber, Chamath Palihapitiya's SPAC for Sunlight Financial is another sign of a renewables boom (TechCrunch, January 25, 2021); Brian Eckhouse and Crystal Tse, Apollo SPAC Agrees to Take Solar Lender Sunlight Public (Bloomberg, January 25, 2021); William White, Sunlight Financial SPAC Merger: 12 Things to Know About the Solar Play as SPRQ Stock Soars (Business Insider, January 25, 2021).
[85] See, e.g., Kirsten Korosec, SoFi to go public in merger with Chamath Palihapitiya's newest SPAC (TechCrunch, January 7, 2021); Brian Sozzi, Why SoFi's dealmaking CEO went the SPAC route for its IPO (Yahoo! Finance, June 1, 2021); Crystal Tse, SoFi Jumps 12% in Nasdaq Debut After Palihapitiya SPAC Merger (Bloomberg, June 1, 2021).
[86] See, e.g., Micah Maidenberg, Mark Cuban-Backed Personal Finance App Dave to Go Public in $4 Billion SPAC Deal (The Wall Street Journal, June 7, 2021); Finextra, Banking app Dave set for $4bn Spac deal (Finextra, June 7, 2021).
[87] See, e.g., Katherine Chiglinsky, Hippo Agrees to a Merger With Mark Pincus, Reid Hoffman SPAC (Bloomberg, March 4, 2021); Leslie Scism, Insurance Startup Hippo to Go Public in $5 Billion SPAC Merger (The Wall Street Journal, March 4, 2021).
[88] See, e.g., Mary Ann Azevedo and Alex Wilhelm, Proptech startup States Title, now Doma, going public via SPAC in $3B deal (TechCrunch, March 2, 2021); Alex Nicoll, Digital closing company States Title, now Doma, is going public in a move fueled by the nation's pandemic homebuying frenzy (Business Insider, March 2, 2021).
[89] See, e.g., Maureen Farrell and Leslie Scism, CCC Information Services to Go Public in $6.5 Billion SPAC Merger (The Wall Street Journal, February 3, 2021); Josh Fineman, SPAC Dragoneer Growth gains on deal to take CCC Information Services public (Seeking Alpha, February 3, 2021).
[90] See, e.g., Crystal Tse, eToro Nears $10 Billion Merger With Betsy Cohen SPAC (Bloomberg, March 15, 2021); Mary Ann Azevedo, Trading platform eToro to go public via SPAC merger in $10B deal (TechCrunch, March 16, 2021); Aisling Finn, UK trading platform eToro to go public in $10bn SPAC deal (AltFi, March 17, 2021); Finextra, Etoro and Fintech Acquisition Corp submit registration for Spac merger (Finextra, June 3, 2021).
[91] See, e.g., Nicole Casperson, Apex Clearing to go public via SPAC in $4.7 billion deal (InvestmentNews February 22, 2021); Crystal Tse, Fintech Firm Apex Clearing Agrees to Go Public Via SPAC (Bloomberg, February 22, 2021); Finextra, Apex Clearing to go public via Spac (Finextra, February 23, 2021).
[92] See, e.g., Alex Wilhelm, Acorns' SPAC listing depicts a consumer fintech business with a SaaSy revenue mix (TechCrunch, May 27, 2021); Peter Rudegeair, Fintech Startup Acorns to Go Public in $2 Billion SPAC Deal (The Wall Street Journal, May 27, 2021); Finextra, Acorns to go public via Spac (Finextra, May 28, 2021).
[93] See, e.g., Alexander Osipovich, Intercontinental Exchange's Cryptocurrency Venture to Go Public Through a SPAC (The Wall Street Journal, January 11, 2021); David Carnevali, Crypto marketplace Bakkt to go public through Spac deal (Financial Times, January 11, 2021); Gillian Tan and Crystal Tse, Crypto Exchange Bakkt Nears Merger With Victory Park SPAC (Bloomberg, January 8, 2021).
[94] See, e.g., Jennifer Surane and Gillian Tan, Payoneer Reaches $3.3 Billion Deal to Go Public With Betsy Cohen SPAC (Bloomberg, February 3, 2021); Finextra, Payoneer joins Spac frenzy in $3.3 billion deal (Finextra, February 3, 2021); Tomi Kilgore, Payoneer to go public after SPAC merger, that values payments company at more than $3 billion (MarketWatch, February 3, 2021).
[95] See, e.g., Tomi Kilgore, CompoSecure to go public through a SPAC merger valuing emergent crypto-storage company at $1.2 billion (MarketWatch, April 19, 2021); PYMNTS, CompoSecure On The Lures Of Heavy Metal Payment Cards – And SPAC Mergers (PYMNTS, April 29, 2021).

management solutions (Qomplx[96]), healthcare fintech (Alight[97]), blockchain/cryptocurrency (Cipher Mining[98]) and real estate technology (Offerpad[99]).

In terms of geographic areas, the United States continues to drive the fintech-SPAC momentum, with a growing number of SPACs raising funds and listing on U.S. exchanges. Among the largest fintech-focused SPAC IPOs completed in 2020 were Foley Trasimene Acquisition Corp. II's $1.4 billion IPO,[100] FTAC Olympus Acquisition Corp.'s $750 million IPO,[101] Dragoneer Growth Opportunities Corp.'s $690 million IPO[102] and Far Peak Acquisition Corporation's $550 million IPO.[103] Other 2020 fintech-related SPAC IPOs of note include SVF Investment Corp.'s $603.75 million IPO[104] and FinTech Acquisition Corp. V's $250 million IPO.[105]

The first half of 2021 has recorded growing appetite for fintech-focused SPAC IPOs in the United States, with several high-profile listings including Independence Holdings Corp's $500 million IPO,[106] Fusion Acquisition Corp. II's $500 million IPO,[107] JOFF Fintech Acquisition's $300 million IPO,[108] Figure Acquisition I's $287.5 million IPO,[109] VPC Impact Acquisition Holdings II's $225 million IPO,[110] EJF Acquisition Corp.'s $250 million IPO,[111] FinTech Evolution Acquisition Group's $240 million IPO,[112] Deep Lake Capital Acquisition Corp.'s $180 million IPO,[113] Quantum FinTech Acquisition Corporation's $175 million IPO[114] and Portage Fintech Acquisition's $240 million IPO.[115]

[96] See, e.g., Katie Roof, Risk Analytics Firm Qomplx to Go Public Via Casper CEO SPAC (Bloomberg, March 1, 2021); Omar Darwazah, Risk Analytics Firm QOMPLX to go Public through a SPAC at a $1.4B Valuation (Medium, March 5, 2021).

[97] See, e.g., Crystal Tse and Yueqi Yang, Foley-Backed SPAC Agrees to $7.3 Billion Deal With Alight (Bloomberg, January 24, 2021); Daniel Laboe, The SPAC Opportunity You Don't Want To Miss (Yahoo! Finance, March 1, 2021).

[98] See, e.g., Isabelle Lee, Bitcoin mining company Cipher to go public via $2 billion SPAC merger with Good Works (Business Insider, March 5, 2021); Chris Katje, Bitcoin Play Cipher Mining To Go Public With SPAC Merger (Yahoo! Finance, March 5, 2021).

[99] See, e.g., Patrick Clark and Gillian Tan, Rascoff SPAC to Take Offerpad Public at $3 Billion Valuation (Bloomberg, March 18, 2021); Mary Ann Azevedo, Real estate tech startup Offerpad to go public via SPAC merger in $3B deal (TechCrunch, March 18, 2021).

[100] See, e.g., Business Wire, Foley Trasimene Acquisition Corp. II Closes Partial Exercise of IPO Over-Allotment Option (Business Wire, August 26, 2020).

[101] See, e.g., Leo Gatdula, Fintech-focused SPAC FTAC Olympus Acquisition closes IPO (S&P Global Market Intelligence, August 31, 2020).

[102] See, e.g., Business Wire, Dragoneer Growth Opportunities Corp. III Announces Pricing of $400,000,000 Initial Public Offering (Business Wire, March 22, 2021).

[103] See, e.g., Renaissance Capital, Former NYSE President's second SPAC Far Peak Acquisition prices $550 million IPO at $10 (Renaissance Capital, December 3, 2020).

[104] See, e.g., Newswire, SoftBank's SVF Investment Corp. Announces Closing of $603,750,000 Initial Public Offering (Newswire, January 12, 2021).

[105] See, e.g., GlobeNewswire, FinTech Acquisition Corp. V Announces Completion of $250,000,000 Initial Public Offering, Including Exercise of Over-Allotment Option (GlobeNewswire, December 8, 2020).

[106] See, e.g., Finextra, FT Partners closes $500m Spac (Finextra, March 22, 2021).

[107] See, e.g., GlobeNewswire, Fusion Acquisition Corp. II Announces Closing of $500 Million Initial Public Offering (GlobeNewswire, March 2, 2021).

[108] See, e.g., Ruby Hinchliffe, JOFF Fintech Acquisition Spac files for $300m IPO (Fintech Futures, January 28, 2021).

[109] See, e.g., Business Wire, Figure Acquisition Corp. I Announces Closing of $287.5 Million Initial Public Offering (Business Wire, February 23, 2021).

[110] See, e.g., Business Wire, VPC Impact Acquisition Holdings II Announces Pricing of $225 Million Initial Public Offering (Business Wire, March 4, 2021).

[111] See, e.g., Business Wire, Figure Acquisition Corp. I Announces Closing of $287.5 Million Initial Public Offering (Business Wire, February 23, 2021).

[112] See, e.g., GlobeNewswire, FinTech Evolution Acquisition Group. Announces Pricing of Upsized $240,000,000 Initial Public Offering (GlobeNewswire, March 1, 2021).

[113] See, e.g., Business Wire, EJF Acquisition Corp. Announces Pricing of $250 Million Initial Public Offering (Business Wire, February 24, 2021).

[114] See, e.g., GlobeNewswire, Quantum FinTech Acquisition Corporation Announces Pricing of Upsized $175 Million Initial Public Offering (GlobeNewswire, February 4, 2021).

[115] See, e.g., Renaissance Capital, Fintech SPAC Portage Fintech Acquisition prices upsized $240 million IPO (Renaissance Capital, July 21, 2021).

Although to date much of the SPAC activity has taken place in the United States and the vast majority of fintech related de-SPAC transactions have involved U.S. fintech companies, [116] U.S. SPACs have been increasingly looking beyond the United States for fintech targets over the last few months. This has already been evidenced by a number of high-profile acquisitions in the fintech space, including the announcement by Fintech Acquisition Corp V of a US$10 billion merger transaction with Israeli stock trading and brokerage company eToro in March 2021.[117]

Furthermore, as we head into the second half of 2021, more European fintech companies eyeing the public markets are wooed by SPACs looking for European targets. Notable examples are German banking-as-a-service (BaaS) provider Solarisbank which is said to be contemplating the route of a SPAC merger in early 2022,[118] and UK-based Atom bank which is rumored to have had discussions with financial advisers about whether it might go public via a SPAC in the coming months. [119]

In parallel, more European sponsors are considering listing SPACs focused on the fintech sector in Europe, with markets such as Amsterdam and Frankfurt showing growing interest in SPAC structures. For example, in March 2021, former Commerzbank CEO Martin Blessing listed a SPAC, European FinTech IPO Company 1, in Amsterdam which targets the acquisition of a fintech company in the region within the next 24 months.[120] Earlier this year, Bernard Arnault, the chairman of luxury goods group LVMH, joined force with former UniCredit bank CEO Jean-Pierre Mustier and global alternative asset management group Tikehau Capital to launch a SPAC, Pegasus Europe, focusing on the financial services sector.[121] Former London Stock Exchange CEO Xavier Rolet is also reportedly planning to launch his own multi-million SPAC targeting fintech investments.[122]

To date, fintech-focused SPACs have displayed quite a variety of features from an industry and geographic reach and target valuation standpoints. [123] Some fintech-focused SPACs aim to acquire target companies active in specific fintech segments, while others do not restrict their search to a particular segment or vertical. For example, Fusion Acquisition Corp. targets a wide variety of fintech companies across the "wealth, financial advisory, investment and asset management" sub-sectors,[124] Motive Capital Corp is focused on fintech companies active in the "banking, payments, capital markets, data and analytics, insurance and investment management" sectors, [125] Figure Acquisition Corp. I intends to target businesses in the fintech and financial services sector including companies "that provide support to the

[116] See, e.g., FT Partners, CEO Monthly Market Update & Analysis – Global Fintech Coverage (FT Partners Report, June 2021), p. 42, 45-46.
[117] See footnote 87.
[118] See, e.g., Ruby Hinchliffe, Solarisbank among first German fintechs mulling Spac deal (Fintech Futures, April 16, 2021).
[119] See, e.g., Emily Nicolle, Atom Bank mulls listing via Spac ahead of IPO plans (Financial News, April 12, 2021).
[120] See, e.g., Swetha Gopinath and Myriam Balezou, Ex-Commerzbank CEO's Fintech SPAC Falls in Amsterdam Debut (Bloomberg, March 26, 2021); Finextra, Former Commerzbank chief files for fintech shell IPO (Finextra, March 15, 2021); Peter Lee, Martin Blessing announces latest Spac targeting European fintechs (Euromoney, March 18, 2021).
[121] See, e.g., Siddharth Venkataramakrishnan, Bernard Arnault and Jean Pierre Mustier Spac raises €500m in Amsterdam listing (Financial Times, April 29, 2021); Phil Serafino and Sonia Sirletti, Ex-UniCredit CEO'S SPAC Seeks $606 Million in Amsterdam IPO (Bloomberg, April 26, 2021).
[122] See, e.g., Jan-Henrik Foerster and Dinesh Nair, Ex-London Bourse Chief Xavier Rolet Is Said to Plan Fintech SPAC (Bloomberg, May 7, 2021); Finextra, Former LSE chief Rolet preps fintech Spac – Bloomberg (Finextra, May 7, 2021).
[123] See, e.g., Jonathan Cardenas, Fintech SPAC Transactions in Europe and the United States, in Fintech 2021 - A practical cross-border insight into fintech law, International Comparative Legal Guides (2021).
[124] See, Fusion Acquisition Corp., Form S-1 (June 24, 2020).
[125] See, Motive Capital Corp., Form S-1 (November 25, 2020).

financial services sector,"[126] while North Mountain Merger Corp. focuses on target companies in the "financial technology segment of the broader financial services industry."[127]

Moreover, some fintech-focused SPACs expressly include blockchain and cryptocurrency related services and solutions within the scope of their target company search, while others do not. Among the former are Far Peak Acquisition Corporation,[128] Joff Fintech Acquisition Corp.,[129] Fintech Evolution Acquisition Group[130] and Ribbit LEAP, Ltd.[131]

Furthermore, some fintech-focused SPACs consider a global search for target companies, while others concentrate on more specific geographic areas. For example, Pegasus Acquisition Company Europe B.V. targets companies operating in the "European financial services industry," [132] Golden Falcon Acquisition Corp. is focused on fintech and other technology target companies headquartered in "Europe, Israel, the Middle East or North America," [133] European FinTech IPO Company 1 B.V. is focused on businesses in the financial services and fintech sector "headquartered or operating in Europe (including the UK) or Israel," [134] and byNordic Acquisition Corporation is focused on fintech targets in "the Nordic and Scandinavian countries, the Baltic states, UK and Ireland, Germany, France and the Benelux countries."[135]

Lastly, some fintech-focused SPACs narrow their search to focus on targets whose enterprise value falls within a specified range, while others do not specify a particular valuation range. For example, VPC Impact Acquisition Holdings is focused on "high-growth businesses in the fintech industry with an enterprise value of approximately $800 million to $2.0 billion," [136] Fusion Acquisition Corp. is focused on fintech targets "with an enterprise value ranging of approximately $750 million to $3 billion,"[137] and European FinTech IPO Company 1 B.V. targets companies in the financial services and fintech sector with "an equity valuation above Euro 1.0 billion." [138]

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[126] See, Figure Acquisition Corp. I, Form S-1 (February 3, 2021).
[127] See, North Mountain Merger Corp., Form S-1 (August 14, 2020).
[128] See, Peak Acquisition Corp, Form S-1 (November 16, 2020).
[129] See, Joff Fintech Acquisition Corp, Form S-1 (February 1, 2021).
[130] See, Fintech Evolution Acquisition Group, Form S-1 (February 11, 2021).
[131] See, Ribbit LEAP, Ltd., Form S-1 (August 25, 2020).
[132] See, Pegasus Acquisition Company Europe B.V., Prospectus (April 29, 2021).
[133] See, Golden Falcon Acquisition Corp., Form S-1 (December 1, 2020).
[134] See, European FinTech IPO Company 1 B.V., Prospectus (March 22, 2021).
[135] See, byNordic Acquisition Corp, Form S-1 (August 28, 2020).
[136] See, VPC Impact Acquisition Holdings, Form S-1 (September 4, 2020).
[137] See, Fusion Acquisition Corp., Form S-1 (June 24, 2020).
[138] See, European FinTech IPO Company 1 B.V., Prospectus (March 22, 2021).

CHAPTER 3

SPACS IN THE UNITED STATES

3.1. Increased Regulatory Scrutiny on SPACs

3.1.1. SEC's SPAC-Related Inquiries and Investigations

The unprecedented surge in the use and popularity of SPACs over the past year and half has resulted in increased activity at the U.S. Securities and Exchange Commission ("SEC"). The SEC's Division of Enforcement has launched several SPAC-related inquiries and is increasingly focused on investigating potential wrongdoings associated with SPAC transactions.

There are a number of issues relating to SPACs that make them a prime target for enforcement action under the U.S. federal securities laws. The SPAC's IPO is a public offering from which liability arises under the Securities Act of 1933 ("Securities Act"). Following its IPO, the SPAC is subject to the periodic reporting requirements under the Securities Exchange Act of 1934 ("Exchange Act"). Liability (including liability under Sections 10(b) and 20 of the Exchange Act) can arise from material misstatements or omissions in the SPAC's periodic filings, as well as proxy statements filed in connection with the proposed acquisition of a target company. In addition to reporting and disclosure-related obligations, the SPAC structure and transactions present heightened risks of conflicts of interest, insider trading and potential Regulation Fair Disclosure ("Reg FD") issues.[139]

In March 2021, Reuters reported that the SEC had opened an inquiry seeking information on how underwriters are managing the risks involved in SPACs.[140] Although the SEC has been monitoring the SPAC boom for a while, this inquiry is a strong sign that the SEC is increasing its scrutiny of SPAC deals and the Wall Street banks that underwrite them. The SEC has asked to provide details on deal fees, volumes, compliance, reporting and internal controls. According to Reuters, the SEC has also sought information on the depth of due diligence that SPACs performed before the acquisitions and whether SPACs have fully disclosed huge payouts to sponsors and affiliates, as well as risks of insider trading. In its letters, the SEC has reportedly asked the interested Wall Street banks to provide information on SPAC transactions on a voluntarily basis, thus not rising to the level of a formal investigative demand. However, the letters were sent by the SEC's Division of Enforcement, suggesting they may be a precursor to a formal investigation.

In parallel, the SEC's Division of Enforcement has opened several investigations in, and brought charges against, various companies involved in SPAC transactions. For instance, in June 2019, the SEC charged Ability Inc., an Israel-based intelligence communications company, its wholly owned subsidiary, and two of its executives with defrauding shareholders of a Florida-based SPAC, Cambridge Capital Acquisition Corp. In this case, the target company used financial projections to support the merger based

[139] See, e.g., Mayer Brown, Special Purpose Acquisition Companies ("SPACs") - What's The Deal? cit., pp. 3-6; Deloitte and Cooley, Private-Company CFO Considerations for SPAC Transactions, cit., pp. 6-7; Kirkland & Ellis, Legal Scrutiny for SPACS on the Rise (Kirkland & Ellis LLP Insights, April 29, 2021); Glen Kopp, Glenn Vanzura, and Jason Linder, Mitigating SPAC Enforcement and Litigation Risks, Harvard Law School Forum on Corporate Governance (May 18, 2021).

[140] See, Jody Godoy and Chris Prentice, U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy – sources (Reuters, March 25, 2021).

on a backlog of orders that were undocumented, primarily came from a single customer where the individuals who had agreed verbally to the orders had been fired, and the primary assets of the target company were licensed subject to a contract that gave 50% of revenues to the licensor and created stiff penalties for underperformance on sales. In its complaint filed in the federal district court in Manhattan, NY, the SEC alleges that Ability CEO and its CFO defrauded the SPAC's shareholders who voted in favor of the merger between Ability and the SPAC in December 2015, and made false and misleading statements about Ability's business prospects, its purported ownership of a new "game-changing" cellular interception product, the purchase orders backing its stated backlog from its largest customer, and its pipeline of possible future orders from customers. As indicated in the complaint, Ability and the two executives profited from the merger, with Ability receiving approximately $19 million, and the two executives each receiving approximately $9 million, plus $6 million each in put options, while the SPAC's shareholders lost c. $60 million.[141]

More recently, the SEC brought an enforcement action against Nikola Corporation, a manufacturer of electric and fuel cell trucks that was acquired by VectoIQ Acquisition in June 2020. In September 2020, Nikola Corporation's stock price plunged more than 30% following the release of a report by a short seller accusing the company of fraud. Shortly thereafter, investors filed a federal securities class action alleging violations of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder. [142] In November 2020, Nikola Corporation disclosed in a regulatory filing that the company and a number of its officers and employees had received subpoenas from the SEC and the Department of Justice in connection to fraud allegations leveled at the company by the short seller.[143] Subsequently, in May 2021, Nikola Corporation disclosed in another regulatory filing that the company had received a further subpoena from the SEC's Division of Enforcement in March 2021 relating to the company's projected 2021 cash flow and anticipated use of funds from 2021 capital raises.[144] Nikola and Trevor Milton, its former co-founder and executive chairman who had resigned shortly after the fraud accusations, also received grand jury subpoenas from the U.S. Attorney's Office for the Southern District of New York and the N.Y. County District Attorney's Office.

Separately, by way of a further example, in September 2020 the SEC brought an enforcement action against Akazoo S.A., a company resulting from the merger between a SPAC named Modern Media Acquisition Corp. ("MMAC") and Akazoo Limited, a music streaming service company. The SEC alleged that Akazoo made false statements to investors regarding its finances, operations, and subscriber

[141] The SEC settled with Ability on a no-admit-no-deny basis and Ability paid disgorgement and a civil penalty. The case against the individual defendants remains ongoing. See U.S. Securities and Exchange Commission v. Hurgin, No. 19-CV-5705 (MKV), 2020 WL 5350536 (S.D.N.Y. September 4, 2020). In addition, the SEC brought an administrative proceeding against the SPAC's CEO. The SEC's order found that the SPAC's CEO negligently failed to take reasonable steps and conduct appropriate due diligence to ensure that the SPAC's shareholders voting on the merger were provided with material and accurate information concerning Ability's business prospects. The SEC's order required the SPAC's CEO to pay a $100,000 civil penalty, imposed a cease-and-desist order, and imposed a 12-month associational, penny stock, and investment company suspension. See, In the Matter of Benjamin H. Gordon, SEC Administrative Proceeding, File No. 3-19210 (June 20, 2019).

[142] See, Borteanu et al. v. Nikola Corporation et al., No. 2:20-cv-01797-JZB (D. Ariz., September 15, 2020), consolidating Salem v. Nikola Corp., et al, No. 2:20-cv-02374-SPL (D. Ariz., September 16, 2020); Wojichowski et al. v. Nikola Corp. et al., No. 2:20-cv-01819-DLR (D. Ariz., September 17, 2020); Malo et al. v. Nikola Corp., et al, No. 2:20-cv-02237-SPL (D. Ariz., October 16, 2020); Holzmacher et al. v. Nikola Corp. et al., No. 2:20-cv-02123-JJT (D. Ariz., November 3, 2020); Eves et al. v. Nikola Corp. et al., No. 2:20-cv-02168-SPL (D. Ariz., November 10, 2020).

[143] See, Nikola Corporation, Quarterly Report for the quarterly period ended September 30, 2020 (Form 10-Q) (November 9, 2020).

[144] See, Nikola Corporation, Quarterly Report for the quarterly period ended March 31, 2021 (Form 10-Q) (May 7, 2021).

base, it grossly misrepresented the nature and success of its music streaming business and continued to mislead the public while its shares were publicly traded.[145]

3.1.2. SEC's SPAC-Related Public Statements, Investor Alerts and Disclosure Guidance

Other divisions at the SEC have closely monitor SPACs and de-SPAC transactions over the last few months. In particular, the SEC's Division of Corporation Finance ("Corp Fin") and the Office of the Chief Accountant ("OCA") staff have weighed in and have issued a series of public statements, investor alerts and disclosure guidance alerting market participants to potential issues concerning SPACs, their structures and activities.

At the SEC Speaks 2020 event in October 2020, SEC Commissioner Allison Herren Lee noted the reduced costs and time of a company going public through a SPAC, highlighted the increased regulatory focus on disclosures by SPACs and stressed the point that SPACs' offering documents should clearly disclose the material risks and potential conflicts involved, as well as the ways in which the sponsors are compensated for their services.[146] Furthermore, Commissioner Lee addressed the potential conflicts of interest between sponsors and investors, observing that a sponsor is generally likely to make a profit only if the SPAC is able to acquire a target company within a prescribed period of time and may therefore be incentivized to pursue a sub-optimal acquisition in order to secure its compensation. While the SEC rules currently require certain holding periods and the governing documents of SPACs may impose additional terms and restrictions on sponsors, SEC Commissioner Lee noted that further ways to align the interests of sponsors and investors should be considered to ensure that sponsors are incentivized by the quality of a potential target and that additional protections for investors in this space should also be explored.[147]

In March and April 2021, Paul Munter, SEC Acting Chief Accountant, and John Coates, SEC Acting Director of the Corp Fin, issued two separate public statements and a joint statement on certain accounting, financial reporting and governance issues relating to SPACs and de-SPAC transactions.

In his public statement on March 31, 2021, SEC Acting Chief Accountant Munter observed that the merger between a SPAC and a target company raises complex financial reporting and governance issues and identified several areas of potential risks and concerns.[148] Among other things, the statement addressed the challenges of public-company readiness that newly merged companies face as they transition from a private operating company to a public company on an accelerated schedule and highlighted the risk that private companies that are not contemplating an IPO, or are otherwise earlier in their preparation, may be unprepared for the rigorous financial reporting and internal control requirements expected of public companies. SEC Acting Chief Accountant Munter noted that a target company should carefully evaluate the status of various functions (including people, processes and technology) that will need to be in place to meet required SEC filing, audit, tax, governance, and investor relations requirements post-merger. It is essential for the combined public company to have a capable,

[145] See, Securities and Exchange Commission v. Akazoo S.A., No. 1:20-cv-08101 (S.D.N.Y., filed September 30, 2020).
[146] See, Allison Herren Lee (SEC Commissioner), Investing in the Public Option: Promoting Growth in Our Public Markets Remarks at the SEC Speaks in 2020 (October 8, 2020).
[147] Ibidem.
[148] See, Paul Munter (SEC Acting Chief Accountant), Financial Reporting and Auditing Considerations of Companies Merging with SPACs, SEC Public Statement (March 31, 2021).

experienced management team that understands the reporting and internal control requirements of a public company and can effectively execute the company's comprehensive plan on an accelerated basis. For these reasons, SEC Acting Chief Accountant Munter encouraged stakeholders in SPACs to carefully consider the risks, complexities and challenges related to SPAC mergers, and to pay particular attention to whether the target company has a clear and comprehensive plan to become a public company.[149]

Further, SEC Acting Chief Accountant Munter warned that target companies need to understand and abide by books and records and internal controls requirements. He highlighted the importance of boards having a clear understanding of their roles, responsibilities and fiduciary duties and how board composition is critical to comply with independence requirements and to ensure the right level of experience for key committee assignments.[150] He then emphasized the importance of corporate board oversight, including the vital role of the audit committee, as well as the importance of issuing annual financial statements audited in accordance with applicable standards. The combined public company should have personnel and processes in place to produce high quality financial reporting in compliance with SEC rules and regulations and to meet deadlines for required current and periodic reports. Clear and candid communications between the audit committee, auditor, and management are considered critical for setting expectations and proactively engaging as reporting, control, or audit issues arise during and after the merger process. Lastly, Acting Chief Accountant Munter recommended that auditor independence, auditor registration with the Public Company Accounting Oversight Board, and other audit-related requirements be assessed early in the process.[151]

Shortly thereafter, on April 8, 2021, SEC Acting Director Coates released a statement focused on the risks and legal liability that attach to disclosures made in connection with SPAC IPOs and de-SPAC transactions.[152] SEC Acting Director Coates began his statement by acknowledging the unprecedented surge in SPAC activity and noting that the SEC staff were looking carefully at filings and disclosures by SPACs and their private targets, were seeking clearer disclosure so that the public can make informed investment and voting decisions, and were providing increased guidance to registrants and the public. He then described how SPACs work as an alternative path to public markets and noted that material misstatements in or omissions from: an effective Securities Act registration statement as part of a de-SPAC transaction are subject to Securities Act Section 11; in connection with a proxy solicitation are subject to liability under Exchange Act Section 14(a) and Rule 14a-9; and in connection with a tender offer are subject to liability under Exchange Act Section 14(e). De-SPAC transactions may also give rise to liability under state laws. In particular, Delaware corporate law applies both a duty of candor and fiduciary duties more strictly in the event of conflicts of interest settings, absent special procedural steps,

[149] Ibidem.
[150] Ibidem.
[151] Ibidem. See, e.g., Morrison & Foerster, Five Key Takeaways from the SEC's Evolving Response to the SPAC Boom (Morrison & Foerster LLP Client Alert, April 22, 2021); Wilson Sonsini Goodrich & Rosati, SEC Signals Heightened Focus on SPACs and de-SPAC Transactions (Wilson Sonsini Goodrich & Rosati Insights, April 12, 2021); Paul Weiss, Q1 2021 U.S. Legal & Regulatory Developments (Paul, Weiss, Rifkind, Wharton & Garrison LLP Client Memorandum, April 15, 2021), pp. 4-5; Akin Gump Strauss Hauer & Feld, SEC Addresses Five Important Considerations for SPAC Business Combination Transactions (Akin Gump Strauss Hauer & Feld LLP, April 9, 2021); Ashley Carpenter, Sean May, Lisa Mitrovich and Michael Morrissey, Accounting and SEC Reporting Considerations for SPAC Transactions (The Wall Street Journal, May 4, 2021); Cooley, SPAC Enforcement Risks Increase with Enhanced SEC Scrutiny (Cooley LLP Insights, April 21, 2021).
[152] See, John Coates (SEC Acting Director, Division of Corporation Finance), SPACs, IPOs and Liability Risk under the Securities Laws, SEC Public Statement (April 8, 2021).

which themselves may be a source of liability risk. SEC Acting Director Coates then addressed the concern that companies may be providing overly optimistic projections in their de-SPAC disclosures, in part based on the assumption that such disclosures are protected by the Private Securities Litigation Reform Act (PSLRA) safe harbor for forward-looking statements, which is not available for traditional IPOs.[153] He questioned whether that assumption is correct, arguing that de-SPAC transactions may be considered IPOs for the purposes of the statute and thus may fall outside of the protection offered by the statutory safe harbor.[154] Correspondingly, he warned on the risks of using forward-looking information, which he noted can be "untested, speculative, misleading or even fraudulent." He therefore urged SPACs to exercise caution in disclosing projections, including by not withholding unfavorable projections while disclosing more favorable ones, and he encouraged them to consider disclosing the assumptions underlying their projections and the key risks that could lead actual results to differ.[155] SEC Acting Director Coates further cautioned that SEC enforcement proceedings do not have any safe harbor for forward-looking statements (even if courts determine that the PSLRA safe harbor applies to de-SPAC transactions), and any safe harbor would not apply to a statement made with actual knowledge that the statement was false or misleading when made. In closing his remarks, SEC Acting Director Coates noted that market participants should treat the de-SPAC transactions as real IPOs and should provide appropriate safeguards with potentially problematic forward-looking information.

Although his comments primarily focused on projections, SEC Acting Director Coates also noted that there are significant investor protection questions concerning whether current liability provisions give those involved in SPAC IPOs and de-SPAC transactions (e.g., sponsors, private investors, and target managers) sufficient incentives to do appropriate due diligence on the target, especially since SPACs are

[153] Ibidem. See also, e.g., Chris Bryant, Why Chamath Palihapitiya, Loves SPACs So Much (Bloomberg, January 28, 2021); Bruce A. Ericson, Ari M. Berman and Stephen B. Amdur, The SPAC Explosion: Beware the Litigation and Enforcement Risk, Harvard Law School Forum on Corporate Governance (January 14, 2021); Adam Brenneman, Jared Gerber, and Rahul Mukhi, Acting Director of SEC's Corp Fin Issues Statement on Disclosure Risks Arising from De-SPAC Transactions, Harvard Law School Forum on Corporate Governance (April 22, 2021); Wilson Sonsini Goodrich & Rosati, SEC Signals Heightened Focus on SPACs and de-SPAC Transactions, cit.; Morrison & Foerster, Five Key Takeaways from the SEC's Evolving Response to the SPAC Boom, cit.; Cooley, Is the SEC considering guidance on SPAC projections? (Cooley LLP PubCo, April 29, 2021); Fenwick & West, SEC's New Guidance on Liability Risks Likens SPACs to IPOs (Fenwick & West LLP Insights, April 9, 2021); Shearman & Sterling, SEC Considering Heightened Scrutiny of Projections in de-SPAC Transactions (Shearman & Sterling LLP, April 30, 2021); Cravath Swaine & Moore, Quarterly Review - M&A, Activism and Corporate Governance (Cravath Swaine & Moore LLP Quarterly Review, Q1 2021), pp. 10-11; Harald Halbhuber, How to Regulate De-SPACs as IPOs, Harvard Law School Forum on Corporate Governance (May 12, 2021).

[154] See, John Coates (SEC Acting Director, Division of Corporation Finance), SPACs, IPOs and Liability Risk under the Securities Laws, cit. In his statement, Acting Director Coates has noted that the text of the statutory safe harbor separately references "initial public offerings" and "offerings of securities by a blank check company" and specifically excludes from the safe harbor the statements made in connection with specified types of securities offerings, including an "offering of securities by a blank check company", a "penny stock issuer" and an "initial public offering." The term "initial public offering" is not defined in the statutory safe harbor and has generally been understood as the initial offering by a company of its securities to the public. The legislative history includes statements that the safe harbor was meant for 'seasoned issuers' with an 'established track-record' and raises the possibility that this term may include de-SPAC transactions, as well as other transactions. The SPAC offers securities to the public in its IPO when it first registers to raise funds to later acquire a target company. However, Acting Director Coates has observed that it is commonly understood that it is the de-SPAC transaction – and not the IPO of the SPAC – the transaction in which a private operating company itself goes public. The information, including financial statements, relevant to evaluating the investment changes significantly in the de-SPAC transaction compared to the SPAC IPO because the private target company has operations unlike the SPAC, and initial SPAC investors commonly have the right to and do sell or have their shares redeemed. On that basis, Acting Director Coates has argued that the economic essence of an IPO and information substance should drive the understanding and interpretation of the term "IPO" for the purposes of the PSLRA safe harbor, thus pointing toward a conclusion that the PSLRA safe harbor should not be available for any unknown private company introducing itself to the public markets. And such a conclusion, according to Acting Director Coates, should hold regardless of what structure or method it used to do so. This is because as Acting Director Coates has noted "the public knows nothing about [the] private company. Appropriate liability should attach to whatever claims it is making, or others are making on its behalf".

[155] This was the second time in five months that Corp Fin had addressed the issue. See, SEC's Division of Corporation Finance, Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies, SEC Public Statement (March 31, 2021).

designed not to include a conventional underwriter at the de-SPAC stage. SEC Acting Director Coates argued that liability risks for those involved are higher than in conventional IPOs, due in particular to the potential conflicts of interest inherent in the SPAC structure. Further, he questioned whether existing protections for investors voting on a de-SPAC transaction and buying shares in SPACs are adequate and whether the level of liability should be assessed regardless of the selected pathway to public markets.

Later in the year, both the SEC's Corp Fin and the OCA staff raised specific questions relating to the way SPACs account for their warrants. On April 12, 2021, SEC Acting Chief Accountant Munter and SEC Acting Director Coates issued a joint statement on accounting and reporting considerations for SPACs.[156] The primary issue addressed in the statement is whether SPAC warrants should be classified as equity or liability under the Generally Accepted Accounting Principles (GAAP), which largely depends on the terms of the warrant and the entity's specific circumstances. To be classified as equity, the warrant must be considered "indexed" to the company's own stock, for example by providing for settlement of the warrant with a fixed number of shares. Warrants may include variables that could affect the settlement amount, which, depending on the nature of the variable, may preclude a determination that the warrant is indexed to the company's own stock. If warrants are classified as a liability, then they should be measured at fair value, with changes in fair value reported each period in earnings.

In their statement, SEC Acting Chief Accountant Munter and SEC Acting Director Coates discussed two fact patterns involving warrants issued by SPACs recently evaluated by the SEC's OCA and they concluded that, under the circumstances presented, the warrants should be classified as liabilities rather than equity. In the first fact pattern, they explained that warrant provisions providing for potential changes to the settlement amounts based on the characteristics of the holder would preclude the warrants from being indexed to the entity's stock, and thus the warrants should be classified as a liability. In the second fact pattern, they indicated that warrants should be classified as liabilities if, in the event of a tender offer, all warrant holders are entitled to cash, whilst only certain of the holders of the underlying shares of common stock are entitled to cash.[157]

In discussing these scenarios, SEC Acting Chief Accountant Munter and SEC Acting Director Coates cautioned that accounting for warrants requires careful consideration of the specific circumstances and facts for the relevant entity and the contract arrangements, thus suggesting there may be other fact patterns that may require warrants to be classified as liabilities rather than equity under GAAP. SEC Acting Chief Accountant Munter and SEC Acting Director Coates concluded by advising SPACs and their independent auditors to consider the impact of the guidance on previously issued financial statements and recommended them to assess whether potential restatements may be necessary.[158]

[156] See, John Coates (SEC Acting Director, Division of Corporation Finance) and Paul Munter (SEC Acting Chief Accountant), Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs"), SEC Public Statement (April 12, 2021).
[157] Ibidem.
[158] Ibidem. See also, e.g., Davis Polk, SEC Statement on Accounting Treatment of Warrants in SPAC Transactions Will Have Significant Near-Term Impact on Capital Markets (Davis Polk & Wardwell LLP Client Memorandum, April 14, 2021); Kirkland & Ellis, A SPAC Curveball (Kirkland & Ellis LLP Insights, April 15, 2021); Wilson Sonsini Goodrich & Rosati, SEC Addresses Accounting Treatment for SPAC Warrants (Wilson Sonsini Goodrich & Rosati Insights, April 20, 2021); Morrison & Foerster, Five Key Takeaways from the SEC's Evolving Response to the SPAC Boom, cit.; White & Case, Clarity Emerges in the Aftermath of the SEC Statement on SPAC Warrant Accounting: A Roadmap for the Changes to Permit Equity Classification (White & Case LLP Insights, June 1, 2021); Paul Weiss, The Impact of the Recent SEC Staff Statement on Accounting and Reporting

The increase in regulatory activity and scrutiny discussed above has been accompanied by the publication of several investor alerts and guidance by the SEC during the last few months.[159] On December 22, 2020, SEC's Corp Fin issued its CF Disclosure Guidance - Topic No. 11. The guidance addresses certain disclosure considerations for SPACs in connection with their IPOs and business combinations, particularly with regard to potential conflicts of interest.[160] SEC's Corp Fin highlights the possible conflicts of interest between the entity and the sponsors, as well as the SPAC's officers, directors and affiliates and the shareholders who invest in the SPAC. The guidance makes it clear that accurate disclosure regarding these potential conflicts of interest, the nature of the economic interests of the SPAC's sponsors, directors, officers and affiliates and their additional business activities should be provided to investors. If insiders have been involved in prior SPACs, then the SPAC should also provide a balanced disclosure of the activities of those SPACs.

Furthermore, SEC's Corp Fin notes in the guidance that the SPAC has usually a limited period of time to identify an acquisition target and to complete a business combination, and that the SPAC's options may narrow as it nears the end of that timeframe, thus giving the acquisition target significant leverage in negotiating the terms of a de-SPAC transaction. SEC's Corp Fin encourages clear disclosure of the financial incentives of SPACs' sponsors, directors and officers to complete a business combination and how these incentives may differ from the interests of public shareholders. SEC's Corp Fin indicates that SPACs should disclose whether insiders are able to approve the business combination directly or upon changing the SPAC's governing documents and, if so, the process required and effect of the approvals. If the SPAC can extend the period during which a business combination may be consummated, then the terms of that extension, including applicable redemption rights, should also be disclosed. Relatedly, SEC's Corp Fin encourages SPACs to clearly disclose the financial impact on the sponsor, directors, officers and affiliates in the event the SPAC fails to complete a de-SPAC transaction.[161]

The disclosure of financial interests that may diverge from those of the public investors extends to other participants in the SPAC transactions and is relevant at the IPO stage through to the business combination stage. Potential conflicts may arise in connection with additional funding being raised to complete the business combination transaction. Corp Fin suggests that accurate disclosure should be made about the sources of the additional financing, how the terms of the additional financing may impact the public shareholders and, if the additional financing involves issuing securities, how the price and terms of those securities compare to, and differ from, the terms of the securities sold in the IPO. Any future plans for fundraising (if known) should be disclosed, with an explanation of the relative dilutive effects on existing shareholders. Further, potential conflicts may arise in connection with additional activities performed by the underwriter of the SPAC's IPO or the terms of the deferred portion of the underwriting compensation. SEC's Corp Fin asks SPACs to consider accurate disclosure of the fees that the underwriter will receive

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Considerations for Warrants Issued by SPACs (Paul, Weiss, Rifkind, Wharton & Garrison LLP Insights, May 6, 2021); Joseph Williams and Stefen Joshua Rasay, Tech and SPACs: SEC regulation could result in fewer, but better SPACs (S&P Global Market Intelligence, May 13, 2021).

[159] See, SEC's Office of Investor Education and Advocacy, What You Need to Know About SPACs, Updated Investor Bulletin (May 25, 2021); SEC's Office of Investor Education and Advocacy, Celebrity Involvement with SPACs, Investor Alert (March 10, 2021).

[160] See, SEC's Division of Corporation Finance, CF Disclosure Guidance: Topic No. 11 – Special Purpose Acquisition Companies (December 22, 2020).

[161] Ibidem.

upon completion of the initial business combination transaction, including any amount that is contingent upon completion of that transaction.[162]

Additionally, in its guidance SEC's Corp Fin emphasizes potential conflicts associated with evaluating acquisition target candidates. SPACs should provide detailed information about how and why a target company has been selected over alternative candidates, how the nature and amount of the consideration that the SPAC will pay to acquire the target company has been determined and what material factors the board of directors has considered in its determination to approve the transaction. The SPAC should also disclose any potential conflicts of interest and how they have been considered and handled, including whether any waivers to a policy that addresses conflicts of interest have been granted.[163]

Following the initial guidance, on March 31, 2021, SEC's Corp Fin staff issued a statement discussing select issues relating to SPACs.[164] The statement makes it clear that although the target company does not go through the traditional IPO process, it nonetheless must be prepared to meet the accounting and reporting requirements, the internal controls provisions of the Exchange Act, the listing standards of the national securities exchanges and the standards regarding corporate governance at the time of the de-SPAC transaction. SEC's Corp Fin observes that there is a risk that a private company that has not prepared for an IPO and is quickly acquired by a SPAC may not have the required processes and controls in place at the time required. Advanced planning may also be needed to identify, elect and on-board a newly constituted independent board and an audit committee, and for them to adequately oversee the preparation and audit of the company's financial statements, books and records, and internal controls.

The public statements and investor alerts discussed above demonstrate that the SEC is heavily focused on the growing SPAC market and is ramping up its scrutiny. While the described statements and investor alerts come from different offices and divisions at the SEC, they are carefully coordinated to put the relevant parties and their advisers on notice that the SEC has identified certain issues concerning SPACs and their transactions, and to encourage them to promptly address these issues. Moreover, these statements provide valuable insights into potential subjects of SPAC-related enforcement activity and could be seen as harbingers of further enforcement activity in this space.

3.1.3. SEC's Anticipated New Rules and Guidelines for SPACs

In recent months the SEC has been weighing new protections for investors in SPACs and has signaled its intent to further increase its oversight on SPAC activity.

On April 27, 2021, Reuters reported that the SEC was considering new guidance "to rein in growth projections made by [SPACs], and clarify when they qualify for certain legal protections," citing three

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[162] Ibidem.

[163] Ibidem. See also, e.g., Skadden, Arps, Slate, Meagher & Flom, SEC Staff Issues CF Disclosure Guidance on Conflicts of Interest and Special Purpose Acquisition Companies (Skadden, Arps, Slate, Meagher & Flom LLP, December 29, 2020); William B. Brentani, Mark A. Brod, and Daniel N. Webb, SEC Issues Guidance in Light of Ongoing Surge in SPAC IPOs, Harvard Law School Forum on Corporate Governance (February 7, 2021); Covington & Burling, SEC Provides SPACtacular Disclosure Guidance (Covington & Burling LLP Insights, December 30, 2020); Paul Weiss, SEC Division of Corporation Finance Issues SPAC Disclosure Guidance (Paul, Weiss, Rifkind, Wharton & Garrison LLP Publications, January 4, 2021).

[164] See, SEC's Division of Corporation Finance, Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies, cit.

people with knowledge of the discussions.[165] The Reuters article went on to note that, according to these sources, the new guidance would aim "at clarifying when a key liability protection for […] forward-looking statements applies to SPACs," and the changes under consideration "would likely prompt more due diligence and caution on the part of SPAC dealmakers wary of incurring liability."[166]

Subsequently, on May 26, 2021, SEC Chairman Gary Gensler told the House Appropriations Committee that SPACs pose significant policy and investor protection questions and that the SEC staff is developing ideas for new rules or guidelines for SPACs.[167]

During his testimony, SEC Chairman Gensler acknowledged the unprecedented surge in SPAC IPOs and reported that the SEC had received 700 S-1 filings from SPACs seeking to go public year-to-date, with 300 of these "blank-check IPOs" completed in the first half of 2021. He then discussed the S-4 merger filings made by SPACs when merging with target companies and referred to de-SPAC transactions as "target IPOs" on the basis that they enable target companies to access public markets for the first time. He further noted that more than 100 "target IPOs" were completed in the first half of 2021 and that in connection with these "target IPOs," SPACs often raised additional funding through PIPEs. [168]

SEC Chairman Gensler discussed how the unprecedented surge in SPACs, along with once-in-a-generation wave in traditional IPOs and direct listings, had placed a "a lot of demands on the SEC's limited resources." He noted that the SEC had spent significant time on the issue, citing as an example the joint statement relating to the treatment of warrants held by early investors in SPACs issued by SEC Acting Chief Accountant Munter and SEC Acting Director Coates on April 12, 2021 discussed above.[169]

In addition to increasing real demands on SEC's resources, SEC Chairman Gensler noted that the surge of SPACs raised several policy questions, including the following: "[f]irst 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 [the SEC's] mission to maintain fair, orderly, and efficient markets? It could be the case that SPACs are less efficient than traditional IPOs."[170]

SEC Chairman Gensler then questioned whether the SPAC structure adequately protects small investors and told the House Appropriations Committee during a question-and-answer session that "[SPACs]'ve just taken off like wildfire […] in the last six months" and "[t]here are real questions about who's benefiting and investor protection."[171]

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[165] See, Anirban Sen, Chris Prentice, Joshua Franklin, U.S. watchdog mulls guidance to curb SPAC projections, liability shield (Reuters, April 27, 2021).
[166] Ibidem
[167] See, Gary Gensler (SEC Chairman), Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee, SEC Testimony (May 26, 2021).
[168] Ibidem.
[169] Ibidem.
[170] Ibidem.
[171] See, e.g., Dave Michaels, SEC Weighs New Investor Protections for SPACs (The Wall Street Journal, May 26, 2021); Benjamin Bain, Wall Street's New Cop Signals More Scrutiny of Crypto, SPACs (Bloomberg, May 26, 2021); Chris Matthews, SEC chairman says Americans need a 'cop on the beat' to protect investors from crypto fraud (MarketWatch, May 26, 2021).

SEC Chairman Gensler further discussed the findings of an interesting study showing that the remuneration of SPACs' sponsors can generate significant dilution and costs.[172] He observed that, while the SPAC's sponsors generally receive 20% of shares as a "promote" and investors in the SPAC's IPO can usually redeem their shares before a de-SPAC transaction is completed, later stage investors cannot typically redeem their shares and are left to bear that dilution. In addition, he noted that financial advisors are paid fees for the "blank-check IPO", the PIPEs, and the merger with the target and that the investors in PIPEs often buy at a discount to a post-target IPO price, whilst retail investors are left to bear much of these costs.[173]

SEC Chairman Gensler warned that "[e]ach new issuer that enters the public markets presents a potential risk for fraud or other violations" and concluded noting that the SEC was considering additional rules or guidance for SPACs and that the SEC's Corp Fin, Examinations, and Enforcement Divisions would be closely looking at each stage to ensure that investors are being adequately protected.[174]

A few weeks after his testimony, on June 23, 2021, SEC Chairman Gensler provided further insights on the SEC's efforts to boost transparency around SPACs during a live interview.[175] In answering a question on how the SEC is addressing the SPAC boom, SEC Chairman Gensler noted that the SEC was taking a closer look at SPACs and highlighted the increased concerns that SPACs' sponsors and large institutions may get a better deal than retail investors.[176]

SEC Chairman Gensler stressed the need for sponsors behind a SPAC to fully disclose their take on it. He argued that SPACs are "very expensive, dilutive products" and noted that "the sponsors take out a chunk at the beginning, then there's more being taken out later when they merge with a private company" in what he referred to as "a target IPO." He further observed that large institutional investors often buy securities in SPACs during their "target IPOs" at a discount to the price paid by retail investors. He therefore emphasized the importance of ensuring that retail investors get the right disclosures and are adequately protected, and that they participate in SPAC transactions like institutional investors.[177]

SEC Chairman Gensler concluded his interview noting that the SEC was looking at other ways to add transparency to SPAC activity and capital markets, including by shortening the amount of time available to investors before they are required to disclose large stakes in companies.[178]

3.2. The Surge in SPAC-Related Litigation

The described increase in regulatory scrutiny by the SEC comes on the heels of a growing number of shareholder lawsuits filed against SPACs, post-merger companies and their respective affiliates (sponsors, directors and officers).[179] Most of these lawsuits have either challenged the de-SPAC

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[172] See, Michael D. Klausner, Michael Ohlrogge and Emily Ruan, A Sober Look at SPACs, Yale Journal on Regulation, Forthcoming, cit.
[173] See, Gary Gensler (SEC Chairman), Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee, cit.
[174] Ibidem.
[175] See, Bloomberg. SEC Chair Gensler Says SPACs Need More Transparency (Bloomberg, June 23, 2021).
[176] Ibidem
[177] Ibidem
[178] Ibidem
[179] Source: Stanford Law School, Securities Class Action Clearinghouse, Current Topics in Securities Class Action Filings. According to data compiled by Stanford University, shareholders have filed 26 securities class actions lawsuits involving SPACs since 2019 to the end of May 2021, with 14 of these filings occurring in 2021. See also, Preston Brewer, Are SPACs Why Securities

transactions or have alleged fiduciary duty and securities law violations in connection with stock drops or other adverse events following the de-SPAC transactions. While many of these lawsuits are based on traditional merger objection claims or securities law claims that could be filed against any public company, a number of plaintiffs in various SPAC-related lawsuits have also called out the unique structural features of SPACs to enhance their allegations.[180]

For example, in *Laidlaw v. Acamar Partners Acquisition Corp*[181] the SPAC's shareholders filed a lawsuit in Delaware state court in January 2021 to enjoin a de-SPAC transaction between the SPAC, Acamar Partners Acquisitions Corp, and CarLotz, Inc., arguing that the SPAC's directors and officers breached their fiduciary duties by rushing to sign a deal just before the time window to complete the transaction expired and they omitted to provide material information necessary to make an informed vote on the proposed transaction to the SPAC's shareholders. The plaintiffs argued that the specified time limit created the wrong incentives for the SPAC's sponsor and its directors and officers to select a de-SPAC target that was not in the best interest of the SPAC's shareholders. In addition, the plaintiffs alleged that a few SPAC's managers lacked independence and were the primary beneficiaries of the de-SPAC transaction as they were promised board memberships in the post-transaction company. The lawsuit was voluntarily dismissed after the SPAC issued additional disclosures.

In addition to allegations of SPACs rushing to complete an acquisition before expiration of the relevant time window discussed above, certain SPACs' shareholders have also filed claims alleging misleading disclosures in the proxy statements used in connection with de-SPAC transactions and threatening to enjoin a shareholder vote until the release of supplemental information. These actions are often brought under Section 14 of the Exchange Act and Rule 14a-9 thereunder and are frequently settled or voluntarily dismissed when the interested company issues additional disclosures and a mootness fee is paid.

For example, in *Pels v. FinTech Acquisition Corp.*[182] the shareholders of a SPAC named FinTech Acquisition Corp., IV sued the SPAC, its directors and certain of its officers in Delaware in March 2021 to enjoin the proposed merger between the SPAC and Perella Weinberg Partners, an advisory firm. The plaintiff shareholders argued that the SPAC's directors breached their fiduciary duties by acting with lightning speed to find a business partner and agreeing to a stockholders' agreement that allegedly would

Litigation Is Way, Way Up?, Bloomberg Law (March 16, 2021) (noting that "Based on Bloomberg Law's Dockets data, there were 10 cases filed in federal courts against SPACs in 2018 and 14 filings in 2019. Last year, cases doubled to 28 against SPACs, and 19 new cases were filed in the first two months of 2021 alone. Through March 2021, 26 securities actions have been filed against SPACs this year, already nearly equaling last year's total."); Priya Cherian Huskins, Why More SPACs Could Lead to More Litigation (and How to Prepare) (Business Law Today, June 25, 2020).

[180] See, e.g., Caitlyn M. Campbell, Surge in SPACtivity Leads to Litigation and Regulatory Risks, Harvard Law School Forum on Corporate Governance (April 19, 2021); Douglas A. Rappaport, Jacqueline Yecies, and Stephanie Lindemuth, Recent SPAC Shareholder Suits in New York State Courts: The Beginning Wave of SPAC Litigation, Harvard Law School Forum on Corporate Governance (April 23, 2021); Cleary Gottlieb, SPAC Sponsors Beware: The Rising Threat of Securities Liability (Cleary Gottlieb Steen & Hamilton LLP, Alert Memorandum, October 21, 2020); Baker Botts, SPACs to the Future: What Types of Litigation May Arise for SPACs and SPAC Targets? (Baker Botts LLP Insights, November 2, 2020); Baker Botts, SPAC Litigation and Enforcement Update: Spring 2021 (Baker Botts LLP Insights, April 23, 2021); Paul Weiss, What SPAC Sponsors, Directors and Officers Can Do to Mitigate Their Litigation Exposure (Paul, Weiss, Rifkind, Wharton & Garrison LLP Publications, March 17, 2021); Quinn Emanuel Urquhart & Sullivan, Litigation Risk in the SPAC World (Quinn Emanuel Urquhart & Sullivan LLP Memorandum, October 1, 2020); Quinn Emanuel Urquhart & Sullivan, SPAC Litigation Risks - What Happens if the SPAC Bubble Bursts (Quinn Emanuel Urquhart & Sullivan LLP Memorandum, March 26, 2021); Quinn Emanuel Urquhart & Sullivan, Recent SPAC Litigation Tied To Short Seller Scrutiny (Quinn Emanuel Urquhart & Sullivan LLP Memorandum, January 13, 2021); Caroline Bullerjahn and Morgan Mordecai, Limiting SPAC-Related Litigation Risk: Disclosure and Process Considerations, Harvard Law School Forum on Corporate Governance (March 14, 2021).

[181] See, Laidlaw v. Acamar Partners Acquisition Corp. et al., No. 2021-0016-SG (Del. Ch., January 7, 2021).

[182] See, Pels v. FinTech Acquisition Corp., IV, et al., No. 2021-0184 (Del. Ch., March 2, 2021).

give the existing owners of Perella Weinberg Partners voting control of the company resulting from the de-SPAC transaction (whilst allowing the SPAC's sponsor to maintain a significant stake in that company), would deprive the post-merger board from exercising certain governance powers (including, raising funds, taking on new debt, and pursuing new business opportunities), and would have shareholders approve a waiver of the corporate opportunity doctrine (thus allowing the owners of Perella Weinberg Partners to compete with the company resulting from the de-SPAC transaction and further limiting business opportunities for the post-merger company). The plaintiffs alleged that the sponsors agreed to these contractual terms because they were more focused on their next SPAC and future investments rather than the success of the company resulting from the de-SPAC transaction. The SPAC has since issued additional disclosures in its proxy statement[183] and completed the proposed business combination with Perella Weinberg Partners.[184]

In *Wheby v. Greenland Acquisition Corporation*,[185] a SPAC shareholder filed a lawsuit for alleged violations of the Exchange Act based on omissions and misstatements in the proxy statement concerning financial statements and projections, material contracts, the negotiations of the de-SPAC transaction, as well as the compensation and affiliations of sponsors, consultants, financial advisers, and PIPE investors involved in the transaction. Shortly after the complaint was filed, the plaintiff, the SPAC and all other named defendants in the action entered into a confidential memorandum of understanding, pursuant to which a stipulation and order of dismissal of the action was filed on October 14, 2019. The stipulation of dismissal was approved and entered by the District Court on October 15, 2019. Among other things, the stipulation of dismissal indicated that the SPAC had revised the proxy statement to include additional information mooting the investor's claims regarding the sufficiency of disclosures. The SPAC also negotiated a mootness fee with the plaintiff.[186]

As previously mentioned, a second growing category of SPAC-related litigations consists of fiduciary duty and securities law claims filed against a SPAC's sponsors, directors, or others after closing of the de-SPAC transaction, typically alleging that the defendants misrepresented material facts about the target company or breached their fiduciary duties in a way that caused the value of the company resulting from the de-SPAC transaction to decline. The likelihood for protracted litigation in the context of these lawsuits is usually far greater compared to lawsuits filed before completion of the de-SPAC transaction.

In recent months, SPACs' shareholders have more closely monitored the performance of post-merger companies and material declines in their share price or other significant adverse events following the de-SPAC transactions and they have increasingly brought claims against SPACs and their sponsors, directors and officers under a number of legal theories, including fiduciary duty claims, as well as claims alleging violations of Sections 10(b), 14(a) and 16 of the Exchange Act. Where new shares have been issued in connection with a de-SPAC transaction, plaintiffs have also asserted claims against the SPACs, the post-merger entity and their respective directors and officers alleging omissions or misstatements in

[183] See, FinTech Acquisition Corp., IV, Current Report (Form 8-K) (June 11, 2021).
[184] See, Business Wire, Perella Weinberg Partners Completes Business Combination With FinTech Acquisition Corp. IV (Business Wire, June 24, 2021).
[185] See, Wheby v. Greenland Acquisition Corp. et al., No. 1:19-cv-01758-MN, 30-41 (D. Del., September 19, 2019).
[186] See, Stipulation and Order of Dismissal, Wheby v. Greenland Acquisition Corp. et al., No. 1:19-cv-01758-MN (D. Del., October 14, 2019).

the accompanying registration statement under Section 11 of the Securities Act, and against other sellers (e.g., PIPEs investors reselling pursuant to registration rights) under Section 12(a)(2) of the Securities Act.

Furthermore, the plaintiffs in these lawsuits have increasingly pointed to several structural features of SPACs and de-SPAC transactions in order to enhance their claims, including certain allegations of conflicts of interest, misaligned incentives, failures to conduct adequate due diligence on the target company and material misrepresentations or omissions relating to the target companies' products, management teams or controls.

For example, lawsuits were filed against the company resulting from the merger between *VectoIQ* and *Nikola Corporation* and its officers, alleging violations of Section 10(b) of the Exchange Act for alleged misstatements and omissions concerning the de-SPAC transaction. One of the lawsuits named the former CEO of VectoIQ as an individual defendant alleging that he had made material misstatements in his capacity as the CEO of VectoIQ, including that VectoIQ had been looking for a partner with a proven technology leader for 2 years and that Nikola Corporation's vision of a zero-emission future and ability to execute had been key drivers in the acquisition process. The plaintiffs claimed that these statements, among others, were false and misleading because Nikola Corporation had overstated its in-house manufacturing, design, production, and testing capabilities. The lawsuits also alleged that VectoIQ's statement that it had performed extensive due diligence on Nikola Corporation and its activities was false and misleading because it had not actually performed any such diligence.[187]

By way of a further example, in *Welch v. Meaux*, the plaintiff alleged that, with only a couple of weeks left before expiration of the SPAC's deadline to acquire a target company, the founders of a SPAC called *Landcadia Holdings*, Inc. had rushed to acquire *Waitr*, a food order and delivery service company, to preserve their reputation as dealmakers, and had made material false and misleading statements in the proxy statement in an effort to rapidly close the de-SPAC transaction in violation of Sections 10(b) and 14(a) of the Exchange Act and the rules thereunder.[188] The plaintiff alleged that the risks involved in the transactions had not been accurately disclosed and that several statements relating to Waitr's financial conditions, operations and projections were false and misleading. In particular, the plaintiff argued that at the time of the merger it was already clear that Waitr's business model was not viable and that the company had no meaningful path to profitability, including because certain material contracts of Waitr were not profitable for the company and its proposed fee structure would have been "draconian" and unsustainable for restaurants. Additionally, the plaintiff brought a claim concerning material deficiencies and false statements in the registration statement for a follow-on offering completed shortly after the closing of the de-SPAC transaction. The case has been consolidated with a companion case and is currently proceeding.

In another lawsuit, certain shareholders filed an amended consolidated securities class complaint against *Akazoo S.A.*, a music streaming service company that became publicly traded through a reverse merger with Modern Media Acquisition Corp. ("MMAC"), and a few individual defendants, including certain

[187] See Section 3.1 and accompanying footnotes.
[188] See, Welch v. Meaux, No. 2:19-cv-01260 (W.D. La., September 26, 2019).

officers and directors of MMAC.[189] The plaintiff shareholders alleged that the defendants had made several false and misleading statements, including in the proxy statement, about Akazoo's revenue, profits, and operations in violation of Sections 10(b) and 14(a) of the Exchange Act. These include misstatements relating to the number of Akazoo's users, its geographic reach, its distribution rights, and the distinctiveness and competitive moat of its business model, as well as the level of diligence that MMAC had undertaken in evaluating Akazoo as a potential target company. Additionally, the plaintiff shareholders brought a claim under Sections 11 and 15 of the Securities Act, alleging that the company's registration statement for the common stock issued in connection with the de-SPAC transaction contained several misstatements relating to similar topics. In April 2021, the parties entered into a stipulation and agreement of partial settlement and the court granted preliminary approval of the settlement.[190]

In *Kaul v. Clover Health Investments, Corp.*, a plaintiff shareholder filed a lawsuit against Clover Health, a healthcare services company, certain of its directors and officers, and a few individuals who had served as officers and directors of Social Capital Hedosophia Holdings Corp. III, a SPAC that had previously acquired Clover Health. In its complaint, the plaintiff alleged that the defendants had materially misrepresented the legal risks of acquiring the target company.[191] This lawsuit followed the publication of a report by a short seller and research firm asserting that the SPAC and its promoter misled investors about critical aspects of Clover Health's business in the run-up to the de-SPAC transaction by failing to disclose, among other things, that the target company had been served with subpoenas by the U.S. Department of Justice shortly before the de-SPAC transaction for a variety of issues, including illegal kickbacks, marketing practices and undisclosed related-party transactions. After publication of the report, Clover Health announced that it had received notice that the SEC had commenced an investigation regarding the contents of the short seller report and requested related documents.[192] On the news of the short seller report and the investigation by the SEC, shares of Clover Health dropped more than 12%, representing a loss of $700 million in market capitalization, and continued to tumble thereafter.

In *Heckmann Corporation Securities* a class action litigation was brought against a SPAC and the post-merger public company resulting from the de-SPAC transaction, alleging that the shareholders had been denied an informed vote on the merger due to false and misleading statements relating to the target company's past financial results and performance, future growth prospects, valuation and management, as well as the failure to disclose that inadequate diligence had been performed by the SPAC prior to the de-SPAC transaction. After over 3 years of litigation, the class reached a $27 million settlement agreement to be paid half in cash and half in stock.[193]

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[189] See, In re Akazoo S.A. Securities Litigation, No. 20-cv-1900 (E.D.N.Y., filed September 8, 2020).
[190] See, Stipulation and Agreement of Partial Settlement (filed April 23, 2021), In re Akazoo S.A. Securities Litigation, No. 20-cv-1900 (E.D.N.Y., filed September 8, 2020).
[191] See, Kaul v. Clover Health Investments, Corp., No. 3: 21-cv-00101 (M.D. Tenn., February 5, 2021). In addition, Clover Health Investments, Corp. and certain of its directors and officers were named as defendants in other putative class actions filed in the U.S. District Court for the Middle District of Tennessee: Bond v. Clover Health Investments, Corp. et al., 3:21-cv-00096 (M.D. Tenn., February 5, 2021); Yaniv v. Clover Health Investments, Corp. et al., Case No. 3:21-cv-00109 (M.D. Tenn., February 10, 20201); and Tremblay v. Clover Health Investments, Corp. et al., Case No. 3:21-cv-00138 (M.D. Tenn., February 22, 2021). In April 2021, all these class actions were consolidated under Bond v. Clover Health Investments, Corp. et al. as lead case.
[192] See, Clover Health Investments, Corp., Current Report (Form 8-K) (February 5, 2021).
[193] See, Motion for Final Approval, In re Heckmann Corp., Securities Litigation, No. 1:10-cv-00378-LPS-MPT (D. Del, May 22, 2014).

In *Calenture, LLC v. Eos Energy Enterprises, Inc.*, the shareholders of a post-merger SPAC alleged that the SPAC's sponsors had realized significant short swing profits from a series of trades that had straddled the de-SPAC transaction. After the SPAC's sponsors had disgorged the profits, plaintiffs filed a lawsuit to recover 25% of the disgorged funds.[194] After a few months, the lawsuit was voluntarily dismissed.[195]

Whilst most of the shareholder litigations brought against SPACs, post-merger companies and their respective affiliates are based on federal securities law claims as discussed above, a growing number of lawsuits have also been filed alleging a breach of fiduciary duties under state laws.

A notable example is the lawsuit filed in the Delaware Court of Chancery *Amo vs. MultiPlan Corp. et al.*, in which a stockholder asserted a breach of fiduciary duties against the SPAC, Churchill Capital Corp. III, and its directors, officers and affiliates under Delaware state laws in connection with the merger of the SPAC with MultiPlan.[196] In its complaint, the plaintiff alleged that the structure of the SPAC had created the incentives for its sponsor and board members to complete the de-SPAC transaction, without regard as to whether the target private company was a good investment, and whether the merger was in the best interest of the investors. In particular, the plaintiff noted the 2-year period for the SPAC to complete the deal (failing which the founder shares granted to the sponsor and the outside directors for minimal consideration would be forfeited and the SPAC funds returned to investors), the deep personal and financial ties between the board members and the sponsor (several of whom were on the boards of other SPACs that he had sponsored), as well as the fact that the SPAC had retained an entity affiliated with the sponsor, rather than an independent third party, as its financial advisor. In its complaint, the plaintiff also alleged that the defendants had breached their fiduciary duties by making false and misleading disclosures in connection with the de-SPAC transaction indicating that they had performed an extensive due diligence of the target company, whilst failing to disclose serious weaknesses in MultiPlan's business, including that one of MultiPlan's main customers was on the verge of leaving the company to create a competing business. The complaint further claimed that the business combination had been a financial catastrophe, causing the loss of millions of dollars of shareholder value. Following closing of the de-SPAC transaction, a market research report publicly disclosed the loss of the customer's business and the negative impact on MultiPlan's financial position, thus causing the company's stock price to drop to $6.27 per share (roughly 37.3% below the SPAC's IPO price of $10 per share). Interestingly, in *Amo vs. MultiPlan Corp. et al*. the plaintiff asserted that the defendants' actions should be judged under the heightened scrutiny of the "entire fairness" standard in light of the described conflicts of interest, rather than the business judgment rule.

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[194] See, Calenture, LLC v. Eos Energy Enterprises, Inc., No. 1:21-cv-01416 (S.D.N.Y., February 17, 2021).

[195] See, Notice of Voluntary Dismissal (filed May 4, 2021), Calenture, LLC v. Eos Energy Enterprises, Inc., No. 1:21-cv-01416 (S.D.N.Y., February 17, 2021).

[196] See, Amo v. MultiPlan Corp., et al., C.A. No. 2021-0258 (Del. Ch., March 25, 2021). Note certain investors had previously filed securities class actions in federal courts in connection with this de-SPAC transaction. In March 2021, two investors filed Notices of Voluntary Dismissal. See, Notice of Voluntary Dismissal, Srock v. MultiPlan Corporation, et al., 1:21-cv-01640-LAK (S.D.N.Y., March 15, 2021); and Notice of Voluntary Dismissal, Verger v. MultiPlan Corporation, et al., 1:21-cv-01965-LAK (S.D.N.Y., March 24, 2021).

3.3. Draft Legislation Targeting SPACs

As noted by SEC Acting Director Coates in his statement relating to the liability risks associated with SPACs and their transactions, one key factor that has contributed to the surge in SPAC activity in the United States is the possibility for SPACs to rely on the PSLRA safe harbor for forward-looking statements which would not be otherwise available to companies going public through a traditional IPO.[197] Under Section 27A of the Securities Act and Section 21E of the Exchange Act, the safe harbor for forward-looking statements excludes statements made in an offering by a "blank check company." Rule 419 under the Securities Act defines a "blank check company" as a "development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person" and is "issuing penny stock." Because most SPACs do not issue penny stock or are otherwise structured to avoid classification as "blank check companies" under Rule 419, the PSLRA safe harbor for forward-looking statements applies to projections and other forward-looking statements used in connection with de-SPAC transactions.

Against this background, on May 24, 2021, the U.S. House Committee on Financial Services held a hearing regarding SPACs, direct listings, public offerings and investor protections associated with these offerings.[198] The attending witnesses included: Stephen Deane, representative of the CFA Institute; Andrew Park, representative of the Americans for Financial Reform; Usha Rodrigues, Georgia School of Law's Professor and M.E. Kilpatrick Chair of Corporate Finance and Securities Law; and Scott Kupor, Managing Partner at Andreessen Horowitz.

In advance of the hearing, the U.S. House Committee on Financial Services released a draft legislation proposing certain amendments to the Securities Act and the Exchange Act aimed at excluding all SPACs (rather than just the SPACs that are issuing penny stock) from the PSLRA safe harbor for forward-looking statements.[199] If this draft legislation is adopted, private companies seeking to go public through SPACs, as well as their sponsors, management, directors and advisors will be subject to an increased risk of liability for inaccuracies in forward-looking statements contained in documents issued in connection with de-SPAC transactions (e.g., proxy statements). This, in turn, may cause some private companies, SPACs and other market participants involved in de-SPAC transactions to change their practices with respect to the projections and other forward-looking statements that are included in SPAC disclosures, thus reducing or reconsidering the use of forward-looking statements. To the extent that forward-looking statements continue to be used in the context of de-SPAC transactions following the adoption of this draft legislation if implemented, then private companies, SPACs and other market participants are

[197] See Section 3.1 and accompanying footnotes.
[198] See, U.S. House Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, Virtual Hearing - Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections (May 24, 2021).
[199] See, H.R. ____, to amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to exclude certain special purpose acquisition companies from safe harbor for forward-looking statements, and for other purposes, Discussion Draft (May 17, 2021) (the draft legislation proposes to revise Section 27A of the Securities Act and Section 21E of the Exchange Act by deleting the term "blank check company" and replacing it with the excerpt "… a development stage company that has no specific business plan or purpose or has indicated that its business plan is to acquire or merge with an unidentified company, entity, or person …" without reference to whether or not the company issues penny stock. Because SPACs are formed for the purpose of acquiring unidentified target companies, the proposed amendments would likely make the PSLRA safe harbor unavailable for forward-looking statements in the context of de-SPAC transactions.).

expected to conduct increased due diligence, apply more rigor and scrutiny, and implement more robust review processes on projections and other forward-looking statements – a process that should include a careful drafting and review of accompanying disclosures, underlying assumptions, information sources and cautionary statements. If the draft legislation is adopted, SPACs and private companies seeking to go public through SPACs may also face increased litigation risks related to SPAC activity and may incur growing costs associated with directors' and officers' liability insurance for SPAC transactions.[200]

During the hearing on May 24, 2021, the four witnesses mentioned above agreed that all offerings - whether via a traditional IPO, a direct listing or a SPAC - should operate on a level playing field and be subject to similar disclosure requirements and a comparable liability regime to avoid regulatory arbitrage. In their written testimonies and their responses to lawmakers, the four witnesses stressed the importance of putting statements made in the context of de-SPAC transactions on the same footing as those issued in the context of IPOs to protect investors and to ensure that adequate liability standards for misstatements and omissions of material facts are implemented.[201]

Stephen Deane, representative of the CFA Institute, noted in his testimony that SPACs involve two very different stories: on the one hand, there are the SPAC's sponsors and sophisticated investors (including hedge funds and other institution investors) that invest at the IPO stage or in the PIPEs, but then largely exit when the de-SPAC merger is announced; on the other hand, there are individual retail investors who buy their shares in the public markets at the time of the merger announcement and hold them into the post-merger period. These two distinct groups face significantly different results: large profits for the SPAC's sponsors and sophisticated investors, and poor returns for retail investors. He then argued that three main systematic design features of SPACs contribute to these results. First, the dilution built in the SPAC structure that results from the sponsor's 20% promote, the detachable warrants that the SPAC's IPO investors retain (even if they sell their shares in the SPAC in exchange for their initial investment plus interest), and the discounts or side payments given to the PIPE investors. Second, the problem of misaligned incentives between the SPAC's sponsors (who have a strong incentive to complete a merger, regardless of the quality of the transaction), the initial SPAC's IPO investors (who can retain their warrants and vote in favor of the merger even if they dispose of their shares), and the private investors in the PIPE at the time of the merger announcement (who often subscribe for shares at a preferred price rather than the price the retail investors get on the public markets) on the one hand, and the retail investors

[200] See, e.g., Ran Ben-Tzur and Jay Pomerantz, House Releases Draft Legislation Eliminating SPAC Safe Harbor for Forward Looking Statements, Harvard Law School Forum on Corporate Governance (June 7, 2021); Pillsbury, Congressional SPACtivity Continues: Draft Legislation Proposes to Eliminate Safe Harbor Protection for Projections in SPAC Transactions (Pillsbury Winthrop Shaw Pittman LLP Insights, May 28, 2021); Baker Botts, SPAC Update: Congress's Proposal to Eliminate Forward-Looking Statement Safe Harbor for SPACs (Baker Botts LLP Insights, June 11, 2021); Cooley, The House hears about SPACs (Cooley LLP PubCo, June 1, 2021); Bill Flook, House Hearing Finds Broad Agreement on Need for SPAC Liability Reforms (Reuters, May 26, 2021).

[201] See, Stephen Deane (Senior Director of Legislative and Regulatory Outreach, CFA Institute), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services - "Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections" (May 24, 2021); Andrew Park (Senior Policy Analyst, Americans for Financial Reform), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services - "Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections" (May 24, 2021); Usha Rodrigues (Professor & M.E. Kilpatrick Chair of Corporate Finance and Securities Law, University of Georgia School of Law), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services - "Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections" (May 24, 2021); Scott Kupor, (Managing Partner, Andreessen Horowitz), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services - "Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections" (May 24, 2021).

on the other hand. Third, the unlevel regulatory playing field and the risks of biased information that flow from the safe harbor protection in the PSLRA for forward-looking statements, which SPACs have been able to enjoy and that would not be otherwise available in traditional IPOs. Because of these factors, representative of the CFA Institute Deane argued that the Congress and securities regulators should look at these areas in more detail and encouraged them to remain vigilant to protect the investors, as well as the transparency and integrity of the securities markets.[202]

Andrew Park, representative of the Americans for Financial Reform, reported in his testimony that over $100 billion was issued by SPACs in the first 5 months of 2021 according to data from SpacInsider, over 10 times the amount raised in 2018. This exponential growth is especially concerning, he argued, because SPACs have historically performed very poorly for retail investors. He observed that SPACs are not a new concept, but rather they date back to the 1980s when they were called "blank check companies" and often associated with scams, which deceived investors out of millions of dollars. After some of the early SPACs were accused of being vehicles for fraud, the Congress passed the Penny Stock Reform Act in 1990 to address some of the problems, which was followed by the SEC adopting Rule 419 for blank check companies. However, the Americans for Financial Reform representative Park noted that recent SPACs are structured to avoid these rules and the forward-looking statements made in connection with de-SPAC transactions have generally enjoyed the protection of the PSLRA safe harbor for forward-looking statements, thus allowing disclosure of projections and other materials that would normally not be disclosed in the context of traditional IPOs. Further, he discussed the dilution caused by the 20% promote of SPACs' sponsors and the misalignment of interest between SPACs' sponsors and institutional investors on the one hand, and retail investors in SPACs on the other hand. He provided interesting market data showing how SPACs have generated extremely poor performance for retail investors. On that basis, he urged the Congress to take action to address these issues, including by amending the Exchange Act to align the rules governing forward looking statements in de-SPAC transactions with those of IPOs and by broadening the definitions of "blank check companies" to better protect main street investors.[203]

In her testimony, Georgia School of Law's Professor and M.E. Kilpatrick Chair of Corporate Finance and Securities Law Usha Rodrigues expressed her support for amending Section 27A of the Securities Act and Section 21E of the Exchange Act to exclude SPACs' disclosures from the safe harbor for forward-looking statements provided by the PSLRA. Professor Rodrigues observed that the Congress enacted the PSLRA safe harbor for forward-looking statements to acknowledge investors' hunger for financial projections and other information about a company's prospects, which can be extremely valuable but also speculative information. In doing so, the Congress made the calculus that the benefits of forward-looking information outweigh the risks for companies that have already gone through the rigorous vetting of the IPO process. Therefore, the PSLRA safe harbor, Professor Rodrigues argued, should not apply to forward-looking statements issued in a de-SPAC transaction because this acquisition

[202] See, Stephen Deane (Senior Director of Legislative and Regulatory Outreach, CFA Institute), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services, cit.
[203] See, Andrew Park (Senior Policy Analyst, Americans for Financial Reform), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services, cit.

is functionally equivalent to an IPO and it should be treated as such. Professor Rodrigues further expressed her agreement with the proposal of extending potential Section 11 liability to SPACs' sponsors and underwriters on the basis that a de-SPAC transaction is functional equivalent of an IPO and that treating a de-SPAC transaction differently from an IPO would weaken investor protections without a good policy reason. And while more robust and standardized disclosure is necessary, it may not be sufficient. In fact, Professor Rodrigues observed that early SPACs required a majority vote to complete the acquisition, and if more than 20% of shares were redeemed then the deal wouldn't close. However, SPACs have evolved in recent months and most of them currently require a majority vote (and in some cases, they use tender offers to avoid a vote entirely) without the conversion threshold. As a result, she noted, the vote is often "meaningless" and decoupled from any economic interest because investors can vote in favor of the proposed merger but still redeem their shares. Professor Rodrigues suggested that this issue be addressed by requiring that if more than 50% of the SPAC's shareholders decided to redeem, then the acquisition should not go forward. This safeguard would be particularly important because SPACs are increasingly thinly traded. Where the concern is with the retail shareholders left behind after institutional players have redeemed their shares in the SPACs, Professor Rodrigues argued that simple disclosure would not be a sufficient protection for retail investors and that instead retail investors should have a protection comparable to that of sophisticated investors, which they would be more likely to have if economic and voting interests were aligned.[204]

During his testimony, Andreessen Horowitz Managing Partner Scott Kupor agreed with the other witnesses that there should be a level playing field and that the framework applicable to traditional IPOs and SPACs should not create regulatory arbitrage. He then called for the Congress and the SEC to provide clear guidance on the disclosure and liability regime for SPACs and encouraged them to conduct further studies to better understand the trading dynamics of SPACs, the redemption behavior of institutional investors, the potential conflicts of interest and the ultimate dilution borne by shareholders post de-SPAC transactions. A deeper understanding of these issues, he argued, could lead to enhanced and more effective disclosures to retail investors. Lastly, he observed that, even in the absence of new regulatory guidance, the SPAC markets are already "self-correcting" in response to institutional investors' feedback, noting in particular that PIPE investors are increasingly requiring SPACs' sponsors to hold on their shares for longer periods of time following the de-SPAC transactions, and that the size and nature of the sponsors' promotes are also being impacted.[205]

[204] See, Usha Rodrigues (Professor & M.E. Kilpatrick Chair of Corporate Finance and Securities Law, University of Georgia School of Law), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services, cit.

[205] See, Scott Kupor, (Managing Partner, Andreessen Horowitz), Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services, cit.

CHAPTER 4

SPACS IN THE UNITED KINGDOM

In stark contrast to the United States, the United Kingdom has seen very limited SPAC activity over the past year and half, with most UK SPACs having a small market capitalization, broad investment strategies and relatively few investors.

Data published by the Financial Conduct Authority ("FCA") estimate that there were only 33 SPACs listed in the United Kingdom as of April 2021.[206] Of these, 13 had their listing suspended. Of the remaining 20 SPACs with live listings, 2 had a size exceeding £100 million market capitalization, while two thirds were worth around £5 million or less.

Market cap:	**≤£5m**	**>£5m to ≤£10m**	**>£10m to ≤£100m**	**>£100m**	**Unknown**	**Total**
Number of 'live' UK-listed SPACs	13	–	2	2	3	**20**
% of live listings	65%	–	10%	10%	15%	100%
UK SPACs with suspended listing (last recorded market cap*)	10	3	–	–	–	**13**
% of suspended SPACs	77%	23%	–	–	–	100%
					Total SPACs:	**33**
					% of total SPACs that are currently suspended	***39%***

Source: Financial Conduct Authority (FCA) internal analysis; LSE Group public data.

UK SPACs typically list on the London Stock Exchange ("LSE") Standard segment or the AIM. The acquisition of a target company constitutes a reverse takeover for the purposes of the Listing Rules. On completion of the reverse takeover, the listing of the shares in the SPAC is cancelled, and the enlarged group needs to seek re-admission to trading to the same market or a different market if deemed more appropriate. This may involve, for instance, moving to the Premium segment on the LSE or a listing venue in another jurisdiction. In that context, the prospectus and the admission documents shall provide accurate information on the acquisition and the enlarged business, including the acquired entity.

Whilst the United Kingdom has not yet experienced the same uptick in SPAC activity as the United States, the use of SPACs has increasingly been discussed among UK market participants during the first half of 2021. In addition, in recent months UK regulators have started considering and implementing certain policy and regulatory changes to the applicable listing regime and environment to level the playing field for UK SPACs in relation to U.S. and European competitors. The changes considered and introduced by UK regulators are intended to lure SPACs and to attract to the UK markets more fast-growing companies that have been flocking to the United States and certain European countries over the last few months, in part because the regulatory frameworks in these jurisdictions are perceived to be more favorable. The following sections discuss recent UK regulatory developments relating to SPACs in more detail.

[206] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, Consultation Paper CP21/10 (April 2021), pp. 11-12.

4.1. The Kalifa Review of UK Fintech

On February 26, 2021, the FinTech Strategic Review, commissioned by the UK HM Treasury and led by former Worldpay CEO Ron Kalifa, published its highly anticipated findings on the state of the UK fintech industry (the "Kalifa Review").[207] The Kalifa Review recognizes the importance of the fintech industry to the UK economy and sets out an ambitious plan with the aim to enable the United Kingdom to retain its position as a global leader in the fintech space and to further build on this to benefit the broader UK economy.

The Kalifa Review begins by noting how the United Kingdom has rapidly become a dominant force in fintech, representing c. 10% of the global market and generating c. £11 billion in revenue.[208] It also recognizes that the trajectory of the UK fintech industry is at an inflection point of opportunity and risk, and identifies three broad threats to the United Kingdom's well-established fintech leadership position: (i) the increased competition from overseas financial centers (e.g., Singapore, Australia and Canada), which are investing heavily in a number of areas to support their fintech industries; (ii) the regulatory environment resulting from Brexit and the related uncertainty and complexity; and (iii) the Covid-19 pandemic, which has considerably accelerated digital adoption globally and has created openings for nimble jurisdictions to capitalize on fintech opportunities.

Against this background, the Kalifa Review identifies three key corresponding opportunities: (i) job creation across the United Kingdom, including new high-income, tech-based roles and the upskilling and retraining of the existing workforce; (ii) increased investment to enable fintech companies to achieve global scale through access to international markets, whilst the United Kingdom continues to be a leader on regulation and standard-setting in the fast-moving tech sector globally; and (iii) inclusion and sustainable recovery to allow citizens and small businesses to access more, better and cheaper financial services.

Building on the current position, the Kalifa Review sets out an ambitious five-point plan of recommendations, prompting the United Kingdom to redouble its focus on the fintech sector. The recommendations cover key areas such as: policy and regulation,[209] skills and talent,[210] investment,[211]

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[207] See, Kalifa Review of UK Fintech (February 26, 2021).
[208] Id., p. 6.
[209] Id., pp. 21-39 (the Kalifa Review emphasizes the central role and the relevance of the UK government in supporting and promoting fintech. It notes that the United Kingdom has led the way globally in its policy and regulatory approach to fintech and there is now a need to ensure the UK policy and regulatory approach continues to protect customers and also creates an enabling environment that encourages growth and competition. To that end, the Kalifa Review proposes the delivery of a digital finance package that creates a new regulatory framework for emerging technology, as well as the implementation of a "scalebox" that goes beyond the initial start-up stage to support firms focusing on scaling innovative technology. Further, the Kalifa Review encourages the creation of a Digital Economy Taskforce (DET) to ensure alignment across government. Lastly, it notes that fintech should form an integral part of the trade policy, and it encourages a coherent and consistent approach and increased commitments in the UK future trade agreements that would benefit fintech.).
[210] Id., pp. 40-51 (the Kalifa Review recognizes the value of people and human capital in the United Kingdom. Three are the main recommendations advanced in this regard: retraining and upskilling of the UK workforce to best support the fintech ecosystem by ensuring access to short courses from high-quality education providers at low cost; the creation of a new visa stream to enable fintech companies to access and attract global talent; and building a pipeline of fintech talent by supporting fintech scaleups to offer embedded work placements to further education and higher education students and kick-starters).
[211] Id., pp. 52-66 (the Kalifa Review recognizes that private funding has been crucial to the success of the United Kingdom as a fintech hub, but more can be done to support fintech companies at later stages of their growth. The Kalifa Review acknowledges the existence of a funding gap that affects UK high grow companies which have limited availability of capital required to reach the next stage of growth, as well as the decreasing number of listings on UK capital markets. Against this background, it proposes a number of actions to promote further investment and foster a culture of investment in the United Kingdom, including: expanding R&D tax credits and investment tax reliefs such as Enterprise Investment Scheme and Venture Capital Trusts to encourage further

international attractiveness and competitiveness,[212] and national connectivity.[213] The Kalifa Review recognizes the need for a vehicle to coordinate the delivery of these wide-ranging recommendations and suggests establishing a government-backed industry-led Centre for Finance, Innovation and Technology (CFIT) to take on this task.

The recommendations contained in the Kalifa Review have been well received and widely endorsed by the UK fintech industry and are expected to be highly influential in steering regulatory and policy reforms in the United Kingdom in the months to come.[214] The UK government has welcomed the findings of the Kalifa Review and the Chancellor has acknowledged the important contribution that the Kalifa Review makes to the plan "to retain the UK's fintech crown."[215] The UK government has committed to review the recommendations in detail and to respond in due course.[216]

4.2. Lord Hill's UK Listing Review

On March 3, 2021, the UK Listing Review, chaired by Lord Hill of Oareford CBE, published a long-anticipated report (the "Hill Review Report"),[217] which sets out the results of a comprehensive review of the UK public markets launched by the UK HM Treasury in November 2020[218] and a related call for evidence opened between November 2020 and January 2021.[219] The Hill Review Report, to be read alongside the Kalifa Review discussed above, examines the UK public markets and makes a series of recommendations with the aim to strengthen the United Kingdom's position as a leading global financial center, to enhance the United Kingdom as a destination for listings, and to optimize the capital raising process for companies seeking to list on the main UK public markets.

The focus of the Hill Review Report is very much on the listing regime and how it could be reformed. The Hill Review Report acknowledges that, although listing in the United Kingdom has historically been recognized as a mark of quality for companies, more recent data paint a stark picture: London accounted

investment in fintech startups; unlocking institutional capital to create a £1bn "Fintech Growth Fund" of sufficient scale to act as the catalyst in developing a world leading ecosystem and provide domestic growth stage (post-Series B) funding; improving the listing environment through free float reduction, dual class shares and relaxation of pre-emption rights to encourage more listings on UK capital markets; and creating a global family of fintech indices to enhance sector visibility and cement the UK's reputation as a premier listing destination.).

212 Id., pp. 67-85 (the Kalifa Review aims to foster an environment where UK fintech companies are encouraged to search for international opportunities and can be successful on a global scale. To that end, it proposes a number of actions, including: delivering an international action plan for fintech; driving increased international collaboration through the Centre for Finance, Innovation and Technology (CFIT); establishing an International Fintech Taskforce; and launching an international "Fintech Credential Portfolio" to support international credibility and increase ease of doing business.

213 Id., pp. 86-100 (the Kalifa Review acknowledges that, to maintain a position as a top-fintech hub, the United Kingdom should look beyond London and focus on scale and supporting regional specialisms, with particular focus on the valuable intellectual property being created in the universities across the United Kingdom. To that end, the Kalifa Review proposes to nurture the high growth potential of the top 10 fintech clusters, to drive national coordination strategy via the Centre for Finance, Innovation and Technology (CFIT), and to accelerate the development and growth of fintech clusters through further investment such as in R&D).

214 See, e.g., Slaughter and May, Financial Regulation Weekly Bulletin - 4 March 2021 (Slaughter and May, March 4, 2021); Linklaters, Kalifa Review of UK Fintech: 10 key takeaways (Linklaters LLP Insights, March 1, 2021); Skadden, Arps, Slate, Meagher & Flom, The Kalifa Review: A Road Map for the Future of UK Fintech? (Skadden, Arps, Slate, Meagher & Flom LLP, March 11, 2021); White & Case, Kalifa Review – Proposed Fintech Investment Reforms (White & Case LLP Publications, March 2, 2021); Bird & Bird, The Kalifa Review of UK Fintech – A Vision for the Future of Fintech (Bird & Bird LLP, March 2021); UK Finance, Maintaining the eminence of UK fintech– strategies from the Kalifa Review (UK Finance Insights, May 10, 2021); Deloitte, A new policy and regulatory strategy for FinTech: the Kalifa review (Deloitte Insights, March 2, 2021); Finextra, The Kalifa Review's five-point plan to bolster UK Fintech (Finextra, February 26, 2021).

215 See, HM Treasury, UK's global fintech leadership bolstered by new review, HM Treasury (February 26, 2021).

216 Ibidem.

217 See, UK Listing Review (March 3, 2021).

218 See, HM Treasury, Chancellor statement to the House – Financial Services, HM Treasury Oral Statement by Chancellor Rishi Sunak to Parliament (November 9, 2020); HM Treasury, New Review launched to attract high-quality innovative companies to list in UK - Lord Hill appointed as Chair of UK Listings Review, HM Treasury (November 19, 2020).

219 See, HM Treasury, Call for Evidence – UK Listings Review, Policy Paper (April 21, 2021).

for only 5% of IPOs globally between 2015 and 2020 and the number of listed companies in the United Kingdom has fallen by about 40% from a peak in 2008. The increased flow of businesses to financial markets like Amsterdam and Frankfurt provides further evidence that the United Kingdom is progressively losing ground and faces stiff competition as a financial center not only from the United States and Asia, but also from Europe.[220]

In addition, the composition of the FTSE index clearly shows that most of the companies listed in the United Kingdom are either financial or more representative of the 'old economy' than companies of the new growing economy. The Hill Review Report notes that although the United Kingdom has great strengths in technology and life science, the number of UK companies operating in these sectors coming to the public markets in London is still very limited. It then emphases the opportunities created by the strong pipeline of tech companies soon ready to go public and the importance to persuade these companies, among others, of the many advantages of listing in the United Kingdom.[221]

In making a number of recommendations of changes to the UK listing regime addressed to the UK Government and the FCA, the Hill Review Report stresses the need to take the best from competitive jurisdictions around the world and then combine that with London's traditional strengths, noting that "it makes no sense to have a theoretically perfect listing regime if in practice users increasingly choose other venues."[222]

The Hill Review Report tries to strike a delicate balance between a widespread sense of urgency and appetite for reform on the one hand, and the need to think longer term on the other hand, thus providing a mix of both immediate and longer-term recommendations. The task of improving London's competitiveness and strengthening the UK capital markets requires long-term attention and focus and is presented in the Hill Review Report as a task that is never complete and should be thought of as a rolling program, not a one-off exercise. [223] The recommendations set out in the Hill Review Report are a sensible initial step in that journey, at a time when many ambitious UK fast-growing tech and life science companies are considering a transition to the public markets.

By way of overarching recommendations, the Hill Review Report proposes two initiatives: first, from 2022, the Chancellor should present a short annual report to the Parliament on the state of the City, setting out the steps taken to improve the listing environment in the United Kingdom and considering further areas for reform; and second, as part of the Future Regulatory Framework Review, the UK HM Treasury should consider amending the FCA's current statutory objectives to charge the FCA with the objective of maintaining a listing environment that it is welcoming, supportive and dynamic whilst also being well regulated.

The Hill Review Report then goes on to provide a list of detailed and broad-ranging recommendations for changes to the UK listing and prospectus regime. These recommendations aim to encourage far-reaching reforms that will allow the UK capital markets to flourish and attract high growth companies.

[220] See, UK Listing Review, cit., p. 1.
[221] Id., p. 2.
[222] Ibidem.
[223] Id., p. 3.

They are designed to close the gap between London and other global capital markets by increasing the regime's flexibility and competitiveness, whilst maintaining high standards of regulation.[224] Some of the key recommendations involve the following changes: allowing issuers with dual class share structures to list on the Premium segment subject to certain limitations; relaxing the rules regarding SPACs including by removing the presumption of suspension when a SPAC announces a reverse takeover; reducing the free float threshold (from 25% to 15%) and introducing a choice of alternative metrics; facilitating the provision of forward-looking financial information to investors; tailoring financial statements to fit the business models of innovative growth companies; and undertaking a fundamental review of the prospectus regime to make prospectus less burdensome to produce and more useful to investors.

The recommendations set out in the Hill Review Report signal the desire to maintain the United Kingdom's position as a global leader in financial markets and the fintech sector, and they reflect some of the proposals set out in the Kalifa Review discussed above. Although many of the recommendations are highly technical, the Hill Review Report notes that, taken together, the recommendations would not only make a practical difference to improving some of the listing processes, but would also send a broader message that London is getting on the front foot. The implementation of the proposed recommendations would demonstrate that the UK markets are able to combine high standards of regulation and governance with flexibility and nimbleness, which are key to attract more growth-stage innovative companies to list in London, and to trigger a virtuous circle of increased capital, investment, jobs and improved returns for investors.[225]

Notably, one of the key areas of consideration for the Hill Review Report is the loosening of the SPAC regime in the United Kingdom. According to the Hill Review Report, there is a dangerous perception that the United Kingdom is not a viable location for SPAC listings, which is causing UK-based companies, particularly fast-growing tech companies, to seek a U.S. or EU SPAC route for financing.

As previously discussed, whilst SPACs have rapidly gained popularity in the United States and more recently in Europe, the market for SPACs has remained relatively dormant in the United Kingdom. In fact, only 4 SPACs listed in the United Kingdom in 2020, which raised a total of £0.03 billion. The Hill Review Report notes that "the recent use by a number of technology-focused companies of the de-SPAC route in the US indicates that the UK is losing out on home-grown and strategically significant companies coming to market in London."[226]

The Hill Review Report observes that several market participants believe that the SPAC trend will continue and some of them have provided relevant evidence that SPACs will likely become increasingly popular sources of finance for European companies seeking alternative routes to public markets to a traditional IPO. On the other hand, the Hill Review Report notes that a number of reservations have also been expressed about SPACs, including concerns relating to the role of, and the share allocation to, the sponsors and the performance of SPACs over time.[227]

[224] Id., p. 9.
[225] Ibidem.
[226] Id., p. 29.
[227] Ibidem.

Responses to the earlier call of evidence opened between November 2020 and January 2021 suggest that, although there may be several reasons why UK SPAC financing has not emerged at scale, two key factors are regulatory: the rule that requires trading in a SPAC to be suspended when the SPAC announces an intended acquisition or in case of leaks; and the inability of issuers to provide meaningful forward-looking information because of the personal liability that attaches to such statements.[228]

Firstly, the rule regarding trading suspension is seen as a key deterrent for potential UK SPAC investors, as it creates the risks for investors to be locked into their investment for an uncertain period of time following the identification of an acquisition target even if the investors wish to exit due to differences of view over the target or for other reasons. To address these concerns and to facilitate the development of SPAC activity, the Hill Review Report recommends the FCA to remove the rebuttable presumption of suspension and to replace it with appropriate rules and guidance aimed at increasing investor confidence in SPACs, in a way similar to how commercial companies are treated.[229] The Hill Review Report suggests that the new guidance could cover various aspects including: the minimum information that a SPAC must disclose to the market upon the announcement of a transaction in relation to a target company; the right of a SPAC's shareholders to vote on an acquisition and to redeem their initial investment prior to the completion of a de-SPAC transaction; and if necessary to safeguard market integrity, the size of a SPAC below which the suspension presumption continues to apply.[230] The Hill Review Report acknowledges that to implement these changes, the FCA will need to consult on amendments to the Listing Rules (see below).

Secondly, the Hill Review Report notes that the level of liability associated with forward-looking statements under the existing rules has become a key deterrent for any such statements. In fact, issuers tend to provide very little forward-looking information to market participants in the United Kingdom, and instead they typically disclose some forward-looking guidance to connected research analysts and review the analysts' models for factual accuracy prior to the publication of their research, following which that information is threaded into the prospectus in a way that will allow investors to build a sensible-looking model.[231]

This approach differentiates UK SPACs from U.S. SPACs, as the latter can currently rely on a safe harbor under U.S. laws to provide forward-looking statements concerning their target companies, provided those statements are identified as forward-looking and are accompanied by meaningful cautionary wording identifying important factors that could cause the actual results to differ materially from those projected in the statement.

The Hill Review Report acknowledges that "forward-looking information is a key, if not the key, category of information that investors ask for when a company is carrying out private funding rounds."[232]

[228] Id., p. 30.
[229] Id., pp. 30-31 (the Hill Review Report notes that when this rule was last reviewed in 2018, the FCA removed the rebuttable presumption of suspension for commercial companies but retained it for SPACs because of the increase in the number of SPACs with very small capitalization which were experiencing high levels of volatility around the time of a proposed transaction. However, the rules now seem to be deterring SPACs of all sizes).
[230] Id., p. 31.
[231] Id., p. 38.
[232] Ibidem.

It openly questions the fact that "the flow of that information […] be curtailed precisely when a company is taking what is usually the most significant corporate step in its history as well as often its largest fundraise and/or liquidity event,"[233] and argues that the existent approach to forward-looking statements discussed above "is clearly a highly inefficient and unsatisfactory process."[234] Further, the Hill Review Report notes that it would be strange for an investor to expect the same level of certainty over forward-looking statements as there is over past events, and argues that the current equal level of liability associated with both backwards-looking and forward-looking information should be revised.[235]

Importantly, responses to the earlier call for evidence support the view expressed in the Hill Review Report and suggest that investors (particularly those in high-growth companies) would like to receive more forward-looking information and that issuers would be willing to provide this kind of information to investors.[236]

To address these concerns and to facilitate the provision of high-quality forward-looking information by issuers in prospectuses, the Hill Review Report recommends amending the liability regime for issuers and their directors to allow directors of companies to publish and stand behind their forward-looking models. This could be achieved, for example, by directors having a defense to liability provided that they could demonstrate that they exercised due care, skill and diligence in preparing the disclosure and they honestly believed it to be true when published. This should apply across the issuer spectrum, including in relation to SPACs, at the time of their first and any subsequent acquisitions.[237]

The Hill Review Report expects the proposed change to the liability regime for forward-looking statements to be welcomed by market participants, to contribute increased efficiency, and to provide more useful and higher quality information to all investors.[238] The Hill Review Report notes that to implement this change the UK HM Treasury would need to launch a consultative review of the liability regime for prospectuses, listing particulars and other published information in the Financial Services and Markets Act 2000 as amended (FSMA) as it relates to forward-looking information (see below).

The recommendations discussed above come at an inflection point for the UK capital markets considering the increasing cohort of innovative and fast-growing tech and life science companies coming to the public markets in the coming months. Implementation of the proposed changes would be critical for the United Kingdom to become a competitive center for SPAC activity and to increase the choice for issuers and investors.

Comments made following the release of the Hill Review Report by a wide range of market participants showed strong support and agreement on the need to implement these recommendations swiftly.[239]

[233] Ibidem.
[234] Id., p. 39.
[235] Ibidem.
[236] Id., p. 38.
[237] Id., pp. 39-40.
[238] Id., p. 40.
[239] See, e.g., Linklaters, Review of the UK Listing Regime: "closing the gap" (Linklaters LLP Insights, March 4, 2021); Slaughter and May, Looking Ahead: Equity Capital Markets Outlook (Slaughter and May, April 8, 2021); Simmons & Simmons, The UK listing review – seizing the opportunity for reform? (Simmons & Simmons LLP, March 5, 2021); White & Case, UK Listings Review – Recommendations published – SPACs and more (White & Case LLP Publications, March 3, 2021); Goodwin Procter, UK Listings Review: Do New Recommendations Change The Game For Tech And Life Sciences Companies? (Goodwin Procter LLP, March 16, 2021); Cooley, UK Listings Review: Lord Hill's Recommendations on the UK Listing Regime (Cooley LLP

The FCA responded shortly after the publication of the Hill Review Report, noting its support for the Hill Review Report as a valuable contribution in assessing how UK markets can continue to meet high regulatory standards, while also ensuring flexibility and effectiveness for issuers and investors.[240] The FCA confirmed that it would consider the recommendations carefully and would act quickly where appropriate, including by publishing a consultation on SPACs with a view to making the relevant rule changes in mid-2021 (see below).[241]

In April 2021, the UK government announced its intent to take forward the recommendations aimed at the UK HM Treasury in the Hill Review Report.[242] In particular, the UK government confirmed that it would publish a consultation on the UK prospectus regime later in 2021 (see below), [243] and would work to bring together an expert group to consider what further can be done to improve the efficiency of capital raising processes by listed companies. The UK government also noted that it was considering the stakeholder responses received on the first consultation relating to the Future Regulatory Framework closed on February 19, 2021, and that it would use those responses to inform a second consultation later in 2021. Further, it confirmed that the Chancellor would present an annual "State of the City" report to the UK Parliament, with the first of these reports to be presented in 2022. Lastly, the UK government noted that the Department for Business, Energy and Industrial Strategy (BEIS) would take forward the recommendations concerning the use of technology to improve retail investor involvement in corporate actions and their undertaking of an appropriate stewardship role.

4.3. FCA's Consultation and Final Changes to the Listing Rules for SPACs

Following swiftly on the recommendations set out in the Hill Review Report, on April 30, 2021, the FCA launched a consultation on proposed changes to its Listing Rules that apply to SPACs, with the aim to create an attractive market environment for these vehicles and their investors in the United Kingdom (the "FCA Consultation on Listing Rules for SPACs").[244] The FCA Consultation on Listing Rules for SPACs remained open for four weeks through to the end of May 2021, and was welcomed positively by various market participants.[245]

Insights, March 9, 2021); Daniel Thomas and Philip Stafford, UK listing rules set for overhaul in dash to catch Spacs wave (Financial Times, March 2, 2021); Polly Jean Harrison, Fintechs React to the Lord Hill Review (The Fintech Times, March 6, 2021); Chris Hughes, If London Can't Beat SPACs, It Should Join Them (Bloomberg, March 1, 2021); Philip Stafford, George Parker and Daniel Thomas, UK markets regulator unveils plan to reform Spac rules (Financial Times, March 31, 2021).

[240] See, Financial Conduct Authority (FCA), FCA welcomes Lord Hill's Listing Review report, FCA Statements (March 3, 2021).

[241] Ibidem. See, also, Financial Conduct Authority (FCA), Future consultation on strengthening investor protections in Special Purpose Acquisition Companies (SPACs), FCA Statements (March 31, 2021). See Section 5.3.

[242] See, HM Treasury, UK Listings Review: Government response, HM Treasury (April 19, 2021).

[243] See Section 5.4.

[244] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit.

[245] See, e.g., Finextra, FCA consults on strengthening investor protections in Spacs (Finextra, April 30, 2021); Finextra, What does the FCA's consultation into SPAC listings mean for UK fintech? (Finextra, May 12, 2021); Daniel Thomas and Philip Stafford, FCA vows more nimble policymaking as it seeks to loosen Spac rules (Financial Times, April 30, 2021); Davis Polk, FCA Consultation on Rules for SPACs Listing in London (Davis Polk & Wardwell LLP Client Memorandum, May 6, 2021); Simmons & Simmons, Keeping up with the neighbours? The FCA consults on a new UK SPAC regime (Simmons & Simmons LLP, May 5, 2021); Skadden, Arps, Slate, Meagher & Flom, FCA Releases Consultation Paper Proposing Draft Rules for SPACs (Skadden, Arps, Slate, Meagher & Flom LLP, May 4, 2021); Slaughter and May, Financial Regulation Weekly Bulletin - 6 May 2021 (Slaughter and May, May 6, 2021); Weil Gotshal & Manges, SPACS Come to the U.K. (Weil Gotshal & Manges LLP, May 3, 2021); Cleary Gottlieb, SPACs and More: Key Proposals for Change to the UK's Listing Regime (Cleary Gottlieb Steen & Hamilton LLP, Alert Memorandum, June 8, 2021); White & Case, FCA SPAC Consultation – Draft Rules Published (White & Case LLP Publications, April 30, 2021); Orrick Herrington & Sutcliffe, Exit through the SPAC door? UK FCA publishes proposed changes to the Listing Rules (Orrick Herrington & Sutcliffe LLP, May 19, 2021); Cooley, UK's FCA Consults on Proposed Changes to the Listing Rules Relating to SPACs (Cooley LLP Insights, May 7, 2021).

In developing its proposals, the FCA considered the recommendations in the Hill Review Report discussed above, while also analyzing key features and trends in the U.S. market and assessing relevant risks and benefits of SPACs following the rapid growth of SPAC IPOs in recent months. [246]

Commenting on the FCA Consultation on Listing Rules for SPACs in April 2021, Clare Cole, Director of Market Oversight at the FCA, noted that the proposed changes "should encourage issuers that are willing to provide transparency and strong protections to investors. This should support market confidence and aligns [the United Kingdom's] approach more closely with standards in other international markets." FCA Director Cole emphasized that the proposed changes would aim to provide "a more flexible regime for larger SPACs, while still ensuring investor protections, potentially resulting in a wider range of large SPACs listed in the UK, increased choice for investors and an alternative route to public markets for private companies." FCA Director Cole further argued that the United Kingdom's position outside the European Union would allow for "a new, more nimble approach to domestic policymaking", but in doing so, the FCA would continue to be "guided by the principles of robust regulation, high standards and strong safeguards."[247]

On July 27, 2021, the FCA published a policy statement which summarizes the feedback received on the FCA Consultation on Listing Rules for SPACs, sets out the FCA's policy response and includes final rules and amendments to its technical note on cash shell companies (the "FCA Policy Statement on Listing Rules for SPACs"). [248] The new rules and guidance came into force on August 10, 2021. The implementation of the final rules shortly after closing of the consultation period evidences the FCA's intent to promptly introduce investor protection measures in light of a much-anticipated growth in SPAC activity.

The focus of the FCA Consultation on Listing Rules for SPACs and the FCA Policy Statement on Listing Rules for SPACs is the presumption of suspension of the listing for SPACs, which has long been considered one of the main barriers to SPAC listings in London causing the United Kingdom to lag far behind the United States and certain EU jurisdictions in the recent "SPAC boom".

Before the introduction of the new rules in August 2021, the prior regime provided for a general rebuttable presumption that the FCA would suspend the listing of a SPAC when a SPAC identified a potential acquisition target or if details of the proposed acquisition leaked in order to preserve market integrity during a period when limited information on a prospective transaction could impair the process of proper price formation and may result in disorderly trading in a SPAC's shares.

Despite these key objectives, the described approach to suspension had also significant drawbacks as it meant that investors in UK SPACs were generally locked in at the point an acquisition target was announced, potentially for many months prior to completion. This created relevant challenges for investors, who could not sell their shares and faced the risk of incurring relevant losses due to a poor

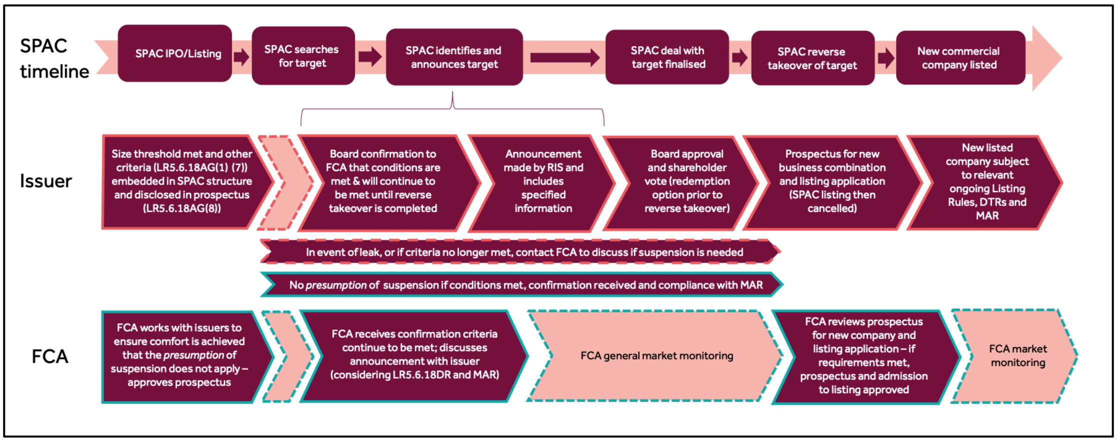
[246] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., p. 8.
[247] See, Financial Conduct Authority (FCA), FCA consults on strengthening investor protections in SPACs, FCA Press Release (April 30, 2021).
[248] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, Policy Statement PS 21/10 (July 2021); Financial Conduct Authority (FCA), FCA publishes final rules to strengthen investor protections in SPACs, FCA Press Release (July 27, 2021).

acquisition, which they had little or no ability to scrutinize or express their view on. As a result, the previous suspension approach created uncertainty and inflexibility both for issuers and prospective investors and was arguably ineffective in reducing or managing potential conflicts of interest for a SPAC's sponsors, directors, and management when choosing a target company. Furthermore, the previous suspension approach was imposing a disproportionate barrier to listing for SPACs with enhanced investor protections built into their structures, especially when compared to other jurisdictions which allow shares in a SPAC to continue trading and have witnessed exponential SPAC activity over the past year and half. For example, U.S. regulation does not presume a suspension of listing when a SPAC identifies a target, and SPACs listed on U.S. public markets routinely include features designed to improve investor protection. Models similar to those adopted in the United States have recently emerged in Europe, with several SPAC listings on markets in Amsterdam, Frankfurt and Paris combining features from the U.S. SPAC market practice with EU regulatory requirements while also not presuming a suspension of listing at the time an acquisition is announced.[249]

To address these concerns and drawbacks, in April 2021 the FCA proposed to remove the presumption of suspension for SPACs that meet certain criteria discussed in greater detail below, which are intended to strengthen the protection for investors, while maintaining the smooth operation of the market. In response to feedback received during the consultation period, the FCA made three main changes to its original proposal. Otherwise, the final rules and guidance, which were released by the FCA in July and came into effect in August 2021, implemented the initial proposal largely unchanged.

The changes to the Listing Rules introduced by the FCA aim to provide an alternative route to market for SPACs demonstrating higher levels of investor protection. The specified criteria have been designed to benefit SPACs that can achieve a certain scale and aim to ensure transparency and to mitigate the risk of conflicts of interest between a SPAC's sponsors (including founders, directors, and management) and its investors. SPACs that do not meet the identified criteria, and those choosing not to meet them, will continue to be subject to a presumption of suspension.

Overview of the alternative approach to suspension and the FCA's supervisory approach



Source: Financial Conduct Authority (FCA) PS21/10.

[249] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., pp. 7-8.

The criteria that a SPAC must satisfy to disapply the FCA's presumption of suspension are the following:[250]

- Size threshold - SPACs must meet a minimum size threshold of £100 million in gross proceeds to be raised when the shares in a SPAC are initially listed. This threshold is calculated excluding any funds that the sponsors (including any founders, directors or others that have a role in promoting or supporting the SPAC) have provided to the SPAC, whether in return for shares or by way of general cash injection in the company. In the FCA's view, the SPAC's ability to raise material sums from public shareholders at inception is more likely to mean that a high level of institutional investment is needed (with institutional investors performing due diligence on the SPAC and its management, thus leading to greater scrutiny of the investment proposition) and to evidence the existence of an experienced management team and supporting advisors. The FCA has reduced this threshold from £200 million, which it consulted on, in response to feedback. The threshold of £100 million is considered sufficiently high to still attract institutional investors, which should ensure a higher degree of scrutiny of the company, while being more appropriate to the size of likely targets in a UK/European context.
- Ring-fenced proceeds - SPACs must adequately ring-fence the funds raised from public markets via an independent third-party to protect the funds from misappropriation or excessive running costs being incurred by the SPAC's management. The ring-fencing should be structured such that funds can only be used to finance an acquisition or a redemption of shares from the shareholders and shall be returned to shareholders if the SPAC winds up or if it fails to find a target or complete an acquisition within the time limit, net of any amounts specifically agreed to be used for operating costs which must be clearly disclosed to investors in the prospectus at the time of the SPAC's IPO. To allow a degree of flexibility for issuers, the FCA has not specified that the funds must be held in a trust or an escrow account, although these methods are commonly used in other markets and may be appropriate for UK SPACs as well. Additionally, the FCA has not required that the independent third-party service provider be an authorized entity, although it may be depending on the arrangements that the SPAC has put in place. However, the FCA has clarified that the independent third-party should be appropriate. This means that, for example, the third-party service provider should be a separate legal entity not under the SPAC's control or influence and should have relevant experience. This would not necessarily exclude banks or other companies with which the SPAC has an existing affiliation or service relationship.
- Time limit for making an acquisition - SPACs must have a time limit on their operating period and not be "open-ended." The FCA has set a 2-year deadline for a SPAC to find and acquire a target company, which starts from the date of the SPAC's admission to listing. If at the end of the 2-year period a target company has been identified and announced but the acquisition has not yet closed, the SPAC should be given the flexibility to extend its operations by up to an additional 12 months, subject to approval by its public shareholders. In response to feedback received during the

[250] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., pp. 16-23; See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., pp. 5-6, 9-24.

consultation period, the FCA has introduced an option to extend the 2-year limited operating period (or 3-year period if extended) by 6 months without the need to get shareholder approval. The additional 6 months is only available in limited circumstances, for instance where the SPAC is in the process of getting shareholder approval for an acquisition or has already gained approval and time is needed to complete the final stages of a transaction. The use of the additional 6-month extension must be notified to the market before the end of the 2-year period (or 3-year period if extended).

The time limit indicated above should be set in the SPAC's articles of association or equivalent constitutional documents and should be disclosed to investors at the outset and be clearly referenced in the prospectus. This requirement reflects common practice and is intended to increase certainty and protection for investors, while creating the right incentives for the SPAC's management to find a suitable target company. If the SPAC has not completed its acquisition within the specified timeframe, the ring-fenced proceeds must be returned to the shareholders before the SPAC winds itself up and has its listing cancelled.

- Board and shareholder approval of an acquisition - SPACs must obtain Board approval of any proposed acquisition, excluding from the Board discussion and vote any Board member that is a director of the target company or any of its subsidiaries (or has an associate that is a director of the target company or any of its subsidiaries), or has a conflict of interest in relation to the target company or any of its subsidiaries. For the purposes of whether a director is excluded from Board approval of a transaction, the conflict of interest is specifically related to the target or its subsidiaries. Thus, for example, this criterion excludes directors that have loaned the target money, hold an equity stake in the target or have other direct links with the target. It does not however prevent a director from participating in Board approval due to having a general financial interest in the SPAC, including where a director holds sponsor/founder shares. Instead, the shareholder vote and the redemption rights discussed below provide separate protections in relation to this inherent conflict.

  In addition to Board approval, SPACs must also obtain shareholder approval for any proposed acquisition, with a majority vote in favor being required to proceed with a deal. SPACs' sponsors, founders and directors holding securities in the SPACs should be prevented from voting. The shareholder vote should be based on sufficient disclosure of key terms of the proposed transaction necessary to allow investors in the SPAC to make a properly informed decision, as well as a 'fair and reasonable' statement where any conflict of interest exists between the SPAC's directors and the target company (see below). The information disclosed to the shareholders should include, among others, detail on the impact on ordinary shareholders of shares or warrants held by the SPAC's sponsors, any conflict of interest they may have in the proposed transaction, and any additional dilution effects on existing shareholders from potential redemptions or the terms of additional financing from private placements (e.g., any PIPE transactions).

  These approval and disclosure requirements aim to ensure that both the Board and the shareholders have an opportunity to scrutinize and approve a proposed transaction, that conflicts of interest in relation to any target company are adequately disclosed and managed, and that a high standard of due diligence is applied to any potential acquisition.

- Fair and reasonable statement - Where any of the SPAC's directors has a conflict of interest in relation to the target company or a subsidiary of the target company, the Board of the SPAC must publish a statement that the proposed transaction is 'fair and reasonable' as far as the public shareholders of the company are concerned. This statement should reflect advice by an appropriately qualified and independent adviser. The Board statement must be provided to the shareholders of the SPAC in sufficient time before the shareholders vote on the proposed acquisition.
- Shareholder redemption rights - SPACs must provide a redemption option to their shareholders allowing them to exit the SPAC before any acquisition is completed. The redemption option should specify a predetermined price at which shares will be redeemed (either a fixed amount or fixed pro rata share of ring-fenced proceeds, net of any pre-agreed amounts the SPAC retains for its running costs). As a right attaching to the shares, the terms of a redemption option should be detailed in the SPAC's initial prospectus under existing prospectus requirements.
- Disclosure – SPACs must provide adequate disclosures to investors at the appropriate stages in the SPAC's lifecycle: from the SPAC's IPO to any de-SPAC transaction that results in the SPAC completing a takeover of another business and establishing a new company. The SPAC's prospectus should include, without limitation, information on the structure of the offer (including any warrants issued alongside shares and their terms), the background and expertise of the management team, the strategy of the SPAC, identified risk factors, ring-fenced arrangements, time limits for making an acquisition, any conflicts of interest, as well as voting and redemption rights attached to the securities. When an initial target company is identified, the SPAC should release an announcement containing, among others, a description of the target business and any material terms of the proposed transaction (including information on the dilutive impact of the proposed transaction), links to all relevant publicly available information on the target (e.g. its most recent publicly filed annual report and accounts), the estimated timeline for negotiation of the transaction, an explanation of how the target has been, or will be, assessed and any other details of which investors should be aware to make a properly informed decision. The announcement should also identify any information described above that has not been included because it is not known at the time of the announcement. Following the announcement, the SPAC should update the information described above as necessary if new information becomes available prior to the shareholder vote on the proposed acquisition. Importantly, in addition to the above, the FCA has clarified that a SPAC with shares admitted to trading on a UK market continues to be subject to the UK Market Abuse Regulation and the FCA Disclosure Guidance and Transparency Rules provisions, to largely safeguard adequate transparency around a SPAC's activities and key terms.

The selected criteria discussed above incorporate into the UK regime many of the key protections applicable to a typical U.S. SPAC. Yet, despite the similarities, there are some relevant deviations from the U.S. model that market participants would need to carefully consider:

- First and principal amongst these deviations is the exclusion of the SPAC's sponsors (including founders, directors, and management) from the shareholder vote to approve the de-SPAC transaction, a restriction that is not present in the United States.

- Second, while U.S. SPACs are typically subject to applicable directors' fiduciary duties, majority independent director and similar governance requirements, the U.S. regime does not impose a requirement for a "fair and reasonable statement" similar to the one requested by the FCA in the event the SPAC's sponsors have a conflict of interest in relation to a target company or its subsidiary.
- Third, different from U.S. based de-SPACs transactions, the changes implemented by the FCA do not contemplate a requirement for the de-SPAC transaction to utilize at least 80% of the funds raised in the SPAC's IPO.
- Fourth, the changes introduced by the FCA go beyond the requirements applicable to U.S. SPACs by providing that UK SPACs that want to remove the presumption of suspension should raise £100 million or more in gross proceeds at their initial admission, and for the purposes of this threshold the FCA excludes the funds provided by the SPAC's sponsors.
- Fifth, the redemption requirement proposed by the FCA is broadly in line with market practice in the United States. However, under both the NYSE and Nasdaq rules if a shareholder vote is held then only those shareholders that vote against the acquisition will be required to be offered the ability to redeem their shares, although U.S. SPAC's corporate governance documents typically require the offer to be made to all shareholders. If no shareholder vote is held, then under the NYSE and Nasdaq rules all shareholders will need to be granted redemption rights.
- Lastly, although funds raised by SPACs must be ring-fenced and held by an independent third-party in line with U.S. market practice, the FCA has not required that the ring-fencing be achieved by way of a trust or an escrow account.

In response to feedback received during the consultation period, the FCA has modified its supervisory approach to provide more comfort prior to admission to listing that an issuer is within the guidance which disapplies the presumption of suspension. The FCA has acknowledged that issuers will want comfort prior to admission that they are within the guidance, rather than only at the point that an announcement is to be made, and has therefore proposed to work with issuers and their advisers to ensure that such comfort is achieved as part of the process of vetting the prospectus and assessing eligibility for listing.[251]

Where the FCA has given comfort prior to admission that an issuer is within the guidance, a SPAC should still contact the FCA:

- before announcing an acquisition transaction that has been agreed or is in contemplation, in order for the SPAC to re-confirm (via written Board confirmation) that it meets the conditions and will continue to do so post announcement until completion of the acquisition, and to discuss its proposed announcement of a target; and
- when details of the proposed transaction have leaked, to inform the FCA of the action it has taken or will take to respond to the leak.

Where details of the proposed transaction have leaked, it is possible that a short period of suspension may occur following the leak, before being lifted when the SPAC confirms that the new criteria have been met and makes the required announcement, as discussed above. In response to feedback, the FCA

[251] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., pp. 27-28.

has clarified that the FCA would not expect to reconsider a previous assessment of whether the SPAC meets the conditions or take action to suspend at this stage if the SPAC has acted in compliance with the UK Market Abuse Regulation and provides a Board confirmation to the FCA in writing that it still meets the conditions. Suspension of listing may still be necessary, but the FCA will consider this under its general suspension powers, as the FCA would for listed commercial companies.[252]

SPACs should include disclosure in their IPO prospectus indicating their intention to seek to take advantage of the alternative guidance to avoid suspension. However, the FCA has made it clear that even if a SPAC complies with the new rules and guidance at the time of its IPO, the FCA cannot guarantee that suspension at a future date will not be necessary, and the disclosure in the prospectus should reflect this fact. In particular, if following its IPO, a SPAC makes changes to, or removes, any of the specified investor protection measures such that the specific criteria discussed above are no longer satisfied when the SPAC announces a target, or at any point afterwards until the reverse takeover completes, then the SPAC will not be able to use the alternative approach to suspension and it will need to notify the FCA to request a suspension.[253]

In addition to the foregoing, the FCA welcomed comments and views on whether further measures or a different approach could be considered to ensure adequate protection for investors. This includes whether the proposed approach to SPACs could be differentiated for vehicles focused on sustainability and investing based on environmental, social and governance (ESG) factors. For example, if a SPAC is seeking to invest in target companies that develop green technology and it provides disclosures that align with the Task Force for Climate-related Financial Disclosure (TCFD) initiative, the FCA could consider applying modified criteria to such SPACs, including a longer period to complete an acquisition or a lower initial capital raising threshold. The guidance for ESG-focused SPACs is not expected to be implemented in the nearer future, but the FCA has noted that it may follow at a later stage if market participants see benefit in a slightly different regime for SPACs seeking acquisitions in this sector.[254] The FCA has carefully considered the feedback provided in this regard and, although it has made no changes at this stage, it has committed to keep this under review.[255]

Moreover, the FCA has recognized that there may be merit in considering a separate listing category for SPACs, thus opening the possibility of further changes in due course and has indicated its intent to discuss this in later publications on its review of primary markets and response to the Hill Review Report.[256]

In the FCA Policy Statement on Listing Rules for SPACs, the FCA has stated its intent to strike a balance by setting robust, credible standards that the FCA considers beneficial for investors and issuers alike,

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[252] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., pp. 22-23; Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., pp. 26-28.
[253] Ibidem.
[254] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., p. 23; Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., pp. 23-25.
[255] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., p. 24.
[256] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., pp. 3, 8.

which may then encourage more SPAC listings in the UK in the future.[257] While new offers of SPACs in the United States have seen a slowdown in Q2 2021, the FCA has noted that the common US SPAC model would appear to be leading to greater interest in similar listings in the UK if the issue of the presumption of suspension was resolved.[258]

Whilst relaxing some of the previous requirements, the FCA has clarified that private companies listing in the UK via a SPAC will still be subject to the full rigor of the FCA's listing rules and transparency and disclosure obligations.[259] Moreover, both in the FCA Consultation on Listing Rules for SPACs[260] and the FCA Policy Statement on Listing Rules for SPACs,[261] the FCA has cautioned market participants that SPACs remain a relatively complex investment vehicle, requiring investors to understand their capital structure and assess the potential value and return prospects of any acquisition target being proposed. The FCA has also observed that evidence from the US market tends to suggest that SPACs have highly varied returns for public investors and can often result in losses. Thus, despite a degree of hype around these vehicles, the FCA has reminded investors to carefully consider whether investing in a SPAC is appropriate for them based on all the available information.

At the date of writing, it remains to be seen whether the changes to the regulatory framework for SPACs recently introduced by the FCA as discussed above will put the UK regime on a footing similar to the regulatory regimes of competing financial markets in the United States and Europe and whether they will lead to increased institutional investor appetite and growing interest by private companies, which are required for the UK SPAC market to gather material momentum.

4.4. UK HM Treasury's Consultation on the UK Prospectus Regime Review

In his Mansion House speech on July 1, 2021, UK Chancellor Rishi Sunak pledged to "sharpen" the competitive advantage of the United Kingdom as he set out his vision for the future of the financial services in the United Kingdom post-Brexit.[262]

During his remarks, UK Chancellor Sunak highlighted how the United Kingdom's departure from the European Union presents a unique opportunity to shape new rules and to forge new international collaborations, while maintaining high regulatory standards and open markets.[263] He then announced the publication of a document – 'A new chapter for financial services' – detailing the UK government's vision for an open, green and technologically advanced financial services sector that is globally competitive and acts in the interests of communities and citizens, creating jobs, supporting businesses, and powering growth across all of the United Kingdom.[264]

[257] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., p. 3.
[258] Id., p. 4.
[259] Ibidem.
[260] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules, cit., pp. 3, 5, and 16.
[261] See, Financial Conduct Authority (FCA), Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules, cit., p. 3.
[262] See, HM Treasury, Mansion House Speech 2021 – Rishi Sunak. The Chancellor's 2021 Mansion House speech, HM Treasury Speech (July 1, 2021).
[263] Ibidem.
[264] See, HM Treasury, A New Chapter for Financial Services, HM Treasury Report (July 1, 2021).

The UK government's vision is shaped around four key themes: (i) an open and global financial hub; (ii) a sector at the forefront of technology and innovation; (iii) a world-leader in green finance; and (iv) a competitive marketplace promoting effective use of capital.[265] This builds on the vision originally announced by UK Chancellor Sunak in his statement to the House of Commons on the future of financial services in November 2020.

Alongside the Mansion House speech and the accompanying document, on July 1, 2020, the UK HM Treasury published a number of consultations which take forward the described strategy.[266] Notable among them is a consultation paper on the proposed review of the UK prospectus regime, which sets out how the UK government proposes reviewing and potentially replacing the prospectus regime that the United Kingdom has inherited from the EU (the "Consultation Paper on the UK Prospectus Regime").[267] In doing so, the UK government is responding to three of the recommendations from the Hill Review Report, including that the UK government carry out a fundamental review of the UK's prospectus regime. The consultation will close on September 24, 2021.

In the Consultation Paper on the UK Prospectus Regime, the UK government considers four key objectives: (i) facilitating wider participation in the ownership of public companies; (ii) improving the efficiency of public capital raising by simplifying the applicable regulation and removing the duplications that currently exist in the UK prospectus regime; (iii) improving the quality of information that investors receive; and (iv) improving the agility of regulation in this area.[268]

The Consultation Paper on the UK Prospectus Regime suggests a new approach to the two main regulatory issues regulated under the EU Prospectus Regulation – the admissions of securities to trading and the public offers of securities – and proposes that these being dealt with separately in the future.[269]

In relation to the admissions to trading, the UK government proposes to remove Section 85(2) of the Financial Services and Markets Act 2000 (FSMA), which currently prohibits requesting admission to trading on regulated markets without first having published an approved prospectus. Under Section 85(3) of FSMA, this offence is punishable by up to 2 years in prison, or a fine, or both. In place of Section 85(2) of FSMA, the UK government proposes to give the FCA new rule making responsibilities on admissions to trading on regulated markets. This would enable the FCA to incorporate a replacement regime into its handbook and to tailor the regime appropriately when required. The FCA would be able to specify in its rules, among other things, when a prospectus is needed and would also have the discretion to determine its content requirements.[270]

In seeking feedback on the design of the new FCA's rule making powers that will replace those parts of the EU Prospectus Regulation that address admissions to trading on regulated markets, the UK

[265] Ibidem.
[266] See, e.g., HM Treasury, UK Prospectus Regime: A Consultation, HM Treasury Consultation (July 1, 2021); HM Treasury, UK Wholesale Markets Review: A Consultation, HM Treasury Consultation (July 1, 2021); HM Treasury, Access to Cash Consultation, HM Treasury Consultation (July 1, 2021); HM Treasury, Access to Cash: Call for Evidence, HM Treasury (July 1, 2021); HM Treasury, Access to Cash: Call for Evidence – Summary of Responses, HM Treasury (July 1, 2021); HM Treasury, Solvency II Review: Call for Evidence, HM Treasury (July 1, 2021).
[267] See, e.g., HM Treasury, UK Prospectus Regime: A Consultation, HM Treasury Consultation, cit.
[268] Id., p. 7.
[269] Id., pp. 8-10.
[270] Id., p. 8.

government considers what the fundamental purpose of a prospectus is and suggests that a prospectus should be a device to provide potential investors with the information that they need to make reliable investment decisions in a security.[271] It then goes on to propose that the FCA be given discretion to determine whether a prospectus is required when securities are admitted to trading on UK regulated markets, including flexibility to establish rules or exemptions equivalent to Article 1(5) of the EU Prospectus Regulation, or to extend them should the FCA deem it appropriate.[272] The UK government further recognizes that consideration of the purpose of a prospectus needs to encompass the issue of prospectuses for further issues.[273]

The UK government then addresses the need to create a framework which would permit overseas companies wanting a secondary listing on UK markets to use an overseas prospectus prepared in accordance with the rules in the jurisdiction of their primary listing.[274] The general approach proposed in the Consultation Paper on the UK Prospectus Regime is to give the FCA broad discretion to determine whether a prospectus is required in relation to an admission to trading on a regulated market. On that basis, the UK government notes that the FCA could use that discretion not to require a UK prospectus where a prospectus is published in another country, and instead accept an overseas prospectus in certain circumstances should it deem it appropriate.[275]

As it proposes to re-design the UK prospectus regime, the UK government considers what elements of the regime should remain in legislation or in the FCA handbook. Its initial view is that provisions that contribute to the establishment of the liability attaching to prospectuses should be located in statute. However, because the overall rationale for giving the FCA rule making powers is to make the regime agile and flexible, the UK government proposes that provisions be retained in statute only where strictly necessary.[276]

In focusing on the provisions that regulate the prospectus content, the UK government proposes retaining in statute an overall standard of preparation for a prospectus based on the existing "necessary information" test. In doing so, it also acknowledges that what is "necessary information" may vary depending on certain factors, including whether the issuer's securities are to be admitted to the market for the first time or they have been admitted to the market before, and whether the securities being issued are debt securities.[277]

The UK government then proposes to give the FCA the responsibility to make detailed rules on content. This would enable the FCA to specify the component parts of the document should it wish to, as well as the detail of individual items of content. Similarly, the FCA would have discretion to determine how base prospectuses should work or to establish the procedure for setting a final price in a price range prospectus. The FCA could also choose how to vary the content requirements for further issuances and could depart from the narrow approach currently contained in Article 14 of the EU Prospectus

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[271] Id., pp. 11-12.
[272] Id., p. 13.
[273] Ibidem.
[274] Id, p. 14.
[275] Ibidem.
[276] Ibidem.
[277] Id., pp. 15-16.

Regulation. Lastly, under the revised regime the FCA would retain the ability to authorize the omission of information from a prospectus under certain circumstances, which would otherwise be normally required in the document.[278]

In assessing whether the FCA should review the prospectus prior to approval and publication, the UK government considers giving the FCA the flexibility to establish its own policy in this area.[279]

Of particular interest for SPACs and market participants, the Consultation Paper on the UK Prospectus Regime discusses a proposed reform of the prospectus liability as it relates to forward-looking information, and how the reform could help achieve the objective of improving the quality of information that investors receive. The UK government notes that the Hill Review Report identifies forward-looking information as "a key, if not the key, category of information that investors ask for when a company is carrying out private funding rounds" and expresses the view that the existing prospectus regime deters companies from including such information in the prospectuses they publish when they come to float in public markets, noting that "it is perverse that the flow of that information should be curtailed precisely when a company is taking what is usually the most significant corporate step in its history as well as often its largest fundraise and/or liquidity event." As previously discussed, the Hill Review Report identifies the legal liability companies and their directors face as the main deterrent to the inclusion of forward-looking information in prospectuses and notes that companies seeking to list are advised to rely on "connected research" (meaning equity research notes published by analysts from the investment banks in the underwriting syndicate) in order to signal to market participants the company management's views of the potential profitability of the company. The Hill Review Report acknowledges that this process is opaque and adds to the time and cost of IPOs.

Against this background, the UK government proposes to apply to forward-looking information in prospectuses and relevant omissions the same "recklessness" or "dishonesty" liability standard applicable to misleading statements under Section 463 of the Companies Act 2006 and Schedule 10A (3) of FSMA. If implemented, this would constitute a reduction in liability from the 'negligent' liability standard which currently applies to prospectuses under Section 90 and Schedule 10 of FSMA. The revised standard would apply only in relation to statements in a prospectus which project or predict a future state of affairs. It would not apply to statements of fact (namely any statement on the state of affairs at the date of the document or any statement of historic fact) or the working capital statement in a prospectus, which would continue to be subject to the existing Section 90 FSMA standard.[280] Importantly, if a company includes forward-looking statements and wishes these to be subject to the proposed new lower standard of liability for forward-looking information described above, additional warnings would be required, including that the information is explicitly identified as forward-looking information (so there is inherent uncertainty as to whether the projection or prediction will prove to be accurate) and that a lower standard of liability applies.[281]

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[278] Id., p. 17.
[279] Id., p. 18.
[280] Id., pp. 20-22.
[281] Id., p. 22.

In addition to regulated markets, the Consultation Paper on the UK Prospectus Regime sets out certain options for addressing companies whose securities are, or will be, admitted to trading on a multilateral trading facility (MTF), including SME Growth Markets (e.g., AIM and Aquis Growth Market in the United Kingdom). The UK government considers how alterations could help achieve the objective of facilitating wider participation in the ownership of public companies and removing disincentives that currently exist for those companies to issue securities to wider groups of investors.[282]

Currently, a prospectus is not required on initial admission to a MTF unless a public offering occurs, and instead an admission document is typically required by the MTF operator's own rules. The UK government proposes two options for addressing companies admitted to MTFs: first, a simple exemption from the Section 85(1) FSMA restriction on public offerings of securities; or second, an exemption from the Section 85(1) FSMA restriction along with a new "MTF admission prospectus," which would fall within the scope of Section 90 of FSMA, including the change to the standard of liability in respect of forward-looking statements discussed above. Under the second approach, the exchange operating the MTF would be able to specify the content of the "MTF admission prospectus" through its own rulebook, together with procedures for ensuring it meets the requirements of the MTF. The FCA would retain oversight of MTF rules as it does under the existing regime.[283]

After discussing a number of proposed changes to the regulation governing admissions of trading, the UK government considers certain proposed changes to the UK public offer rules. In looking at the key elements of the UK's public offering rules, the UK government begins by proposing to retain the Section 85(1) FSMA prohibition on public offers of transferable securities absent a publication of an FCA-approved prospectus, as well as the accompanying sanction (2 years in prison, or a fine, or both) under Section 85(3) of FSMA. However, it also suggests that new exemptions for companies with (or applying to have) securities admitted to trading on stock markets of various types be introduced. Such exemptions would cover offers of securities admitted to trading on regulated markets or junior markets like AIM or the Acquis Growth Market. Exemptions for companies admitted to trading on overseas equivalents of regulated markets would also be introduced. This would mean that offerors of securities admitted to trading on stock markets or subject to an application for admission to a stock market would be exempted from rules governing public offers of securities on the basis that the securities are already freely trading or, in the case of an IPO, will be freely trading once the IPO completes.[284]

In parallel, the UK government proposes some changes to what constitutes "the public" in a public offering of securities to ensure that fundraises to existing stakeholders in a company are not treated as public offers of securities subject to the penalties mentioned above. This proposal aims to remove a disincentive against offering shares to a company's own shareholders and is intended to facilitate wider participation.[285] On the other side, the UK government believes that the overall package of proposals is sufficient such that there is no need to change the 150-person threshold in the Article 1(4)(b) exemption, the Article 1.4(i) exemption for public offers to employees, former employees, directors and ex-directors,

[282] Id., p. 23.
[283] Id., pp. 24-26.
[284] Id., pp. 8-9.
[285] Id., pp. 27-28.

and the ‘Qualified Investor’ exemption in Article 2(e) in the Prospectus Regulation, but seeks views on this approach.

The Consultation Paper on the UK Prospectus Regime then investigates how the reformed regime would affect public offerings of securities by private companies and overseas companies.

In relation to the former, the UK government observes that the current size threshold for an offer under which an offeror is exempted from the requirement to publish a prospectus is Euro 8 million. Research shows that the FCA approved very few ‘public offer only’ prospectuses (i.e., prospectuses issued in connection with a fundraising but with no admission to a stock market (of any type)) between 2017 and 2020, and that securities-based crowd funding rounds has increased considerably during the same period. The UK government notes that, while the Euro 8 million threshold is intended to provide a level at which additional obligations apply to public offers, recent data show that fundraisings over the threshold at which a prospectus is required are rare. Moreover, whilst the exemption is intended to operate as a threshold, data indicate that it is in fact operating more like a cap. In light of these findings, the UK government is looking at alternative options to the requirement that an offeror publish a prospectus where a private company offers securities which are not to be admitted to a stock market of any type. Three are the main options being considered: first, a requirement for the offer to be made through an authorized firm; second, a requirement for the offer to be made through an authorized firm subject to a new bespoke permission; and third, the *status quo* option with no changes.[286]

In relation to the latter, the Consultation Paper on the UK Prospectus Regime sets out three options for overseas securities being admitted to UK stock markets and views are sought on each. A first option would be to maintain the *status quo* with overseas issuers being able to extend an offer (in association with an admission of securities to an overseas stock market) into the United Kingdom provided an FCA-approved prospectus is reviewed and approved. A second option would be to introduce a new regime of regulatory deference to replace the equivalence regime set out in Articles 29 and 30 of the current Prospectus Regulation. This would allow companies with securities listed on a non-UK stock market to extend an offer of those securities to the public in the United Kingdom, based on offering documents prepared in accordance with the rules of that market’s jurisdiction. However, there would be no FCA review of the documents, and such a mechanism would consider investor protection on a wider and more holistic basis than is currently the case. Lastly, a third option would be not to provide an equivalent right to make a public offer in the United Kingdom under the revised regime. This would not constrain the UK government from including such a mechanism on a reciprocal basis in any mutual recognition arrangement in the future.[287]

As a final issue addressed in the Consultation Paper on the UK Prospectus Regime, the UK government considers the risks of cross-border public offerings in the securities of overseas private companies to be in a different category to those presented by listed companies. The UK government is minded not to provide a facility enabling these companies to make public offerings into the United Kingdom. As noted

[286] Id., pp. 31-39.
[287] Id., pp. 40-42.

above, the 'Qualified Investor' exemption would continue to facilitate the access of UK institutional investors to overseas private equity markets.[288]

4.5. FCA's Consultation on the Effectiveness of UK Primary Markets

On July 5, 2021, the FCA launched a wide-ranging consultation on a series of proposed reforms to improve the effectiveness of UK primary markets, alongside a discussion of how it may continue to develop the regime to ensure the United Kingdom remains a competitive and dynamic destination for issuers and investors (the "FCA Consultation on the Effectiveness of UK Primary Markets").[289]

The FCA Consultation on the Effectiveness of UK Primary Markets responds to the recommendations for the listing regime put forward in the Hill Review Report and the Kalifa Review discussed in prior sections, and it seeks to ensure that the United Kingdom remains an attractive place to grow and list successful companies.

The proposed changes aim to reduce barriers to listing and, thus, increase the range of investment opportunities on UK public markets. The FCA recognizes the changing nature of companies coming to public markets and seeks to broaden access for investors to companies in high-growth sectors by improving flexibility and accessibility in the FCA's listing regime as a gateway to the UK main public markets. The FCA also proposes measures to ensure the listing regime continues to have high standards of market integrity, corporate governance and shareholder protections and to simplify its rulebook.

The key measures on which the FCA is consulting are the following:

- allowing a targeted form of dual class share structures within the Premium listing segment to encourage innovative, often founder-led companies onto public markets sooner, and so broaden the listed investment landscape for investors in the United Kingdom;
- reducing the amount of shares an issuer is required to have in public hands (i.e. free float) from 25% to 10%, to reduce potential barriers for issuers created by current requirements;
- increasing the minimum market capitalization ("MMC") threshold for both the Premium and Standard listing segments for shares in ordinary commercial companies from £700,000 to £50 million, with the aim to give investors greater trust and clarity about the types of company with shares admitted to different markets; and
- making several minor changes to the Listing Rules, Disclosure Guidance and Transparency Rules and the Prospectus Regulation Rules to simplify the FCA's rulebooks and reflect changes in current technology and business practices.

Alongside these measures, the FCA is also seeking views on the overall structure of its listing regime and whether wider-reaching reforms could improve its longer-term effectiveness. The FCA seeks to understand the value placed by market participants on different aspects of the current regime, as well as to gather views on how the regime could be modernized.

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[288] Id., pp. 42-43.

[289] See, Financial Conduct Authority (FCA), FCA consults on reforms to improve the effectiveness of UK primary markets, FCA Statements (July 5, 2021); Financial Conduct Authority (FCA), Primary Markets Effectiveness Review, Consultation Paper CP21/21 (July 2021).

Commenting on the FCA Consultation on the Effectiveness of UK Primary Markets, FCA Director of Market Oversight Clare Cole noted that "[e]ffective public markets are critical in enabling companies to finance their businesses, which in turn creates growth and jobs for the UK economy. These proposals are essential if we intend for the UK to continue to be a modern and dynamic market. Today, we are acting assertively to meet the needs of an evolving marketplace." She then went on to observe that "[the FCA's] proposals should result in a wider range of listings in the UK, and increased choice for investors while [the FCA] continue[s] to ensure appropriate levels of investor protection. They are intended to encourage high quality companies to list earlier, and so increase the possibility of a wider investor base being able to access growth in these companies."

The FCA is consulting for 10 weeks, with a closing date of September 14, 2021. Subject to consultation feedback and FCA Board approval, the FCA will seek to make relevant rules before the end of 2021. On the discussion areas, the FCA will provide feedback and potentially consult further on wider listing regime changes in due course, if appropriate.

CHAPTER 5

SPACS IN EUROPE

5.1. European SPAC Activity Starts to Gather Pace

Europe has been slower to join in the SPAC trend compared to the United States, but European markets are progressively catching up with SPACs gathering increased attention from European sponsors, investors and potential target companies in the first half of 2021.[290]

While several sponsors have continued to tap U.S. markets for liquidity and a number of fast growing European private companies have been acquired, or are considering a proposed acquisition, by U.S. SPACs,[291] a few European jurisdictions have also seen the emergence of SPAC IPOs on their stock markets and more de-SPAC transactions involving European SPACs and targets have taken place in the last few months.[292]

A total of 19 SPACs raising aggregate $5.19 billion listed on European stock exchanges during the first half of 2021.[293] This represents a relevant increase compared to $496 million raised across 4 SPACs launched in Europe in 2020, and $376 million raised across 5 SPACs listed in Europe in 2019. This recent growth in SPAC issuances seems to suggest an increased preference by European sponsors to list their SPACs on European stock exchanges and to look for target opportunities in Europe, thus avoiding the crowded U.S. SPAC market which is facing tighter regulatory scrutiny and growing litigation risks.[294]

Annual breakdown of European-listed SPAC IPOs

Year	Number of issues	Market share (%)
2019	5	18
2020	4	14
2021	19	68
Total	**28**	**100**

Source: Refinitiv.

Over the past few months, the size of European SPAC IPOs has also grown larger. The average size of SPAC IPOs in Europe was c. $75 million in 2019; it subsequently increased to c. $124 million in 2020, and during the first half of 2021 the average size reached c. $320 million. This increase is partially attributable to the growing investor appetite for SPACs and the enhanced quality of the sponsors of newly formed SPACs in Europe.[295]

[290] See Sections 2.1 and 2.2 and accompanying footnotes.
[291] See, e.g., PWC, European Companies Showing Strong Interest in a US SPAC Merger, cit.; PWC, European Companies Considering a US SPAC Merger (PWC Insights, February 2021).
[292] See, e.g., Leah Hodgson, As the US SPAC boom cools, Europe's is just heating up (PitchBook, May 17, 2021); Alex Webb, The SPAC Party Gets Going in Europe, This Time With Better Terms (Bloomberg, May 24, 2021); Vanya Damyanova, European stock exchanges expect SPAC surge in 2021, but not at US scale (S&P Global Market Intelligence, March 29, 2021); Karam Filfilan, Founders: Here's what you need to know about European SPACs, cit.; Ryan Browne, After U.S. SPAC frenzy, blank-check firms eye deals in Europe's burgeoning tech sector (CNBC, February 12, 2021); J.P. Morgan, What is a SPAC?, cit.
[293] See, White & Case, European SPAC & De-SPAC Data & statistics roundup (White & Case LLP Publications, July 2021), pp. 2-4.
[294] Ibidem
[295] See, Deloitte, The SPACs boom - Europe picks up the pace (Deloitte Insights, July 14, 2021).

As SPAC activity gradually heats up amid growing interest among market participants in Europe, various European jurisdictions are emerging as increasingly receptive environments for SPACs.[296]

Issuance stock exchange by number of SPAC listings (1 January 2021 to 30 June 2021)

Primary exchange nation	Number of issues	Market share (%)
Netherlands	6	32
Sweden	4	21
France	3	16
Germany	3	16
United Kingdom	1	5
Italy	1	5
Finland	1	5
Total	**19**	**100**

Source: Refinitiv.

Among the various European financial centers, Amsterdam has rapidly emerged as the premier destination for SPACs. The Euronext Amsterdam has taken the lead in developing SPAC expertise ahead of other stock exchanges in Europe and has been able to leverage its flexible listing rules to attract more SPACs in the first half of 2021.[297] In addition, the reputation of Euronext Amsterdam as a home to international companies has helped make it a more attractive venue for SPACs than its European rivals.[298] Among the high-profile examples of SPACs that have chosen the Euronext Amsterdam for their listing are: Pegasus Europe, a SPAC sponsored by former UniCredit bank CEO Jean-Pierre Mustier, LVMH chief executive Bernard Arnault and Tikehau Capital, which raised Euro 500 million in its Euronext Amsterdam IPO in April 2021 and targets acquisitions in the European financial services sector;[299] European FinTech IPO Company 1, a SPAC launched by former Commerzbank CEO Martin Blessing, which raised c. Euro 415 million in its Euronext Amsterdam IPO in March 2021 and currently targets fintech companies;[300] and Hedosophia European Growth, a SPAC launched by British fund manager Hedosophia, which raised Euro 400 million in its Euronext Amsterdam IPO in May 2021 and targets European tech companies worth up to Euro 5 billion.[301]

Along with Amsterdam, Frankfurt has also gained increased traction as an attractive listing venue for SPACs, with a few SPACs listing on the Frankfurt Stock Exchange in the first months of 2021. Notable among these listings is the Euro 275 million IPO of Lakestar SPAC I in February 2021, a SPAC backed by German venture capitalist Klaus Hommels which focuses on European late-stage growth technology companies.[302] A dozen more listings of SPACs are expected in Frankfurt in the second half of 2021.[303]

[296] See, White & Case, European SPAC & De-SPAC Data & statistics roundup, cit. pp. 2-4.
[297] See, e.g., Nikou Asgari and Stephen Morris, European bankers set sights on Amsterdam as regional Spac capital, cit.; PYMNTS, Europe Eyes Amsterdam As Center For SPACs (PYMNTS, February 17, 2021); Velocity Global, Why Amsterdam Is the Capital of Europe's SPAC Frenzy (Velocity Global, March 19, 2021).
[298] Ibidem.
[299] See Section 2.2 and accompanying footnote 118.
[300] See Section 2.2 and accompanying footnote 117.
[301] See, e.g., Reuters, UK investor Ian Osborne raises $484 million in Amsterdam SPAC listing (Reuters, May 14, 2021); Timothy Adler, Hedosophia to float €400m Spac to buy European tech unicorns (Growth Business, May 11, 2021); PitchBook, Hedosophia European Growth raises €400M in Amsterdam listing (PitchBook, May 17, 2021); Alex Webb, The SPAC Party Gets Going in Europe, This Time With Better Terms, cit.
[302] See, e.g., Paul Clarke and Lina Saigol, Frankfurt lands first US-style Spac launch with Klaus Hommels' Lakestar (Financial News, February 17, 2021); Ryan Browne, Tech investor Klaus Hommels launches $332 million SPAC in Europe (CNBC, February 17, 2021).
[303] See, Christoph Steitz, Deutsche Boerse expects 12 SPACs in Frankfurt in 2021 (Reuters, May 2, 2021).

Following in the footsteps of Amsterdam and Frankfurt, Paris has rapidly emerged as an active listing venue for SPACs, with an increasing number of high-profile sponsors announcing the listing of their SPACs on the Euronext Paris in late 2020 and the first half of 2021. Notable examples are: the Euro 300 million IPO of 2MX Organic in December 2020, a SPAC sponsored by French billionaire Xavier Niel, banker and former Lazard executive Matthieu Pigasse and prominent businessman Moez-Alexandre Zouari, which aims to acquire one or more target companies operating in the consumer goods industry in Europe valued at up to Euro 1.5 billion;[304] and the Euro 275 million IPO of I2PO in July 2021, a SPAC sponsored by French business billionaire Francois Pinault's family and Matthieu Pigasse, which focuses on the leisure and entertainment sectors.[305]

In addition to a gradual increase in SPAC IPOs in Europe, de-SPAC transactions involving European target companies have also gained traction. The first half of 2021 recorded 29 de-SPAC transactions for European targets, up from 11 de-SPAC transactions with European targets in 2020 and 5 such deals in 2019.[306] Of the 29 European de-SPAC transactions, 14 involved U.S. buyers. UK buyers were the next most active with 6 deals, followed by German buyers with 3 deals.[307] Whilst U.S. acquirors still account for a large market share, the buyer landscape is becoming more diverse and is seeing increased participation by European SPACs. There are several reasons why European private companies may favor implementing a business combination with a European SPAC, including tax structuring considerations and cross-border tax rules, accounting considerations, the attractiveness of certain sponsors to European investors and target companies, as well as more flexibility on certain corporate governance requirements and stock exchange listing rules.

Although the European SPAC market may not match the scale of the SPAC boom seen in the United States over the past year and half, the level of dialogue and interest in SPACs among market participants in Europe continues to be strong at the date of writing. The opportunities for SPAC listings and de-SPAC transactions in Europe are expected to increase even further in the coming months, as investor appetite escalates and numerous European companies reach the right size and maturity to seek public capital markets funding to support the next stage of their growth.

5.2. Selected Legal Considerations for European SPACs

The extent to which the traditional structure and features of U.S. SPACs can be replicated in Europe depends in large part on the applicable regulatory framework, the flexibility of the relevant jurisdiction's corporate and securities laws, the listing rules of the stock exchange on which the SPAC and the enlarged group are listed, as well as marketing considerations.[308]

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[304] See, e.g., Swetha Gopinath and Angelina Rascouet, Billionaire's $363 Million Blank-Check Firm Jumps in Debut (Bloomberg, December 9, 2020); Reuters, SPAC owned by Niel, Pigasse and Zouari soars on its Paris debut (Reuters, December 9, 2020).
[305] See, e.g., Victor Mallet, France's billionaire Pinault family joins European Spac push (Financial Times, July 14, 2021); Reuters, Pinault and Pigasse join forces on entertainment-focused SPAC (Reuters, July 14, 2021).
[306] See, White & Case, European SPAC & De-SPAC Data & statistics roundup, cit. pp. 5-8.
[307] Ibidem.
[308] See, e.g., Skadden, Arps, Slate, Meagher & Flom, SPACs: Reshaping M&A and IPOs for European Companies (Skadden, Arps, Slate, Meagher & Flom LLP, February 10, 2021); Latham & Watkins, Europe Set for Increased SPAC Activity (Latham & Watkins LLP, June 24, 2021); Freshfields Bruckhaus Deringer, US SPAC Boom Spreads to Europe with Recent Amsterdam and Frankfurt SPAC Listings and Potential Reform in London (Freshfields Bruckhaus Deringer LLP Insights, March 10, 2021); Cleary Gottlieb, Europe Prepares for SPAC Surge (Cleary Gottlieb Steen & Hamilton LLP Insights, March 31, 2021); Allen & Overy, European special purpose acquisition companies (SPACs) (Allen & Overy LLP Insights, 2021); White & Case, US SPACs look beyond their

The Dutch private company with limited liability (BV) and the European company incorporated in Luxembourg (SE) have been used by several SPACs that have recently listed in Europe.

As indicated above, Amsterdam has emerged as the most popular venue for SPAC listings in Europe in part due to the flexibility of its listing rules and the Dutch legal system, which is considered more accommodating for SPAC transactions. SPACs listed in Amsterdam tend to follow the same basic structure of U.S. SPACs, but with some important differences.[309] For example, in contrast to U.S. SPACs, SPACs that have recently listed in Amsterdam have requested a higher threshold (70%) for shareholder approval of the proposed initial business combination, with the sponsors being prohibited to vote their founder shares.[310] Moreover, while de-SPAC transactions in the United States must be with a target(s) with an aggregate fair market value equal to at least 80% of the value of the assets held in the SPAC's trust account, Dutch SPACs are not subject to this target-size restriction, and instead can decide to acquire one or more private companies of their choice.

Furthermore, different from U.S. SPACs, the SPACs that have recently listed in Amsterdam have allowed only shareholders who have voted against the proposed initial business combination to exercise their redemption rights.[311] Additionally, the SPACs that have listed in Amsterdam have involved a promote ranging from 8-10% to 20% or more of the SPAC's share capital and have issued half of their warrants to shareholders in the context of their IPOs, with the remaining half to be issued when the de-SPAC transaction closes.

As previously discussed, market participants are also increasingly looking at Frankfurt as a leading European center for SPAC listings. The key structural terms of SPACs listed on the Frankfurt Stock Exchange and the U.S. stock exchanges are very similar. For example, in the United States de-SPAC transactions generally require a shareholder majority vote, and the SPAC's sponsors are typically entitled to vote their shares. Similarly, initial business combinations of SPACs listed in Frankfurt must be approved by a majority of the SPAC's shareholders, and the sponsors can vote their shares. In addition, on all matters subject to a shareholder vote (including a proposed initial business combination) the holders of founder shares and the holders of public shares can typically vote as a single class, with each share entitling the holder to one vote.

Similar to the shareholders of U.S. SPACs, shareholders of SPACs listed in Frankfurt can typically redeem their shares irrespective of whether and how they vote on the proposed initial business combination. Moreover, consistent with U.S. practice, recent SPACs listed in Frankfurt have issued to their sponsors a promote of roughly 20% of the SPAC's share capital and have offered their warrants to shareholders at closing of their IPOs. In addition, similarly to the United States, underwriters of IPOs of

backyard to Europe (White & Case LLP Insights, March 19, 2021); Baker McKenzie, SPACs cross the Atlantic, cit.; Clifford Chance, SPACs in Europe (Clifford Chance LLP Insights, February 26, 2021); Dentons, Special Purpose Acquisition Companies (SPACs) (Dentons Insights, September 23, 2020).

[309] Dutch companies can be formed as Naamloze Venootschaps (NVs) or Besloten Vennootschaps (BVs). Two out of three Dutch SPACs listed to date are BVs.

[310] Dutch law allows more flexibility compared to the structures adopted by the three SPACs that have recently listed in Amsterdam. For example, business combinations by NVs must be approved by more than 50% of the votes casted, whilst there is no explicit rule setting a minimum vote requirement for BVs. In addition, Dutch law does not restrict SPACs' sponsors from voting their founder shares in connection with the proposed business combination.

[311] Dutch law allows more flexibility in this regard and doesn't restrict shareholders who vote in favor of a proposed business combination from redeeming their shares.

SPACs listed in Frankfurt have received a portion of their underwriting fees at the closing of the IPO, with the remaining in the form of a deferred fee to be paid upon completion of the SPAC's initial business combinations. However, different from U.S. SPACs whose target companies must have a fair market value of at least 80% of the value of the assets held in the SPAC's trust account, SPACs listed in Frankfurt are not subject to this restriction and have more flexibility to choose one or more target companies.

In addition to corporate and securities laws and stock exchange rules discussed above, the sponsors of European SPACs must consider, among others, the Alternative Investment Fund Managers Directive and national legislation implementing it, which govern alternative investment fund ("AIF") managers based in the European Union ("EU") and non-EU countries within the European Economic Area ("EEA") and any fund marketing activities within the EU and the EEA. The directive restricts the management of an AIF and the marketing of shares or units in an AIF without having the required authorizations. To avoid being qualified as an AIF, SPACs can be structured to fall within certain exemptions for operating companies outside the financial sector or holding companies. In the absence of specific authoritative guidance relating to SPACs and given the potential for different regulatory views, European SPACs' sponsors are generally encouraged to approach the competent regulatory authority early in the process to discuss the matter in more detail.

5.3. ESMA's Disclosure and Investor Protection Guidance on SPACs

As Europe is looking to transform itself into a SPAC-friendly region and European exchanges are seeing growing interest in SPACs, European regulators are also increasing their scrutiny on SPAC activity.

In April 2021, it was reported that Natasha Cazenave, Executive Director at the European Securities and Markets Authority (ESMA), had urged the European Union to study the rise of SPACs.[312] In her remarks, ESMA Executive Director Cazenave noted that "[the European Union] need[s] to understand why [SPACs] are so popular, why do people provide money just on the basis of the sponsors' names and announcement of a project".[313] She further acknowledged that "it is too early to say if [SPACs] are a "bubble" and that "it's too soon to make a determination ... and what should be the appropriate response from a European perspective."[314]

More recently, in July 2021, ESMA released a public statement on the prospectus disclosure and investor protection issues raised by SPACs ("SPAC Public Statement").[315]

The SPAC Public Statement highlights ESMA's view that SPAC transactions may not be appropriate investments for all investors due to the risks relating to the dilution, conflicts of interests in relation to the sponsors' incentives and the uncertainty as to the identification and evaluation of the target companies.[316]

[312] See, e.g., Huw Jones and Arno Schuetze, EU needs to study rise of SPACs, says ESMA exec candidate (Reuters, April 22, 2021).
[313] Ibidem.
[314] Ibidem.
[315] See, European Securities and Markets Authority (ESMA), SPACs: prospectus disclosure and investor protection considerations, Public Statement (July 15, 2021); European Securities and Markets Authority (ESMA), ESMA publishes disclosure and investor protection guidance on SPACs, Press Statement (July 15, 2021).
[316] Id., p. 2

ESMA acknowledges that, although SPAC activity has increased significantly in the Europe Union in the first half of 2021, there is not yet a harmonized regulatory approach to SPAC transactions. This is partly because the relevant structure and approach will depend on what is allowed under national laws across the Europe Union. ESMA further notes that the structure of SPAC transactions is complex and there may be variations between transactions. Because of the differences in company laws and market practices across jurisdictions, investors need to study the SPAC structures very carefully to ensure that they fully understand the proposed SPAC transactions.[317]

In view of the described complexity and the diversity of SPAC transactions in the Europe Union, ESMA's SPAC Public Statement aim to: promote a coordinated approach by national competent authorities ("NCAs") regarding the scrutiny of the disclosures included in prospectuses relating to SPACs, which are approved in accordance with Regulation (EU) 2017/11291 ("Prospectus Regulation"); promote uniform disclosure and provide SPACs with a better understanding of the disclosure that NCAs will expect them to include in their prospectuses; and support investors' analysis of these transactions by ensuring that potential investors are provided with comprehensible, clear and comparable information when making their investment decisions in SPACs.[318]

In its SPAC Public Statement, ESMA observes that the typical life cycle of a SPAC consists of three key phases – the SPAC's IPO, the SPAC's search for a target company, and the business combination between the SPAC and the selected target company. It then notes that it is possible that no approved prospectus is published in relation to the third stage of the SPAC's life cycle (the business combination), unless required under the Prospectus Regulation. Absent a prospectus, ESMA expresses the concern that the disclosure provided by the SPACs to their shareholders at the meeting held to approve the proposed business combination may not meet the standards that would normally be expected and verified by a NCA when a new business is admitted to trading on a regulated market or where shares are offered to the public.[319]

ESMA notes that some disclosure requirements are likely to have particular significance when determining whether a prospectus relating to a SPAC includes all the necessary information to allow an investor to make an informed investment decision. It therefore encourages NCAs to focus their scrutiny on the following disclosure requirements, among others:[320]

- Risk factors - Risk factors concerning both the issuer and its securities should address the conflicts of interest inherent in a SPAC transaction, the governance of the SPAC, the decision-making process concerning the business combination, and any possible future dilution, such as dilution arising from the payment of the sponsors' fees in shares, the exercise of warrants and/or in relation to the financing of the acquisition. Issuers should use a table or diagram to indicate the amount of possible dilution in different scenarios.
- Strategy and objectives - Issuers should provide a detailed description of the issuer's business strategy and objectives, both financial and non-financial (if any). This description shall take into

[317] Id, pp. 1-2.
[318] Ibidem.
[319] Ibidem.
[320] Id, pp. 3-6.

account the issuer’s future challenges and prospects. Detailed information should be provided in relation to the issuer’s investment policy and strategy, and the criteria for the selection of the target company. This must be consistent with the rest of the information contained in the prospectus. For example, if the issuer intends to invest in a “green” target or a tech company but is also able to select a target outside of these sectors, then the name of the issuer should not imply that it will only invest in environmental, social, and governance (ESG) or tech companies.

- Escrow accounts and the reinvestment of the proceeds - Issuers should include information on the funding structure of the issuer. NCAs should confirm that the prospectuses contain information on any escrow account and the reinvestment of the proceeds of the offering in the period before the acquisition of the target company, including any reliance on third parties and any investment policy.
- Relevant experience and principal activities of the administrative, management and supervisory bodies - Issuers should include an indication of the principal activities performed by the members of the administrative, management and supervisory bodies outside of that issuer that are relevant to their role within the issuer, as well as each member’s relevant management expertise and experience.
- Conflicts of interest / sponsors - The prospectus should disclose any conflicts of interest arising under the following circumstances: in the event that the sponsors will lose their initial investment if no acquisition is completed by a specific deadline; in relation to any agreements with the sponsors restricting their disposal of the issuer’s securities; concerning any possibility that the SPAC could invest in companies associated with the sponsors; relating to the fact that the sponsors and their affiliates may have already invested in the same sector as the SPAC; and emerging due to the fact that the sponsors and their affiliates are not obligated to share any potential targets they identify with the SPAC and may acquire these targets themselves.
- Shares, warrants and shareholder rights - Issuers should provide detailed information on the share and warrant structure, including information on any redemption, withdrawal rights and information about any rights that the shareholders meeting shall approve concerning the acquisition of the target company. ESMA expects the prospectus to contain detailed information regarding the procedure for approving the business combination, including the required majority for its approval. Additionally, the prospectus should contain a detailed description of the disclosures that will be provided at the shareholders meeting about the target company and the proposed business combination, particularly if an approved prospectus concerning the business combination may not be presented to the investors. Importantly, even if no prospectus is required for the business combination, ESMA expects that issuers provide a level of disclosure about the business combination similar to that included in an approved prospectus.
- Major shareholders - The prospectus should include information on any major shareholders, including: the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer’s capital or voting rights which is notifiable under the issuer’s national law, together with the amount of each such person’s interest; and information as to whether major shareholders have different voting rights. Negative disclosures are also required on these points.
- Related party transactions - Issuers must provide information about any related party transactions.

- Material interests - Issuers should include information about any material interests in the SPAC transactions, including conflicts of interest. In particular, the issuers should disclose any services provided to the issuers by parties associated with the sponsors.
- Information on the proceeds of the offer - If the IPO proceeds do not cover the entire acquisition price, the prospectus should contain an estimation of the amount and sources of other funds needed, including further details on the proceeds since they are being used to acquire the target company. The issuers should include information on different scenarios if necessary to provide investors with sufficient information to make an informed investment decision. Equivalent information should also be provided in relation to the shares and the warrants placed with the sponsors, since the proceeds of such placement are often used to fund the SPAC activities during the period before the acquisition of the target company. This information should enable investors to assess the total level of costs during the period up to and including the acquisition of the target company and whether there is any risk that the amounts intended to fund such costs are likely to be insufficient.
- Information on the intention of certain persons to subscribe in the offer - Issuers should include an indication as to whether major shareholders or members of the issuer's management, supervisory or administrative bodies intend to subscribe for the offer, or whether any person intends to subscribe for more than 5% of the offer.
- Information on the offer price - The prospectus should disclose any material disparity between the public offer price and the effective cash price of securities acquired by members of the issuer's administrative, management or supervisory bodies, senior management or affiliated persons during the previous year, or which they have the right to acquire.

Furthermore, to promote convergence among NCAs regarding the scrutiny of SPACs' prospectuses, ESMA indicates that NCAs should also expect disclosures on the following matters to be included:[321]

- The future remuneration of the sponsors and their possible role after the acquisition of the target company;
- Information about the future shareholdings of the sponsors and other related parties;
- Information about possible changes to the governance after the acquisition of the target company; and
- Detailed information about the possible scenarios that may arise if the sponsors fail to find a suitable target to acquire, including possible scenarios such as the winding up of the issuer and the de-listing of the shares.

ESMA acknowledges that the disclosures in IPO prospectuses may differ depending on the applicable company laws and market practices. Because of this, the list above is not intended to be exhaustive and NCAs may require additional disclosures for the purposes of investor protection.[322]

Lastly, in addition to its expectations under the Prospectus Regulation discussed above, ESMA highlights the risks and complexity of SPAC shares and warrants, which are subject, among other things, to the

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[321] Id, p. 7.
[322] Ibidem.

Directive 2014/65/EU (MIFID II) product governance requirements. ESMA expects manufacturers and distributors of SPAC shares and warrants to comply with these existing rules and requirements, and to scrutinize such products very carefully in their product approval processes which are fundamental for investor protection. In particular, ESMA notes that manufacturers and distributors of SPAC shares and warrants should assess whether retail clients should be excluded from the positive target market or even included in the negative target market.[323]

In commenting on the ESMA's SPAC Public Statement, ESMA Interim Chair Anneli Tuominen noted that "[t]here has been a significant rise in SPAC activity in EU capital markets [in 2021], and with this comes growing interest from investors. Therefore, it is essential that investors are provided with the information necessary to understand the structure of SPAC transactions before making any investment decisions. […] ESMA's statement will contribute to maintaining a high level of investor protection and promote a common consistent supervisory convergence by regulators across the EU."[324]

While the ESMA's SPAC Public Statement is addressed to NCAs, ESMA notes that its content should be considered by SPACs' issuers when preparing their prospectuses, as well as manufacturers and distributors of shares and warrants of SPACs. After publication of the SPAC Public Statement, ESMA and NCAs will continue to monitor SPAC activity in Europe to determine if additional initiatives are necessary to promote a coordinated supervisory action aimed at preserving investor protection.[325]

[323] Id., pp. 1-2.
[324] See, European Securities and Markets Authority (ESMA), ESMA publishes disclosure and investor protection guidance on SPACs, Press Statement (July 15, 2021).
[325] See, European Securities and Markets Authority (ESMA), SPACs: prospectus disclosure and investor protection considerations, cit., p. 1.

CHAPTER 6

THE ROAD AHEAD

6.1. The Continued Evolution of SPACs

Despite the recent slow-down in U.S. SPAC transactions driven in part by growing concerns around SPAC-related litigation risks and increased regulatory scrutiny, the pace of SPAC activity is expected to remain at a high level in the coming months, with more SPACs launching and expanding internationally into non-U.S. markets, most notably in Europe and the United Kingdom. SPAC activity in the fintech sector, in particular, is expected to continue at a steady pace in light of the sector's strong revenue and growth projections, the anticipated wave of fintech companies hitting profitability, as well as a record-high demand for fintech products and services fueled by evolving customer behavior in the aftermath of the recent Covid-19 pandemic.

Latest SPAC issuances have broadened the range and improved the makeup of SPAC sponsors to include more institutional and high-reputable market participants, thus further legitimizing the SPAC process. The influx of large private equity and venture capital firms and seasoned managers with well-proven track records, coupled with better alignment of sponsors' incentives and investors' returns, has contributed to boost investor confidence, thus enabling SPACs to raise significant capital to use for acquisitions of larger and more mature target companies. The high-profile companies that have recently gone public via a SPAC have also helped accelerate the momentum and have lent increased credibility to the SPAC structure. Additionally, the SPAC market has benefitted from a more diversified and growing pool of well-known institutional investors entering the space, which have shown increased interest in growth industries and appetite for suitable returns in volatile markets.

More recent SPACs have begun targeting a wider range of acquisitions. A number of sophisticated SPACs' sponsors are progressively reducing the equity they receive in exchange for striking a merger, are broadening their objectives and are aiming to use a sizeable portion of the equity raised to fund growth. These sponsors tend to remain more closely involved with their target companies to provide ongoing support post-closing and they strategically partner with their target companies on the longer term. They increasingly look for larger and more mature companies and technologies that are scalable and can be efficiently integrated with complementary technologies. Many SPACs are also seeking to be more transparent to promote a better understanding of, and confidence in, their structure, including among non-traditional SPAC investors.

Looking further ahead, the deal terms of SPACs themselves are likely to continue to evolve. Today, sponsors are the big winners of the SPAC boom. However, as SPAC transactions grow in volume and popularity and the competition increases, SPACs are expected to adopt more company-friendly structures to entice potential acquisition targets and remain an attractive option for companies looking to go public. Moreover, as larger and more sophisticated players enter the market, SPAC structural enhancements and variations of the typical SPAC structure are expected to be increasingly adopted with the aim of strengthening investor protection, reducing closing risks with de-SPAC transactions and improving the alignment of interests among the parties involved.

As previously discussed, some SPACs have started using alternative promote structures to more closely align the economic interests of the sponsors with those of the IPO investors and to reduce the dilution traditionally associated with SPACs, thus making their offering more attractive to potential target companies and investors. For example, some SPACs' sponsors have agreed to forego the traditional promote in favor of a smaller promote and have made a portion of the founder shares subject to vesting, forfeiture requirements and/or "earn-out" mechanisms, so that these shares will vest only if certain post-closing trading price targets are achieved. Certain SPACs have seen sponsors agreeing to longer lock-up periods. Other SPACs' sponsors have chosen to forgo founder shares altogether. In addition, some SPACs operating in the life science sector have issued only ordinary shares (i.e., no public or founder warrants) to IPO investors and sponsors, with the aim to reduce dilution and to simplify the capital structure, although limiting investors' economic upside. Along with these alternative structures, a number of SPACs have also introduced non-detachable warrants aimed at disincentivizing redemption. Others have utilized redemption protections, including forward purchase agreements whereby the sponsors (or other third parties) agree at the IPO-stage to purchase additional units or private placement warrants or other securities at the time of the business combination as additional financing to backstop redemptions or supplement available cash, thus providing greater certainty of available funds and alleviating the pressure to raise additional PIPE financing.

A recent interesting example that combines a number of these innovative features is Pershing Square Tontine Holdings Ltd., a high-profile SPAC sponsored by activist investor Bill Ackman which made its debut on the New York Stock Exchange in July 2020. In what is the largest SPAC IPO completed to date, Pershing Square Tontine Holdings Ltd. offered 200 million units at $20 each raising $4 billion in IPO proceeds to be used for a future business combination with a "mature unicorn." [326]

Pershing Square Tontine Holdings Ltd. has departed from the typical SPAC structure in several ways.[327] A key differentiating element is the pricing and structure of its units and warrants. As previously discussed, SPACs typically issue units consisting of one share of common stock and a fraction (e.g., one half or one third) of a warrant to purchase common stock at a later stage. Shortly following the SPAC's IPO, the shares and warrants detach and trade separately. The units are usually sold for $10.00 per unit, while the warrants are generally exercisable at $11.50 per share. Importantly, investors who decide to redeem their shares before completion of the proposed de-SPAC transaction can usually retain their warrants, thus enjoying the potential upside post-acquisition of the target company. On the contrary, Pershing Square Tontine Holdings Ltd. has offered 200 million units priced at $20.00 per unit, with each unit consisting of one share of common stock, one-ninth of a redeemable warrant (exercisable at $23.00 per share), and contingent rights to acquire two-ninths of a warrant (exercisable at $23.00 per share) if investors do not redeem their units prior to completion of the proposed de-SPAC transaction. All redeeming shareholders in Pershing Square Tontine Holdings Ltd. will lose their warrants, which will be

[326] See, Pershing Square Tontine Holdings Ltd., Form S-1 (June 22, 2020) and amendments to the Form S-1 (July 6, 2020; July 13, 2020; July 16, 2020; and July 20, 2020). See also Section 1.3.2 and accompanying footnotes 28 and 29.

[327] See, e.g., Deloitte, Taking stock: How to assess SPACs and other IPO options in a post-pandemic market, cit., p. 3; Ramey Layne, Brenda Lenahan and Sarah Morgan, Update on Special Purpose Acquisition Companies, cit.; Andrew R. Brownstein, Andrew J. Nussbaum, and Igor Kirman, The Resurgence of SPACs: Observations and Considerations, cit.; White & Case, 5 things you need to know about...SPACS, cit.; Freshfields, Ackman SPAC sets itself apart from traditional SPACs (Freshfields Bruckhaus Deringer LLP Insights, July 28, 2020).

distributed pro-rata to the remaining shareholders at the time of the business combination with the target company. This feature creates an incentive not to redeem and is designed to encourage long-term investment in Pershing Square Tontine Holdings Ltd., thereby reducing closing risks and providing increased deal certainty that the SPAC will have sufficient funds in its trust account to complete the proposed de-SPAC transaction.

Further distinguishing features of Pershing Square Tontine Holdings Ltd. are the absence of a promote and the structure of its sponsor/founder warrants. Instead of receiving a typical promote representing approximately 20% of the SPAC's common shares for nominal consideration, Pershing Square Tontine Holdings Ltd.'s sponsor has not received any promote and instead its entire economics rely on the warrants purchased. Whilst sponsor/founder warrants are typically priced at $11.50, Pershing Square Tontine Holdings Ltd.'s sponsor and directors have bought warrants exercisable at a price of $24.00 for roughly 5.95% of the resulting company on a fully diluted basis. In addition, while sponsor/founder warrants are generally exercisable and transferable shortly after the closing of the business combination for up to 5 years, Pershing Square Tontine Holdings Ltd.'s sponsor cannot exercise or transfer the warrants until 3 years after completion of the business combination and the warrants are exercisable for 10 years. As a result of these features, Pershing Square Tontine Holdings Ltd.'s sponsor will not collect any compensation until at least 3 years following the closing of the de-SPAC transaction and only after a 20% increase in the share price above the IPO price. The overall sponsor compensation is structured to reduce the dilution of investors and shareholders of the resulting company, to better align the incentives among the parties involved and to create more long-term economics for the sponsor.

Additionally, similar to many SPACs, Pershing Square Tontine Holdings Ltd. has 24 months from its IPO closing to complete an initial business combination. However, different from the typical SPAC structure, such deadline is automatically extended to 30 months if a letter of intent or a definitive agreement is signed within 24 months from the SPAC's IPO closing. By building in an extension mechanism, this structure aims at mitigating the concerns that Pershing Square Tontine Holdings Ltd.'s shareholders may redeem their shares if a deal takes longer than 24 months to complete.

Other significant departures from the traditional SPAC deal terms include the underwriter compensation, which in case of Pershing Square Tontine Holdings Ltd. is considerably lower than typical, and the absence of the typical underwriters' overallotment option or green-shoe.

Lastly, different from many SPACs, various affiliates of Pershing Square Tontine Holdings Ltd.'s sponsor have committed via a forward purchase agreement to buy an additional $1 billion (and at their option up to $3 billion) of units at a price of $20.00 per unit at or prior to the closing of the de-SPAC transaction, with such units consisting of one common share and one-third of a warrant. Additionally, certain independent directors have committed to purchase an aggregate of $6 million of such units. Whilst many SPACs line up PIPE commitments, the forward commitment in this case is quite unique both in relation to the significant commitment by the sponsor and its affiliates and the size of the overall committed financing.

Although it remains to be seen whether the described features will work as intended in facilitating an initial business combination and whether they will be utilized more widely by other market participants, innovative SPAC structures like the one adopted by Pershing Square Tontine Holdings Ltd. represent an interesting development and have the potential to offer a more sustainable model and an important way of enhancing the appeal of SPACs across the U.S., UK and European markets.

6.2. Key Takeaways and Risk Mitigants when Considering a SPAC Transaction

The surge in SPAC-related litigations and the increased regulatory scrutiny discussed in prior sections are likely to continue and to expand further in the months to come. At the date of writing, SPAC-related litigation risks are raising in the United States, with more SPACs becoming a target of shareholder litigations both at federal and state levels. In parallel, SPAC regulators across the United States, the United Kingdom and Europe remain intensely focused on SPACs and committed to identify and address potential securities law and policy concerns with the growing SPAC market, while their guidance and regulations continue to evolve.

SPACs, sponsors, target companies, and their respective directors and officers should carefully review these ongoing developments and should take proactive steps to mitigate legal and litigation risks and to effectively address the relevant areas of concern identified by the regulators. Key steps that they may consider taking include the following:[328]

- At the time of formation, SPACs and the companies resulting from the de-SPAC transactions should include in their charters and bylaws appropriate exculpatory provisions for liability and business opportunity waivers to protect directors from fiduciary duty claims to the extent permitted by applicable laws and regulation. Appropriate forum selection provisions should also be included in the organizational documents.
- Effective diligence and analysis of the target company and the overall de-SPAC transaction are critical. SPACs and their advisers may consider performing the type of due diligence that is usually associated with a traditional IPO, in addition to the valuation-focused due diligence typical of a merger transaction. Thorough and robust due diligence should be performed on the proposed business combination and the target company, its activities, product viability, customer-base stability and the relevant risks, among others. SPACs should maintain a complete and accurate record of the diligence investigation completed, the documents reviewed, the information collected, and the related actions taken, including any reports or comments from external advisers.
- SPACs should accurately disclose all material information in regulatory filings and other relevant documents, including any potential risks associated with a target company's ongoing operations or future activities. SPACs should provide appropriate details and include caveats concerning the sources of the information regarding the target company being disclosed as needed. They should clearly indicate whether a disclosure is a forward-looking statement or reflects opinions and should describe the relevant basis. Forward-looking statements, including financial projections or similar statements, should be accompanied by meaningful cautionary language. SPACs should also

[328] See, e.g., Cleary Gottlieb, SPAC Sponsors Beware: The Rising Threat of Securities Liability, cit., p. 4; Baker Botts, SPAC Litigation and Enforcement Update: Spring 2021, cit., pp. 3-4; Paul Weiss, What SPAC Sponsors, Directors and Officers Can Do to Mitigate Their Litigation Exposure, cit., pp. 6-7.

document the process by which the projections are generated and should provide accurate information on the assumptions that underline any such projection.

- SPACs should carefully review regulatory guidance on disclosure and should accurately disclose any relevant potential conflicts of interest involving sponsors, directors, officers, underwriters, or other parties. These include clear and complete information on the remuneration of the SPAC's sponsors, directors, officers and underwriters, their outside business interests, related-party transactions and other relevant activities and how these may influence their efforts to find an acquisition target, as well as the economic and reputational impact that SPAC's sponsors, directors, officers and underwriters may suffer if the SPAC does not complete an acquisition within the prescribed time period.
- Additionally, SPACs should seek to mitigate inherent conflicts of interest as much as possible, including by implementing effective governance procedures, obtaining a fairness opinion from an independent third-party financial advisor, or delaying the financial compensation and incentives for the sponsors in whole or in part until after the acquired company meets certain post-acquisition benchmarks and milestones.
- Related to the above, SPACs should pay particular attention to the deadline for completing a de-SPAC transaction as target acquisitions completed near the deadline are likely to face increased scrutiny if shareholders incur significant losses post-acquisition.
- SPACs and target companies should maintain effective directors' and officers' liability insurance and carefully consider its coverage and relevant costs.
- Lastly, SPACs and target companies should follow appropriate corporate formalities, maintain good corporate governance practices, and implement effective controls and processes to meet the regulatory, tax, governance, reporting and internal control requirements and expectations of a public operating company on an ongoing basis after the SPAC's IPO and following completion of the de-SPAC transaction.

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