NOTE

SPACs: A POST-MORTEM AND A PATH FORWARD

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Abstract

Special purpose acquisition companies (SPACs) took the financial world by storm from 2020 to 2022 as an alternative to initial public offerings (IPOs). SPACs' usage during this time period was novel. Wall Street leveraged this unique financial vehicle to enrich themselves at the expense of mom-and-pop investors on Main Street. Though recent years have seen the use of SPACs decline precipitously in the face of regulatory threats from Capitol Hill and adverse rulings from state courts, this saga is rich with lessons. Foremost among them is determining how a financial instrument that created record-breaking poor returns was able to reach public markets in the first place and how such an outcome can be avoided in the future. This Note attempts to answer that question so the regulators of tomorrow can learn from the trials experienced by the regulators of today.

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I. Introduction

A special purpose acquisition company ("SPAC") is a publicly traded vehicle that raises cash to subsequently acquire and merge with a second company. Such entities, despite existing for decades without fanfare, captivated the hearts and minds of capital markets in recent years. From 2020 through 2022, nearly two-thirds of the 1,536 initial public offerings ("IPOs") were transacted via SPACs,[1] a dramatic increase in SPACs' share of the American public offering market.[2] This uptick is driven by a combination of factors, like a macroeconomic environment propelled by low-interest rates, which created easy cash that found its way to immature growth companies.

These growth companies, represented by the likes of Virgin Galactic, former President Trump's Truth Social, and the particularly ill-fated Nikola Motors, sought access to public equity via exchanges that were then growing at record rates. SPACs were the vehicle for these companies to access public capital markets rather than their counterpart—the Initial Public Offering ("IPO")—because of the unique benefits a SPAC transaction provides to its main stakeholders, the SPAC sponsors, and its initial investors. SPAC sponsors and initial investors are distinctly advantaged in SPAC transactions relative to IPO transactions because SPACs face a reduced liability regime and a quicker route to public markets—and the corresponding payday for the SPAC team that comes with it.

This Note argues that Wall Street has taken advantage of this regulatory asymmetry to Main Street's detriment and describes the legislative and common law efforts to rein in a legitimate investment vehicle gone rogue.

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[1] *See SPAC and US IPO Activity*, SPAC Analytics (2023), https://www.spacanalytics.com/ [https://perma.cc/LY97-PZL7]. There were 947 public offerings done via a deSPAC offering during this time period. *See id.*

[2] From 2009 to 2019, SPACs never accounted for more than twenty percent of this market, often hovering below ten percent. *See id.*

After introducing and describing the key players in a SPAC in Parts I and II, the Note in Part III argues that regulatory and corporate governance developments in the SPAC space are not uniformly positive and simultaneously go too far and not far enough. Part IV of this Note reviews recent opinions from the Delaware Court of Chancery that may expose SPACs to increased liability moving forward, rendering some reformist proposals at the federal level potentially overbroad. Regardless, federal regulators should endeavor to learn from the Court of Chancery's crusade to regulate SPACs, for much work has already been done and there are insights to be drawn. Part V of this Note then argues that the Securities and Exchange Commission ("SEC") already has a mechanism—section 20(b) of the Securities Exchange Act of 1934 ("Exchange Act")—to police SPACs and future fraudulent behavior without being overbroad in the way current reform efforts may be. This Note maintains that reinvigorating section 20(b) could give the SEC and private plaintiffs an evergreen enforcement tool that could be useful beyond SPACs. Nevertheless, using section 20(b) to its fullest potential will require some legislative and regulatory involvement.

This Note also has a more fundamental purpose beyond detailing SPAC-related regulatory and governance issues: to shed light on how a financial instrument—the SPAC—that has created record-breaking poor returns was ever able to reach public markets in the first place, and how such misfortune can be avoided in the future. To be sure, it is unlikely that SPACs will ever again be plat-du-jour for Wall Street to engage in regulatory arbitrage. But there is still much to be learned from SPACs' brief popularity. Even if regulatory interventions backfill the deficits that permitted Wall Street to benefit at the expense of Main Street, we must learn from the havoc SPACs wreaked on Main Street investors and endeavor to do better as lawyers, regulators, and policymakers the next time around. These generalized lessons, as much as the statutes, rules, and regulations that govern and will govern SPACs, will be crucial to ensuring markets are fair and efficient for all participants moving forward.

II. SPACs—What Are They?

To understand SPACs, one must understand the relevant stakeholders and the perverse incentives inherent to their structure. A SPAC is a blank-check company that seeks out a company to acquire, which generally must occur within eighteen to twenty-four months of being created or else the project dissolves.[3] If the SPAC finds a worthy acquisition target during this

[3] *See* Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, Harv. Bus. Rev., July-Aug. 2021, https://hbr.org/2021/07/spacs-what-you-need-to-know [https://perma.cc/2J7M-KTF6]; Landon W. Mignardi & Scott Mascianica, *SEC Enforcement Continues SPAC Crackdown as Founder Trading Profits Generate Scrutiny*, Holland & Knight (June 15, 2023), https://www.hklaw.com/en/insights/publications/2023/06/

time period, the sponsors propose a merger—a deSPAC transaction—to the SPAC's then-existing stockholders, who then vote for or against the proposed business combination.[4] Behind this operation are two main groups, investors and sponsors, the former providing capital and the latter providing both capital and the management expertise that informs the decision of which company the SPAC should merge itself with.[5]

The initial investors in SPACs include hedge funds, institutional investors, and other types of accredited investors that are often referred to collectively as "initial public stockholders."[6] This group of investors purchases shares in the SPACs' initial public offerings, usually costing $10, and warrants, which accompany the shares at no-cost and generally have an exercise price between $11.50 and $12.50.[7] The proceeds from the shares are placed into a trust account that pools investors' money so that it can be used as capital by the SPAC and its sponsors to ultimately purchase a target company.[8] The warrants granted alongside the shares function as an option for the investor to purchase shares at a higher price in the future, akin to a call option, and are not tied to holding shares.[9]

That warrants are not tied to share ownership is important because a unique feature of a SPAC is the option to exercise a "redemption right." This right permits investors to liquidate their shares and receive "their [initial] investment back with interest" *after* the SPAC has proposed an acquisition target but *before* the merger has been consummated.[10] Reasonable investors would do this if they thought the acquisition target would not trade at greater than ten dollars per share on the public markets.[11] If they decide to redeem, the amount of money invested into the target is reduced proportionally.[12] But even if investors exercise their redemption right, they retain their warrants, which they received cost-free when they purchased shares.[13] That they still retain their warrants means that investors, at worst, receive the option to purchase shares of the SPAC at a below-market cost at some point in the future even if

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sec-enforcement-continues-spac-crackdown-as-founder-trading [https://perma.cc/T7NJ-TJTR]; Off. of Inv. Educ. & Advoc., *What You Need to Know About SPACs – Updated Investor Bulletin*, U.S. Sec. & Exch. Comm'n (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin [https://perma.cc/AS47-NW3X].

[4] *See* Bazerman & Patel, *supra* note 3; Off. of Inv. Educ. & Advoc., *supra* note 3.

[5] *See* Bazerman & Patel, *supra* note 3; Off. of Inv. Educ. & Advoc., *supra* note 3.

[6] *See, e.g.*, *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 791 (Del. Ch. 2022); *see also* Bazerman & Patel, *supra* note 3.

[7] *See, e.g.*, *MultiPlan*, 268 A.3d at 794.

[8] *See* Off. of Inv. Educ. & Advoc., *supra* note 3.

[9] *See* Bazerman & Patel, *supra* note 3. Usually, the warrant is an option to buy the stock at an $11.50 strike. *See id.*

[10] *See id.*

[11] *See* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 Yale J. on Regul. 228, 247 (2022).

[12] *See id.*

[13] *See* Bazerman & Patel, *supra* note 3.

they redeem their initial shares free of charge.[14] Those investing in the SPAC IPO thus possess a potentially riskless investment.[15]

SPAC sponsors, the crux of the SPAC transaction, are the second major party in the transaction. This group invests their own capital into the SPAC itself, covering the operating expenses incurred from finding and acquiring a company.[16] Similar to a venture capitalist general partner in a venture capital fund,[17] the sponsors' experience, expertise, and authority draw investors to their SPAC, which increases the SPAC's capital base, in turn making it more competitive when it is on the hunt for a company to acquire, a process also managed by the sponsors.[18]

Sponsors compensate their efforts in forming and managing the SPAC by endowing themselves with twenty percent of the SPAC's equity in the form of "founder shares,"[19] which are purchased at a nominal price, often for $25,000.[20] This compensation is called the "promote" in industry parlance.[21] These shares then convert into standard, publicly traded shares—priced at ten dollars per share—only when the SPAC finds an acquisition target and completes the deSPAC transaction, though the shares are often subject to lock-up requirements that restrict the trading of founders' shares for contractually specified periods of time.[22] This means that simply acquiring a company and completing the deSPAC, regardless of the transaction's ultimate success, garners the sponsors holding founders' shares astronomical returns.[23] In *MultiPlan*, those holding founders' shares turned their $25,000 initial investment into $305 million, a 1,219,000% return on investment,[24] even though post-merger shareholders have lost about 85% of their investment to date.[25]

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[14] *See id.*

[15] *See id.*; Holger Spamann & Hao Guo, *The SPAC Trap: How SPACs Disable Indirect Investor Protection*, 40 Yale J. on Regul. Bull. 75, 78, 80 (2022).

[16] *See SPAC Sponsorship: The Ultimate Guide to SPAC Sponsorship*, Clear Think Cap., https://spac.guide/spacsponsorship/#whatisspacsponsorship [https://perma.cc/68YZ-ZEF2].

[17] *Cf.* Andrew Ross Sorkin, *Wall Street's New Favorite Deal Trend Has Issues*, N.Y. Times (Feb. 10, 2021), https://www.nytimes.com/2021/02/10/business/dealbook/spac-wall-street-deals.html/ [https://perma.cc/VX33-54E2] (noting that "[s]ome have called the SPAC a new, public form of venture capital").

[18] *See SPAC Sponsorship*, *supra* note 16; Mignardi & Mascianica, *supra* note 3.

[19] *See SPAC Sponsorship*, *supra* note 16; Mignardi & Mascianica, *supra* note 3.

[20] Steven Nebb & David Larsen, *Valuing Founder Shares and Other SPAC Investments*, Kroll (June 21, 2021), https://www.kroll.com/en/insights/publications/valuation/valuation-insights-second-quarter-2021/valuing-founder-shares-and-other-spac-investments [https://perma.cc/4CQZ-JA8B].

[21] *See, e.g.*, *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 794 (Del. Ch. 2022).

[22] *See* Mignardi & Mascianica, *supra* note 3.

[23] *See id.*

[24] *MultiPlan*, 268 A.3d at 798, 810.

[25] The MultiPlan Corp. share price was $1.71 on September 19, 2023, compared to a $10.00 deSPAC price. *See MultiPlan Corporation (MPLN)*, yahoo! fin. (Sept. 19, 2023), https://finance.yahoo.com/quote/MPLN/ [https://perma.cc/YP2N-LX2A].

This disparity between sponsor returns and investment performance is not unusual.[26]

If the extraordinary profit incentive alone were not enough to lay bare the "acquire or die" dilemma SPACs create,[27] failing to acquire a company renders founders' shares and warrants completely worthless.[28] If sponsors fail to find a target within two years, the SPAC and the founders' shares are dissolved and all funds contributed by the initial crop of investors are returned to them with interest.[29] This web of conflicts and empirical let-downs are what have caused SPACs to become such a hot topic of corporate governance and regulatory reform, and it is for these reasons that sponsors are the most important stakeholders for regulatory and corporate governance purposes.[30]

SPACs thus present a business opportunity wherein sponsors and early-stage investors have incentives to conduct a deSPAC transaction with little regard for whether the company is ready for the public markets that retail investors have access to. The story is a familiar one that has played out consistently in the aftermath of the SPAC boom, with the *Wall Street Journal* reporting that nearly one-third of SPACs brought to market from 2016 to 2022 were on the verge of bankruptcy.[31] Illustrative of this trend is the saga behind Nikola Motors, one of the many companies now careening toward bankruptcy that went public via deSPAC with no revenue and no product.[32] To bolster investor confidence in this pre-revenue company, CEO-turned-securities-law-felon Trevor Milton said the company's flagship hydrogen-powered truck "fully function[ed]."[33] Nikola quickly saw its market cap jump to $29 billion—higher than Ford's.[34]

Its vehicles did not fully function.

It turned out that the truck models showcased in investor videos were rolling downhill, and the film crew doctored the video so it appeared that Nikola's trucks were propelled by their signature hydrogen fuel technology.[35]

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[26] *See, e.g.*, Klausner et al., *supra* note 11, at 255 (recognizing "that sponsors' returns are very high, even when post-merger price performance is poor").

[27] *See id.* at 234; *see also* Sorkin, *supra* note 17.

[28] *See, e.g.*, *MultiPlan*, 268 A.3d at 794.

[29] *See, e.g.*, *id.*

[30] *See* Mignardi & Mascianica, *supra* note 3.

[31] Amrith Ramkumar & Shane Shifflett, *SPACs Delivered Easy Money, but Now Companies Are Running Out*, Wall St. J. (Apr. 26, 2023), https://www.wsj.com/articles/spacs-delivered-easy-money-but-now-companies-are-running-out-f086c255?mod=article_inline [https://perma.cc/27CV-BS9R].

[32] For an oral history of the debacle, see generally Bad Bets, *The Unraveling of Trevor Milton*, Wall St. J. (Sept.–Nov. 2022), https://www.wsj.com/podcasts/bad-bets [https://perma.cc/EW25-Z3QJ].

[33] Timothy B. Lee, *Nikola Admits Prototype Was Rolling Downhill in Promotional Video*, ArsTechnica (Sept. 14, 2020), https://arstechnica.com/cars/2020/09/nikola-admits-prototype-was-rolling-downhill-in-promotional-video/ [https://perma.cc/EZ8B-GKPV].

[34] *See* Ben Foldy, *Electric-Truck Startup Nikola Bolts Past Ford in Market Value*, Wall St. J. (June 9, 2020), https://www.wsj.com/articles/electric-truck-startup-nikola-bolts-past-ford-in-market-value-11591730357 [https://perma.cc/J9FV-DLPP].

[35] Lee, *supra* note 33.

Since then, Trevor Milton resigned and has been found guilty of criminal felonies related to securities and wire fraud.[36] Nonetheless, civil securities fraud claims against Milton in his personal capacity and against his company have been dismissed pending the resolution of amended pleadings in the District of Arizona,[37] despite selling $374 million of stock.[38] That Milton may face years in federal prison for his fraud, but that he and his company may end up insulated from monetary damages *for the same misconduct* for claims brought by shareholders, underscores how difficult it is to hold SPAC-related fraudsters accountable.[39] As to Nikola, the SEC and Nikola entered into a $125 million settlement to resolve fraud charges.[40] As of September 19, 2023, Nikola's stock was trading for $1.47, down about 85% from its $10 deSPAC listing price.[41]

The question for regulators and corporate governance scholars is how Nikola, and similarly fraud-ridden SPACs, reached public markets in the first place. Retail investors have suffered catastrophic losses, while SPAC sponsors have made out with historic gains, averaging hundreds of percent in returns.[42] And the reason that Nikola was ever accessible to retail investors is because it had secured the backing of a host of former General Motors executives—experts in the field of infrastructure and vehicles—who sponsored the SPAC.[43] Yet the sponsors were apparently duped by a hydrogen truck company that had no hydrogen-fueled truck, no reasonable plan to produce one, sham

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[36] Scooter Doll, *Nikola Founder Trevor Milton Found Guilty Over Previous Fraudulent Statements to Pump Company Stock*, Electrek (Oct. 14, 2022), https://electrek.co/2022/10/14/nikola-founder-trevor-milton-found-guilty-over-previous-fraudulent-statements/ [https://perma.cc/6ZE5-DUYU]. Milton has sought a new trial. *See* Jody Godoy, *Nikola Founder Seeks New Trial, Says Juror Concealed Bias Against Wealthy*, Reuters (Dec. 15, 2022), https://www.reuters.com/legal/nikola-founder-seeks-new-trial-says-juror-concealed-bias-against-wealthy-2022-12-15/ [https://perma.cc/54D5-U6EL].

[37] *See* Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL, 2023 WL 1472852, at *37–*38 (D. Ariz. Feb. 2, 2023) (granting defendants' motions to dismiss).

[38] Tom McGinty, Shane Shifflett & Amrith Ramkumar, *Company Insiders Made Billions Before SPAC Bust*, Wall St. J. (May 30, 2023), https://www.wsj.com/articles/company-insiders-made-billions-before-spac-bust-4607a869 [https://perma.cc/V2X5-DZME].

[39] *See Borteanu*, 2023 WL 1472852, at *37–*38 (granting defendants' motions to dismiss).

[40] Press Release, U.S. Sec. & Exch. Comm'n, Nikola Corporation Pays $125 Million to Resolve Fraud Charges (Dec. 21, 2021), https://www.sec.gov/news/press-release/2021-267 [https://perma.cc/6EMN-2SVT].

[41] *Nikola Corporation (NKLA)*, yahoo fin!, https://finance.yahoo.com/quote/NKLA/?p=NKLA [https://perma.cc/96HK-PWRF].

[42] *See, e.g.*, Klausner et al., *supra* note 11, at 263. SPACs may be subject to lock-up periods that prevent immediate selling of shares. *See* Mignardi & Mascianica, *supra* note 3. The standard period is 180 days, but this can be negotiated by contract. *See Lock-Up Periods: Regular IPOS V/S SPACS IPOS*, Legal Scale (Sept. 21, 2022), https://www.legalscalellp.com/lock-up-periods-regular-ipos-v-s-spacs-ipos/ [https://perma.cc/FB5N-LYER].

[43] *See* David Welch & Andrew Ludlow, *Ex-GM Executive Moonlights as Matchmaker in Deal with Startup Nikola*, Bloomberg (Sept. 16, 2020), https://www.bloomberg.com/news/articles/2020-09-16/ex-gm-exec-moonlights-as-matchmaker-in-deal-with-startup-nikola [https://perma.cc/K35A-HN2X].

videos, and a CEO with no background in the field.[44] These so-called experts were none the wiser. If Nikola had been subject to liability beyond current standards, they likely would have done more diligence, and Nikola may never have accessed public markets, which would have saved Main Street investors billions. But Nikola's SPAC sponsors did not care.

Nor did they have reason to. The moral failing of thrusting a company steeped in fraud upon mom-and-pop investors was facilitated by legal and regulatory failings. Not only is there a mind-bogglingly large payday at the end of a deSPAC transaction for the sponsors, but there is still no clear way for securities laws to hold sponsors liable under facts like Nikola's. Indeed, although Trevor Milton was convicted for securities fraud, the sponsors, directors, and officers of VectoIQ—the SPAC that brought Nikola public—had all securities fraud claims dismissed in February 2023.[45] It is this misalignment of incentives and zone of immunity that current SPAC law does not address, but that Congress, the SEC, and the Delaware Court of Chancery are in the process of reforming.[46]

III. SPAC Law Today and Prospective Legislative and Administrative Reform

As former General Counsel of the SEC and Acting Director for the SEC's Division of Corporate Finance John C. Coates has remarked, "'SPAC law' is dauntingly complex in its full detail."[47] Nevertheless, regulators and legislators have keyed in on a few important aspects of SPACs that give them clear comparative advantages over other investment vehicles, like IPOs, which may be leveraged by companies of dubious quality to access public markets. The relevant advantages discussed in this Note, ones that have been the subject of regulatory and legislative scrutiny, are threefold.[48]

First, the Private Securities Litigation Reform Act of 1995 (PSLRA) provides SPACs, but not IPOs, with a safe harbor for "forward-looking" financial projections in a proxy or registration statement, provided that they are not knowingly false or misleading and are "accompanied by meaningful

[44] Milton had no engineering, business, or other degree relevant to Nikola's operations or to business more generally, having dropped out of college after a semester. *See Nikola: How to Parlay an Ocean of Lies Into a Partnership With the Largest Auto OEM in America*, Hindenburg Rsch. (Sept. 10, 2020), https://hindenburgresearch.com/nikola/ [https://perma.cc/ZDV2-M33H].

[45] *See* Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL, 2023 WL 1472852, at *37–*38 (D. Ariz. Feb. 2, 2023) (granting defendants' motions to dismiss).

[46] *See infra* Parts III–IV.

[47] John C. Coates, *SPAC Law and Myths*, 78 Bus. Law. 371, 376 (2023).

[48] For a concise review of the regulatory distinctions between SPACs and IPOs, see Nicholas Swan, *SPACs: Avoiding Volatility, Evading Regulation*, Cornell J.L. & Pub. Pol'y: The Issue Spotter (Feb. 22, 2021), http://jlpp.org/blogzine/spacs-avoiding-volatility-evading-regulation/ [https://perma.cc/UP6U-SLNU].

cautionary" language.[49] This permits SPAC sponsors, directors, and executives to make lofty statements of future progress with little liability, even if the practical effect of those statements is to mislead investors.

Second, SPACs arguably do not involve an entity considered a statutory underwriter under the Securities Act of 1933 (Securities Act), a SPAC-specific feature that provides "at least the promise of lowering the overall legal exposure."[50] SPAC supporters argue that this reduced liability regime is important because it lowers capital costs by avoiding the otherwise expensive and laborious process of an IPO.[51] However, these features also increase the rate of unworthy SPACs reaching the public markets as SPAC advocates "attempt to use SPACs as a way to arbitrage liability regimes."[52]

And third, because a deSPAC transaction is considered a merger and not an IPO, there is no "distribution of the securities."[53] This, coupled with the lack of an underwriter, renders SPACs outside the scope of the Securities Act's gun-jumping rules. This means that in the days immediately before a SPAC trades on public markets, its founders, sponsors, directors, and executives can applaud the company and its potential in an attempt to prime public interest in the company. IPOs, by contrast, are subject to a thirty-day pre-IPO period in which no reference to the securities can be made without violating section 5 of the Securities Act and its gun-jumping rules. The purpose of the gun-jumping rules is to ensure that companies offering securities to the public do not distort the price of their stock by priming the market immediately before the public can acquire the stock. To be sure, SPAC directors, founders, and executives could be held liable for fraud under Rule 10b-5, but that comes with difficult-to-satisfy scienter and loss causation requirements, whereas section 5 subjects those within its purview to strict liability.

As of October 2023, there were as many outstanding securities suits against SPACs as there were against cryptocurrencies, a field that has become the poster child for securities fraud.[54] Indeed, cryptocurrencies have proven dangerous enough to capital markets that the SEC has created an entire trial

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[49] *See* 15 U.S.C. § 78u–5; Brian V. Breheny, Howard L. Ellin, Raquel Fox, Michael J. Mies, Gregg A. Noel, Susan L. Saltzstein & Andrew J. Brady, *SEC Proposes Significant Changes to Rules Affecting SPACs*, Skadden (Mar. 31, 2022), https://www.skadden.com/insights/publications/2022/03/sec-proposes-significant-changes-to-rules-affecting-spacs [https://perma.cc/7UKX-PWMC]. IPOs are protected by the judicially created "bespeaks caution" doctrine, which is less protective than the PSLRA safe harbor. *See* Ann Morales Olazábal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 Ind. L.J. 595, 622 (2011).

[50] Coates, *supra* note 47, at 380.

[51] *See Why So Many Companies Are Choosing SPACs Over IPOs*, KPMG (2021), https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html [https://perma.cc/YE7M-QXVV].

[52] *See* Thomas Franck, *SEC Chair Gensler Seeks Tougher SPAC Disclosure*, *Liability Rules*, CNBC (Dec. 9, 2021), https://www.cnbc.com/2021/12/09/sec-chair-gensler-seeks-tougher-spac-disclosure-liability-rules.html [https://perma.cc/YS85-UXQE].

[53] *See* Breheny et al., *supra* note 49.

[54] *See Securities Class Action Clearinghouse*, Stan. L. Sch., https://securities.stanford.edu/current-trends.html#collapse2 [https://perma.cc/HR92-2V7T]. As of October 10, 2023, there

division to deal with the issue.[55] If SPAC litigation is on pace with cryptocurrency litigation, the only reasonable conclusion is that SPACs are working to the detriment of capital market integrity and Main Street investors in their current form. That SPACs were, as of October 2023, cumulatively down nearly seventy-five percent since December 2020[56] compared to a roughly sixteen percent increase in the S&P 500 over the same time span is further evidence that something is amiss in the SPAC regulatory and governance space.[57]

Liability Regime Comparison	
SPACs	**IPOs**
• Management's forecasts, projections and forward-looking statements are protected by the PSLRA safe harbor.	• Management's forecasts, projections and forward-looking statements are *not* protected by the PSLRA safe harbor.
• No statutory underwriter, therefore, no underwriter liability for untrue or misleading statements of material facts in the registration statement under section 11 of the Securities Act.	• Underwriter is subject to section 11's requirement that registration statements are free from untrue statements or omissions of material facts.
• No liability under section 5 of the Securities Act even if management primes the market before the deSPAC occurs.	• Liability under section 5 of the Securities Act if any statement made "on behalf of the company" references the IPO in the thirty-day period beforehand.

A. PSLRA Safe Harbor

"The PSLRA provides a safe harbor for forward-looking statements"—or colloquially, business projections—"under the Securities Act and the Exchange Act" from private actions (but not SEC actions), as long as "the forward-looking statement is identified as such and is accompanied by

were eighty-five pending lawsuits against SPACs and eighty-five pending lawsuits in the cryptocurrency space. *Id.*

[55] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit (May 3, 2022), https://www.sec.gov/news/press-release/2022-78 [https://perma.cc/2W9W-HTSX].

[56] *See CNBC SPAC Post*, CNBC, https://www.cnbc.com/quotes/.SPACPOST [https://perma.cc/PGY8-BKJD].

[57] *See SPDR S&P 500 ETF Trust*, GOOGLE FIN., https://www.google.com/finance/quote/SPY:NYSEARCA [https://perma.cc/EC3P-393D].

meaningful cautionary statements."[58] If business projections are accompanied by cautionary language, the safe harbor provision protects an otherwise materially false or misleading statement from action by the investors it harms. It is a potent safe harbor that provides an opportunity for corporations to prime the market without being subject to liability under the Securities or Exchange Acts.[59]

1. The PSLRA Safe Harbor and SPACs Today

This safe harbor is not available in connection with an IPO.[60] However, it is available in connection with a SPAC, even though SPACs are often pre-revenue companies easily susceptible to overestimating their financial projections, thereby presenting a greater risk of misleading the average retail investor. As Professors Andrew Tuch and Joel Seligman have noted, "SPACs routinely disclose the relatively weakly tested projections of target companies, exposing investors to risk."[61] Even more, academics have found that "[t]he more aggressive [a SPAC's] revenue [projection] is, the more likely [the SPAC is] to underperform."[62]

Indeed, forward-looking statements have always been viewed skeptically by the SEC and were banned entirely until 1973.[63] To hold a SPAC liable despite this safe harbor, a would-be plaintiff must prove that the person or entity making the statement had *actual knowledge* that the statement was false or misleading.[64] This is difficult, if not impossible, to prove in SPAC litigation—these lofty ambitions are a feature rather than a bug of the SPAC. They are not made with actual knowledge of being misleading, but rather

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[58] *See* Breheny et al., *supra* note 49; 15 U.S.C. § 78u–5. For a detailed review of the PSLRA's legislative history and judicial interpretations surrounding it, see Olazábal, *supra* note 49, at 613–25.

[59] For a robust review of the PSLRA's safe harbor, see generally Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 FORDHAM L. REV. 1953 (1995).

[60] *See* Breheny et al., *supra* note 49.

[61] Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 345 (2022). Impressively, an August 2023 deSPAC transaction fell over ninety percent on its first day of trading, which is exactly the type of outcome that regulators should try to avoid. *See* Emily Bary & Ciara Linnane, *Online Mortgage Lender Better Sees Stock Implode After SPAC Merger*, MARKETWATCH (Aug. 24, 2023), https://www.marketwatch.com/story/online-mortgage-lender-better-sees-stock-implode-after-spac-merger-1976c4aa [https://perma.cc/F7S8-MXNP].

[62] Heather Somerville & Eliot Brown, *SPAC Startups Made Lofty Promises. They Aren't Working Out.*, WALL ST. J. (Feb. 25, 2022) (quoting Professor Michael Dambra), https://www.wsj.com/articles/spac-startups-made-lofty-promises-they-arent-working-out-11645785031?mod=article_inline [https://perma.cc/EAP2-NFUK].

[63] *See* Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, 38 Fed. Reg. 7220, 7220 (Mar. 19, 1973) ("It has been the Commission's long-standing policy generally not to permit projections to be included in prospectuses and reports filed with the Commission.").

[64] *See Is Your Forward-Looking Statement Safe Harbor Safe?*, DYKEMA (Aug. 12, 2015), https://www.dykema.com/news-insights/is-your-forward-looking-statement-safe-harbor-safe.html [https://perma.cc/QYM5-A4BT].

reflect an ambitious company advocate with big goals, which puts retail investors at risk of making an investment choice based on untested—indeed, untestable—projections. Because SPACs can benefit from the PSLRA safe harbor for forward-looking statements, sponsors and the acquisition targets are incentivized to be overly optimistic about their financial prospects. As long as there is some cautionary language, a statement that in effect primes the market may nevertheless be insulated provided that it is not outrightly false.

As a case in point, Nikola Motors, whose CEO Trevor Milton was convicted of criminal securities fraud,[65] was insulated him from civil liability largely due to this safe harbor provision.[66] When a plaintiff is suing a corporation, the PSLRA safe harbor requires parsing each individualized statement that was allegedly false or misleading and then looking to see if it was accompanied by corresponding cautionary language.[67] By dividing up the whole pie of misleading statements, the safe harbor's analytical approach makes the sum of the parts worth less than the whole. That is, each statement taken in isolation may have corresponding cautionary language. But, taken together, a series of statements that individually may have appropriate cautionary language nevertheless exert a misleading effect in the aggregate. Moreover, the cautionary language is located in SEC filings, which are documents that are unlikely to inform Main Street investing decisions.

2. *SPACs and the PSLRA Safe Harbor Tomorrow*

SPACs' access to the safe harbor pleases neither Chair Gary Gensler's SEC nor Congress.[68] Both have sought to render this safe harbor unavailable to SPACs in recent proposed rulemaking and proposed legislation.[69] Delegate Michael F. Q. San Nicolas (D-Guam) has introduced the Holding SPACs Accountable Act of 2021, which would amend the PSLRA safe harbor to

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[65] Jack Ewing, *Founder of Electric Truck Maker Is Convicted of Fraud*, N.Y. Times (Oct. 14, 2022), https://www.nytimes.com/2022/10/14/business/trevor-milton-nikola-fraud.html [https://perma.cc/CQJ8-8NX4].

[66] *See* Borteanu v. Nikola Corp., No. CV-20-01797-PHX-SPL, 2023 WL 1472852, at *37–*38 (D. Ariz. Feb. 2, 2023) (granting defendants' motions to dismiss).

[67] *See, e.g.*, *In re* Harman Int'l Indus., Inc. Sec. Litig., 791 F.3d 90, 101–03 (D.C. Cir. 2015).

[68] Former SEC Chair Jay Clayton, before SPACs imploded, did note that "[t]here's more forward-looking information in the SPAC space. Maybe one thing we can learn from this is that there should be more forward-looking information in the IPO space." Thornton McEnery, *SEC Boss Jay Clayton to Take a Deeper Look at the Blank-Check Company Boom*, N.Y. Post (Nov. 19, 2020), https://nypost.com/2020/11/19/sec-boss-to-take-a-deeper-look-at-the-blank-check-company-boom/ [https://perma.cc/3G98-QVRA]. Whether IPOs should receive protections for forward-looking statements is beyond the scope of this Note but is a subject of rich debate. For a holistic review, see generally Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage*, 64 Wm. & Mary L. Rev. 1757 (2023).

[69] Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29458, 29463 (proposed May 12, 2022) (to be codified at 17 C.F.R. pts 210, 229, 230, 232, 239, 240, 249, and 270) [hereinafter SPAC Rulemaking].

"exclude certain" SPACs.[70] Its counterpart in the Senate has yet to be introduced, but Senator Elizabeth Warren (D-Mass.) has a bill in the works—the SPAC Accountability Act of 2022—that intends to comprehensively regulate SPACs. Like Delegate San Nicolas's Holding SPACs Accountable Act of 2021, Senator Warren's bill plans to exclude SPACs from the PSLRA's forward-looking safe harbor.[71] Although neither of these bills have been passed, and may never pass, the SEC has likewise taken it upon themselves to review whether SPACs should benefit from the safe harbor.

In May 2022, the SEC issued a proposed rulemaking that would, like the previously mentioned bills, ensure "that the safe harbor for forward-looking statements . . . would not be available to SPACs, including with respect to projections of target companies seeking to access the public markets through a de-SPAC transaction."[72] To do this, the SEC proposes modifying the definition of a blank-check company (which can benefit from the safe harbor) to encompass SPACs.[73] This would be the first time the "blank-check company" definition has been amended since the SEC adopted the current definition in 1992.[74] This would be sensible, commentators write, since the PSLRA was not enacted until 1995. Therefore, "[t]here is reason to believe that Congress [in 1995] was unaware of how narrowly 'blank check stock' had been defined," accidentally bringing SPACs within the ambit of this statutory term of art and thus within the safe harbor's protections.[75]

This is an important move by the SEC, one that aligns SPAC regulation with its agenda of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation.[76] As Senator Warren explained, SPACs "rely on the ability to make 'bullish' projections—bordering on or fully falling into falsities—through the PSLRA safe harbor provision."[77] These bullish projections have not borne out, highlighting the unfairness that SPACs have wrought on capital markets. As a case in point, aerospace company Virgin Galactic went public via deSPAC in 2019, forecasting $210 million in revenue by the end of 2021.[78] But by the end of 2021, Virgin Galactic had only $3 million in revenue and had not yet conducted a flight.[79] Neither the company

[70] Holding SPACs Accountable Act of 2021, H.R. 5910, 117th Cong. (2021).

[71] *See* Office of U.S. Senator Elizabeth Warren, *The SPAC Hack: How SPACs Tilt the Playing Field and Enrich Wall Street Insiders* 5, 19–20 (May 2022) [hereinafter *SPAC Hack*], https://www.warren.senate.gov/imo/media/doc/SPACS.pdf [https://perma.cc/Q4DH-QM4Q].

[72] SPAC Rulemaking, *supra* note 69, at 29463.

[73] *Id.*

[74] *Id.* at 29482.

[75] *See* Klausner et al., *supra* note 11, at 283–84.

[76] *See Mission*, U.S. Sec. & Exch. Comm'n (last modified Aug. 29, 2023), https://www.sec.gov/about/mission [https://perma.cc/VMZ7-7EJ5].

[77] *SPAC Hack, supra* note 71, at 15.

[78] Chris Bryant, *SPACs, The 'Poor Man's Private Equity,' Made Investors Poorer*, Bloomberg (Feb. 25, 2022), https://www.bloomberg.com/opinion/articles/2022-02-25/-spce-virgin-galactic-reveals-how-spacs-have-made-retail-investors-poorer?leadSource=uverify%20wall [https://perma.cc/G6QX-E8KX].

[79] *Id.*

nor its directors and officers will likely ever be subject to monetary liability for their impressively poor projection, even if this projection duped investors while lining the pockets of Virgin Galactic's management team.

A stronger hand by the SEC and legislators in regulating forward-looking statements may be particularly useful as applied to SPACs, which do not trade in an efficient market.[80] As Professor Holger Spamann and Harvard LL.M. student Hao Guo have observed, efficient markets provide a critical indirect protection to investors, including unreasonable investors.[81] But, where the market is inefficient, like with SPACs, regulatory safe harbors should only be advocated for to the extent they make that inefficient market more efficient. In fact, Main Street "investors systematically overpay for SPAC shares."[82] This "overpayment is captured, directly or indirectly, by sophisticated players," exemplifying an inefficient market.[83] Moreover, considering that "higher SPAC revenue forecasts" have been found to "predict post-merger stock and accounting underperformance and litigation," it is unlikely that the PSLRA safe harbor is being used by SPAC management teams to make the market more efficient.[84] Rather, their overly ambitious projections inhibit rather than facilitate price discovery and market efficiency. Thus, removing the safe harbor and creating liability for material misstatements in forward-looking projections would likely make the SPAC market *more* efficient, and thus less likely to harm the average (unreasonable) investor.

The unique structure of a deSPAC transaction, however, may justify the safe harbor's malignant effects. Because the deSPAC constitutes a merger, rather than an IPO, Delaware corporate law and the SEC generally demand disclosing the projections underlying the proposed combination.[85] SPAC advocates thus justify the PSLRA safe harbor on the grounds that if the SEC and Delaware corporate law require projections, they should be guarded by a corresponding safe harbor.[86] Regardless of the fairness of that proposition, the policy question then becomes whether requiring public disclosure of management forecasts in a deSPAC transaction has more drawbacks (overly bullish projections) than it does benefits (more information given to market participants).[87]

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[80] *See* Spamann & Guo, *supra* note 15, at 76–77, 82–83.

[81] *See id.* at 76.

[82] *See id.* at 77.

[83] *See id.*

[84] Michael Dambra, Omri Even-Tov & Kimberlyn George, *Are SPAC Revenue Forecasts Informative?*, ACCOUNTING REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933037 [https://perma.cc/6MRK-E5SS].

[85] *See* Rose, *supra* note 68, at 1770, 1810 nn.186–87.

[86] *See, e.g.*, Kirkland & Ellis LLP, Comment Letter on Proposed Rule for Special Purpose Acquisition Companies, Shell Companies and Projections 11 (June 15, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20131385-301434.pdf [https://perma.cc/Y4YJ-W2XS].

[87] For a robust discussion of this issue, see generally Rose, *supra* note 68.

If the safe harbor were removed, such projections would be made with less regularity,[88] and market participants would instead rely on company analyses by Wall Street and the company's historical financials (which often are nonexistent for SPACs). Considering SPAC performance and the deluge of fraud-based litigation against SPACs, Wall Street reports—which are made by actors whose interest is to make money by revealing the truth behind a company—are likely more reliable than projections made by the SPAC participants themselves—whose primary goal is to boost their company's value. A greater emphasis on Wall Street reporting could also focus the market on particularly impressive SPACs, whereas the current methodology used by Main Street investors to differentiate between the hundreds of SPACs is essentially based on which founder or sponsor gave the most ambitious or persuasive company pitch. All told, Wall Street reports would be more likely to move SPACs toward an efficient market than SPAC self-disclosure. In light of these probable outcomes, combined with the fact that SPACs themselves do not trade in an efficient market even *with* the safe harbor,[89] removing them from the safe harbor's protection is sensible. Removing the safe harbor would not significantly threaten investor protection because the current informational climate around SPACs is not efficient, as demonstrated by the bevy of fraud-based suits against them and their overwhelmingly poor returns on investment.[90] Thus, removing the safe harbor would not turn an information-rich, investor-protecting, efficient market into an investor-threatening, inefficient market. In fact, it may actually make the SPAC market more efficient, and therefore more friendly to average investors.[91]

The main defense by SPAC advocates to justify the forward-looking safe harbor—that there exists an important distinction between a deSPAC and an IPO[92]—prioritizes form over function to the detriment of shareholders and the integrity of capital markets. Formally, a deSPAC constitutes a merger. But it functions like an initial distribution of securities to the public.[93] As noted in the SEC's recent rulemaking, "[t]he substance of a de-SPAC transaction is, in many ways, analogous to the distribution that occurs in a traditional IPO."[94] Functional approaches to securities markets animate securities regulation,

[88] *See id.* at 1769–71.

[89] *See* Spamann & Guo, *supra* note 15, at 77.

[90] *See* Cameron McVie, *The State of the SPAC Market*, Russell Invs. (Apr. 27, 2023), https://russellinvestments.com/us/blog/state-of-spac-market/ [https://perma.cc/RG2K-HNC6]; Yelena Dunaevsky & Teresa Milano, *SPAC Litigation by the Numbers: Surprisingly Positive Trends in 2022*, Am. Bar Ass'n (Jan. 24, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-february/spac-litigation-by-numbers-surprisingly-positive-trends-in-2022/ [https://perma.cc/PNY9-EYRW].

[91] *See* Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and its Legal Underpinnings*, 14 J. Legal Analysis 16, 34, 51–53 (2022).

[92] *See* Kirkland & Ellis LLP, *supra* note 86, at 10.

[93] *See* Breheny et al., *supra* note 49.

[94] SPAC Rulemaking, *supra* note 69, at 29485.

from the *Howey* test's functional definition of a "security"[95] to control person liability under section 20(a)[96] and more. This functional understanding, coupled with the SEC's mission of protecting investors and capital markets, justifies excluding deSPAC transactions from the PSLRA's safe harbor for forward-looking statements.

B. Statutory Underwriters and Section 11 Liability

In an IPO, underwriters that operate in fear of potential liability under the Securities Act of 1933 push forward disclosure and due diligence processes. Specifically, section 11 of the Securities Act imposes civil liability on any underwriter that effectuates a registration statement containing a material misrepresentation or omission, functioning as the core enforcement mechanism for both the SEC and private plaintiffs to hold reporting companies accountable.[97] But although a deSPAC transaction functions almost identically to an IPO, it is not regulated like one because it is considered a merger, not a public offering of securities, and thus lacks a statutory underwriter—often the key party in a transaction ensuring that due diligence is undertaken before a company's shares reach retail investors.

1. SPACS, Underwriters, and Section 11 Liability Today

That no statutory underwriter clearly exists for a deSPAC transaction reduces the incentive for all SPAC gatekeepers—sponsors, major investors, and acquisition company executives—to be clear-eyed about the financial prospects of any given transaction. SPACs, however, are not exempt from section 11 and may nevertheless come within its ambit, even if a conventional deSPAC transaction is not subject to section 11. Most SPACs will ultimately file a form S-4 or F-4 with the SEC,[98] forms that the SEC requires to be filled out when any publicly traded company intends to conduct a merger or acquisition. Generally, these contain the terms of the transaction, risk factors, and other material information related to the deal. Material misrepresentations in these forms theoretically subject the signatories of that form to section 11 liability.[99] However, because the signatories of this form might not even be the SPAC management itself, or the acquisition target, it can be difficult to expose the parties in need of enhanced liability to liability's diligence-inducing

[95] *See* SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

[96] *See* Erin L. Massey, *Control Person Liability Under Section 20(a): Striking a Balance of Interests for Plaintiffs and Defendants*, 6 Hous. Bus. & Tax L.J. 109, 114–22 (2005).

[97] *See* Securities Act of 1933 § 11, 15 U.S.C. § 77k.

[98] In its recently proposed reforms, the SEC observed that in 2020, about 57% (21 out of 37) of SPAC mergers were registered on Form S-4 or F-4; in 2021, about 82% (212 out of 260) were so registered. *See* SPAC Rulemaking, *supra* note 69, at 29487 n.212; *see also* Tuch & Seligman, *supra* note 61, at 330 n.146.

[99] *See* Tuch & Seligman, *supra* note 61, at 329–30.

effects.[100] That said, part of the SEC's 2022 SPAC rulemaking would require "that the private target company in a de-SPAC transaction . . . be a co-registrant when a SPAC files" an S-4 or F-4.[101]

Even when a SPAC files an S-4 or F-4 with the SEC, those who buy securities on the secondary market—regular retail investors—are met with the additional hurdle of "tracing" before they could ever sue the SPAC or the acquisition company under section 11.[102] Tracing constitutes a judicially crafted concept invented by Judge Henry Friendly on the Second Circuit almost sixty years ago.[103] It requires security purchasers making a section 11 claim to prove that *their* securities came from the *specific* registration statement at issue.[104] But because the market generally contains SPAC shares issued through various offering types, it is likely impossible for retail investors to "trace" *their* shares to any allegedly defective registration statement. Even if investors can be ninety-nine percent certain that their shares came from a defective S-1, S-4 or F-4, tracing has not been satisfied. This framework all but erases threats of section 11 liability for the deSPAC transaction from claims brought by regular retail investors that buy post-merger shares.

2. *Underwriter Liability and Section 11 in deSPAC Transactions Tomorrow*

This seemingly gaping hole in liability has perked the ears of regulators and legislators alike. Both the SEC and Congress have taken steps to reduce the asymmetry in liability between SPACs and IPOs, but whether such steps are prudent is the subject of debate. This Note suggests such steps are generally prudent but are likely harmfully overbroad. Instead, Congress should define section 20(b) of the Securities Act to bring within its ambit a similar group of defendants—SPAC sponsors and those substantively in charge of the deSPAC transaction—while also providing private plaintiffs with the tools to combat the next financial instrument used to enrich a privileged group at the expense of Main Street investors, a theory detailed more fully in Part V below.

The SEC has begun a rulemaking that seeks to expand liability for those dealing with SPAC and deSPAC transactions. The SEC's proposed Rule 140a broadens the scope of the term "underwriter," bringing within section 11's ambit any entity "act[ing] as an underwriter in a SPAC initial public offering" that also "tak[es] steps to facilitate the de-SPAC transaction," (e.g., as a financial advisor), "or otherwise participates (directly or indirectly) in the

[100] *See id.*

[101] Bradley D. Houser, Shane N. Segarra & Alex Nicole Cosio, *SEC Releases Proposal to Enhance Disclosures for SPACs and De-SPAC Transactions*, Holland & Knight (Apr. 8, 2022), https://www.hklaw.com/en/insights/publications/2022/04/sec-releases-proposal-to-enhance-disclosures-for-spacs-and-despac [https://perma.cc/T4GN-HBHH].

[102] *Cf.* Tuch & Seligman, *supra* note 61, at 330–31.

[103] *See id.* (citing Barnes v. Osofsky, 373 F.2d 269, 271–73 (2d Cir. 1967)).

[104] *See, e.g.*, Pirani v. Slack Techs., Inc., 13 F.4th 940, 951–52 (9th Cir. 2021) (Miller, J., dissenting); *see also* Tuch & Seligman, *supra* note 61, at 330–31.

de-SPAC transaction."[105] This underwriter-turned-advisor two-step often exists in deSPAC transactions, where a standard underwriter at the IPO stage often then advises the SPAC as a financial advisor while the SPAC seeks an acquisition target. Thus, Rule 140a would significantly increase exposure to liability for underwriters and other key players in a deSPAC transaction, which will likely be helpful for investors but will significantly raise the costs of conducting a deSPAC transaction.

Rule 140a hinges on "direct or indirect participation" in the deSPAC transaction, which is concerningly ambiguous.[106] According to the SEC, direct or indirect participation could include "receipt of compensation in connection with the de-SPAC transaction."[107] This would bring SPAC sponsors squarely within the Securities Act's definition of an underwriter, rendering them liable for material misstatements or omissions outside the scope of the due diligence defense, which is the defense provided to underwriters in all section 11 suits.[108] This would put sponsors on notice that they should be wary about acquiring a company that has financial projections that could be construed as materially misleading and would greatly encourage due diligence on their part.[109] If this were the case for a company like Nikola, the motor industry executives that sponsored the SPAC would have had a higher incentive to discover that the only thing once-in-a-generation about Nikola was the fraud it perpetrated, not the technology it allegedly created.

Senator Elizabeth Warren is the only legislator in the House or Senate to confront the definitional issue of what constitutes an "underwriter" under section 11 of the Securities Act in the context of a deSPAC. Her proposal codifies the SEC's rulemaking, bringing within the statutory underwriter definition "any party that facilitates, directly or indirectly, a de-SPAC transaction."[110] This would, as the SEC likewise noted, increase potential section 11 liability for SPAC sponsors and boards, financial institutions, and the target company.[111]

Senator Warren's expansive definition of underwriter that seeks to bring more gatekeepers within section 11's liability framework is somewhat tricky. First, the definition proposed by Senator Warren and the SEC is unwieldy. To "indirectly" participate in a deSPAC transaction escapes precise definition. Such imprecision should be policed particularly carefully given that the proposed SEC rules could have retroactive effect because it is a "clarification

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[105] *See* SPAC Rulemaking, *supra* note 69, at 29486. Professor John C. Coates, former Acting Director of the SEC Division of Corporate Finance, has argued for this position, noting that the "sponsor itself . . . is purchasing from the target with a view to a distribution, and so also already bears some underwriter liability risk." Coates, *supra* note 47, at 381 (internal quotations omitted).

[106] *See* SPAC Rulemaking, *supra* note 69, at 29486.

[107] *See id.*

[108] *See* William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 Brandeis L.J. 549, 549–50 (2006).

[109] *See* SPAC Rulemaking, *supra* note 69, at 29535–36.

[110] *SPAC Hack*, *supra* note 71, at 5.

[111] *See id.*

rather than a rule change."[112] Indeed, Citibank has paused issuing new SPACs on account of this regulatory uncertainty, which suggests that the SEC's rule may have injected too much uncertainty.[113] That is, unless the demise of SPACs is considered an ideal result.

Second, it is unclear how underwriter compensation will be addressed in deSPAC transactions. Generally, there are various parties that "indirectly" and "directly" participate in the deSPAC transaction that are compensated with shares—for instance, the sponsors and the board of directors of the SPAC and the acquisition company. These individuals would come within the SEC's definition of "underwriter," which runs into a conflict with FINRA Rule 5110.[114] The FINRA Rule notes that "[a]ny underwriting compensation consisting of securities" cannot be transferred or sold "for a period of 180 days," which seems to mandate a 180-day lock-up for those within the scope of Rule 140a.[115] Neither the SEC nor academia has addressed this apparent implication of the SEC moving forward with its broad interpretation of underwriter under Rule 140a, although the deSPAC definition of underwriter may simply be outside the scope of FINRA's conception of underwriter.

Third, the entity acting as a veritable underwriter at the IPO of the SPAC, which occurs before it finds an acquisition target, may not be sufficiently involved enough in the deSPAC—the acquisition process—to avail itself of defenses generally available to underwriters. Specifically, underwriters in standard IPOs can use the due diligence defense, which requires showing that, after reasonable investigation, the underwriter had no grounds to believe and did not believe that the registration statement was tainted by material misrepresentations or omissions.[116] However, commentators have noted that because the SPAC public offering and the deSPAC acquisition are two distinct processes that can occur up to two years apart, it would be possible "that certain parties that would be deemed underwriters under the proposed [SEC] rule may not have sufficient access to the materials necessary to formulate a due diligence defense."[117] This reality cuts against adopting either Senator Warren's or the SEC's reinterpretation of what amounts to statutory underwriter status.

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[112] Timothy J. Kirby, Mark D. Wood & Richard D. Marshall, *Sweeping SEC Proposals Raise Significant Concerns for SPAC Market*, KATTEN (May 3, 2022), https://katten.com/sweeping-sec-proposals-raise-significant-concerns-for-spac-market [https://perma.cc/DJH4-V4K9] (internal quotation omitted).

[113] Gillian Tan, *Citi to Pause New SPAC Issuance as SEC Signals Crackdown*, BLOOMBERG (Apr. 4, 2022), https://www.bloomberg.com/news/articles/2022-04-04/citi-said-to-pause-new-spac-issuance-as-sec-signals-crackdown [https://perma.cc/3YMB-DQN6].

[114] *See* FINRA RULE 5110 (FINRA 2020).

[115] *Id.* 5110(e)(1)(A).

[116] *See* Sjostrom, *supra* note 108, at 554.

[117] Scott Mascianica & Michael W. Stockham, *Writing on the Wall for SPAC Underwriters? New SEC Rule Increases Exposure and Risks*, HOLLAND & KNIGHT (Apr. 15, 2022), https://www.hklaw.com/en/insights/publications/2022/04/writing-on-the-wall-for-spac-underwriters [https://perma.cc/BN3D-J935].

Lastly, there are other provisions in the recent proposed rulemaking that would likely achieve the same ends without disturbing "the most potent liability provision in the federal securities regulatory arsenal."[118] Specifically, Proposed Item 1606 would "[r]equire disclosure on whether a SPAC reasonably believes that a de-SPAC transaction . . . [is] fair or unfair to investors" and the bases for that belief.[119] This, in a nutshell, requires that SPACs show their work. This would likely result in the same type of due diligence that the SEC and Senator Warren are trying to incentivize by expanding section 11's definition of underwriter but has the benefit of leaving intact a monumentally important statutory term of art.

These are a few of the lingering considerations and difficulties related to the SEC and Senator Warren's adoption of an extensive underwriter definition. There are also arguments that the definition is devoid of statutory basis[120] and that the retroactivity concerns could implicate reliance and due process issues. This array of concerns suggests that the SEC and Senator Warren may have overstepped in their proposals. Although such an ambitious redefinition would be limited to the deSPAC transaction and would not reverberate throughout the securities space, a regulatory willingness to reinterpret a carefully developed term—"underwriter"—whenever the SEC feels it is necessary would create uncertainty in federal securities regulation writ large.

It is also the case that the SEC and private litigants have other tools to incentivize due diligence on behalf of key SPAC players. For instance, as discussed more fully below in Part V, Congress could refine and reinvigorate section 20(b) such that it could be used to directly target those who induce fraudulent behavior. Section 20(b)'s text provides liability for inducing "directly or indirectly" anything that would be unlawful under the securities laws.[121] This text mirrors the language in both Senator Warren's and the SEC's proposals and could presumably capture similar misconduct while avoiding the awkwardness that reinterpreting section 11's underwriter provisions would cause. Given that this is one of the most significant statutory phrases in the securities law canon, it should be reinterpreted only under incredibly persuasive circumstances. Expanding and reinterpreting section 20(b), however, is a theory yet to be explored by the literature but is explored more fully by this Note in Part V.[122] Reinvigorating section 20(b) may require congressional action, as it has been a dead letter to date. While it has been subject to vary-

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[118] Andrew F. Tuch, *SEC Proposed Reforms of SPACs: A Comment from Andrew Tuch*, Harv. L. Sch. F. on Corp. Governance (July 21, 2022), https://corpgov.law.harvard.edu/2022/07/21/sec-proposed-reforms-of-spacs-a-comment-from-andrew-tuch/ [https://perma.cc/VQ8L-EK26].

[119] SPAC Rulemaking, *supra* note 69, at 29465.

[120] *See* Kirkland & Ellis LLP, *supra* note 86, at 7.

[121] Securities Exchange Act of 1934 § 20(b), 15 U.S.C. § 78t(b).

[122] One of the only articles published on section 20(b) was written eight years ago by Mr. William D. Roth. *See generally* William D. Roth, Note, *The Role of Section 20(b) in Securities Litigation*, 6 Harv. Bus. L. Rev. Online 36 (2015), https://journals.law.harvard.edu/hblr/2015/12/the-role-of-section-20b-in-securities-litigation/ [https://perma.cc/5LDP-SRNS].

ing interpretations by numerous federal courts and SEC commissioners,[123] a stance from the SEC on the section could get courts on board. These contrasting and conflicting interpretations have rendered section 20(b) null, but its reinvigoration should be a priority for any Congress or SEC concerned with giving private plaintiffs a greater toolkit for combatting corporate fraud, whether that be related to SPACs or the next instrument manipulated by financiers. Before the SEC's proposed Rule 140a or Senator Warren's analogous provision in the SPAC Accountability Act is adopted, Congress should prioritize crafting or amending legislation to guarantee that the solution is properly tailored to the malfeasance at hand. Section 20(b) could be just the provision to fit that bill.

All told, proposed Rule 140a paints too broadly. As the Federal Regulation of Securities Committee of the American Bar Association argues in a comment on the proposed SEC rules, Rule 140a fails to define the level of participation necessary to be a statutory underwriter, bringing within its ambit those that merely "facilitate the participation of others in a securities offering."[124] Historically, however, only activities "related to the actual distribution of securities"[125] render a party a statutory underwriter and accordingly subject to section 11 liability, making Rule 140a an uncomfortably large expansion of underwriter liability. To be sure, these ambiguities are a feature rather than a bug of the securities law system. Before the SEC proposed Rule 140a, Professor John C. Coates suggested "the term 'underwriter' is uncertain—by design."[126] "It includes not only conventional underwriters" but also theoretically includes actors like SPAC sponsors and financial advisors, a conclusion the SEC ultimately adopted in the previously referenced proposed rulemaking.[127] Nevertheless, the deficiencies of defining that ambiguity in the way the SEC and Senator Warren propose opens up a pandora's box that is unlikely to be productive when the dust settles, especially when there are other tools in the toolbox.

C. Section 5 Pre-Filing Restrictions and the Quiet Period

IPOs are subject to a host of Securities Act restrictions in the days and months before shares hit the public markets so that market participants cannot arouse public interest before full disclosure to the SEC.[128] SPACs, by contrast,

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[123] *See id.* at 37. For a full discussion of section 20(b) and how courts have interpreted it, see Part V of this Note.

[124] Fed. Regul. of Sec. Comm., Am. Bar Ass'n., Comment Letter on Proposed Rule for Special Purpose Acquisition Companies, Shell Companies and Projections 5 (June 17, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20131981-302447.pdf [https://perma.cc/YB63-6Q8C].

[125] *In re* Lehman Bros. Mortg.-Backed Sec. Litig., 650 F.3d 167, 176 (2d Cir. 2011).

[126] *See* Coates, *supra* note 47, at 380.

[127] *See id.*

[128] *See* Harald Halbhuber, *Economic Substance in SPAC Regulation*, 40 Yale J. on Regul. Bull. 44, 59 (2022).

are subject to almost no restrictions, even though they "typically announce their mergers many weeks before the filing of a registration statement."[129] Section 5(c) is the predominant Securities Act prohibition in this area. Under section 5(c), issuers may not "offer" to sell any security.[130] Section 2 of the Securities Act defines "offer" broadly, and the SEC has interpreted it to prohibit any communication that could conceivably "condition the market" in anticipation of the IPO.[131] If pre-filing prohibitions like these are violated, then the registrant is subject to liability under section 5. This restriction, applicable to IPOs but not SPACs, ensures that companies do not "condition the market" and engage in calculated securities-related advertising in an attempt to manipulate public perception of the stock before a well-vetted registration statement has been submitted to the SEC.[132] Interestingly, the SEC's toughening of the pre-filing restrictions occurred in the late 1950s after Ford Motor Company jumped twenty percent on investor excitement only to fall below the offering price shortly thereafter, a pattern replicated by SPACs today.[133]

The SEC, recognizing the harsh edges of section 5, has created carveouts. Rule 163A, for instance, provides all issuers with a bright-line period ending thirty days before the filing of a registration statement during which issuers are effectively immune from section 5 liability. But once the company is within thirty days of filing a registration statement with the SEC, section 5 kicks in, and issuers are subject to a quiet period where statements on behalf of the company cannot reference the upcoming securities offering.[134]

1. SPACs and the Lack of Pre-Filing Restrictions Today

SPACs are not subject to the same prefiling restrictions as IPOs because the deSPAC transaction is formalistically considered by securities laws to be a merger, not a public offering of securities.[135] The IPO aspect of the two-step occurs when the sponsors put together a blank-check company in advance of acquiring—merging—with the target company, and the subsequent merger is outside the scope of section 5 of the Securities Act. Thus, the most significant

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[129] Tuch & Seligman, *supra* note 61, at 343.

[130] *See* 15 U.S.C. § 77e(c).

[131] *See* James D. Cox, Robert W. Hillman, Donald C. Langevoort & Ann M. Lipton, Securities Regulation, Cases and Materials 147 (10th ed. 2022).

[132] *See* Gibson Dunn Cap. Mkts. Prac. Grp., Dissemination of Information During the Initial Public Offering Process 2 (2017), https://www.gibsondunn.com/wp-content/uploads/2018/01/CAP-Dissemination-of-Information-During-the-IPO-Process.pdf [https://perma.cc/3N9U-VKQT].

[133] *See* Note, Arvida *and the SEC: Prefiling Publicity*, 1959 Duke L.J. 460, 463–64.

[134] Not all publicly traded companies are subject to these rules. Emerging growth companies, which are companies that are relatively small, are subject to different rules. These rules reflect the proposition that smaller, more start-up like companies, ought to be subject to reduced regulation given their smaller size, even if they are publicly traded. *See Emerging Growth Companies*, U.S. Sec. & Exch. Comm'n (last modified May 5, 2023), https://www.sec.gov/education/smallbusiness/goingpublic/EGC [https://perma.cc/V7TR-M8RD].

[135] *See* Tuch & Seligman, *supra* note 61, at 342–44.

procedural component of the SPAC process is not subject to the core of securities law liability and the diligence-enhancing effects that core inspires.

The SPAC acquisition announcement is often followed by distribution of slide decks, lofty revenue projections, and other types of information. "These materials—which would not be permitted in a traditional IPO—'condition the market' for the SPAC before any well-vetted registration statement has been filed."[136] Thus, not only can SPACs find refuge in the PSLRA safe harbor, but they can also do so in the days immediately before a registration statement has been filed with the SEC. This results in SPAC investors making investment decisions based on only weakly vetted information that should not form the basis of a sound investment decision, inhibiting price discovery of the SPAC and often working to the detriment of these investors.[137]

2. SPACs and Pre-Filing Restrictions Tomorrow

The SEC wants to change this asymmetry. In its recent proposed rulemaking, the SEC proposed amending Rule 163A[138] to remove blank-check companies from the list of entities exempt from section 5's pre-filing communications prohibitions in the thirty days prior to registration. The same proposed rulemaking would define SPACs as such blank-check companies under Rule 419.[139] Accordingly, under the SEC's proposed rulemaking, SPACs would be subject to the same quiet period and pre-filing restrictions that traditional IPOs are subject to.

This move accords with the broad purpose of the Securities Act and section 5 in particular. Section 5 is fundamentally concerned with guaranteeing that "salesmanship does not run ahead of the mandatory disclosure that is supposed to inform investor decisions of whether to buy or not."[140] Although SPACs, as reviewed, are not subject to the same mandatory disclosure requirements that IPOs are, there is still value in prohibiting salesmanship to occur in the period immediately preceding when the company hits public markets. At the very least, prohibiting pre-filing communications by SPACs in the same manner as IPOs would ensure that investors who do ultimately buy the stock were not persuaded to do so by lofty rhetoric coming from those running the deSPAC.

Whether subjecting SPACs and IPOs to the same pre-filing regulations is an apt public policy choice hinges on how much bite the pre-filing restrictions actually have. Empirics on the effect of pre-filing restrictions show that restrictions generally discourage investment activity because they reduce the

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[136] *Id.* at 343.
[137] *Id.*; *see also supra* text accompanying notes 80–83.
[138] 17 C.F.R. § 230.163A (2023).
[139] SPAC Rulemaking, *supra* note 69, at 29482.
[140] Donald C. Langevoort & Robert B. Thompson, *IPOs and the Slow Death of Section 5*, 102 KY. L.J. 891, 891 (2014).

publicity associated with an IPO.[141] Considering how poorly SPACs have performed, if that outcome were replicated in the SPAC field, it would be a good one. That SPACs "are permitted to engage in all forms of marketing and communications to generate interest in the transaction"[142] and that over ninety percent of SPACs take advantage of providing financial forecasts[143] also militate toward ratcheting up pre-filing restrictions in the space. Lastly, empirical research has shown that there is a positive correlation between the annual growth rate projected by SPACs and the level of retail trading in the five-day period around the publication of such projections.[144] This shows that investors are reacting to SPAC management's forecasts. However, considering SPACs' performance vis-à-vis these projections, it would be prudent for the SEC to regulate with the goal to decouple the relationship between the strength of a SPAC's forecast and the level of retail trading. Subjecting SPACs to the pre-filing quiet period would be consistent with that goal.

Although there is relatively little research on the relationship between pre-filing restrictions, stock price, and SPACs, subjecting SPACs to the same pre-filing restrictions as IPOs would be a relatively low-cost intervention with benefits captured largely by retail investors who might otherwise succumb to an overly rosy pre-filing statement. The SEC's move in this space, to align SPACs and IPOs, does not disrupt the fundamental structure of SPACs or the benefits that advocates vaunt and thus should be accepted as a salutary measure that will, at worst, force SPAC management to be quieter in the pre-filing period.

D. Lessons Learned from Legislative and Administrative Reform

Chair Gensler, Senator Warren, and other reform advocates in the SPAC space have their work cut out for them. They confront a catastrophically underperforming financial vehicle subject to nearly as many lawsuits as the chronically fraud-ridden cryptocurrency space, but only after losses were booked. The question, then, is this: how do Chair Gensler, Senator Warren, and other reformists ensure that the next novel financial vehicle is not exploited in the same way that SPACs have been exploited?

First, the regulations governing forward-looking information should be subject to a functional analysis. Whether the information comes from an IPO, SPAC, or another financial instrument, the more it looks like a distribution of securities, the more it should be subject to the same regulations as an IPO. This is particularly the case in the SPAC space, which trades in an inefficient

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[141] *See* Halbhuber, *supra* note 128, at 59.

[142] *10 Questions with Don Duffy*, 10 Activist Rep., no. 9, Sept. 2020, at 1, https://westwicke.com/wp-content/uploads/10-Questions-with-Don-Duffy-1.pdf [https://perma.cc/7Z97-5MDB].

[143] *See* Michael Dambra, Omri Even-Tov & Kimberlyn George, *Should SPAC Forecasts be Sacked?*, Harv. L. Sch. F. on Corp. Governance (Oct. 11, 2021), https://corpgov.law.harvard.edu/2021/10/11/should-spac-forecasts-be-sacked/ [https://perma.cc/YET8-5HKB].

[144] Dambra et al., *supra* note 84.

market relative to traditional IPOs. Reducing the incidence of such statements via external regulatory interventions would help ensure that Wall Street does not take advantage of the inefficient market.

Second, rather than take on the gargantuan task of changing the meaning of the term "underwriter," the SEC and Capitol Hill should pursue other measures that achieve the same end with less collateral damage. For instance, instead of redefining one of the most important terms in all of securities law, policymakers could use section 20(b) to empower private plaintiffs and increase scrutiny on those who might effectuate sketchy transactions, a theory discussed fully in Part V. Empowering private plaintiffs more generally would be particularly prudent given that it would help combat dubious financial arrangements, even in the post-SPAC era.

Lastly, Congress and the SEC should adopt low-cost interventions that increase market stability and shield retail investors from potentially misleading statements, like subjecting SPACs to a quiet period. It is a tenet of securities law that retail investors should be protected from overly rosy management projections, a principle that applies to SPACs no less than it does to IPOs.

IV. Common Law Reform

Supplementing these regulatory interventions has been the work of common law courts, particularly the Delaware Court of Chancery, which has jurisdiction over the vast majority of IPOs, public companies, and SPACs.[145] Although the Delaware Court of Chancery has issued only a pair of decisions related to SPACs, the opinions coming out of Wilmington should be recognized and understood by federal regulators in Washington, considering that they both supplement and could potentially supplant federal regulation of SPACs.

A. *Delaware Court of Chancery*

The Delaware Court of Chancery considered whether the structure of the SPAC and its inherent conflicts of interest militate toward subjecting the SPAC sponsors' and board's conduct to the enhanced "entire fairness" standard of review. This standard, which is used to determine when fiduciary duties are breached, is triggered when a "controlling stockholder" engages in a "conflicted transaction,"[146] or when a majority of the board that approved the transaction was self-interested or lacks independence from a self-interested

[145] *See* WilmerHale, IPO Report 8 (2020), https://www.wilmerhale.com/en/insights/publications/2020-ipo-report [https://perma.cc/6BWC-HW9V] (reporting that eighty-eight percent of IPO companies from 2017 through 2019 were incorporated in Delaware and that no other state had over three percent).

[146] Jon Muenz, *SPAC In Action: Court of Chancery Applies Entire Fairness Review in Declining to Dismiss SPAC Lawsuit*, Sidley (Feb. 21, 2023), https://ma-litigation.sidley.com/2023/02/

party.[147] Under this standard, the defendant—in this case, the SPAC sponsors, directors, and officers—must prove that the acquisition price and the manner in which the transaction was conducted was "entirely fair to the corporation and its stockholders."[148] In the SPAC context, this means that the SPAC sponsors, directors, and officers must show that the acquisition made financial sense and that the SPAC disclosed reasonably available information related to the acquisition company so that SPAC shareholders could knowledgeably exercise their redemption rights.

To dismiss a claim predicated on breach of fiduciary duties at the motion to dismiss stage, the defendant must show that the acquisition was "cleansed."[149] A majority of votes from a fully informed stockholder electorate being cast in favor of the transaction meets this standard.[150] But if the electorate is not fully informed of the facts and circumstances underlying the corporate decision, then the relevant conduct will be subject to entire fairness review. Because the entire fairness inquiry is fact intensive, application of the standard can be outcome determinative; "it is rare the court will dismiss a fiduciary duty claim on a Rule 12(b)(6) motion when entire fairness is the governing standard of review."[151] Thus, when entire fairness applies, the defendant-controlling stockholder usually enters into settlement negotiations to avoid trial.

To date, the Delaware Court of Chancery has issued two blockbuster opinions on whether certain SPAC misconduct was subject to entire fairness, a stringent, stockholder-protecting standard of review. On both occasions, the Court of Chancery, through the pen of Vice Chancellor Lori Will,[152] held SPAC acquisitions to that standard. In those same opinions, Vice Chancellor Will found breaches of fiduciary duties by the SPAC sponsors, directors, and officers for their conduct and lack of disinterestedness in the SPAC and deSPAC. It is crucial that SPAC reformists in Washington understand developments coming out of Wilmington. Developments in Delaware law, a body of law that governs nearly all SPACs in existence through their incorporation in the state, can complement, supplant, and reduce the need for federal regulation in the space while achieving the same ends federal regulators are striving for.

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spac-in-action-court-of-chancery-applies-entire-fairness-review-in-declining-to-dismiss-spac-lawsuit/ [https://perma.cc/UF99-97PM].

[147] *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013).

[148] *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 815 (Del. Ch. 2022) (quoting *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006)).

[149] *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305–06 (Del. 2015).

[150] *See id.*

[151] *MultiPlan*, 268 A.3d at 815–16 (quoting Tornetta v. Musk, 250 A.3d 793, 812 (Del. Ch. 2019)).

[152] Chancery Court judges are the highest judges of the Delaware Court of Chancery. The chief judge is called the Chancellor, while the other judges are given the title of Vice Chancellor. *See Judicial Officers*, Del. Cts., https://courts.delaware.gov/chancery/judges.aspx [https://perma.cc/4AGV-3BN2].

1. In re MultiPlan Corp. Stockholders Litigation

MultiPlan, issued in January 2022, was the first time the Delaware Court of Chancery ruled on a SPAC-related governance issue since the boom began. In *MultiPlan*, Michael Klein, formerly head of institutional clients at Citibank, formed a SPAC named Churchill Capital Corp. III with the intention of acquiring MultiPlan. This was one of at least seven SPACs Klein formed amid the SPAC boom.[153] However, like many SPACs, this deal was a bust, and shareholders launched a suit in the Delaware Court of Chancery alleging that the SPACs sponsors, directors, and officers breached their fiduciary duties by engaging in a conflicted transaction by acquiring MultiPlan. The plaintiffs claimed that Klein and his management team were conflicted for two reasons, both of which the court found to be sufficient to implicate entire fairness review.[154]

First, Klein's renumeration as sponsor rendered the transaction a "conflicted controller" transaction.[155] This occurs when a controlling stockholder, which the parties stipulated Klein was due to his control of the sponsor, "receives a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders to the detriment of the minority."[156] Klein, as most SPAC sponsors do, had issued himself the sponsor promote, which made him the owner of seventy percent of the Class B shares and private placement warrants.[157] The Class B shares were worth upwards of $300 million, and the warrants were worth more than $50 million once the deSPAC occurred—representing over a 1.2 million percent gain on Klein's initial $25,000 investment.[158] Had Churchill not acquired a company like MultiPlan, these Class B shares and warrants would have expired with zero value.[159] The public, Class A, shareholders, had a much different arrangement if no company was acquired. If Churchill had not acquired a company, they would have received their ten dollars per share plus interest back. Thus, Klein was guaranteed to profit handsomely in an acquisition, regardless of how good the deal was. Shareholders, by contrast, would be left to the sometimes-unforgiving whims of the capital markets. Importantly, stockholders in the SPAC have *no say* in the acquisition target. Overall, "th[is] potential conflict between Klein and

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[153] *MultiPlan*, 268 A.3d at 793.
[154] *Id.* at 792.
[155] *Id.* at 809–10.
[156] *Id.* at 810 (internal quotations omitted).
[157] *See id.*
[158] *Id.*
[159] *See* Coates, *supra* note 47, at 403 ("Cost pressure exerted by SPAC sponsors is strong. If a SPAC cannot find a de-SPAC in the SPAC period, the sponsor eats all of the start-up costs of the SPAC.").

public stockholders resulting from their different incentives in a bad deal versus no deal" meant that entire fairness governed the case.[160]

For similar reasons, Vice Chancellor Will held that a majority of the board was not disinterested, which also independently triggered entire fairness review. Those board members, like Klein, held millions of dollars of Class B shares and warrants that would have been worthless in the event of a non-acquisition.[161] Additionally, the board was also not independent from a self-interested party—Klein. This was because "Klein appointed each of the directors to the board and retained the unilateral power to remove them."[162] Moreover, the directors were involved with many of Klein's SPACs.[163] Given the prospect of lucrative SPAC deals in the future should they remain in Klein's good graces, this made it less likely for them to be independent when reviewing the MultiPlan acquisition.[164] Altogether, this meant that the directors' conduct with respect to the MultiPlan acquisition would likewise be reviewed under the entire fairness standard because a majority of the board was not disinterested.

Vice Chancellor Will then rejected the motion to dismiss the breach of fiduciary duties claims because the sponsor and the directors could not show that the transaction was entirely fair.[165] Because Klein and the directors' disclosures were "unilateral and not counterbalanced by opposing points of view"[166] and because they did not disclose that MultiPlan would soon lose a customer responsible for thirty-five percent of its revenue,[167] the acquisition was not the product of fair price or fair dealing. Accordingly, both the directors and Klein, in both his personal and officer capacities, could be subject to damages at trial. But trial never arrived—MultiPlan settled the case for $34 million in November 2022.[168]

2. Delman v. GigAcquisitions3

Vice Chancellor Lori Will issued her second important SPAC opinion in *Delman* a year later in January 2023.[169] *Delman*'s facts mimicked those

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[160] *MultiPlan*, 268 A.3d at 812.

[161] *Id.* at 813.

[162] *Id.* at 814.

[163] *See id.* ("Other than Abson, those individuals were on at least five other Churchill SPAC boards.").

[164] *Id.* at 814–15.

[165] *See id.* at 818–19.

[166] *Id.* at 816 (quoting Eisenberg v. Chi. Milwaukee Corp., 537 A.2d 1051, 1057 (Del. Ch. 1987)).

[167] *See id.* at 797.

[168] *See* Mike Leonard, *MultiPlan Pays $34 Million to End Suit Over M. Klein SPAC Merger*, Bloomberg L. (Nov. 18, 2022), https://news.bloomberglaw.com/esg/multiplan-pays-34-million-to-end-suit-over-m-klein-spac-merger/ [https://perma.cc/8XLB-XPLN].

[169] *See* Mark D. Wood, Richard H. Zelichov & Michelle Mount, *Delaware Chancery Court Issues* Delman *Decision Potentially Increasing Scrutiny of the Actions of SPAC Sponsors and Boards*, Katten (Jan. 31, 2023), https://katten.com/

in *MultiPlan*: after an acquisition went sour, shareholders sued alleging that the SPAC sponsors, directors, and officers breached their fiduciary duties in acquiring the target. Like in *MultiPlan*, Vice Chancellor Will held that the *Delman* defendants "disloyally depriv[ed] public stockholders of information material to the redemption decision," triggering entire fairness review.[170]

Upon ultimately acquiring Lightning eMotors, an electrical vehicle manufacturer, the Gig3 managing team disclosed lofty projections for the company's future success. In the proxy statement detailing the acquisition, the management team noted that Lightning's revenues, as disclosed by the Lightning management team, were projected to grow 222-fold over five years, from $9 million to more than $2 billion, with profits growing from $0 to over $500 million over the same period.[171] In addition to these projections, the SPAC described the conflicts of interest related to the founders' shares, which would expire worthless in the event of a non-acquisition, and noted that the shares held publicly were worth $10 each.[172] The acquisition was accepted by a majority of shareholders and the SPAC formerly known as Gig3 became Lighting eMotors on May 6, 2021.[173]

By May, Lightning's stock price had fallen to $7.82 per share. The share price ultimately traded for less than $0.50 per share.[174] In response to this disaster, shareholders sued the SPAC for breach of fiduciary duties; the SPAC filed a motion to dismiss the claim.[175]

Because the Gig3 team, unlike Klein in the *MultiPlan* litigation, did disclose their conflicts, Vice Chancellor Will emphasized that the distinction between *Delman* and *MultiPlan* was the manner in which the redemption rights of shareholders were hindered.[176] In *Delman*, the Gig3 management team omitted key information that would have otherwise informed the shareholder vote.[177] Specifically, the management team misled shareholders on the true cash value per share.[178] The stockholders could have redeemed their shares for $10 on the day of the vote, and the proxy noted that "the merger consideration to be paid to Lightning stockholders consisted solely of Gig3 stock *valued at $10 per share*."[179] However, the true cash value of Gig3's shares was less than $6 per share once the dilutive effects of the transaction

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delaware-chancery-court-issues-delman-decision-potentially-increasing-scrutiny-of-the-actions-of-spac-sponsors-and-boards/ [https://perma.cc/RY3Y-V4FX].

[170] *See* Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 700 (Del. Ch. 2023).

[171] *Id.* at 706.

[172] *See id.* at 705–06 (explaining that the stock would be valued at $10 per share and the potential conflicts of interest between public stockholders and the board).

[173] *See id.* at 706–07 (stating that the stockholders "overwhelmingly approved the transaction").

[174] *Id.* at 707.

[175] *Id.*

[176] *Id.* at 708.

[177] *See id.* at 726–27.

[178] *See id.* at 725.

[179] *Id.* at 723 (emphasis added).

were accounted for.[180] And "[i]f Gig3 had less than $6 per share to contribute to the merger, the Proxy's statement that Gig3 shares were worth $10 each was false."[181]

In addition to this nondisclosure, Gig3 failed to qualify Lightning's lofty revenue and profit expectations with impartial information.[182] For instance, the proxy made no mention of potential headwinds that the company's business model and its scalability might face and how that might affect management's projection that the company would grow revenue 222-fold over the next five years.[183] But management at Gig3 "knew . . . or should have known" that such forecasts were extraordinarily aggressive.[184] Boards undergoing a major acquisition are expected to engage in responsible due diligence. The Gig3 board did no such thing. Because this type of "reasonably available" information was not disclosed to shareholders, Vice Chancellor Will held that the merger was not the product of fair dealing, thus forming another independent basis for the plaintiffs' breach of fiduciary duty claims.[185] Moreover, the simple fact that an overwhelming number of shareholders voted in favor of the acquisition did not insulate the directorship. Because shareholders can both redeem their shares while retaining warrants and vote in favor of the merger, their voting and economic interests are completely decoupled. Accordingly, that shareholders voted in favor of the merger "was of no real consequence" and thus "equivalently meaningless" as to its effect on entire fairness review.[186] Lastly, like in *MultiPlan*, Vice Chancellor Will noted that because both the board and the sponsors had such enormous profit incentives to close even a value-destructing deal, the acquisition did not meet the standards expected of fiduciaries under Delaware law.[187]

3. *What Federal Regulators Should Learn from the Court of Chancery*

Vice Chancellor Will's dual opinions on SPACs and the recurrent conflicts they create should inform regulatory efforts in the space. The Court of Chancery is effectively imposing a standard of care through fiduciary duties that exceeds the standards SPAC participants are subject to under the Securities and Exchange Acts. In essence, the SPAC acquisition will be subject to entire fairness and an ensuing settlement if (1) deSPACs make ambitious projections and do not provide reasonably available countervailing information; (2) the sponsors and management team have an asymmetrical interest in consummating a deal as compared to public stockholders; or (3) a majority

[180] *Id.* at 724.
[181] *Id.* at 725.
[182] *Id.* at 726.
[183] *See id.*
[184] *Id.* at 727.
[185] *See id.*
[186] *Id.* at 722.
[187] *See id.* at 728.

of the board has an interest in appeasing a non-independent person, like the sponsor.[188]

To be sure, reliance on Delaware and Delaware alone to police SPAC excesses would be foolhardy. There is always the lingering threat of a race to the bottom where SPACs, or the next instrument of financial chicanery, simply incorporate in a state where they can act without the potential restraint of Delaware law. For instance, this has occurred in banking law, with many banks incorporating in states where there are no usury laws, thereby permitting them to make loans to customers that would otherwise be usurious, even if the customer lives in a state with usury laws.[189] SPACs, as a relatively novel organizational form, may also be more likely to respond to interstate competition for their business.[190] This is because when organizational forms are newer, Delaware law is comparatively less "efficient"—that is to say, predictable—than it is with a more traditional form.[191] Thus, SPACs may indeed be reactive to the stringent decisions put forth by the Court of Chancery, described above, and start incorporating themselves elsewhere.

Given this potential race to the bottom, this Note does not advocate for wholesale reliance on Delaware law. Instead, this Note encourages regulators to draw insights therefrom. However, any race-to-the-bottom dilemma would likely only spur federal—and state-preempting—regulation. The relationship between developments in Delaware corporate law, interstate competition, and regulation of corporations at the federal level has long been recognized.[192] Professor Mark J. Roe noted that Delaware's strongest competitors in corporate regulation are not other states, but rather Congress and federal regulators.[193]

Federal regulators should pull from the wisdom of Vice Chancellor Will's opinions when creating a regulatory regime for SPACs and financial instruments of the future. Indeed, the SEC should regulate in a way that is symbiotic with opinions coming out of the Court of Chancery by imposing regulations and conducting itself in ways that could give plaintiffs more hooks to hang

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[188] *See* Matt Albaugh, *Special Purpose Acquisition Companies: Five Lessons Learned from* Delman v. GigAcquisitions3, LLC, Taft L. (Jan. 19, 2023), https://www.taftlaw.com/news-events/law-bulletins/special-purpose-acquisition-companies-five-lessons-learned-from-delman-v-gigacquisitions3-llc [https://perma.cc/88FZ-J5L2].

[189] *See generally* Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and The Evasion of Usury Law*s, 71 Duke L.J. 329 (2021) (describing bank arrangements to avoid state consumer protection laws); Amy Sullivan, *How Citibank Made South Dakota the Top State in the U.S. for Business,* The Atlantic (July 10, 2013), https://www.theatlantic.com/business/archive/2013/07/how-citibank-made-south-dakota-the-top-state-in-the-us-for-business/425661 [https://perma.cc/XU7U-TQKY].

[190] *See* Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 Ga. L. Rev. 1111, 1172 (2021).

[191] *See id.*

[192] *See, e.g.*, Mark J. Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588, 590 (2003) (arguing that federal government regulations exert more competitive pressure on Delaware than other states do); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (And Europe) Face*, 30 Del. J. Corp. L. 673, 686 (2005).

[193] *See* Roe, *supra* note 192, at 593.

their claims on when they enter Delaware courts, a practice known as incentivizing "piggyback" litigation.[194] For instance, if the SEC moves forward with Proposed Item 1606, which will require fairness opinions to be issued during a deSPAC transaction,[195] then private plaintiffs could focus on breaches of fiduciary duties located in those opinions when creating their claims. Or, in entering into settlements with SPACs, the SEC should seek concessions that the SPAC *knew* it was making material misstatements or omissions related to projections—a potential breach of fiduciary duty—so that private litigants have a clean record from which to levy their own claims.[196]

Approaching SEC regulation from a perspective that envisions not just SEC regulation, but also parallel regulation by private plaintiffs in state courts, will maximize the effectiveness of the SEC in this space. As the Supreme Court noted in *J. I. Case Co. v. Borak*,[197] "[p]rivate enforcement of the [securities laws] provides a necessary supplement to Commission action."[198] Given the rate of SPACs subject to fraud-based litigation and the active rulemaking in the space, the overall amount of regulation appears suboptimal. Supplementing it with an eye toward private litigation could bring this imbalance into homeostasis without even having to engage in rulemaking or other types of regulation.

This framework will ensure that regulators complement the law governing SPACs, especially with respect to Delaware, for nearly all SPACs are subject to Delaware fiduciary law. Moreover, even seemingly duplicative regulation at the state and federal level would be valuable given that Delaware common law could be overridden by the Delaware legislature to the benefit of SPACs and would thereby prevent an interstate race to the bottom of SPAC-friendly law. Thus, providing a parallel federal form of relief and standards of conduct that mimic those currently in play after *MultiPlan* and *Delman* is still an important step, one that the SEC already appears to have laid the groundwork for in Proposed Item 1606.[199]

The courts in *Delman* and *MultiPlan* noted that the information provided by the management team to shareholders was not "counterbalanced

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[194] *See* Alexander I. Platt, "*Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited*, 72 Admin. L. Rev. 27, 31 (2020) (arguing that the SEC can and should consider how its regulatory approaches incentivize and facilitate private litigation).

[195] *See* SPAC Rulemaking, *supra* note 69, at 29473.

[196] *See* Platt, *supra* note 194, at 50 (noting that the SEC "Enforcement Division has the discretion to require the company to *admit* liability or specific facts as a part of its settlement," which could help private plaintiffs survive motions to dismiss).

[197] 377 U.S. 426 (1964).

[198] *Id.* at 432; *cf.* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 Colum. L. Rev. 1301, 1343 (2008) (noting that private enforcers' profit motivations are misaligned with the public's interest in deterrence).

[199] *See* SPAC Rulemaking, *supra* note 69, at 29528.

by opposing points of view"[200] and was not "impartial."[201] This echoes the SEC's current Proposed Item 1606,[202] a part of the previously referenced rulemaking, which intends to require SPACs to announce "whether they reasonably believe the de-SPAC and any related financing transaction are fair to the SPAC's unaffiliated security holders and to discuss the material factors upon which such belief is based."[203] Given Vice Chancellor Will's language in the *Delman* opinion, where she noted that it could not be inferred that the acquisition was the product of fair dealing in part because "the Board did not obtain a fairness opinion or even an information presentation on the fairness of the transaction,"[204] Proposed Item 1606 is already the (common) law of the land in Delaware. However, extending that to the federal level by engaging in rulemaking, as the SEC is doing, will be especially beneficial in light of the empirical work that confirms that agency costs pervade SPACs and "result in the average SPAC investor making sizeable forecast errors when inferring the underlying deal quality."[205]

The apparent imposition of something akin to a fairness opinion for SPACs incorporated in and thus subject to Delaware law also echoes the reforms related to underwriter liability that the SEC and Senator Warren have advocated for. The fact that *Delman* and *MultiPlan* both cited a lack of due diligence as partial justification for an enhanced level of scrutiny is like efforts by Chair Gensler and Senator Warren to expand underwriter liability—both simply want responsible parties to engage in more investor-protecting diligence before a deSPAC hits public markets. This is apparently accomplished by standards similar to Proposed Item 1606, as the *Delman* and *MultiPlan* opinions both hinge on the same language and logic underlying the proposed item. Accordingly, this simultaneously demonstrates that the SEC and Senator Warren need not delve into redefining section 11's definition of statutory underwriter; if the same ends can be achieved without redefining one of the most important words in securities law, then the less intrusive route should be taken absent a compelling justification.

V. What's Missing from SPAC Reform Efforts?

Reformists have attacked SPACs from multiple angles since they rose to capital-markets infamy during the SPAC boom, generally by bringing SPAC regulation more closely to IPO regulation given their similarities. Yet

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[200] *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 816 (Del. Ch. 2022).
[201] Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 726 (Del. Ch. 2023).
[202] SPAC Rulemaking, *supra* note 69, at 29528.
[203] Tuch, *supra* note 118.
[204] *Delman*, 288 A.3d at 727.
[205] Felix Feng, Tom Nohel, Xuan Tian, Wenyu Wang & Yufeng Wu, *The Incentives of SPAC Sponsors*, PBCSF-NIFR Rsch. Paper Series (forthcoming 2023) (manuscript at 42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4069007 [https://perma.cc/8V6J-CPG9].

as detailed previously, some reformists are talking past each other. Federal regulators at the SEC and on Capitol Hill could learn more from how the Delaware Court of Chancery has dealt with the perverse incentive effects that are inherent in SPACs. However, there is also one provision in the Securities Exchange Act of 1934 that could be used to supplant the most ambitious proposals by the SEC and Senator Warren for redefining what it means to be a statutory underwriter. Section 20(b) of the Exchange Act, which prohibits entities from violating the securities laws "by means of any other person,"[206] is an obscure and historically ignored provision used in only a handful of cases since its enactment in 1934.[207] But regulators should give the provision fresh life because its language mimics the language used by the SEC in its proposed expansion of the statutory underwriter term—one of the most important terms in securities regulation—while avoiding the lingering difficulties of redefining section 11's statutory underwriter definition. This would also not be the first time that fiduciary duties law, historically "the core of common law regulation of the corporation, have suffered from federal incursions."[208] In the 1960s and 1970s, Rule 10b-5 was used to enforce state common law duties at the federal level.[209]

A. *Section 20(b)—An Old Tool Ripe for Reinvigoration*

Section 20(b) could be a potent tool for the plaintiffs' bar and the SEC. It could conceivably capture much of the conduct that Chair Gensler and Senator Warren intend to capture with their expansion of the statutory underwriter definition, which seeks to encompass those who "otherwise participate[] (directly or indirectly) in the de-SPAC transaction" but are not themselves underwriters or registration statement signatories.[210] Moreover, by proceeding with a reinvigoration of section 20(b), the SEC and Capitol Hill would be making an evergreen solution that would be relevant long after SPACs fall out of vogue, whereas current rulemaking and legislation in the SPAC space will be relevant only to the extent SPACs are relevant. Considering the fast-paced, continuously evolving nature of twenty-first century capital markets, it would be prudent for the SEC and Capitol Hill to take prophylactic rather than reactive measures to combat fraud.

Past commissioners have also recognized section 20(b)'s utility. In 2014, then-SEC Chair Mary Jo White sought to revive section 20(b) to fill in the gaps from *Janus Capital Group v. First Derivative Traders*,[211] a Supreme

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[206] 15 U.S.C. § 78t(b) (titled "[u]nlawful activity through or by means of any other person").

[207] Marc J. Fagel & Monica K. Loseman, *Exchange Act Section 20(b): The SEC Enforcement Division Dusts Off an Old Weapon*, 18 Wall St. Law., no. 9, Sept. 2014, at 1, 2 (describing section 20(b) as "arcane" and "obscure").

[208] Roe, *supra* note 192, at 614.

[209] *Id.*

[210] SPAC Rulemaking, *supra* note 69, at 29486.

[211] 564 U.S. 135 (2011).

Court decision that markedly limited fraud liability under Rule 10b-5(b).[212] Chair White described section 20(b) as "potentially a very powerful tool" with a range of applications.[213] Indeed, the most recent use of section 20(b) by the SEC confirms that it could be used to ensnare those who may evade fraud liability post-*Janus*, but nevertheless contribute significantly to misrepresentations, as is the case with many management teams in the SPAC space.

B. Section 20(b) in Practice

The last time the SEC employed section 20(b) was in 2014.[214] There, the SEC charged a company and its CEO with violating section 20(b) because the offender had provided a stock promoter and a bank with recklessly false information regarding the company's stock price that was later disseminated to investors.[215] Because the CEO "was reckless in not knowing" basic facts about his company[216] and failed to make disclosures about the data underlying financial forecasts that ultimately "lacked a reasonable basis in fact,"[217] but disseminated them anyway through investor presentations, he and his company could be liable under section 20(b). Eventually, he and his company settled with the SEC and admitted to violating section 20(b), in addition to Rule 10b-5, because they had "promoted Houston American's interest . . . with a series of fraudulent statements . . . and downplayed any associated risks."[218]

This finding of misconduct echoes the SPAC misconduct that undergirded Vice Chancellor Will's opinions in *MultiPlan* and *Delman.* In those cases, she imposed a more stringent standard of review in part because the SPAC management teams had made impressive financial projections but failed to counterbalance their assessments with neutral information.[219] In *Houston American*, the CEO's and his company's financial projections were described as based on "at most, [the CEO's] recklessly wishful thinking."[220] In *Delman*, the management team "knew . . . or should have known that [the acquisition

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[212] *See id.* at 141–46.

[213] Mary Jo White, Chair, Sec. & Exch. Comm'n, Address Before the NYC Bar Association's Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (May 19, 2014) (transcript available at https://www.sec.gov/news/speech/2014-spch051914mjw [https://perma.cc/8AF6-HPZB]).

[214] *See* Fagel & Loseman, *supra* note 207. The author is unable to find any uses of section 20(b) since 2014.

[215] *See id.* at 2–3.

[216] Hous. Am. Energy Corp., Order Instituting Cease-and-Desist Proceedings, Securities Act Release No. 9621, Exchange Act Release No. 72749, 109 SEC Docket 10, ¶ 77 (Aug. 4, 2014), https://www.sec.gov/litigation/admin/2014/33-9621.pdf [https://perma.cc/FKY4-8SWE].

[217] *Id.* ¶ 85.

[218] Hous. Am. Energy Corp., Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Act Release No. 9756, Exchange Act Release No. 74800, 111 SEC Docket 7, ¶ 7 (Apr. 23, 2015), https://www.sec.gov/litigation/admin/2015/33-9756.pdf [https://perma.cc/4B4D-2KU4].

[219] Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 713 (Del. Ch. 2023); *In re* MultiPlan Corp. S'holders Litigation, 268 A.3d 784, 816 (Del.Ch. 2022).

[220] *Hous. Am. Energy Corp.*, 111 SEC Docket 7, at ¶ 9.

company's] production would be difficult to scale in the manner predicted."[221] And in *MultiPlan*, more scrutiny was warranted in part because disclosures "were unilateral and not counterbalanced by opposing points of view."[222] Each of these three cases hinged on the same type of misconduct, but section 20(b) was only deployed in *Houston American*. The parallels between the SPAC litigation and the section 20(b) enforcement action in *Houston American* show that there are existing mechanisms in the SEC's toolkit to combat companies that come to public markets and pitch their stock to investors on the back of outlandish projections that are not also informed by reasonably available and impartial information.

C. Technical Obstacles to Implementing Section 20(b)

Because the tool already exists, the SEC and Capitol Hill should set out to revive section 20(b) from its dormancy rather than wade into the murky waters of reinterpreting section 11's statutory underwriter definition, among other regulatory pushes. To be sure, section 20(b)'s dormancy has rendered it understudied and underlitigated, making section 20(b) an unclear part of the SEC's toolkit that could subject its use to varying technical obstacles. Whether section 20(b) imposes either primary or secondary liability and whether it creates a private cause of action are the two predominant issues plaguing aggressive use of the section, especially by private plaintiffs.

The SEC and Capitol Hill should work together and take two steps to reinvigorate section 20(b). First, the SEC should engage in rulemaking that clarifies that section 20(b) imposes primary liability. Second, Congress should amend section 20(b) to guarantee a private cause of action exists. Under *Kisor v. Wilkie*,[223] the SEC's construction of its own rule is presumptively valid if there is a genuine ambiguity, the interpretation is reasonable, and the interpretation is the agency's official position rather than a convenient litigating position.[224] Considering the "dearth of authority construing section 20(b),"[225] the moment is ripe for the SEC to interpret section 20(b) to impose primary liability. And ensuring that section 20(b) is available to private litigants and not just the SEC will likely require congressional intervention. If Senator Warren wants to ensure that financial markets work more fairly and effectively and intends to target SPAC misconduct, her efforts should be focused on section 20(b) rather than on the gargantuan task of reinterpreting what it means to be a statutory underwriter.

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[221] *Delman*, 288 A.3d at 727.
[222] *MultiPlan*, 268 A.3d at 816.
[223] 139 S. Ct. 2400 (2019).
[224] *See id.* 2414–18.
[225] Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 158 (2011) (Breyer, J., dissenting).

1. Section 20(b) Imposes Primary Liability

Various courts have interpreted section 20(b) to impose only secondary liability.[226] That is, for there to be liability under section 20(b), there must first be a predicate primary violation of the securities laws, often under Rule 10b-5(b), which prohibits manipulative and deceptive practices but only when done with scienter.[227] However, former SEC Chair Mary Jo White contended that section 20(b) imposes own primary liability, rather than being merely a type of secondary liability.[228] Chair White's reading is the more persuasive one considering the provision's plain text and its juxtaposition with sections 20(a) and 20(e); contrary readings have resulted from a lack of adequate judicial engagement with section 20(b)'s text and purpose.

Section 20(b) has a crucial textual distinction that supports its imposing primary liability. As Roth wrote, sections 20(a) and 20(e) "explicitly require a pre-existing violation by another person to attach a second level of liability."[229] However, section 20(b)'s "lack of such explicit language and its placement between two provisions in which Congress used unequivocal formulations suggest that Congress intended for [s]ection 20(b) to establish primary liability."[230] Indeed, the Supreme Court has gestured that this textual distinction is meaningful. In *Janus*, albeit via footnote, the majority hinted that section 20(b) could impose primary liability in a private cause of action by noting that "[w]e do not address whether Congress created liability for entities that act through innocent intermediaries [under section 20(b)]."[231] And given the Supreme Court's insistence that "statutes should be read to avoid superfluity,"[232] this textual distinction should have analytical bite. Congress purposefully wrote section 20(b) the way it did for a reason. That it has been underutilized until now does not justify dismissing its enforcement potential.

Moreover, the Supreme Court's recent holding in *Janus* leaves gaping holes in the private securities regulation framework if section 20(b) does not impose primary liability. In *Janus*, the Supreme Court held that an investment advisor who participated in the drafting of a false statement made by another could not be held liable under 10b-5(b) because the advisor did not have

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[226] *See, e.g.*, SEC v. Stringer, No. Civ. 02-1341-ST, 2003 WL 23538011, at *15 (D. Or. Sept. 3, 2003); SEC v. Coffey, 493 F.2d 1304, 1318 (6th Cir. 1974); Espinoza v. Whiting, 8 F. Supp. 3d 1142, 1157 (E.D. Mo. 2014); Shemian v. Rsch. in Motion, Ltd., No. 11 Civ. 4068(RJS), 2013 WL 1285779, at *24 (S.D.N.Y. Mar. 29, 2013), *aff'd*, 570 F. App'x 32 (2d Cir. 2014); Union Cent. Life Ins. Co. v. Credit Suisse Sec. (USA), LLC, No. 11 Civ. 2327(GBD), 2013 WL 1342529, at *9 (S.D.N.Y. Mar. 29, 2013).

[227] *See* 17 C.F.R. § 240.10b-5 (2023).

[228] Roth, *supra* note 122, at 39.

[229] *Id.* at 42.

[230] *Id.*

[231] Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 146 n.10 (2011); *see also id.* at 158 (Breyer, J., dissenting).

[232] *See* Corley v. United States, 556 U.S. 303, 314 (2009); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

"ultimate authority" over the statement.[233] Even though that advisor exercised day-to-day management over the fund that "made" the false statement, the advisor was distinguished because they were subject to the ultimate control of the fund they advised.[234] Thus, persons who contribute to fraudulent misstatements (e.g., falsifying internal reports) are no longer liable under 10b-5(b) if they were not the "maker" of the statement, which requires having "ultimate authority over the statement, including its content and whether and how to communicate it."[235]

The natural corollary to this would instead be to prosecute or to sue the fund that had the "ultimate authority" over the statements under section 20(a) of the Exchange Act, which establishes liability for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws.[236] However, as noted previously, section 20(a) unambiguously imposes only secondary liability, meaning there must be a viable predicate, primary violation, like under Rule 10b-5. This means that in a circumstance like *Janus*, the fund itself can relay fraudulent data to the fund advisor and have the fund advisor publish and disseminate that information while still being insulated from liability under section 20(a) in a suit brought by private plaintiffs. Even if the fund advisor has reason to believe the data is fraudulent, but does not reach the level of scienter,[237] then the absence of "ultimate authority" over the statement defeats an action under 10b-5, and without primary liability there is no path to a private cause of action under section 20(a). This has been dubbed the "*Janus* paradox,"[238] wherein individuals seemingly cannot be held liable by private plaintiffs for actions that are unlawful but are perpetrated "through or by means of any other person."[239] To be sure, misconduct like that in *Janus* could, and has been, prosecuted under section 17(a) of the Exchange Act by the SEC,[240] but section 17(a) does not provide a private right of action, which reduces its ability to combat fraud.[241] And as addressed below

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[233] *Janus*, 564 U.S. at 142.

[234] *Id.* at 146–47.

[235] *Id.* at 142.

[236] 15 U.S.C. § 78t(a).

[237] In *Lorenzo v. SEC*, the Supreme Court held that an individual who is not a "maker" of a misstatement under *Janus* can nonetheless be held primarily liable under section 10(b) if they knowingly disseminate a misstatement with the intent to defraud. 139 S. Ct. 1094, 1099 (2019).

[238] Fagel & Loseman, *supra* note 207.

[239] 15 U.S.C. § 78t(b). *See generally SEC Seeks to Deploy Section 20(b) to Skirt Restrictions of* Janus, Morgan Lewis (May 5, 2014), https://www.morganlewis.com/pubs/2014/05/sec-seeks-to-deploy-section-20b-to-skirt-restrictions-of-janus [https://perma.cc/7HMZ-XQRN].

[240] *See, e.g.*, SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786, 796 (11th Cir. 2015) (noting that *Janus* does not apply to section 17(a)).

[241] *See, e.g.*, Maldanado v. Dominguez, 137 F.3d 1, 6–8 (1st Cir. 1998) (holding that no private right of action exists under section 17(a) and noting that "every circuit to have addressed the issue has refused to recognize a private right of action under section 17(a), including four circuits which originally had held otherwise"); Cox et al., *supra* note 131, at 479 ("it seems clear today that only government enforcers can bring suit directly under [section 17(a)]"). For a general review of section 17(a), see Nick Oberheiden, *The Growing Risk of Securities Fraud*

in Part V.D, section 17(a) does not go as far as section 20(b), highlighting the significant potential and need for reinvigoration of the latter. Section 20(b) has the potential to fill in the gaps left by the *Janus* paradox and give private plaintiffs another tool to vindicate themselves.

Lastly, nearly every court to suggest section 20(b) invokes only secondary liability has done so in a conclusory fashion. For instance, the courts in both *Shemian v. Research in Motion, Ltd.*[242] and *Espinoza v. Whiting*[243] erroneously conflated sections 20(a) and (b) despite their previously referenced textual dissimilarities. And in *SEC v. Stringer*,[244] the court noted that section 20(b) creates secondary liability but did not suggest why.[245] By contrast, where courts have distinguished the provisions in section 20, they have implied that section 20(b) imposes primary liability. For instance, in *Union Century Life Insurance v. Credit Suisse Securities (USA), LLC*,[246] the Southern District of New York dismissed the section 20(b) claim only because plaintiffs failed to state an "unlawful act," while dismissing the section 20(a) claim because there was no "primary violation."[247] If the Southern District had read 20(a) and (b) as imposing secondary liability, this distinction would be unnecessary.

Section 20(b) should be read as imposing primary liability based on its text, legislative context, and interpretive history. First, it is textually distinct from the sections around it—sections 20(a) and (e)—that impose secondary liability. Second, section 20(b) fills a functional gap left open by *Janus* that can be filled by private plaintiffs. And third, when courts and SEC commissioners have drawn a distinction between section 20(a) and (b), they have found that section 20(b) imposes primary liability.

2. *Section 20(b) Should be Amended to Provide a Private Cause of Action*

While whether section 20(b) creates a private cause of action is technically unsettled, the practical realities of the modern implied private rights jurisprudence all but guarantee foreclosure of a private cause of action under the provision.[248] The *Janus* Court expressly refused to address whether section 20(b) gave rise to a private action, and no court has ruled decisively on it since.[249] Although the Supreme Court has historically been open to implying

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Litigation Under 17(a), NAT. L. REV. (Nov. 4, 2021), https://www.natlawreview.com/article/growing-risk-securities-fraud-litigation-under-section-17a [https://perma.cc/TX6P-5S2W].

[242] Shemian v. Rsch. in Motion, Ltd., No. 11 Civ. 4068(RJS), 2013 WL 1285779, at *24 (S.D.N.Y. Mar. 29, 2013), *aff'd*, 570 F. App'x 32 (2d Cir. 2014).

[243] Espinoza v. Whiting, 8 F. Supp. 3d 1142, 1157 (E.D. Mo. 2014).

[244] No. Civ. 02-1341-ST, 2003 WL 23538011 (D. Or. Sept. 3, 2003).

[245] *Id.* at *6.

[246] No. 11 Civ. 2327(GBD), 2013 WL 1342529 (S.D.N.Y. Mar. 29, 2013).

[247] *Id.* at *9.

[248] *See* Julie H. Jones, Peter L. Welsh & Rodman K. Forter, Jr., *Litigation Risks Remain for Private Equity Sponsors Even After* Janus, 25 INSIGHTS, no. 11, Nov. 2011, at 1, 2.

[249] Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 146 n.10 (2011).

private causes of action in the Exchange Act,[250] its more recent decisions on implied rights make it unlikely that section 20(b), as it stands, can be wielded by private litigants.

In *Borak*, the Supreme Court held that section 27 of the Exchange Act impliedly authorized both derivative and direct private causes of action brought pursuant to violations of section 14(a).[251] Section 14(a), like section 20(b), made no direct reference to any private right of action. However, because the Exchange Act granted federal courts "jurisdiction over 'all suits in equity and actions at law brought to enforce any liability or duty created,'"[252] the Court supported a private cause of action because it furthered the purpose of the Exchange Act—combatting securities fraud. This stemmed directly from the Court's general trend to imply causes of action under the Exchange Act. Previously, courts had recognized implied causes of action for violations of the margin requirements of section 7,[253] and the Supreme Court would later find an implied private right of action for violations of section 10(b).[254]

Such expansive interpretations of private rights are no longer the modus operandi of the Supreme Court. In recent years, the Court has exhibited skepticism toward private rights, even in the context of the Exchange Act,[255] with Chief Justice Roberts describing the Court's decision under *Borak* as one that "would not be decided the same way today."[256] Given that the current conservative Court exudes deference to Congress when it comes to implied private rights, section 20(b) faces a particularly uphill battle considering section 20(a) nearly expressly provides for a private right. Section 20(a) renders control persons liable "to any person."[257] This language may imply the existence of a private right under the modern private rights jurisprudence, which focuses on "rights-creating" language.[258] Because section 20(b) simply notes

[250] Section 10(b), for instance, is an Exchange Act provision whose private cause of action is implied. *See* John Patrick Clayton, *The Two Faces of* Janus*: The Jurisprudential Past and New Beginning of Rule 10b-5*, 47 U. Mich. J.L. Reform 853, 857–58 (2014).

[251] J. I. Case Co. v. Borak, 377 U.S. 426, 431–32 (1964).

[252] *Id.* at 431 (quoting 15 U.S.C. § 78aa).

[253] *See* Remar v. Clayton Sec. Corp., 81 F. Supp. 1014, 1017 (D. Mass. 1949).

[254] *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (describing the existence of an implied right under section 10(b) and Rule 10b-5 as "simply beyond peradventure").

[255] *See generally* Elisse B. Walter, *The Interrelationship Between Public and Private Securities Enforcement*, Harv. L. Sch. F. on Corp. Governance (Dec. 11, 2011), https://corpgov.law.harvard.edu/2011/12/11/the-interrelationship-between-public-and-private-securities-enforcement/ [https://perma.cc/TT9A-7VY9].

[256] Susanna M. Buergel, Geoffrey R. Chepiga, Andrew J. Ehrlich, Andrew G. Gordon, Brad S. Karp, Daniel J. Kramer, Richard A. Rosen, Kannon K. Shanmugam, Audra J. Soloway & Daniel J. Toal, *Supreme Court Passes–for Now–on Rejecting an Implied Private Right of Action for Tender Offer Claims*, Paul, Weiss (Apr. 25, 2019), https://www.paulweiss.com/practices/litigation/supreme-court-appellate-litigation/publications/supreme-court-passes-for-now-on-rejecting-an-implied-private-right-of-action-for-tender-offer-claims?id=28654 [https://perma.cc/448P-LARC].

[257] 15 U.S.C. § 78t(a).

[258] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979). For instance, in *Cannon*, the Supreme Court found the following language indicative of an implied private right: "[n]o person . . . shall . . . be subjected to discrimination." *See id.* at 681–82, 690 n.13.

that certain conduct—engaging in unlawful conduct directly or indirectly—is itself unlawful, it is unlikely that the modern Court would imply a private right absent congressional amendments to the language.

The Supreme Court's emphasis that "private rights of action to enforce federal law must be created by Congress"[259] is exactly why Congress should amend section 20(b) to bring it in line with section 20(a), which unambiguously grants a private right of action. Rather than pass a wholesale SPAC regulation bill, Senator Warren should concentrate on amending the Exchange Act to ensure that private plaintiffs harmed by corporate malfeasance have remedies not just with respect to SPACs, but also with respect to the next financial vehicle that goes rogue. By enabling private plaintiffs under section 20(b), Senator Warren could set a course for the plaintiffs' bar that would help deter the type of corporate negligence that SPACs epitomize.

The importance of private plaintiffs is underscored by the reality that the SEC is resource-constrained and thus likely unable to pursue the full range of SPAC misconduct. As noted above, SPAC-related litigation is nearly as common as cryptocurrency litigation.[260] Private plaintiffs are critical to police SPACs effectively. Moreover, private litigation works symbiotically with SEC oversight, oftentimes highlighting misconduct that the SEC should focus on. Former Commissioner Richard Smith noted as much over fifty years ago when he described one of the primary purposes of private litigation as being "to bring to [the SEC's] attention matters appropriate for enforcement action of which [they] had not previously been aware."[261] Given the sheer magnitude of SPAC-related litigation, private litigation could funnel the SEC toward the most important cases and the most egregious misconduct.

D. Section 20(b) is Superior to Other Antifraud Provisions

Section 20(b) provides comparative advantages to other securities law enforcement mechanisms because it is more likely that the SEC can offer an interpretation of section 20(b) that will withstand judicial scrutiny because its text already encompasses the type of misconduct SPACs habitually engage in. Moreover, section 20(b) likely also imposes primary liability in its own right. Because of these features, it is more likely to succeed in capturing the conduct that is the focus of the SEC's and Senator Warren's SPAC-focused proposals than other anti-fraud sections like section 17(a) or actions under Rule 10b-5.

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[259] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[260] *See Securities Class Action Clearinghouse*, *supra* note 54 (showing, as of October 10, 2023, there were eighty-five securities class action filings on cryptocurrency and eighty-five filings on SPACs).

[261] Richard B. Smith, Comm'r, Sec. & Exch. Comm'n, Address at the Program of Continuing Education of the Bar of the State of California: The Interest of the Securities and Exchange Commission in Private Civil Actions Under the Securities Acts (Jan. 12, 1968) (transcript available at https://www.sec.gov/news/speech/1968/011268smith.pdf [https://perma.cc/JEN5-2X9W]).

Section 17(a) prohibits (1) using a device, scheme, or artifice to defraud; (2) making material misstatements or omissions, akin to Rule 10b-5; and (3) engaging in a course of business that defrauds or deceives.[262] However, each of these prohibitions applies only when there is *an offer or sale of a security*.[263] Importantly, this means that section 17(a) has a much narrower scope when the fraud is perpetrated on the secondary market outside of selling or offering a security. In other words, section 17(a) does not reach a deSPAC transaction because a deSPAC is definitionally not an offer or sale, but a merger.[264] The SEC could theoretically reinterpret a securities regulation term of art—the term "distribution"—to bring within it a deSPAC transaction, but considering the term of art's historically consistent meaning, it may encounter administrative law challenges if it were reinterpreted by the SEC in this way.

For instance, section 17(a) would not reach the conduct in *MultiPlan*, but section 20(b) would. In *MultiPlan*, the management team was sued for breach of fiduciary duty because the team made material misrepresentations regarding the merger, not the initial offering of securities in the SPAC.[265] Misconduct at that stage, which is where SPAC misconduct tends to occur, is not within section 17(a)'s breadth, for the misconduct did not occur in the offering or selling context. Section 20(b), however, has much broader language that applies to secondary market fraud outside of the offering and selling context.

Importantly, section 20(b) can surely reach misconduct outside of the selling and offering of a security. Although the SEC's recent proposed rulemaking on SPACs seeks to define the deSPAC transaction as a "distribution" of securities,[266] which would likely bring it within section 17(a)'s ambit, that interpretation must still withstand judicial scrutiny. Given that the phrase "distribution" is a statutory term of art that has been interpreted as synonymous with "public offering,"[267] and that a deSPAC is categorically not a public offering, judicial reluctance to redefining the term of art can be expected. Indeed, it is unclear whether such a redefinition by the SEC would even be entitled to *Auer* deference. In *Kisor*, Justice Kagan noted that the Court rarely grants *Auer* deference "to an agency construction 'conflict[ing] with a prior' one," especially when it creates "unfair surprise."[268] Accordingly, if the SEC were to rely on section 17(a) as the tool to target SPAC misconduct, it would require

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[262] *See* 15 U.S.C. § 77q.

[263] *See id.*

[264] *See* Wendy Gerwick Couture, *Prosecuting Securities Fraud Under Section 17(a)(2)*, The CLS Blue Sky Blog (Mar. 20, 2019), https://clsbluesky.law.columbia.edu/2019/03/20/prosecuting-securities-fraud-under-section-17a2/ [https://perma.cc/ZS83-628C] (arguing that section 17(a) applies only to the offering and selling context).

[265] *See In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 798–99 (Del. Ch. 2022).

[266] SPAC Rulemaking, *supra* note 69, at 29485.

[267] *See, e.g.*, Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 215 (3d Cir. 2006) ("We agree with the rationale of those courts and similarly hold that the term 'distribution' in § 2(a)(11) is synonymous with 'public offering.'").

[268] Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

a redefinition of "public offering" that may not withstand judicial scrutiny. Rulemaking related to section 20(b), however, would not be subject to the same reliance interests because of the blank slate that the SEC would be painting on. Thus, in addition to empowering private plaintiffs, interpreting section 20(b) to target SPACs and SPAC-like misconduct is more likely to withstand judicial pushback.

Bringing actions under section 20(b) would also be preferable to bringing actions under Rule 10b-5. First, primary liability under Rule 10b-5(b) requires the difficult-to-satisfy scienter requirement.[269] Under section 20(b), however, negligence or recklessness in "directly or indirectly" violating the federal securities laws "through or by means of any other person" violates the statute that, as this Note has argued, should give rise to primary liability.[270] To be sure, absent congressional intervention that creates a private right under section 20(b), the provision would likely target misconduct similar to that under Rules 10b-5(a)'s and (c)'s provisions on aiding and abetting. Recently, the Supreme Court held in *Lorenzo v. SEC*[271] that an individual who knowingly disseminates a misstatement made by *another person* can be subject to primary liability under Rules 10b-5(a) and (c).[272] However, the *Lorenzo* decision still leaves section 20(b) as the optimal antifraud provision for two reasons.

First, no private right of action exists under Rules 10b-5(a) and (c). Thus, even though *Lorenzo* broadens the scope of actionable misconduct, only the SEC can prosecute such misconduct. Second, the decision has been criticized for confusingly undermining the distinction between aiding and abetting liability—which is a form of secondary liability—and primary liability.[273] In this aftermath, appellate courts have interpreted *Lorenzo* both narrowly—in the Second Circuit—and broadly—in the Ninth and Tenth Circuits—potentially priming another Supreme Court decision on the issue.[274] Given this circuit split, actions under Rules 10b-5(a) and (c) could be narrowed, requiring that more stringent conditions be met for aiding and abetting liability. If the

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[269] *See* Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 Case W. Rsrv. L. Rev. 441, 451 (2012) ("The PSLRA requires plaintiffs to plead scienter with sufficient particularity to establish a 'strong inference' that the intent requirement is met.").

[270] 15 U.S.C. § 78t(b).

[271] 139 S. Ct. 1094 (2019).

[272] *Id.* at 1099.

[273] *See generally* Brian Elzweig, Lorenzo v. SEC*: Blurring the Line Between Primary and Secondary Securities Fraud Liability*, 89 U. Cin. L. Rev. 1 (2020); Andrew N. Vollmer, *A Missed Opportunity in Securities Fraud Enforcement*, The Reg. Rev. (July 11, 2019), https://www.theregreview.org/2019/07/11/vollmer-missed-opportunity-securities-fraud-enforcement/ [https://perma.cc/3PDP-V39H].

[274] Stefan Atkinson & Yi Yuan, *Different Federal Court Approaches to Scheme Liability*, Kirkland & Ellis (Jan. 9, 2023), https://www.kirkland.com/publications/article/2023/01/different-federal-court-approaches-to-scheme-liability [https://perma.cc/KFN2-2S33].

Court narrows these actions, only congressional intervention could broaden Rule 10b-5.

Moreover, like section 20(b), Rules 10b-5(a) and (c) would need to be amended before a private right could exist. Thus, section 20(b) is comparatively better because it does not suffer from the same uncertainty and circuit splits as Rules 10b-5(a) and (c). Section 20(b) exists on a comparatively blank slate, and its language is much more likely to capture a broad set of scheme liability—"directly or indirectly" violating securities laws "through or by means of any other person"[275]—when compared to Rules 10b-5(a) and (c), which only recently have extended to scheme liability and may be reeled in by the Supreme Court in light of consistent criticism of the *Lorenzo* decision.

Section 20(b) should thus be the next antifraud provision leveraged by the SEC and, if Congress adds a private right, by the plaintiffs' bar. It likely imposes primary liability for scheme liability, and it is unclear that Rule 10b-5 does the same. Moreover, it surely captures the type of misconduct that SPACs engage in, which occurs at the deSPAC merger phase of the transaction and not when securities are offered, making it a provision more capable than section 17(a) to fight SPAC misconduct. In other words, section 20(b) takes the best of both Rule 10b-5 and section 17(a) and puts it into one provision. SPACs, and the next vehicle used to defraud the public, should be put on notice of its utility.

VI. Conclusion

SPACs present a crucial case study for securities regulation. They reveal that, even after multiple financial crises, the SEC and capital markets regulators can be caught on their back foot in the face of notoriously poor and frequently fraudulent financial instruments. While the push by the SEC and Capitol Hill toward regulation of SPACs was and will be necessary to protect Main Street, the critical step will be determining how regulators can ensure that they are equipped with the tools necessary to combat the next financial vehicle exploited by Wall Street financiers. Insights into how this can be achieved should be drawn from the Delaware Court of Chancery and from a deep look into the SEC's existing toolkit in provisions like section 20(b). Proactively guaranteeing that both the SEC and private litigants can fight for Main Street against potential fraud should be the touchstone for regulators in the SPAC space. This Note intends to help guide them in the right direction.

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[275] 15 U.S.C. § 78t(b).