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To SPAC or Not to SPAC: Liberalizing the Regulation of Capital Markets

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To SPAC or Not to SPAC: Liberalizing the Regulation of Capital Markets

ABSTRACT

The merger and acquisition world has experienced an uptick in deal flow since 2016, reaching unprecedented levels in 2020 due to enhanced private equity funding and market volatility. While the market volatility spurred by COVID-19 halted traditional initial public offerings (IPOs), the special purpose acquisition company (SPAC) market exploded. The flurry of SPAC activity in the United States triggered the development of SPAC markets worldwide. Unfortunately, SPACs' great rise to fame in the past few years has come at a cost—fraud. As such, the US Securities and Exchange Commission (SEC) is left grappling with how to best regulate the market moving forward, avoiding a return to rampant fraud that plagued the market in the 1980s. This Note assesses the current SPAC regulatory framework in the United States and abroad. The solution suggests that capital markets should impose modest preventative measures that enable SPACs to occupy their own sphere in capital markets while also affording greater investor protections.

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I. INTRODUCTION

Trevor Milton, former Nikola Chief Executive Officer, learned the hard way that social media can come back to haunt you. On July 29, 2021, the US Securities Exchange Commission (SEC) filed suit against Milton for defrauding and misleading investors to earn capital for Nikola Corporation (Nikola).[1] The SEC alleged that Milton purposefully misled investors into committing funds to Nikola through the use of a special purpose acquisition company (SPAC) by embarking on an aggressive social media campaign and making false claims about Nikola's product capabilities and earning capacities.[2] One of Milton's most infamous moves involved a promotional video featuring the prototype semi-truck Nikola One, which purported to show the Nikola One traveling on its own power down the highway.[3] In actuality, the Nikola One remained motorless at the time of the video; the truck simply

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1. *See generally* Complaint & Demand for Jury Trial, SEC v. Milton, No. 1:21-cv-6445 (S.D.N.Y. July 29, 2021) [hereinafter Milton Complaint].
2. *See id.* ¶ 6.
3. *See id.* ¶¶ 50–65.

rolled down the incline thanks to gravity, not Nikola's innovative engineering capabilities.[4]

The mechanism by which the company went public was believed to be key to Milton's ability to mislead investors: the merging of Nikola with a SPAC, VectoIQ Acquisition Corporation. After VectoIQ issued an initial public offering (IPO) in May 2018, VectoIQ merged with Nikola during the de-SPAC process on June 2, 2020.[5] The resultant entity was Nikola Corporation.[6] The merger raised over $700 million for Nikola's business.[7] To understand how Milton's actions illustrate the problem SPACs present, it is necessary to briefly explain the SPAC process.

SPACs are blank check companies created for the sole purpose of acquiring and taking another company public.[8] A SPAC is referred to as a blank check company because it is an entity that lacks its own business model, so the initial investors have no idea which company they will ultimately be investing in.[9] SPACs are attractive because they offer a faster alternative for high growth, early-stage companies to earn capital by becoming publicly traded companies.

The lifecycle of a SPAC is approximately twenty-four months and proceeds as follows: First, founders, typically experienced business professionals with strong reputations, provide the starting funds for the SPAC.[10] Second, the founders, with the assistance of investment bankers that serve as underwriters, take the SPAC public through a traditional IPO.[11] Through the IPO, the SPAC raises funds that are held in a trust until the SPAC identifies its acquisition target.[12] After completion of the IPO, the SPAC's sponsors have between eighteen and twenty-four months to identify a target company and complete an acquisition.[13] If an acquisition does not occur within the specified time

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4. *See id.* ¶ 64.

5. *See Nikola and VectoIQ Acquisition Corp. Announce Closing of Business Combination*, NIKOLA (June 3, 2020), https://nikolamotor.com/press_releases/nikola-and-vectoiq-acquisition-corp-announce-closing-of-business-combination-77 [https://perma.cc/35FM-3GPZ] (archived Jan. 4, 2023).

6. *Id.*

7. *Id.*

8. *See* Julie Young, *Special Purpose Acquisition Company (SPAC) Explained: Examples and Risks*, INVESTOPEDIA, https://www.investopedia.com/terms/s/spac.asp (Dec. 22, 2022) [https://perma.cc/KU5M-J2GF] (archived Jan. 4, 2023).

9. *See id.*; Eric Reed, *How Blank Check Companies (SPACs) Work*, SMARTASSET (Sept. 19, 2022), https://smartasset.com/investing/blank-check-company [https://perma.cc/E6VQ-UZJ5] (archived Jan. 4, 2023).

10. Victor Koch, *What Is a SPAC? Simple Explanation*, SEEKINGALPHA (Aug. 11, 2020, 9:16 PM), https://seekingalpha.com/instablog/50309069-victor-koch/5484131-what-is-spac-simple-explanation [https://perma.cc/LAR6-GWHP] (archived Jan. 4, 2023).

11. *Id.* For purposes of this Note, "traditional IPO" refers to the process when a private corporation sells shares to the public for the first time, thus becoming a public company.

12. *Id.*

13. *Id.*

period, then the SPAC is liquidated, and the money is returned to investors.[14] However, if the sponsors do identify a target and the shareholders approve the merger, then the "de-SPAC" process begins. De-SPACing refers to the process of the SPAC merging with the target company.[15] Once the de-SPAC process is completed, the combined company retains the name of the target company and its operations, making the target a now publicly traded company on a stock exchange.

The controversy surrounding SPACs really concerns the de-SPAC process rather than the creation of the SPAC itself. Because the de-SPAC process is a merger, the process is subject to different rules and regulations in the United States than the traditional IPO process—notably the "gun-jumping" provisions of the Securities Act, discussed in Part II.[16]

De-SPAC transactions are essentially IPOs masked as mergers, leading some to dub SPACs as the "Wild West" of the mergers and acquisitions (M&A) world.[17] Tellingly, the goals of M&A for SPACs differ from the goals of traditional M&A, where two established companies with underlying operations combine. There can be a myriad of reasons why two firms decide to merge or one firm decides to acquire another, such as gaining economies of scope, diversifying a business model, and gaining access to new human capital.[18] On the other hand, the sole purpose of a de-SPAC transaction is to take another company public.[19] Therefore, outside of enhanced funding, a SPAC acquisition does not gain the same synergies that are created in traditional M&A transaction. SPACs have gained popularity in tandem with the emergence of the most recent major M&A wave.

The M&A world in the United States has experienced several major waves characterized by booms and busts. The most recent M&A wave was fueled by the introduction of global capital, resulting in cross border transactions.[20] Due to low interest rates, cash replaced stock as the primary source of financing M&A.[21] Likewise, Asian market deregulation and European market integration contributed to the rise of M&A.[22] During this wave, M&A came to a standstill in 2008 with the

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14. Andrew Packer, *SPACs 101: What Is a SPAC, and How Does It Work?*, KIPLINGER (July 6, 2021), https://www.kiplinger.com/investing/stocks/ipos/603076/spacs-101-what-is-a-spac-how-does-it-work [https://perma.cc/UL64-PT4K] (archived Jan. 4, 2023).

15. *See* Koch, *supra* note 10.

16. *See infra* Part II.C.2.

17. *See A SPAC-tacular Explosion*, DELVE (Aug. 10, 2021), https://delvedc.com/a-spac-tacular-explosion/ [https://perma.cc/3BWA-LAMQ] (archived Jan. 15, 2023).

18. *See Types of Synergies: The Different Sources of Synergies*, CFI, https://corporatefinanceinstitute.com/resources/knowledge/valuation/types-of-synergies/ (Dec. 6, 2022) [https://perma.cc/97SZ-VLD2] (archived Jan. 4, 2023).

19. *See* Young, *supra* note 8.

20. *See* CLAIRE A. HILL, BRIAN JM QUINN & STEVEN DAVIDOFF SOLOMON, MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE 14 (2d ed. 2019).

21. *Id.*

22. *Id.* at 15.

crash of the housing market, bank bailouts, and the beginning of a financial crisis.[23]

Since the 2008 recession, the rate of M&A has once again rebounded, with an uptick starting in 2016. This new M&A wave has its own unique characteristics: a spreading pandemic worldwide; an enhanced participation in the retail investor market; an increased commitment to environmental, social, and governance factors; and an explosion of private equity funding and SPACs. While the COVID-19 pandemic initially caused mounting uncertainty in financial markets, it also led to businesses striving for technological innovation. Executives reassessed business strategies, resulting in many strategic acquisitions and divestitures to gain a competitive edge.[24] The first half of 2021 resulted in a record number of mega M&A deals, catapulted by the popularity surrounding SPACs and private equity funding.[25]

Although SPACs have existed since the 1990s, they just recently rose to popularity in 2020. After explosive growth in the first half of 2020, the popularity of SPACs in the United States declined due to increased scrutiny from the SEC, signaling enhanced regulatory oversight ahead. Because SPACs are subject to fewer regulations than traditional IPOs, they are easier to exploit and abuse, as evidenced in Trevor Milton's scandal. Milton's exploitation of the SPAC sparked shareholder class actions against the company. At the end of 2021, Nikola reached a settlement with the SEC, agreeing to pay a $125 million penalty and cooperate with the SEC's investigation of Milton.[26] Last fall, Milton stood trial for the fraud charges brought by the SEC, where he faced up to a twenty-five-year federal prison sentence.[27] In October 2022, a jury found Milton guilty of one count of securities fraud and two counts of wire fraud.[28] In the wake of Milton's claims that juror misconduct occurred during his trial, Milton remains free on a $100

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23. *See id.*

24. *See Global M&A Industry Trends: 2022 Mid-Year Update*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/gx/en/services/deals/trends.html (last visited Feb. 12, 2022) [https://perma.cc/YQU3-NJRC] (archived Jan. 4, 2023).

25. *Id.*

26. *See* Thomas Franck & Michael Wayland, *SEC Cracks Down on SPAC Claims as Electric Truck Maker Nikola Agrees to Pay $125 Million to Settle Fraud Charges*, CNBC (Dec. 21, 2021, 7:00 AM), https://www.cnbc.com/2021/12/21/nikola-to-pay-125-million-to-settle-fraud-charges-as-sec-cracks-down-on-spac-claims.html [https://perma.cc/K6BW-DM37] (archived Jan. 4, 2023).

27. *See* Alan Adler, *Nikola CEO Testifies Trevor Milton Went on 'Blitz' to Attract Shareholders*, FREIGHT WAVES (Sept. 19, 2022), https://www.freightwaves.com/news/nikola-ceo-testifies-trevor-milton-went-on-blitz-to-attract-shareholders [https://perma.cc/LU89-HH7K] (archived Jan. 4, 2023).

28. *See* John Rosevear, *Nikola Founder Trevor Milton Found Guilty of Fraud Over Statements He Made while CEO of the EV Company*, CNBC (Oct. 14, 2022, 4:19 PM), https://www.cnbc.com/2022/10/14/nikola-nkla-founder-trevor-milton-found-guilty-of-fraud-.html [https://perma.cc/6D34-5MR6] (archived Feb. 5, 2023).

million bond until his rescheduled sentencing hearing on June 21, 2023.[29]

The Nikola scandal makes apparent weaknesses and loopholes in the current SPAC structure. Likewise, the SEC has begun taking a closer look at the SPAC market, making more regulatory oversight in the United States inevitable.

This Note aims to assess the current regulatory environment surrounding SPACs in the United States through a comparative approach abroad. Part II discusses the history of US SPACs, the growth of SPACs in the United States, the impacts of COVID-19 on SPACs, and current issues facing US regulators. Part III compares the regulatory regimes surrounding SPACs in the United States, the Netherlands (specifically, Amsterdam), the United Kingdom, Singapore, and Hong Kong. In turn, Part III analyzes the upsides and downsides of the aforementioned countries' regulations on the SPAC market as well as the implications a tightening regulatory regime may have on SPACs' viability worldwide. Part IV seeks to offer a solution that will maintain the attractiveness and flexibility of SPACs while also protecting investors from perverse actions of SPAC sponsors.

II. THE TURBULENT EVOLUTION OF SPACS

The United States capital markets put the SPAC on the map as an alternative to the traditional IPO. This Part explores the history and evolution of SPACs in the United States, from their inception in the 1990s to the present day.

A. *Prelude to SPACs: The Notorious Penny Stock Market*

SPACs' nefarious predecessors include the 1980s blank check companies that comprised the penny stock market. Penny stocks are highly speculative stocks that sell below five dollars per share.[30] The companies underlying penny stocks were generally small and lacked liquidity, making the investments risky.[31] Despite this risk, the penny stock market attracted retail investors because penny stocks were

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29. *See* Alan Adler, *Nikola Founder's Sentencing on Fraud Convictions Delayed Until June 21*, FREIGHT WAVES (Jan. 23, 2023), https://www.freightwaves.com/news/nikola-founders-sentencing-on-fraud-convictions-delayed [https://perma.cc/94ZP-ASZJ] (archived Feb. 5, 2023).

30. *See* Chris B. Murphy, *What Are Penny Stocks?*, INVESTOPEDIA, https://www.investopedia.com/terms/p/pennystock.asp (Mar. 10, 2022) [https://perma.cc/N5ZJ-8ZX5] (archived Jan. 4, 2023) [hereinafter Murphy, *Penny Stocks*]. Previously, penny stocks were defined as stocks that sold below $1 per share. *Id.*

31. Barbara Aarsteinsen, *High-Risk 'Pennies' for the Bold*, N.Y. TIMES (Nov. 17, 1985), https://www.nytimes.com/1985/11/17/business/high-risk-pennies-for-the-bold.html [https://perma.cc/BC67-KHM9] (archived Jan. 4, 2023).

cheaper than stocks listed on centralized exchanges, like the New York Stock Exchange.[32]

Penny stocks are generally not listed on large exchanges because they do not meet the listing requirements; rather, they are sold over the counter on pink sheets.[33] In over the counter markets, securities are traded directly between parties.[34] Securities sold over the counter are subject to far less regulatory oversight and lack minimum compliance standards.[35] While penny stocks may have had the capacity to raise needed capital for small and emerging businesses, the absence of regulations made them a magnet for abuse.

In the 1980s, corruption plagued the penny stock market. Most penny stock issuances were made by blank check companies, which are companies "whose stated purpose[s] [are] to merge with a yet-to-be-identified target."[36] By 1989, it was estimated that traders of penny stocks were losing $2 billion per year on their investments.[37] Congress attributed the rampant abuse in the penny stock market to three main sources: inaccurate and unreliable information,[38] hard-sell tactics,[39] and criminal activities.[40]

Exacerbating these issues, penny stocks were often issued for obscure companies, meaning little historical information was available to

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32. *See* MICHAEL V. SEITZINGER, CONG. RSCH. SERV., 89-485A, PENNY STOCKS: LEGAL ISSUES AND BACKGROUND 1 (1989).

33. *See* Murphy, *Penny Stocks*, *supra* note 30; Chris B. Murphy, *Over-the-Counter (OTC): Trading and Security Types Defined*, INVESTOPEDIA, https://www.investopedia.com/terms/o/otc.asp (Aug. 10, 2022) [https://perma.cc/JSU8-YWQC] (archived Jan. 4, 2023) [hereinafter Murphy, *Over-the-Counter (OTC)*].

34. Murphy, *Over-the-Counter (OTC)*, *supra* note 33.

35. *See* Gregory A. Robb, *Fraud Cited in Penny Stocks*, N.Y. TIMES (Sept. 7, 1989), https://www.nytimes.com/1989/09/07/business/fraud-cited-in-penny-stocks.html [https://perma.cc/P9WC-76TB] (archived Jan. 4, 2023).

36. *Id.*

37. *Id.*

38. Investors alleged that penny stock issuers either provided incomplete information or withheld material information that, if disclosed, would have dissuaded investors from buying the penny stock. *See* SEITZINGER, *supra* note 30, at 2. The issuers purposefully withheld or misstated such information to increase the number of prospective purchasers. *Id.*

39. These hard-sell tactics included the use of both cold calls and "pump and dump" schemes. Promoters cold-called potential customers and pressured them into purchasing a large number of penny stock securities, promising large pay offs. *See id.* at 3. In conjunction with cold calls, pump and dump schemes were used, which operate as follows: Scammers first buy up a large chunk of shares in the penny stock, causing the stock price to rise. Robb, *supra* note 35. Then, the scammers talk up the stock on an online bulletin platform, making false claims about the company and promising would-be investors large returns. *Id.* These tactics proved successful as ill-informed investors bought into the ruse. *Id.* Once a sizable number of shares were purchased, the initial scammer would then sell (or dump) all his shares, reaping profits for himself while simultaneously killing the returns for the remaining investors as the stock price inevitably crashed. *Id.*

40. *See* SEITZINGER, *supra* note 30, at 3–4 (noting that many penny stock promoters had prior criminal convictions, which investors argued should bar such individuals from further brokering and promoting security deals).

investors about these companies. Therefore, investors had limited opportunity to perform due diligence into the companies' financials. Rather, investors relied on the false promises of anonymous "hypsters" online because the information was shared through a reputable platform.[41]

As a result of the penny stock fraud epidemic of the 1980s, 90 percent of investors lost part or all of their investment.[42] Even in the absence of fraud, 70 percent of investors lost money in penny stocks.[43] This led Congress to enact the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (PSRA).[44]

B. *PSRA Squeezes Out Corruption in the Penny Stock Market and David Nussbaum Breathes Life into SPACs*

The PSRA amended the Securities Act of 1933. Congress cited multiple reasons that necessitated implementation of the PSRA, which included the following: promoting a healthy and honest primary and secondary securities market to enhance economic growth, protecting investors, protecting new security issuers, minimizing fraud and abuse, providing an adequate regulatory structure for penny stocks, and enhancing transparency regarding price and volume information in the penny stock market.[45]

To redress the concerns listed in subpart II.A, the PSRA granted greater oversight to the SEC over the penny stock market and blank check companies. The act includes five notable provisions. First, the PSRA empowered the SEC to ban individuals that previously violated securities laws from serving as promoters and consultants in the penny stock market.[46] Congress found that a lot of promoters in the penny stock market were previously banned from the securities market and,

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41. Hypsters refer to online promoters of the penny stocks that would convey false information and generate excitement around the stock in order to persuade retail investors to invest in the stock, driving up the price. *See* Lee Gomes & Knight-Ridder Tribune, *On-Line Ripoffs*, CHI. TRIB. (May 24, 1994, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1994-05-24-9405240090-story.html [https://perma.cc/N9QR-CMUU] (archived Jan. 4., 2023). For example, David Garner, co-founder of the Motley Fool, decided to test the waters of the penny stock market to expose how easily the market could be exploited. *Id.* As a joke, Garner and his brother created a fictitious company, Zeigletics, and promoted its growth potential on Prodigy Money Talk Bulletin, an online platform where members made posts about stocks and the financial market in the United States. *Id.* Although Zeigletics had an absurd business platform—"selling portable toilets to the African nation of Chad"—Gardner received hundreds of hits from Prodigy users requesting more information to invest in the company. *Id.* Gardner's experiment exemplified just how easily the penny stock market could be manipulated.

42. Robb, *supra* note 35.

43. *Id.*

44. *See* Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of Spacs*, 37 DEL. J. CORP. L. 849, 875 (2012).

45. *See* Penny Stock Reform Act of 1990, Pub. L. No. 101–429, § 502, 104 Stat. 951, 951 (1990).

46. *See id.* § 505.

unsurprisingly, brought the same fraudulent practices and abusive schemes to the penny stock market.[47] Second, the PSRA required penny stock companies to comply with some disclosure requirements, such as divulging risks to investors and establishing a quotation system, which is a way to provide stock price information to investors.[48] Third, the PSRA required the SEC to establish rules for registration statements of blank check companies.[49] Fourth, the PSRA required security associations to establish a telephone line where the public can obtain information about a specific broker's disciplinary history.[50] Finally, the PSRA mandated that the SEC implement regulations for blank check companies' disclosure statements.[51] Therefore, the PSRA attacked the factors that made penny stocks vulnerable—lack of information and little regulatory oversight.

This call to action resulted in the SEC promulgating Rule 419. Rule 419's notable provisions include: requiring funds to be placed in an escrow account until completion of the business acquisition and requiring companies to file registration statements with the SEC.[52] The SEC required the creation of an escrow account for the sole benefit of the investors in blank check companies, not the promoters.[53] Therefore, the escrow account's purpose is to serve as a safety net for investors. Overall, the PSRA and Rule 419 put a halt to the use of the penny stock market, and likewise the use of blank check companies, in the 1990s.

In response to the SEC crackdown and promulgation of Rule 419, David Nussbaum, a banker, along with his old law school friend David Miller, created a new business form, which today is known as the SPAC.[54] While SPACs resemble the notorious 1980s blank check companies used in the penny stock market in that they are blank check companies formed for the purpose of raising capital to acquire a company to take public, Nussbaum committed to complying with Rule 419, which made the SPAC viable.[55] Compliance with Rule 419 made SPACs safer for investors than original blank check companies, which are an example of a blind pool investment. Blind pool investment vehicles raise funds from a group of investors without a stated purpose of

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47. *See id.* § 502.
48. *See id.* § 505.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See* 17 C.F.R. § 230.419 (2021).
53. *See id.*
54. *See* Amrith Ramkumar, *SPAC Pioneers Reap the Rewards After Waiting Nearly 30 Years*, WALL ST. J., https://www.wsj.com/articles/they-created-the-spac-in-1993-now-theyre-reaping-the-rewards-11615285801 (Mar. 9, 2021, 4:53 PM) [https://perma.cc/V5WT-ZAHM] (archived Jan. 4, 2023).
55. *See id.*

how the funds will be invested.[56] Nussbaum initially became drawn to the idea of blind pool investing because of the blind pool that took toymaker THQ, Inc. public in the early 1990s.[57] For over a year, Nussbaum and Miller worked closely with regulators to ensure SPACs provided adequate protections and disclosures for investors.[58] In 1993, the first SPAC was born, which ultimately raised $12 million and later merged with a software firm.[59]

C. *Comparison of SPACs and Traditional IPOs*

Although the de-SPAC process is the way in which the private target company becomes public, the process is akin to a reverse merger, making it subject to different regulations than required in an IPO process.[60] An exploration of the differences between IPOs and mergers as well as how the SEC regulates both processes is key to understanding why SPACs have traditionally been viewed as requiring less regulatory oversight.

1. Features of Traditional IPOs and SPACs

When formed, SPACs do not have a specific acquisition target in mind.[61] Usually, they just have an industry in mind, such as software.[62] This makes them especially attractive for growing and emerging companies in industries like technology, which may need a significant amount of capital to produce their software and product but lack the notoriety, funds, and connections to large institutional investors. After formation, SPACs then blind pool investors. Once the SPAC goes public through an IPO, the sponsors have two years to acquire a company to take public.[63] Otherwise, the SPAC is liquidated, and investors will receive their pro-rata share of funds held in the SPAC's escrow account.[64]

SPAC shareholders have voting rights and the power to vote against the merger of the acquisition target that the sponsors select.[65]

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56. James Chen, *Blind Pool*, INVESTOPEDIA, https://www.investopedia.com/terms/b/blind_pool.asp (June 21, 2022) [https://perma.cc/8ZR6-KZTU] (archived Jan. 4, 2023).

57. *See* Ramkumar, *supra* note 54.

58. *See id.*

59. *See id.*

60. *See* Brian O'Connell & Benjamin Curry, *What Is a Reverse Merger?*, FORBES (Mar. 7, 2022, 9:37 AM), https://www.forbes.com/advisor/investing/reverse-merger/ [https://perma.cc/S8JF-4FJV] (archived Jan. 4, 2023).

61. *See* Young, *supra* note 8.

62. *See id.*

63. FIN. INDUS. REGUL. AUTH. (FINRA), GUIDANCE ON SPECIAL PURPOSE ACQUISITION COMPANIES, REGUL. NOTICE 08-54 (Oct. 2008).

64. *See id.*

65. *See How Special Purpose Acquisition Companies (SPACs) Work*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/services/audit-assurance/accounting-advi-

If the SPAC proceeds to acquire a company, it is required to file a proxy statement with the SEC that will describe the merger, lay out governance of the corporation, and disclose financial information such as the corporation's historical and projected earnings.[66] If a SPAC acquires a company, the company becomes public and then will go through the process of de-SPACing, where the SPAC is dissolved and the target company retains its own name.[67]

On the other hand, private companies that go public via the traditional IPO process do so by issuing their own securities for the first time on publicly traded markets, rather than becoming public by virtue of a merger.[68] Private companies that go public via the IPO process instead of going through a de-SPAC merger tend to be more mature and typically have a valuation of at least $1 billion.[69] The IPO process is subject to a more stringent regulatory approval process and receives greater scrutiny and due diligence from underwriters.[70]

The key differences between the de-SPAC and traditional IPO processes concern time, regulation, and valuation.[71] The de-SPAC process is faster than the traditional IPO process.[72] However, SPACs are also constrained by the twenty-four-month timeframe, which forces liquidation of the trust account if a suitable target is not identified. The key regulatory provisions are discussed below in subpart II.C.2.

In terms of valuation, the IPO process is subject to market volatility whereas the de-SPAC transaction benefits from price certainty.[73] Prior to the consummation of the business combination, the SPAC and target will negotiate a price before publicly announcing the deal.[74] This price usually results in the SPAC seeking additional funding, which, as of late, is largely sourced from Private Investment in Public Equity (PIPE) deals. A PIPE deal entails "a private placement of shares of an

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sory/spac-merger.html (last visited Jan. 16, 2023) [https://perma.cc/2WFL-WY3X] (archived Jan. 9, 2023).

66. *See id.*

67. *See id.*

68. *See* Jason Fernando, *Initial Public Offering (IPO): What It Is and How It Works*, INVESTOPEDIA, https://www.investopedia.com/terms/i/ipo.asp (Nov. 3, 2022) [https://perma.cc/8Z4L-E75R] (archived Jan. 9, 2023).

69. *Id.*

70. *See id.*

71. *See Understanding SPAC IPOs Versus Traditional IPOs*, WOODRUFF SAWYER, https://woodruffsawyer.com/industries/spacs/spac-ipos-traditional-ipos-difference/ (last visited Jan. 16, 2023) [https://perma.cc/G8ZQ-8AKC] (archived Jan. 9, 2023).

72. *See* Mike Bellin, *Why Companies Are Joining the SPAC Boom*, PRICEWATERHOUSECOOPERS (Sept. 22, 2020), https://www.pwc.com/us/en/services/deals/blog/spac-boom.html [https://perma.cc/XE5Z-3H2J] (archived Jan. 8, 2023) (showing that the de-SPAC process takes about six months whereas the traditional IPO process takes about twelve to twenty-four months).

73. *See Understanding SPAC IPOs Versus Traditional IPOs*, *supra* note 71.

74. *See id.*

already listed company to a select group of accredited investors."[75] In a private placement, securities are sold directly to the pre-determined private investors rather than sold on the open market.[76] Unlike securities sold through the traditional IPO process, PIPE deals have less regulatory requirements to comply with. For instance, PIPE transactions are not required to be registered with the SEC, nor is a prospectus required.[77] Rather, a private placement memorandum is sent to prospective investors, which describes the company that is selling the securities, the terms of the offering, and the risks.[78] PIPE investors are limited to large private investors, such as hedge funds and mutual funds, because of the high risks involved.[79] Typically, PIPE investors get shares at a slight discount to the de-SPAC price.[80] Overall, once the negotiated price is agreed upon, the target is guaranteed those proceeds once the de-SPAC transaction takes place.

IPO prices, to the contrary, are not negotiated with investors and are more dependent on the market. Underwriters perform due diligence and assign a valuation to the company while also soliciting and managing potential investors.[81] IPOs are typically underpriced to achieve a first day pop in price, reaping positive returns for initial investors.[82] In contrast, de-SPAC transactions are valued higher because of the negotiation process.[83] In valuing the private company pre-IPO, analysts consider the past performance, growth prospects, industry comparables, and demand.[84] Because private companies that go public via an IPO are more mature companies, analysts and investors have greater access to the companies' past performance and financial history, whereas companies going public via de-SPAC transactions values are based on future projections with little historical data, resulting in greater uncertainty.

These differences outlined above explain why SPACs became popular during the pandemic. With the onset of the coronavirus pandemic

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75. Anurag Agarwal, *A Primer on SPACs and PIPEs: How They Work*, MENABYTES (Aug. 1, 2021), https://www.menabytes.com/spac-pipe [https://perma.cc/4TXG-LKQL] (archived Jan. 9, 2023).

76. *See* Akhilesh Ganti, *Private Placements: Definition, Example, Pros and Cons*, INVESTOPEDIA, https://www.investopedia.com/terms/p/privateplacement.asp (Mar. 29, 2022) [https://perma.cc/KSF5-QU6U] (archived Jan. 9, 2023).

77. *See id.*

78. *See* Armand Aponte, *What Is a Private Placement Memorandum?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-private-placement-memorandum.html (last visited Mar. 17, 2022) [https://perma.cc/PAT5-CS4W] (archived Jan. 9, 2023).

79. *See* Agarwal, *supra* note 75.

80. *See id.*

81. 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/35EP-YJ2A] (archived Jan. 9, 2023).

82. *See id.*

83. *See id.*

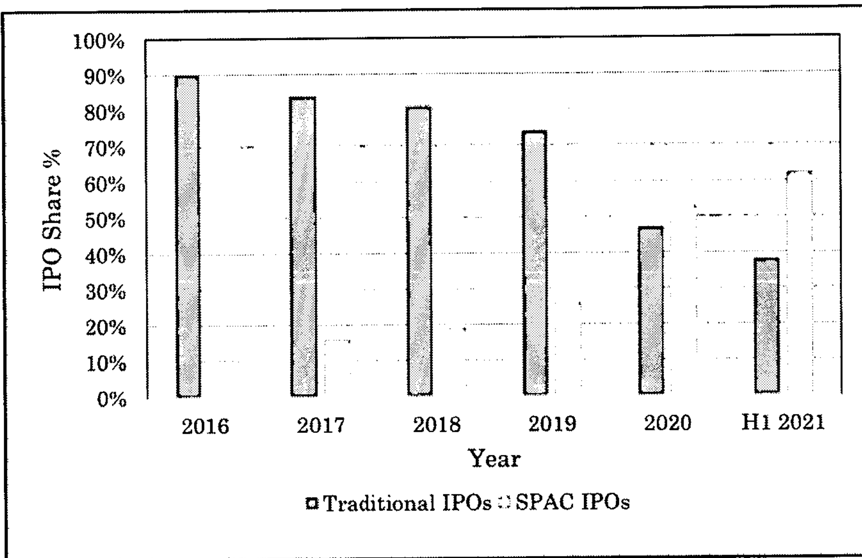
84. *See* Sham Gad, *How an Initial Public Offering (IPO) Is Valued*, INVESTOPEDIA, https://www.investopedia.com/articles/financial-theory/11/how-an-ipo-is-valued.asp (Dec. 30, 2022) [https://perma.cc/8Z7S-A3QN] (archived Jan. 9, 2023).

in 2020, traditional IPOs took a hit. The traditional IPO standstill provided room for the SPAC market to expand. Bloomberg Legal Analyst Preston Brewer contributes the diverse impact COVID-19 had on the traditional IPO and SPAC markets, as follows:

> Traditional IPOs are ill-suited to this volatile, highly uncertain environment: The challenge of accurately assessing the current and future business prospects of a start-up conducting a traditional IPO is simply too great. SPACs, however, offer many advantages in such an uncertain environment. The structure affords managers considerable flexibility in the type of target, deal timing, and terms of a future deal.[85]

The exhibit below shows the shift from traditional IPOs to SPAC IPOs once the COVID-19 pandemic began.

Exhibit 1: Traditional IPOs versus SPAC IPOs Trend[86]

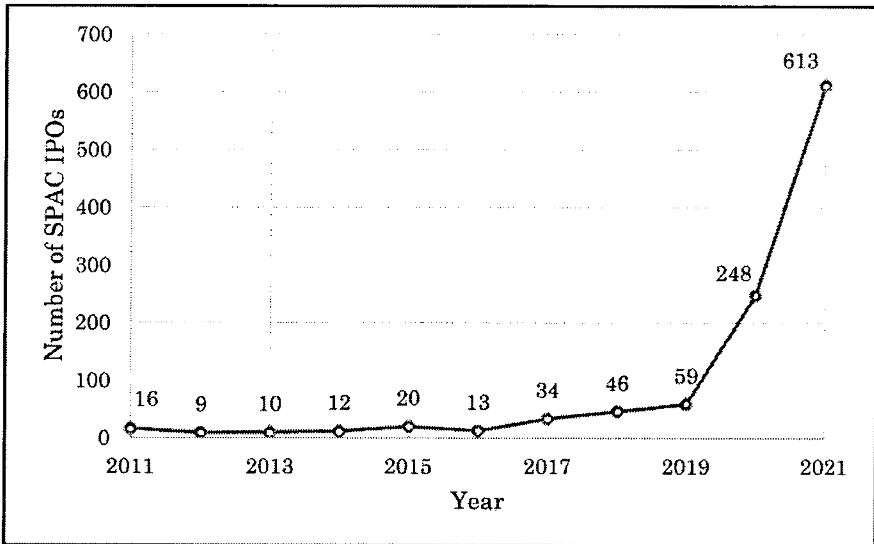


Relatedly, the exhibit below reflects the explosive growth in SPAC IPOs in the United States in the last couple years.

85. Preston Brewer, *ANALYSIS: Fortunes of SPAC, Traditional IPOs Diverge in Pandemic*, BLOOMBERG L. (June 16, 2020, 5:35 AM), https://news.bloomberglaw.com/securities-law/analysis-fortunes-of-spac-traditional-ipos-diverge-in-pandemic?context=article-related [https://perma.cc/36Z4-WLTB] (archived Jan. 9, 2023).

86. Statista Research Department, *Distribution of Traditional IPOs and Special Purpose Acquisition Company (SPAC) IPOs in the United States from 2016 to 2021*, STATISTA (July 4, 2022), https://www.statista.com/statistics/1234111/number-traditional-spac-ipo-usa/ [https://perma.cc/WN8M-7HVT] (archived Jan. 9, 2023).

Exhibit 2: Number of SPAC IPOs in the United States 2011-2021[87]



So, what exactly led to the high growth in number of SPAC IPOs and, consequently, the decline in traditional IPOs? The onset of the COVID-19 pandemic spurred innovation in the technology industry, especially biotech.[88] During the second half of 2020, 21.09 percent of SPACs sought biotech targets; similarly, in the first quarter of 2021, 11.53 percent of SPACs listed biotech as their target industry.[89] SPACs are attractive to biotech companies due to price certainty, as drugs can take years to develop and require a large cash outlay to fund research.[90] In all, innovation, price certainty, market volatility, and an expedited timeline—factors not conducive to the traditional IPO process—served as tinder for the SPAC market to explode during the onset of COVID-19.

Although new companies could technically pursue the traditional IPO route instead of the de-SPAC route, multiple barriers prevent this from being a viable alternative. The traditional IPO process is very costly and lengthy. Additionally, to be listed on a major stock exchange, like the New York Stock Exchange or Nasdaq, the company pursuing

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87. STATISTA, SPACS 12 (2021), https://www.statista.com/study/89025/special-purpose-acquisition-companies/ [https://perma.cc/7M4L-R5HB] (archived Jan. 23, 2023).

88. *See* SPAC Consultants, *SPAC Acquisition Target Industries and Sectors H2 2020 and Q1 2021*, SPAC CONSULTANTS (Apr. 2, 2021), https://spacconsultants.com/spac-acquisition-industries-and-sectors-2020-2021/ [https://perma.cc/364L-2DWC] (archived Jan. 9, 2023).

89. *Id.*

90. *See* Annalee Armstrong, *SPAC Attack: The 10 Biggest in Biotech*, FIERCE BIOTECH (Sept. 7, 2021, 2:00 AM), https://www.fiercebiotech.com/special-report/spac-attack-10-biggest-biotech [https://perma.cc/FQW5-W4DQ] (archived Jan. 9, 2023).

a traditional IPO must meet certain listing requirements. The listing requirements set minimums for the number of shares outstanding upon issuance, market capitalization, and earnings.[91] Such requirements are unrealizable for early-stage companies. Therefore, while a traditional IPO is possible for early-stage companies, it is not feasible.

2. Notable Statutes and Regulations

Not only do the de-SPAC process and traditional IPO process differ in form, but they also are subject to different statutes and regulations. The key laws applicable to SPACs are Section 14 of the Securities Exchange Act, the Private Securities Litigation Reform Act (PSLRA), Rule 165, and Rule 425. Each is discussed in turn below.

Section 14 of the Securities Exchange Act governs proxy statements. As discussed in Part I, prior to a de-SPAC transaction, SPAC shareholders must approve the merger, which is accomplished through a proxy.[92] The proxy statement includes information about the proposed target and its business, including financial projections and pro forma financial statements.[93] The use of financial projections in the proxy statement has been a source of controversy because in some instances it has been used to deceive investors about the target company through materially false and misleading information.[94] For instance, in July 2022, the SEC entered a cease and desist order against Momentus, Inc.— a private company that sought to merge with Stable Road Acquisition Company, a SPAC.[95] Momentus, a commercial space company, misrepresented that its technology had been successfully tested, when in actuality the test failed and its technology remained unproven.[96] This information was conveyed to investors in presentations as well as filed in the S-4 registration statements.[97] Stable Road Acquisition Company failed to perform due diligence, relying on Momentus's claims that the testing had been successful.[98] The SEC found that Momentus and Stable Road Acquisition Company's claims about the technology were a material misrepresentation because the viability of Momentus's technology was imperative to the viability of its business model and ability to generate future revenues.[99]

SPACs historically have been viewed to be insulated from liability for materially false, forward-looking projections due to a safe harbor

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91. *What Are the Listing Requirements for the NASDAQ?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/nasdaq-listing-requirements/ (Jan. 8, 2022) [https://perma.cc/F6M7-UZ4G] (archived Jan. 9, 2023).
92. *See* 17 C.F.R. § 240.14a-3 (2022).
93. *See* 17 C.F.R. § 240.14a-101 (2022).
94. *See, e.g.*, Momentus, Inc., Exchange Act Release No. 10955 (July 13, 2021).
95. *See generally id.*
96. *See id.* ¶¶ 12–16.
97. *See id.* ¶ 29.
98. *See id.* ¶¶ 55–56.
99. *See id.* ¶¶ 5, 61–63.

provision in the PSLRA. The PSLRA creates a private cause of action for investors against companies that make material misleading statements, false statements, or omissions regarding a company's financials or business operations.[100] The safe harbor provision exempts certain securities issuers from liability under the PSLRA as long as the representations are identified as forward-looking statements with a cautionary instruction that actual results may differ materially from projections.[101] Relevant here, the safe harbor provision applies to issuers subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act.[102] SPACs meet this condition because, as publicly traded companies, they are required to file the periodic financial reports under Section 13(a).[103]

Notably, the safe harbor protection is not available to blank check companies.[104] However, the use of the term "blank check company" in the PSLRA adopts the definition of blank check company used in Rule 419, which limits the definition of blank check company to one that issues penny stocks.[105] Most SPACs avoiding meeting this definition; thus, they are interpreted to enjoy the safe harbor protection.[106]

Rules 165 and 425 regulate communications in connection with mergers and acquisitions.[107] The rules governing communications surrounding such business combinations are far less stringent than the rules governing communications for a traditional IPO. Communications in connection with IPOs are restricted by Section 5 of the Securities Act, which are known as the "gun-jumping rules."[108] Section 5(c) bans all offers to sell securities prior to the filing of the registration statement.[109] The SEC interprets "offer" broadly to encompass any communication that may condition the market.[110] The SEC explained in interpretative guidance that conditioning the market includes publicity efforts, stating, "it follows from the express language and the legislative history of the Securities Act that an issuer, underwriter, or dealer may not legally begin a public offering or *initiate a public sales*

100. *See* 15 U.S.C. § 77z-2 (2010).

101. *See id.*

102. *See id.*

103. *See* 15 U.S.C. § 78m (2015).

104. *See* § 77z-2.

105. *See* 17 C.F.R. § 230.419 (2021); *see also* John Coates, *SPACs, IPOs and Liability Risk under the Securities Laws*, SEC (Apr. 8, 2021), https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws [https://perma.cc/Z4CQ-Y87D] (archived Jan. 9, 2023).

106. *See* Coates, *supra* note 105.

107. *See* 17 C.F.R. § 230.165 (1999); 17 C.F.R. § 230.425 (1999).

108. *See* STEPHEN J. CHOI & A.C. PRICHARD, SECURITIES REGULATION: CASES AND ANALYSIS 535–36 (Saul Levmore et al. eds., 5th ed. 2019).

109. *See* 15 U.S.C. § 77e(c).

110. *See* CHOI & PRICHARD, *supra* note 108, at 507–08.

campaign prior to the filing of a registration statement."[111] Therefore, initiatives like advertisements, social media posts, and speaking engagements constitute conditioning the market and violate Section 5.

To the contrary, business combinations are not subject to the same restrictions. Under Rule 165, registrants may offer securities prior to the filing of the registration statement if the issuer files the written communications in accordance with Rule 425, the prospectus directs investors to filed documents, and tender and proxy rules are followed.[112] Rule 425 requires that the written statements made in reliance on Rule 165 are prospectuses filed with the SEC.[113]

Finally, Rule 10b-5 is a noteworthy regulation applicable to both de-SPAC/merger transactions and traditional IPO transactions. Rule 10b-5 is a catchall anti-fraud provision that makes it illegal to make untrue statements or omissions of material fact in connection with the sale or purchase of a security.[114]

D. *Current Problems Brewing in the US SPAC Market*

Early in 2021, the number of SPACs going public rose to unprecedented levels. However, during the second quarter of 2021, the public issuances of SPACs came to a halt due to increased SEC scrutiny, enhanced private litigation filings, and tightening in the PIPE market.[115] This subpart addresses these issues in turn.

1. Increased SEC Scrutiny and Impending Legislation

The SEC began to set its sights on the SPAC market beginning in December 2020. In December 2020, the Division of Corporate Finance of the SEC issued guidance highlighting the potential need for SPAC promoters and issuers to disclose factors to investors that may result in conflicts of interest throughout the SPAC process. The Division identified three main reasons that SPAC sponsor incentives may misalign with SPAC investors: increased target leverage as the SPAC timeframe draws near, underwriter compensation that is dependent on the consummation of a business combination, and sponsor obligations to other business entities.[116]

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111. Statement of the Commission Relating to Publication of Information Prior to or After the Effective Date of a Registration Statement, Release No. 3844, 22 Fed. Reg. 8359, 8359 (Oct. 4, 1957) (emphasis added).

112. *See* 17 C.F.R. § 230.165 (1999).

113. *See* 17 C.F.R. § 230.425 (1999).

114. *See* 17 C.F.R. § 240.10b-5 (1951).

115. *See* Jones Day, *2021 Transactional Year in Review and 2022 Forecast: SPAC Year in Review and 2022 Outlook*, JD SUPRA (Feb. 3, 2022), https://www.jdsupra.com/legalnews/2021-transactional-year-in-review-and-4300810/ [https://perma.cc/V6E3-PRA7] (archived Jan. 9, 2023).

116. *See* DIV. OF CORP. FIN., U.S. SEC. & EXCH. COMM'N, CF DISCLOSURE GUIDANCE: TOPIC NO. 11, SPECIAL PURPOSE ACQUISITION COMPANIES (2020).

Moreover, the SEC issued guidance for accounting considerations in SPACs at the beginning of the second quarter in 2021. For example, the SEC issued guidance in April 2021 concerning accounting considerations for SPAC warrants.[117] The guidance required SPACs to restate warrants, which were previously classified as equity, on balance sheets as liabilities; the process of restating financial statements was costly and impeded SPACs' abilities to move forward with the de-SPAC process throughout the second quarter of 2021.[118] Although some SPAC founders believe this accounting change does not have a material change on the valuation process in SPACs, reclassifying warrants as liabilities can have a dilutive impact on shares once the business combination commences.[119]

In December 2021, the SEC Chair, Gary Gensler, issued a call-to-action to the SEC staff to produce proposals aimed at increasing SPAC investor protections, enhancing disclosure requirements, guarding against market priming, and aligning incentives between gatekeepers and investors.[120] Gensler expressed concerns that SPAC investors have been afforded fewer protections than traditional IPO investors.[121] Gensler advocated for equal treatment between SPACs and traditional IPOs, which would result in increased liability and reporting requirements for SPACs as well as enhanced protections for investors.[122] As a result, SPAC issuance significantly slowed down in the United States.[123] In March 2022, the SEC issued proposed rules and regulations that would significantly alter the United States' regulatory landscape for SPACs.[124]

Increased SEC scrutiny likewise spurred congressional action. The House of Representatives introduced two bills targeting perceived deficiencies of SPACs on November 9, 2021: the Holding SPACs

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117. *See* John Coates & Paul Munter, *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ('SPACs')*, SEC (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs [https://perma.cc/9NZZ-LY59] (archived Jan. 9, 2023).

118. *See id.*

119. *See* Louisa Galbo & David Larsen, *SPACs and Valuation of Warrant Liabilities*, KROLL (June 21, 2021), https://www.kroll.com/en/insights/publications/valuation/valuation-insights-second-quarter-2021/spacs-and-valuation-of-warrant-liabilities [https://perma.cc/JG37-UJX8] (archived Jan. 9, 2023).

120. *See* Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Remarks Before the Healthy Markets Association (Dec. 9, 2021), https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921 [https://perma.cc/Y8MR-V74K] (archived Jan. 9, 2023).

121. *See id.*

122. *See id.*

123. *See* Yun Li, *SPAC Issuance Jumps to the Highest Since March as Deals Rush to Market Before Year-End*, CNBC, https://www.cnbc.com/2021/11/03/spac-issuance-jumps-to-the-highest-since-march-as-deals-rush-to-market-before-year-end.html (Nov. 3, 2021, 1:07 PM) [https://perma.cc/3FD2-35CS] (archived Jan. 9, 2023).

124. *See infra* Part III.D.

Accountable Act of 2021 (H.R. 5910) and the Protecting Investors from Excessive SPACs Fees Act of 2021 (H.R. 5913).[125]

H.R. 5910 aims to eliminate SPACs' protections for forward-looking statements under the safe harbor provision of the PSLRA.[126] Forward-looking statements have been integral to the SPAC process because these projections are used to secure funding from PIPE investors.[127] These forward-looking projections likewise become available to the public due to the proxy rules' required disclosures.[128] The PSLRA safe harbor provision insulates SPAC issuers from liability for misstatements made through forward-looking information in a proxy statement.[129] This is different than traditional IPOs because traditional IPO issuers are not protected by the safe harbor provision when filing registration statements, thus dissuading the use of forward-looking projections.[130]

A notable provision of H.R. 5913 excludes retail investors from the SPAC market because it bars participation of retail investors when sponsors obtain a stake of 20 percent or higher.[131] This act would preclude retail investors from the SPAC market because sponsors traditionally maintain a 20 percent stake in the SPAC. Both bills have been passed by the Committee on Financial Services and are currently awaiting action by the entire House.

2. Enhanced Private Litigation Filings

In 2021, the SPAC market saw an explosion in litigation proceedings in connection with de-SPAC transactions due to alleged omissions and misstatements in proxy statements. Most issues that arise in connection with SPACs are related not to when the SPAC goes public, but rather to the de-SPAC process. Because the SPAC acquisition requires shareholder approval, the SPAC must issue a proxy statement to shareholders. The proxy statement contains business and financial information about the target company, enumerates the interests of the buyer and seller, and lays out the terms of the initial business combination transaction, which includes the capital structure of the resulting entity.[132]

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125. *See* H.R. 5910, 117th Cong. (as reported by H.R. Comm. On Fin. Servs., Nov. 16, 2021); H.R. 5913, 117th Cong. (as reported by H.R. Comm. On Fin. Servs., Nov. 16, 2021).

126. H.R. 5910.

127. *See supra* Part II.C.

128. *See id.*

129. *See id.*

130. *See id.*

131. H.R. 5913, 117th Cong. (as reported by H.R. Comm. On Fin. Servs., Nov. 16, 2021).

132. *See* U.S. Securities & Exchange Commission, *What You Need to Know About SPACs – Updated Investor Bulletin*, SEC (May 25, 2021), https://www.sec.gov/oiea/

During an IPO, there is a quiet period where a company's management team cannot publicly share forecasts or additional opinions about their business.[133] The quiet period begins when the company files its registration statement and lasts up to forty days post stock issuance.[134] The purpose of the quiet period is to level the playing field between investors and prevent information asymmetry.[135] Because the de-SPAC process is treated as a merger rather than an issuance of securities, this process is not subject to the quiet period.[136]

The lack of quiet period surrounding mergers enables SPAC target's management to embark on public engagement to generate excitement around the potential deal. This process has been subject to abuse as target management has released false and misleading information to PIPE and retail investors prior to the merger, as shown in the Nikola case discussed in Part I.[137] Blatant misstatements and lack of due diligence caused the SEC to initiate investigations in 2021 into some of the largest SPAC deals, resulting in over a $125 million settlement with Nikola.[138] Likewise, 2021 saw a marked increase in federal securities class actions, alleging violations under Section 10(b) and Rule 10b-5 of the Exchange Act for gross misstatements and omissions in financials.[139]

3. Tightening PIPE Market

The onset of COVID-19 led to an accumulation of dry powder, meaning the amount of unspent cash reserves that private equity and venture capital firms hold on their books that has yet to be invested.[140] By June 30, 2020, $273 billion of dry powder was available.[141] Because of the amount of capital available, PIPEs became attractive vehicles for SPACs to raise needed capital to complete a de-SPAC transaction.

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investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin [https://perma.cc/U9WX-FGCP] (archived Jan. 9, 2023).

133. *See* Will Kenton, *Quiet Period: Definition, Purpose, Violation Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/q/quietperiod.asp (Apr. 9, 2022) [https://perma.cc/QFP9-XB8F] (archived Jan. 9, 2023).

134. *Id.*

135. *See id.*

136. *See* Paul Ausick, *Insider Action: Expiring Quiet Periods, Lockups for Week 7/26*, 24/7 WALL ST. (July 28, 2021, 10:11 AM), https://247wallst.com/investing/2021/07/28/insider-action-expiring-quiet-periods-lockups-for-week-of-7-26/ [https://perma.cc/H7MK-Z29J] (archived Jan. 9, 2023).

137. *See supra* Part I.

138. *See* Goodwin Procter, *SPAC 2021 Year-End Review and 2022 Preview: Tailwinds, Headwinds, and Regulatory Landscape*, JD SUPRA (Jan. 7, 2022), https://www.jdsupra.com/legalnews/spac-2021-year-end-review-and-2022-6792705/ [https://perma.cc/YDV9-NAEC] (archived Jan. 9, 2023).

139. *See id.*

140. *See What Is Dry Powder in Private Equity?*, PITCHBOOK (July 14, 2022), https://pitchbook.com/blog/what-is-dry-powder [https://perma.cc/AEC7-M3ZV] (archived Jan. 9, 2023).

141. *See id.*

As SPACs received increased regulatory scrutiny and investors elected to exercise redemption rights in 2021, the PIPE market tightened, leaving less funds available to finance de-SPAC transactions.[142] When the SPAC surge initially began in 2020, the market usually reacted favorably to the announcement of de-SPAC deals, increasing the market price of the shares issued.[143] But, the increased regulatory scrutiny in 2021, combined with PIPE's inability to hedge their position, caused PIPEs to decline to fund the de-SPAC deal.[144] Instead, PIPEs awaited market reactions to the proposed de-SPAC transaction and subsequently purchased the securities in the market.[145] Overall, PIPEs have enhanced leveraging power and a restructuring of PIPE-SPAC deals may be required to maintain PIPEs as a viable capital source.

III. COMPARATIVE ANALYSIS: HOW DIFFERENT CAPITAL MARKETS HANDLE SPACS

The United States has led the SPAC race, but SPACs have gained increasing popularity abroad, especially in the Netherlands, specifically Amsterdam.[146] The US SPAC boom in 2020 and 2021 also inspired additional markets to enter the SPAC arena, namely the United Kingdom, Singapore, and Hong Kong.

Although SPACs have become more popular in Europe during 2021, Europe's SPAC market significantly lags behind the US SPAC market. For instance, between January and May 2021, Europe had only twelve SPAC IPOs, totaling $3.9 billion.[147] The United States, on the other hand, had 331 SPAC IPOs totaling $98.5 billion during this same period.[148] SPACs have been slower to take off abroad because of more restrictive regulations, less investor flexibility, and a smaller pool of venture capital funds.[149] Many European countries' regulations do

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142. *See* Christopher M. Barlow, C. Michael Chitwood, Howard L. Ellin, P. Michelle Gasaway, Gregg A. Noel, Patrick G. Rideout, Susan L. Saltzstein & Yingchuan Mo, *Choppy Market for SPACs and PIPEs, Competition for Targets Spurs Deal Innovations*, SKADDEN (Jan. 19, 2022), https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/choppy-market-for-spacs-and-pipes [https://perma.cc/CS48-BGTP] (archived Jan. 9, 2023).

143. *See* ANNA PINEDO & BRIAN HIRSHBERG, STAYING NIMBLE IN THE SPAC PIPE MARKET 1 (2022).

144. *See id.* at 2–3.

145. *See id.* at 2–3.

146. *See Why Amsterdam Is the Capital of Europe's SPAC Frenzy*, VELOCITY GLOB. (Mar. 19, 2021), https://velocityglobal.com/blog/amsterdam-capital-europe-spac/ [https://perma.cc/T9PP-B5CB] (archived Jan. 9, 2023) [hereinafter *Amsterdam SPAC Frenzy*].

147. Tomás de Heredia, Mayrin Garcia & Javier Fernandez-Galiano, *The SPACs Boom: Europe Picks Up the Pace*, DELOITTE (July 14, 2021), https://www2.deloitte.com/uk/en/insights/industry/financial-services/spacs-in-europe.html [https://perma.cc/7BPN-FME6] (archived Jan. 9, 2023).

148. *Id.*

149. *See Amsterdam SPAC Frenzy*, *supra* note 146.

not differ much in requirements between a de-SPAC merger and a traditional IPO, resulting in businesses opting for the traditional IPO route.[150] Likewise, many European SPAC markets do not allow the redemption right, which enables shareholders to sell their shares back to the SPAC prior to consummation of the de-SPAC transaction, a primary attractive feature of investing in the SPAC process.[151]

Asia has likewise entered the SPAC market. Singapore and Hong Kong are the newest players in the SPAC market, having just publicly listed SPACs on their exchanges in January 2022 and March 2022, respectively.[152] The exchanges have stricter listing requirements than the United States.

Overall, the growth of SPACs worldwide indicates that the SPAC may be here to stay. Understanding the different requirements that exchanges worldwide impose on SPACs can assist and inform the United States' regulatory policy moving forward. As the leader in the SPAC market, new SPAC regulations in the United States have the propensity to affect SPACs' role in capital markets worldwide. This Part will undertake a comparative analysis between more lenient and stricter SPAC regimes, assessing the pros and cons of each. Through this analysis, this Note endeavors to assess which safeguards should be implemented to maintain SPACs as a viable alternative to access public capital markets moving forward.

A. *Amsterdam Paves the Way for a Global SPAC Market*

The Netherlands, particularly Amsterdam, is emerging as the hub for SPACs in Europe.[153] Amsterdam is attractive for SPACs because of its looser regulatory environment compared to the rest of Europe, mirroring more closely the regulations in the United States before March 2022.[154] Amsterdam's regulations offer more flexibility to investors, and the Netherlands has a favorable business reputation.[155]

The first European SPAC to list in 2021 was ESG Core Investments Euronext Amsterdam, whose IPO was valued at $300 million.[156] Attracted to the up-and-coming Amsterdam SPAC market, both Jean Pierre Mustier (former Unicredit head) and Bernard Arnault (Europe's

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150. *See* Heredia, Garcia & Fernandez-Galiano, *supra* note 147.

151. *See id.*

152. *See* Anshuman Daga, *Singapore Lists First SPAC as Asia Investors Warm Up to Blank Check Firms*, REUTERS (Jan. 20, 2022, 1:54 AM), https://www.reuters.com/markets/europe/singapore-makes-bold-foray-into-spac-market-temasek-backed-firm-lists-thursday-2022-01-19/ [https://perma.cc/G42V-XSWU] (archived Feb. 22, 2023); *HKEX Welcomes First SPAC Listing*, HKEX (Mar. 18, 2022), https://www.hkex.com.hk/News/News-Release/2022/220318news?sc_lang=en [https://perma.cc/63WR-3S3Y] (archived Feb. 22, 2023).

153. *See Amsterdam SPAC Frenzy*, *supra* note 146.

154. *See id.*

155. *See id.*

156. *Id.*

richest person) chose Amsterdam as the home to take their SPAC, Pegasus Acquisition Company Europe B.V., public.[157] In deciding which market to form the SPAC in, Mustier and Arnault considered both Amsterdam and the United States. The pair ultimately chose Amsterdam because of their belief that the US market is oversaturated as well as their desire to replicate the US SPAC market structure in Amsterdam.[158] The SPAC listed publicly in April 2021 for $605.4 million, aiming to acquire a target in the financial services industry.[159]

Due to flexibility in Dutch law, Amsterdam began to mirror the US SPAC structure.[160] Dutch companies have varying rules depending on whether they are formed as *naamloze venootschap* (NV) or *besloten vennootschap* (BV) companies. NVs are typically used for listed companies, while BVs are typically used for privately held companies.[161] Although SPACs are listed companies, they can be formed as BVs.[162] Dutch law concerning BVs is more flexible than Dutch law for NVs.

To approve a de-SPAC transaction, Amsterdam requires the approval of "(i) 70% of the votes cast, provided a quorum of (at least) 33%-50% of the shares outstanding is represented, or (ii) approval of more than 50% of the votes cast, typically without any quorum requirements."[163] While Amsterdam initially prohibited SPAC sponsors from voting their founder shares, Amsterdam has since removed this prohibition.[164] BVs do not have a percentage vote requirement.[165]

Initially, the redemption right was only available to shareholders who voted *against* the de-SPAC transaction.[166] In more recent SPAC transactions, however, shareholders had been permitted to redeem their shares whether or not they approved the transaction.[167] As opposed to the United States, where the redemption right enables investors to redeem 100 percent of their shares, a SPAC in Amsterdam under the NV model places a 50 percent cap on redemption. SPACs formed as BVs are not subject to a cap. As compared to the United States, Amsterdam's redemption right cap reserves greater liquidity for the SPAC since it preserves the amount of cash backing the securi-

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157. Ahbinav Ramnarayan & Simon Jessup, *Mustier and Arnault-Backed Pegasus Launches Amsterdam SPAC Listing*, REUTERS (Apr. 26, 2021, 2:16 AM), https://www.reuters.com/article/uk-tikehau-mustier-spac/mustier-and-arnault-backed-pegasus-launches-amsterdam-spac-listing-idUKKBN2CD0OO [https://perma.cc/V9QJ-2PDQ] (archived Jan. 9, 2023).

158. *See Amsterdam SPAC Frenzy*, *supra* note 146.

159. Ramnarayan & Jessup, *supra* note 157.

160. *See* FRESHFIELDS, UPDATE: SPAC MOMENTUM CONTINUES IN EUROPE WITH FURTHER LISTINGS IN AMSTERDAM AND FRANKFURT AND REFORM IN LONDON 1–2 (2021).

161. *See id.* at 1 n.1.

162. *See id.* at 2.

163. *Id.* at 12.

164. *See id.*

165. *Id.*

166. *See id.*

167. *See id.*

ties.[168] Likewise, the redemption cap minimizes the dilutive effect after the de-SPAC transaction. After a successful de-SPAC transaction, sponsors receive 20 percent of the equity for their nominal contribution.[169] The more shareholders redeem their shares prior to the de-SPAC transaction, the less money backs the shares, resulting in greater dilution.[170] Therefore, as compared to the United States, Amsterdam's redemption cap preserves greater liquidity in SPACs, which may result in greater performance post de-SPAC transaction. However, this preserved liquidity is achieved at the expense of shareholder protections.

Capping redemption rights in the United States market arguably is not necessary to preserve liquidity because most de-SPAC transactions are funded through PIPEs, which serve as a backstop against the dilution that results from executed redemption rights, with the caveat that the PIPE market has tightened as a result of increased SPAC scrutiny and market volatility.[171] As such, it is possible for the United States regime to preserve the 100 percent redemption option while improving liquidity because of the use of PIPEs.

B. *The United Kingdom and Singapore Loosen Regulations in Response to the SPAC Boom*

Because of the SPAC explosion in the United States and Amsterdam, the Financial Conduct Authority, the financial regulatory body of the United Kingdom, has taken initiatives to relax SPAC restrictions in order to attract SPACs to the United Kingdom market.

In August 2021, the Financial Conduct Authority updated its rules regarding SPACs. The rules require that investor funds be ringfenced, meaning that the funds are held separately from the rest of the SPAC's assets.[172] Most importantly, the updated rules abolished the requirement that SPACs automatically suspend trading of shares once the SPAC identifies an acquisition target.[173] This requirement is removed as long as the SPAC raises £100 million (about $110 million

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168. *See* David Kaufman & Haley Kavanaugh, *Key Considerations for Target Companies in a SPAC Merger*, THOMPSON COBURN (Apr. 14, 2021), https://www.thompsoncoburn.com/insights/publications/item/2021-04-14/key-considerations-for-target-companies-in-a-spac-merger [https://perma.cc/3S8U-4CXW] (archived Jan. 9, 2023).

169. *Id.*

170. *See id.*

171. *See* Joanna Makris, *SPAC Financing Gets More Creative Amidst Clogged PIPE Market*, BOARDROOM ALPHA (Mar. 14, 2022), https://www.boardroomalpha.com/spac-financing-gets-more-creative/ [https://perma.cc/EVJ5-NWTY] (archived Jan. 9, 2023).

172. *See* Penny Sukhraj, *New Rules on UK SPAC Listings Start Today: Here's What You Need to Know*, FIN. NEWS LONDON (Aug. 10, 2021, 12:01 AM), https://www.fnlondon.com/articles/new-rules-on-uk-spac-listings-start-today-heres-what-you-need-to-know-20210810 [https://perma.cc/T5YS-X4Z9] (archived Jan. 9, 2023).

173. *See id.*

USD), which is a decrease from the prior £200 million threshold, in its initial capital raising.[174] The suspension requirement previously made the United Kingdom unpalatable to SPACs. The Financial Conduct Authority's changes have the effect of providing greater investor protections, while also lowering the regulatory hurdles in the United Kingdom to make using a SPAC over the traditional IPO process a viable option for investors and businesses.

The Financial Conduct Authority's rules regarding SPACs now more closely mirror the regulations in the United States and Amsterdam with a few differences. Like the other major SPAC markets, the United Kingdom added the redemption option and requires ongoing disclosures by the SPAC regarding key terms and risks.[175] Unlike the other major SPAC markets, the United Kingdom prevents founders, sponsors, and directors from voting on the acquisition target.[176] Consequently, the decision whether to acquire the target is left entirely to the public shareholders of the SPAC. Prohibiting founders, sponsors, and directors from voting on the acquisition target helps to minimize agency costs because these individuals are incentivized to consummate a de-SPAC deal, even with a less-than-ideal target. The perverse incentive stems from the requirement that a SPAC liquidate if it fails to identify an acquisition target with the two-year limit, which is the standard time limit worldwide.

Similarly, Singapore has sought a piece of the SPAC market. The Singapore Exchange (SGX) enacted new rules to attract funds and startup firms. Accordingly, SGX became the first Asian stock exchange to allow SPAC listings.[177]

Singapore is hoping to further expand into the technology market, as the Singapore market has traditionally been attractive for real estate, consumer, and infrastructure industries.[178] Startup firms in the technology sector are drawn to SPACs as SPACs can provide needed capital to further develop the firm's products. Additionally, these firms often lack the resources and capability to go public through the traditional IPO process.

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174. Emma Fitzpatrick & Stuart Maleno, *SPACs in the UK – The New Listing Rules and Their Potential Impact on Deal Activity and Claims Trends*, CLYDE & CO. (Aug. 5, 2021), https://www.clydeco.com/en/insights/2021/08/spacs-in-the-uk-the-new-listing-rules-and-their-po [https://perma.cc/B3PP-8Q4T] (archived Jan. 9, 2023).

175. *See id.*

176. *See id.*

177. Ayman Falak Medina, *Singapore Exchange Becomes the First Major Bourse in Asia to Allow SPAC Listings*, ASEAN BRIEFING (Sept. 24, 2021), https://www.aseanbriefing.com/news/singapore-exchange-becomes-the-first-major-bourse-in-asia-to-allow-spac-listings/ [https://perma.cc/FLW3-8HKZ] (archived Feb. 22, 2023).

178. *See* Anshuman Daga, *Singapore Exchange's SPAC Rules Seen Giving Market Much-Needed Boost*, REUTERS (Sept. 5, 2021, 8:58 PM), https://www.reuters.com/business/singapore-exchanges-spac-rules-seen-giving-market-much-needed-boost-2021-09-03/ [https://perma.cc/F79D-UCMA] (archived Jan. 9, 2023).

SGX's major changes to its SPAC rules include halving the minimum market capitalization previously required to $112 million and allowing detachable warrants from the underlying common shares.[179] The smaller capital requirements allows for a larger pool of target companies for SPACs to acquire.

SGX listing requirements for SPACs have two notable differences from the requirements of the United States' exchanges—appointment of a financial adviser and a valuation process. Under the SGX rules, SPACs are required to appoint a financial adviser to advise on the de-SPAC transaction.[180] Still, the financial adviser's precise role in the valuation process remains unclear. The exchanges in the United States, however, have no comparable requirement.

In regards to valuing the de-SPAC transaction, the SGX requires that an independent party bear responsibility for valuing the transaction when either (a) "a placement or subscription for the SPAC's equity securities by institutional and/or accredited investors is not conducted contemporaneously with the business combination;" or (b) "the business(es) or asset(s) to be acquired under the business combination involves a mineral, oil and gas company, or property investment/development company."[181] To the contrary, the US exchanges contain no requirement that an independent valuer be appointed. Rather, the de-SPAC transaction value is determined by SPAC management, underwriters, and investors.[182] This valuation is calculated based on the "fair value" and takes revenues, future cash flows, and business activities into consideration.[183]

Overall, the United Kingdom and Singapore's entrances in the SPAC market offer unique SPAC features that are not present in other markets.

C. *Hong Kong Enters the SPAC Market with Heightened Listing Requirements*

Departing from Singapore and the United Kingdom's trend of relaxing SPAC regulations, Hong Kong is heading the opposite direction. Hong Kong's tightening regulations are in response to previous shell company scandals that plagued the market.[184] Hong Kong was initially

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179. *Id.*

180. *See* CLIFFORD CHANCE, GUIDE TO SPECIAL PURPOSE ACQUISITION COMPANIES 7 (2021).

181. *Id.* at 9.

182. *See id.*

183. *Id.*

184. *See* Daniel Shane, *Hong Kong's 'Nasdaq' GEM Market Fails to Sparkle*, FIN. TIMES (Nov. 17, 2019), https://www.ft.com/content/7e48e97c-06ea-11ea-a984-fbbacad9e7dd [https://perma.cc/H45W-EDZ8] (archived Feb. 22, 2023) (explaining that HKEX closed a backdoor loophole where shell companies would list on the GEM exchange (a Hong Kong exchange for emerging companies that do not fulfill the requirements to list

hesitant to enter the SPAC market due to the market's checkered past with shell companies. For SPACs to list on the Hong Kong Exchange and Clearing Market (HKEX), it was necessary to loosen a regulation that had been established to prevent back door listings and the use of shell companies as listing vehicles.[185] This regulation was implemented at the end of 2019 in response to findings that the backdoor listings through utilization of shell companies resulted in speculative trading, market manipulation, and diminished shareholder confidence.[186]

In September 2021, the HKEX issued a consultation paper seeking feedback on proposed SPAC regulations.[187] HKEX acknowledged the need for a SPAC listing regime to compete with the United States because twelve companies in the Greater China and Southeast Asia area listed SPACs in the US SPAC market.[188]

Despite its desire to compete in the growing worldwide SPAC market, HKEX simultaneously worried about potential abuses SPACs could bring to its capital markets, necessitating stricter listing requirements. The report stated that HKEX was unable to mirror the US SPAC market structure due to greater retail market participation in Hong Kong as well as the United States' reliance on private litigation to mitigate abusive practices.[189] The report attributed de-SPAC failures in the United States to the over saturation of SPACs in the market with limited numbers of suitable de-SPAC targets.[190] Hence, HKEX sought to implement stricter regulations to vet out substandard de-SPAC transactions.[191] The comment period on HKEX's proposed listing requirements closed on November 1, 2021. Ultimately, the new listing requirements took effect on January 1, 2022.

Notably, Hong Kong now requires SPACs to raise $1 billion HKD (about $128 million USD) prior to listing on the exchange and bars retail investors from participating.[192] The HKEX has the highest market

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on HKEX) and then transfer to the main board, HKEX, enabling the shell companies to skip the entire listing process, which resulted in scandals that undermined investor confidence in the market).

185. *See* Enoch Yiu & Chad Bray, *What Are SPACs, Where Are the Pitfalls and Why Is Hong Kong Mulling Joining in the Latest Investment Craze?*, S. CHINA MORNING POST (Apr. 2, 2021, 8:30 AM), https://www.scmp.com/business/banking-finance/article/3126445/what-are-spacs-where-are-pitfalls-and-why-hong-kong [https://perma.cc/8A49-UU7U] (archived Dec. 30, 2022).

186. *See* HKEX, CONSULTATION CONCLUSIONS: BACKDOOR LISTINGS, CONTINUING LISTING CRITERIA AND OTHER RULE AMENDMENTS 1 (2019).

187. HKEX, CONSULTATION PAPER: SPECIAL PURPOSE ACQUISITION COMPANIES 1 (2021) [hereinafter HKEX 2021].

188. *See id.*

189. *See id.*

190. *See id.* at 2.

191. *See id.* at 2.

192. Kiuyan Wong, *Hong Kong Seen Struggling to Lure SPACs with Strict Rulebook*, BLOOMBERG (Sept. 20, 2021, 12:06 AM), https://www.bloomberg.com/news/

capitalization requirement in comparison with other SPAC markets.[193] HKEX's decision to bar retail investors from participating in the SPAC market resulted from a study produced in South Korea, indicating that the volume of retail investors attributed to volatility in the SPAC market.[194] Speculation by retail investors resulted in SPAC share prices rising higher than its IPO price, weakening the redemption right for shareholders because they could only redeem the SPAC units at the IPO price, rather than the inflated price.[195] The United States likewise considered banning retail investors from the SPAC market, as evidenced by H.R. 5913. While this move has the intention of protecting unsophisticated investors from getting roped into risky investments and experiencing losses, passage of H.R. 5913 or similar provisions would be overly paternalistic and antithetical to the United States' emphasis on a free market economy. Moreover, this bill focuses on the wrong demographic—it punishes investors by keeping them from the market rather than punishing those who have utilized fraud and deception to make the market unfair, as seen in the Nikola and Momentus, Inc. scandals. In this case, hate the players, not the game. It is the Trevor Miltons of the world—not the retail investors—that should be kept out of the SPAC market.

In addition, Hong Kong has crafted an eligibility test for SPAC promoters, which is a requirement absent from other SPAC market regimes. To be a SPAC promoter, individuals are required to have managed at least $8 billion HKD (about $1.024 billion USD) in assets for three years or possess senior management experience at a major listed company.[196] These requirements differ markedly from the United States and Singapore, which have no minimum fundraising requirements nor restrictions on retail investors.[197] This eligibility test adds credence to the SPAC. Stronger SPAC sponsor credentials may correlate with better stock performance after the de-SPAC transaction because of the corresponding lower costs related to forming, funding, and maintaining the SPAC.[198] In analyzing over forty de-SPAC transactions, Michael Klausner, Michael Ohlrogge, and Emily Ruan separated the SPACs into two merger cohorts, designating the SPACs as either "high-quality" or "non-high quality."[199] The designation de-

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articles/2021-09-20/hong-kong-seen-struggling-to-lure-spacs-with-strict-rulebook [https://perma.cc/PQ7T-W2DT] (archived Dec. 30, 2022).

193. *SPACs Listings in Hong Kong – A Comparison Among Different Jurisdictions*, ALLEN & OVERY (Dec. 20, 2021), https://www.allenovery.com/en-gb/global/news-and-insights/publications/spacs-listings-in-hong-kong-a-comparison-among-different-jurisdictions [https://perma.cc/Q86W-EB3N] (archived Dec. 30, 2022) [hereinafter *SPACs Listings in Hong Kong*].

194. *See* HKEX 2021, *supra* note 187, at 27.

195. *See id.*

196. Wong, *supra* note 192.

197. *See id.*

198. *See* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REGUL. 228, 251–63 (2022).

199. *Id.* at 251–52.

pended on the experience of the sponsor and managers, where high-quality SPACs were defined as SPACs in which the sponsor or manager is either (a) a private equity fund that manages at least $1 billion in assets and is listed in Pitchbook, or (b) a former senior officer of a Fortune 500 company.[200] On average, high-quality SPAC costs are half that of non-high-quality SPACs, which results in greater cash per share.[201] The lower costs are attributed to less warrants, lower redemption rates, and greater PIPE funding.[202] Klausner, Ohlrogge, and Ruan also underscore the sponsor's skills and experience in contributing to the success of a high-quality de-SPAC transaction.[203] A credible sponsor's ability to vouch for a de-SPAC transaction also may assuage fears regarding information asymmetry, enabling a profitable deal for both the SPAC and target company.[204] A highly regarded reputation is key to form and maintain business relationships, which can be hard to rebuild once destroyed. Accordingly, well-regarded SPAC sponsors are incentivized to seek out deals that add favorably to their business portfolios to continue attracting new business ventures. Overall, these findings suggest that sponsor eligibility tests can better protect investors by minimizing dilution, resulting in greater returns to investors.[205]

To better safeguard shareholder rights, HKEX requires that 100 percent of IPO proceeds are ringfenced in an escrow account.[206] Moreover, consummation of the de-SPAC transaction requires shareholder approval.[207] The SPAC promoter and shareholders with material interests are barred from participating in the vote.[208] Likewise, the shareholders have a redemption right that is exercisable prior to a de-SPAC transaction when a material change occurs with respect to the SPAC promoter, or when an extension is granted on the timeline.[209]

Unlike other SPAC jurisdictions, the SPAC and de-SPAC process has a longer timeline under the HKEX rules to complete the IPO and de-SPAC transaction. Under the HKEX rules, the SPAC is required to identify the acquisition target twenty-four months after the IPO and has an additional twelve months to complete the de-SPAC transaction.[210] This more flexible time frame allows extra time to identify a suitable target and perform due diligence.

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200. *Id.* at 252.
201. *See id.* at 252–53.
202. *Id.* at 253.
203. *Id.* at 256.
204. *See id.*
205. *But see id.* at 256–58 (showing that, although high-quality SPACs tend to generate positive returns in the twelve months following the de-SPAC transaction, returns are worse than benchmark indices).
206. *See SPACs Listings in Hong Kong*, *supra* note 193.
207. *See id.*
208. *See id.*
209. *See id.*
210. *See id.*

While HKEX's requirements are targeted to reduce fraud and abuse, some institutional investors raise concerns that the requirements are too stringent for the SPAC market to be viable in Hong Kong. These investors claim that the high market capitalization requirement of $1 billion HKD excludes smaller buyer targets that lack the minimum market capitalization requirement.[211] Moreover, banning retail investors from the market until the de-SPAC transaction is complete makes trading in the Hong Kong SPAC market illiquid.[212] Lastly, by requiring the combined entity to appoint a financial sponsor to effectuate due diligence, sources argue that the process is drawn out, diminishing the SPACs value as a faster alternative to the traditional IPO process.[213] As a result of this stricter regulatory regime, few SPACs have become listed on the HKEX.[214]

D. *The United States' SEC Issues Proposed Rules Regarding SPACs, Expected to Chill SPAC Activity*

On March 30, 2022, the SEC levied its biggest blow to the SPAC market to date—proposed rules and amendments governing SPACs (Proposed Rules)—with the goal of enhancing disclosure requirements and investor protections for SPAC IPOs and de-SPAC transactions.[215] Key components of the Proposed Rules include increasing disclosures to investors, eliminating the PSLRA safe harbor protection, requiring greater underwriter liability, aligning SPAC regulations and requirements more with traditional IPOs, and providing a safe harbor under the Investment Company Act of 1940.[216]

Disclosure. The Proposed Rules include new Subpart 1600 of Regulation S-K, which would require the following disclosures: information from SPAC sponsors regarding the sponsors' backgrounds and conflicts of interest; disclosure from SPAC sponsors describing the effects of share dilution; an opinion by the SPAC regarding the de-

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211. Scott Murdoch & Alun John, *Investment Banks Argue Hong Kong's Proposed SPAC Rules Are too Rigid Sources*, REUTERS (Oct. 27, 2021, 4:36 AM), https://www.reuters.com/business/investment-banks-argue-hong-kongs-proposed-spac-rules-are-too-rigid-sources-2021-10-27/ [https://perma.cc/96LK-92WA] (archived Dec. 30, 2022).

212. *See id.*

213. *See id.*

214. Jonathan Breen, *SPACs Get Off to Slow Start in Hong Kong*, ASIA MONEY (July 13, 2022), https://www.asiamoney.com/article/2a95r6xa3l9ml5pgshbeo/northeast-asia/spacs-get-off-to-slow-start-in-hong-kong [https://perma.cc/P2SU-6JT8] (archived Dec. 30, 2022).

215. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections, (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-56 [https://perma.cc/C6C5-LY8G] (archived Dec. 30, 2022).

216. *See generally* Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 33-11048, Exchange Act Release No. 34-94546 (Mar. 30, 2022), https://www.sec.gov/rules/proposed/2022/33-11048.pdf [https://perma.cc/63NE-2RPS] (archived Dec. 30, 2022) [hereinafter Proposed Rules].

SPAC transaction's fairness to investors and disclosure whether an independent party has completed a report, opinion, or appraisal regarding the fairness of the transaction; and certain disclosures on the cover of the prospectus.[217] The SPAC sponsors would be required to disclose their experience, role in the de-SPAC transaction, conflicts, lock-up agreements, and compensation.[218] The SPAC is likewise required to disclose any conflicts that arise between any of its agents (sponsors, promoters, directors, or officers) and third party security holders.[219] Proposed Items 1602 and 1604 require disclosure about potential dilution related to SPAC and de-SPAC transactions.[220] Generally, Proposed Rules commentators seem to support enhanced disclosures for SPACs to aid in informative investment decisions.[221]

Some commentators have taken issue with the fairness opinion requirement, arguing that the SEC does not have the rulemaking authority to impose such a requirement and that, even if the SEC does have the authority, it incorrectly focuses on the fairness to unaffiliated shareholders only.[222] Moreover, a fairness opinion focusing only on the fairness to unaffiliated shareholders seems to conflict with the board of directors mandate to look out for the interests of *all* shareholders.[223] Additionally, the fairness opinion arguably is not just a disclosure requirement; instead, in effect, it may impose a substantive requirement that requires the SPAC to undertake additional analysis, as it requires the SPAC to disclose the factors it considered in determining fairness as well as the weight accorded to each factor.[224]

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217. *Id.* at 18, 29–30.

218. *See id.* at 29–30.

219. *See id.* at 33.

220. *See id.* at 36.

221. *See, e.g.*, Letter from Goodwin Procter LLP, to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 1 (June 13, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20131322-301503.pdf [https://perma.cc/KRB5-Q9C8] (archived Dec. 30, 2022); Letter from CFA Inst., to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 4–5 (May 31, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20129959-296347.pdf [https://perma.cc/L2AP-KXVM] (archived Dec. 30, 2022) [hereinafter CFA Letter].

222. *See* Letter from Jay H. Knight, Chair, Fed. Regulation of Securities Comm., Am. Bar Ass'n, to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 28–30 (June 17, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20131981-302447.pdf [https://perma.cc/R4EL-F32R] (archived Dec. 30, 2022) [hereinafter ABA Letter].

223. *See Get on Board: Understanding the Role of Corporate Directors*, FINRA, https://www.finra.org/investors/insights/get-board-understanding-role-corporate-directors (Feb. 6, 2023) [https://perma.cc/R4EL-F32R] (archived Dec. 30, 2022). However, as highlighted by Klausner, the consummation of a de-SPAC transaction, even if bad for unaffiliated shareholders, tends to be profitable for sponsors. *See* Klausner, Ohlrogge & Ruan, *supra* note 188, at 264 (explaining that when analyzing sponsor returns in the twelve months following de-SPAC transactions, "sponsors tend to do quite well even where SPAC investors do quite poorly"). Therefore, a fairness opinion focusing on unaffiliated shareholders only may better align sponsor incentives with those of the average retail investor.

224. *See* Proposed Rules, *supra* note 216, at 52–53; Norm Champ, Tamar Donikyan, Sophia Hudson, Joshua Korff, Christian Nagler, Peter Seligson & Stefan

No More PSLRA Safe Harbor for SPACs. As discussed in subpart II.C.2, the PSLRA has traditionally been interpreted to allow SPACs to enjoy a safe harbor for forward-looking statements under the PSLRA because these entities do not match PSLRA's "blank check company" definition.[225] Under the Proposed Rules, the SEC seeks to amend the blank check company definition and eliminate the penny stock requirement, thus removing the safe harbor for SPACs.[226]

The proposed rule removing the PSLRA safe harbor has sparked controversy. Critics point out that SPACs are required to share target projections due to intersections in federal securities regulation and state corporate law.[227] Additionally, forward-looking statements are viewed as key information that investors need to vote on the de-SPAC transaction.[228] Proponents of this rule believe it necessary to ensure the legitimacy of forward-looking projections.[229]

Underwriter liability. Proposed Rule 140a would increase underwriter liability by requiring underwriters party to the SPAC IPO to also be underwriters to the de-SPAC transaction, subjecting such underwriters to liability under Sections 11 and 12(a)(2).[230] The SEC views this modification as necessary to ensure the accuracy of disclosures made during the transactions, dubbing underwriters as "'gatekeepers' to the public markets."[231] The SEC further emphasizes that Section 2(a)(11)'s definition of underwriter goes beyond investment banks. Rather than only encompassing parties that purchase securities with the intent to then sell or distribute those securities, the term "underwriter" has been interpreted more broadly; importantly, parties "*directly or indirectly* 'participating' in a distribution by engaging in activities 'necessary to the distribution' or in '*distribution-related activities*'" have been deemed underwriters.[232] Therefore, promoters and officers may also qualify as underwriters.[233] Because a large portion of underwriter fees are typically deferred until completion of the de-SPAC transaction,

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Atkinson, *The SEC Proposes New Rules Regarding SPACs*, KIRKLAND & ELLIS (Apr. 6, 2022), https://www.kirkland.com/publications/kirkland-alert/2022/03/sec-proposes-new-rules-regarding-spacs [https://perma.cc/4QU9-FFK2] (archived Dec. 30, 2022)

225. *See supra* Part II.C.2.

226. *See* Proposed Rules, *supra* note 216, at 84–85 (the term "blank check company" is defined in 17 CFR 230.419(a)(2) as a development stage company that has no specific business plan or purpose or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, and that is issuing "penny stock," as defined in 17 CFR 240.3a51-1 (Exchange Act Rule 3a51-1)); Proposed Rules, *supra* note 216, at 8 n.3.

227. *See* ABA Letter, *supra* note 222, at 6.

228. *See* CFA Letter, *supra* note 221, at 6.

229. *See id.* at 6–7.

230. Proposed Rules, *supra* note 216, at 20, 89; *see also* 15 U.S.C. § 77k (creating strict liability for underwriters when the registration statement contains a material misrepresentation or omission); 15 U.S.C. § 77l (creating liability for underwriters when a prospectus or oral communication contains a material misstatement or omission).

231. Proposed Rules, *supra* note 216, at 20, 88.

232. *Id.* at 92–93 (emphases added).

233. *Id.* at 93.

underwriters for the SPAC deal have a significant interest in the SPAC identifying an acquisition target and consummating the transaction.[234] Therefore, by clarifying underwriter liability for the de-SPAC transaction, the SEC hedges against underwriters behaving in their own self-interest, thus affording investors greater protections.[235]

Critics of this proposed rule argue that the rule's provisions are too broad because the language deems certain actors as "underwriters" that do not undertake traditional underwriting roles.[236] Additionally, the proposed rule fails to outline how underwriter liability is determined for de-SPAC transactions.[237] The potential for greatly expanded liability has resulted in investment banks, which typically serve as underwriters, to exit the SPAC market.[238]

Aligning De-SPAC Transaction Regulations with Traditional IPO Regulations. Consistent with SEC initiatives to align de-SPAC regulations with IPO regulations, the SEC proposed Rule 145a "that would deem any business combination of a reporting shell company, involving another entity that is not a shell company, to involve a sale of securities to the reporting shell company's shareholders."[239] Likewise, the SEC proposed an addition to Regulation S-X, Article 15, which imposes greater financial reporting requirements on de-SPAC transactions.[240]

The Proposed Rules also require a dissemination period, where filed prospectuses and proxies related to the de-SPAC transaction must be disseminated to shareholders at least twenty days prior to the shareholder meeting.[241] The SEC Proposed Rules include an amendment to Form S-4, which would require the private company in the de-SPAC transaction to be a co-registrant; this amendment has the effect of extending Section 11 liability to the private company's directors and officers.[242]

Investment Company Act Safe Harbor. Finally, the SEC proposed a safe harbor to Section 3(a)(1)(A) of the Investment Company Act, which SPACs can satisfy by complying with prescribed duration, asset composition, and business purpose requirements.[243] Under Section

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234. *See id.* at 97.

235. *See id.*

236. *See* Letter from Jeffrey M. Soloman, Chair and Chief Exec. Officer, Cowen Inc., to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 2 (June 8, 2022), https://www.sec.gov/comments/s7-13-22/s71322-20130571-299465.pdf [https://perma.cc/R42Z-PD7F] (archived Dec. 30, 2022) [hereinafter Cowen Letter].

237. *See id.*

238. *See* Katherine Doherty, *Global Banks Flee the Monster SPAC Market They Helped Create*, INS. J. (May 10, 2022), https://www.insurancejournal.com/news/national/2022/05/10/667036.htm [https://perma.cc/W95G-5QZ5] (archived Dec. 30, 2022) (explaining that both Goldman Sachs and Bank of America have scaled back and/or halted their involvement in SPAC-related transactions).

239. Proposed Rules, *supra* note 216, at 20–21.

240. *See id.* at 21

241. *See id.* at 70–71.

242. *See id.* at 74–75.

243. *See id.* at 21.

3(a)(1)(A), an investment company is an issuer that "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities."[244] The SEC adds this rule in order to alert SPACs that certain activities could subject the entities to requirements under the Investment Company Act.[245] In order to enjoy the protection of the safe harbor, the SPAC must meet three conditions. First, the SPAC's assets must consist only of government securities, government market funds, and cash before the de-SPAC in consummated.[246] Second, the SPAC must seek one de-SPAC transaction where the surviving entity primarily engages in the business activities of the target.[247] Finally, the SPAC must identify an acquisition target within eighteen months after filing the registration statement, and the de-SPAC transaction must be completed within twenty-four months of such filing.[248] Otherwise, the SPAC must return the funds back to investors to avoid forfeiting such protection.[249] In general, this safe harbor is not expected to have large consequences because many already interpreted SPACs to be exempt from the Investment Company Act.

IV. A PRAGMATIC SOLUTION: ENHANCING SHAREHOLDER PROTECTIONS WHILE MAINTAINING SPACS AS A VIABLE ROUTE TO ACCESS CAPITAL MARKETS

The SEC's overhaul of rules regulating the SPAC market comes prematurely and risks jeopardizing the United States' position as a global SPAC leader. The Proposed Rules fundamentally change the rules that apply to SPACs and de-SPAC transactions, which has resulted in uncertainty and has upset market expectations.[250] This Note advances a more conservative solution, which proposes that the SEC adopt incremental efforts that primarily focus on instituting preventative measures, rather than adopting the Proposed Rules in the March 2022 form.

A. *Strengthening Preventative Measures*

Preventing fires is easier than putting them out. The same is true with capital markets—it is better to implement safeguards to deter misconduct than to attempt to rectify the damage done once fraud occurs. Potential fraud in the SPAC market can be mitigated by provid-

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244. 15 U.S.C. § 80a–3.
245. *See* Proposed Rules, *supra* note 216, at 137–38.
246. *See id.* at 142.
247. *See id.* at 145.
248. *See id.* at 152–53.
249. *See id.* at 157.
250. *See generally supra* Part III.D.

ing investors the information necessary to make informed investment decisions and requiring sponsors to meet certain eligibility thresholds.

In the capital markets system, information is king. Ensuring that investors have access to accurate and digestible information helps to cure information asymmetry issues and instills trust in capital markets.[251] Generally, disclosure requirements that enable investors to better understand the mechanics underlying a proposed de-SPAC transaction will help investors make better informed investment decisions.[252] Therefore, SPACs should provide clear disclosures regarding the sponsor's background and conflicts as well as the potential for dilution.

SPACs should be required to provide detailed dilution disclosure schedules that reflect the expected value per share in light of redemptions, sponsor promotes, and warrants. The disclosure schedule will need to feature a range of values, given that the percentage of shareholders that choose to exercise redemption rights will be unknown prior to the de-SPAC transaction.[253]

Moreover, eligibility requirements should be implemented for SPAC sponsors, as seen in Hong Kong.[254] While not foolproof, sponsors that meet certain eligibility thresholds tend to run SPACs that ultimately consummate a profitable de-SPAC transaction. As Klausner, Ohlrogge, and Raun's research suggests, a de-SPAC transaction's ability to generate value positively correlates with the experience and knowledge of the SPAC sponsor.[255] Practically, sponsors with substantial experience will be best positioned to spot and vet potential acquisition targets. Likewise, such credentials will enable the sponsor to negotiate a profitable deal.

B. *Minimizing Dilutive Effects*

In addition to disclosing dilution in relation to de-SPAC investments, several measures can be taken to further minimize the dilutive effects baked into SPAC structures. To decrease dilution, which will thereby decrease the costs borne by unaffiliated shareholders, efforts

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251. *See* Paul M. Healy & Krishna G. Palepu, *Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature*, 31 J. ACCT. & ECON. 405, 408–09 (2001) (explaining the "lemons problem" that occurs as a result of information asymmetry, resulting in investors being unable to distinguish between "good" and "bad" companies and valuing both companies equally).

252. *See id.*

253. *See* CFA INST., SPAC CRIB SHEET: WHAT INVESTORS NEED TO KNOW BEFORE THEY INVEST (2022), https://www.cfainstitute.org/-/media/documents/comment-letter/2020-2024/20220210.pdf [https://perma.cc/SZ73-2G62] (archived Dec. 30, 2022) (explaining that SPAC investors can elect to redeem their shares at the initial business combination, which is the de-SPAC transaction).

254. *See supra* Part III.C.

255. *See* Klausner, Ohlrogge & Raun, *supra* note 198, at 256.

should focus on restructuring sponsor promotes and redemption rights.[256]

Because sponsors tend to profit handsomely even when a de-SPAC transaction performs poorly, better aligning sponsors' financial incentives with unaffiliated shareholders' financial incentives will better ensure that the SPAC seeks out a suitable target. Sponsors' incentives are currently misaligned with investors' incentives due to the structure of the promote. As things stand, once a de-SPAC transaction commences, the sponsor receives a large ownership stake for a nominal cost. On one hand, this payoff is justifiable because sponsors take on substantial risk upfront when funding the SPAC IPO, where they stand to lose their entire investment. However, the structured payoff system is not commensurate to the risk undertaken since the viability of the de-SPAC company has little bearing on the sponsor's payoff.[257]

Instead, the sponsor's promote should be structured based on an earnout system where the sponsor receives a greater ownership stake once certain milestones are reached in the de-SPAC company, which could include both stock price metrics as well as operational achievements. An earnout system would both decrease immediate dilution impacts and encourage sponsors to continue actively managing the company after the de-SPAC transaction, making it more likely that the company produces profits for shareholders.

Similarly, the redemption rights and warrants available to SPAC shareholders cause dilutive effects, as most shareholders exercise the redemption right once the de-SPAC transaction is announced.[258] The detachable warrants are peculiar features of the redemption rights, as it gives investors virtually no downside risk.[259] Typically, capital market investors' downside risk equals the amount of their initial investment. The elimination of downside risk makes it a no-brainer for SPAC security holders to redeem their shares, choosing to rely on any upside associated with the warrants.

To rectify this issue, redemptions could be capped, or a shareholder's warrants could be cancelled upon the shareholder's election to redeem shares. Capping redemption, as shown in Amsterdam, minimizes the dilutive effect of non-redeeming shareholders.[260] Cap-

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256. *See id.* at 298 ("Based on data collected from SPACs that merged between January 2019 and June 2020, we have found that the median SPAC share purportedly worth $10.00 has $5.70 in net cash per share, and that the mean net cash per share is only $4.10, at the time of a SPAC's merger.").

257. *See id.* at 264 (highlighting that SPAC sponsors profit even when the combined company performs poorly).

258. *See* Klausner, Ohlrogge & Raun, *supra* note 198, at 239 ("The median proceeds of a SPAC IPO are roughly $220 million, but at the median, 73% of those proceeds are returned to shareholders in redemptions.").

259. *See id.* at 248.

260. *See supra* Part III.A; *see also* Klausner, Ohlrogge & Raun, *supra* note 198, at 293 ("Lower redemptions meant lower dilution and more net cash per share delivered in a merger.").

ping redemption rights erodes some shareholder protections. However, most SPAC IPO investors are institutional investors.[261] Because regulations governing capital markets are arguably in place to protect retail investors rather than sophisticated, institutional investors, this effect is largely inconsequential.

As an alternative to capping redemptions, warrants could be cancelled if a shareholder exercised the redemption right. This would enable the investor to still recoup its initial investment while limiting dilutive effects to non-redeeming shareholders. Moreover, since the upside obtainable from warrants would be eliminated when redeeming shares, these investors are encouraged to keep their shares, providing greater liquidity and financial backing for the de-SPAC transaction.

C. *Punishing Misconduct without Bolstering Current Liabilities for Underwriters*

After implementing preventative measures, the SEC should adopt a wait and see approach and utilize the methods that it already has at its disposal to punish fraud and misconduct in the SPAC market. Rather than issuing the Proposed Rules that enhance SPAC liability, aligning it more closely with liability associated with the traditional IPO process,[262] the SEC should simply wait and see how the SPAC market continues to develop in light of recent high-profile lawsuits and enhanced regulatory scrutiny. Waiting is a practical move to avoid over regulation and wasted resources. Even though SPACs have been around for a few decades now, SPACs did not become heavily utilized until the past two years. It may be fruitful to continue to monitor the market and gauge the issues identified in other markets that have marked differences in their regulations of SPACs as compared to the United States.

This approach is beneficial because it would avoid unnecessary regulations, maintaining the attractiveness and flexibility of SPACs. By punishing those companies that have engaged in flagrant and material fraud or misrepresentations, the SEC has sent a message that SPACs are not as invincible as once believed.[263] The threat of lawsuits may be a sufficient check on sponsors and management through the SPAC and de-SPAC processes, ensuring that their actions are above board.

For example, one of the SEC's most controversial proposed rules—extending underwriter liability to de-SPAC transactions—is unneces-

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261. Klausner, Ohlrogge & Raun, *supra* note 198, at 241.
262. *See supra* Part III.D.
263. *See, e.g.*, Momentus, Inc., Exchange Act Release No. 10955 (July 13, 2021).

sary and intrudes on a SPAC's ability to operate within a distinct sphere in the capital market system, separate from traditional IPOs.[264]

This rule would have the effect of making de-SPAC transactions more like traditional IPOs than mergers, as it subjects underwriters to Section 11 liability.[265] This modification thereby subjects underwriters of SPACs to risks that are absent in mergers. Additionally, as written, the proposed rule greatly expands the definition of underwriter, subjecting parties to underwriter liability that have not assumed traditional underwriter roles.

Commensurate with the objective of avoiding enhanced SPAC liability as compared to other non-SPAC mergers, the forward-looking safe harbor should not be eliminated. As the statute stands, SPACs are insulated from private lawsuits in connection with materially false statements made on forward-looking statements as long as there are cautionary disclosures.[266] Forward-looking statements are imperative in order to assess the target of de-SPAC transactions given that these targets are largely early-stage companies with little historical financial data, so financial projections are imperative to value the transaction.[267] The PSLRA should continue to apply to these forward-looking statements made by SPACs if (1) there is support backing the valuations and (2) appropriate due diligence is executed.

These conditions would impose duties on both SPAC promoters and target management. To ensure due diligence on the part of the SPAC promoters, the SEC should impose liability on SPAC promoters and boards if materially false information is in forward-looking statements that could have been vetted out with adequate due diligence on the part of the SPAC. In connection with this enhanced liability on the part of SPACs, the SEC should require a SPAC's management to appoint an independent financial adviser, as seen in Singapore, to ensure that the representations that the target makes to the SPAC management is accurate.[268] Instead of having a purely advisory role, however, the financial adviser should also have a vote on the business combination and issue its findings to SPAC shareholders with a recommendation as to whether they should approve the transaction. Although boards have historically undertaken this role, placing this duty on a truly independent financial advisor with no financial stake in the transaction would hedge against the potential for self-interested actions of the board, given SPAC boards are appointed by the SPAC sponsors and have close relationships with them. Consequently, an independent financial adviser would help to reduce the agency costs associated with a de-SPAC transaction by ensuring that the SPAC only

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264. *See generally* Cowen Letter, *supra* note 236 (criticizing enhanced underwriter liability).

265. *See supra* Part III.D.

266. *See* Coates, *supra* note 105.

267. *See* ABA Letter, *supra* note 222, at 6; CFA Letter, *supra* note 221, at 6.

268. *See supra* Part III.B.

merges with a suitable private company that is ready and able to meet the demands of a public listing. Likewise, these conditions would require the target to provide the SPAC's management with ample business and financial information to back the valuation negotiated prior to the combination.

Lastly, it is worth noting that in rejecting the SEC's extension of Section 11 liability to de-SPAC transactions, the SEC is still left with two enforcement mechanisms: Rules 10b-5 and 14a-9. The SEC should continue to bring enforcement actions under the rules the commission has at its disposal to eliminate bad actors in the market.[269] PSLRA protections aside, Rule 10b-5 does not permit outright fraud in any market.[270]

D. *The Value of Enhanced Access to Capital Markets*

Overall, these incremental steps discussed above would protect against self-interested actions of the SPAC sponsors and increase investor protections without squandering the aspects of the SPAC that make it an attractive alternative to the traditional IPO. The United States' policy toward SPACs should move cautiously forward, striking an appropriate balance between affording greater retail investor protections while simultaneously refraining from hindering access to capital markets.

SPACs bring companies to the public markets that the average investor may otherwise be barred from investing in because without the option to go public via a SPAC, companies that go public via de-SPAC transactions may not otherwise have the resources to pursue the traditional IPO route, siloing these companies to private markets. Likewise, SPACs enable emerging companies to obtain needed capital to propel their operations and advancement. Because private placements are largely unregulated due to registration exemptions under Regulation D, these markets are limited to accredited investors, excluding most retail investors.[271] With adequate safeguards in place, SPACs operate in what was previously a no-man's-land for retail investors—these individuals are able to invest in otherwise private companies, granting more investment choices and liberalizing access to capital markets. Aligning SPAC regulations with traditional IPOs is overly paternalistic and threatens this liberalization.

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269. *See* 17 C.F.R. § 240.10b-5 (1951).

270. *See id.*

271. *See* U.S. Securities & Exchange Commission, *Private Placements Under Regulation D – Investor Bulletin*, SEC (Apr. 17, 2022), https://www.sec.gov/oiea/investor-alerts-and-bulletins/private-placements-under-regulation-d-investor-bulletin [https://perma.cc/L7KU-TFTD] (archived Dec. 30, 2022).

V. CONCLUSION

The SPAC market has received a bad name over the past year as it has been marred by scandals. In considering and assessing the regulatory environment in the United States going forward, it is crucial to reflect on whether it is really the SPAC and de-SPAC structure itself that is wrought with fraud or whether it is the players within the SPAC market than engage in fraudulent practices. With increased scrutiny and legislation looming ahead, the SEC has sent a message that SPAC promoters must play by the same rules as everyone else. Efforts should focus on vetting out bad actors in the SPAC market and subsequently gauging the market's progress in the coming year before taking any drastic measures that would compromise the United States' position as the leading SPAC market worldwide.

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