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SEC/CORPORATE

SEC Statements Regarding SPACs Address Warrants and Projections

Following the increase in the number of special purpose acquisition companies (SPACs) and the related business combinations between SPACs and private target businesses (commonly referred to as "de-SPAC" transactions), an increase in regulatory scrutiny, particularly from the Securities and Exchange Commission, is emerging. As discussed below, in the last week the SEC has issued two statements — one related to the accounting treatment of warrants and one related to liability risk — that have attracted considerable attention from SPACs and other stakeholders.

Accounting Treatment of SPAC Warrants

On April 12, the Division of Corporation Finance (Corp Fin) of the SEC issued a Staff Statement from the Acting Director, John Coates, and Acting Chief Accountant, Paul Munter, relating to the accounting treatment of warrants issued by SPACs.

In a typical SPAC initial public offering (IPO), a SPAC will issue and sell to public investors units, comprised of one share of common stock and a fraction of a warrant to purchase additional shares of common stock. In addition, SPAC sponsors also will typically purchase warrants from the SPAC to fund SPAC offering and operating expenses. These privately placed warrants, when held by the sponsor and certain permitted transferees, include certain protective provisions, including a provision that prevents the SPAC from redeeming the privately placed warrants at such as time as the warrants held by public stockholders would otherwise be redeemable. The protective provisions fall away when the private placement warrants are transferred to other third parties.

Historically, the financial statements of SPACs have classified warrants as equity. The Staff Statement challenges this long-applied accounting treatment and suggests that the warrants should instead be classified as a liability in financial statements if they contain certain customary provisions in the agreement governing the terms of these warrants. The two features that the Staff Statement focused on to support their view that the warrants should be treated as a liability apply in the case of a reorganization of the SPAC or tender or exchange offer with respect to the SPAC common stock. More particularly:

1. **Indexation.** The Staff Statement highlights the fact that an equity-linked instrument, such as the warrants, must be considered indexed to the entity's stock in order to qualify for equity classification, as opposed to liability classification, under applicable accounting rules. Nonetheless, certain variables may affect the settlement amount (i.e., the value upon exchange) for the warrants without causing liability accounting treatment. However, "the holder of the instrument" is not an approved variable input that may be considered. Accordingly, the Staff Statement expressed the view that, because in certain situations (including as a result of the protective provisions of the private placement warrants discussed above), the settlement amount of the private placement warrants containing the offending features will differ depending on whether such warrants are held by the SPAC sponsor or an unrelated third party, those warrants should be classified as a liability.
2. **Tender Offer.** The Staff Statement also focused on the fact that the terms of the warrants (public and private) provide that, in the event of a tender offer or exchange offer with respect to the SPAC common stock that is accepted by holders of more than 50 percent of the common stock, all holders of the warrants would be entitled to receive cash for their warrants. In those situations only holders of common stock that

received and accepted the relevant cash tender offer would receive cash consideration. The fact that all warrant holders, but not necessarily all common stockholders, would receive cash consideration, would require that those warrants be treated as a liability under applicable accounting rules, the Staff Statement concludes.

As a result, SPACs that have completed an IPO or that are planning for an IPO will likely need to take steps to address the conclusions set forth in the Staff Statement.

SPACs that have already completed their IPO will need to confirm whether their outstanding warrants contain the provisions that have been called into question by the Staff Statement, and if they do, consider along with their auditors, the impact on their financial statements for prior periods, including whether any accounting errors in prior period financial statements are "material" and financial statements need to be restated to account for outstanding warrants as liabilities rather than as equity. The Staff Statement provides that SPACs may correct material errors relating to the warrant accounting treatment by amending their most recent Form 10-K and any subsequently filed Form 10-Qs. In addition, going forward, these companies will need to determine whether quarterly valuations of the warrants and mark-to-market accounting treatment will be required.

SPACs that have not yet completed their IPO have additional options. This may include accounting for their warrants as liabilities on a go forward basis or structuring the warrants to exclude the features that would give rise to a need to classify the warrants as a liability and maintain the ability to classify the warrants as equity.

The impact that the Staff Statement will have on the market for existing and future SPACs, and whether additional SEC guidance on SPAC accounting matters will be issued, is yet to be seen.

The Staff Statement represents staff views of Corp Fin and the Office of the Chief Accountant. It is not a rule, regulation, or statement of the SEC. However, issuers should anticipate the need to address the matters set forth in the Staff Statement in a satisfactory manner in connection with the SEC comment and review process with respect to IPOs and their ongoing periodic reports made under the Securities Exchange Act of 1934.

SEC Corp Fin Staff Statement

SPAC Liability Risk

On April 8, John Coates, the Acting Director of Corp Fin, issued a statement addressing the rise of SPAC transactions and his views on certain important liability issues, stating that the Corp Fin staff "will continue to be vigilant about SPAC and private target disclosure so that the public can make informed investment and voting decisions about these transactions."

Mr. Coates' statement focused particularly on the use of projections in disclosures in connection with de-SPAC transactions. He noted that the conventional market wisdom on the benefit of SPAC transactions, as compared to traditional IPOs, focuses on the perceived ability of SPACs to rely on the safe harbor for forward-looking statements (such as projections) provided by the Private Securities Litigation Reform Act of 1995 (PSLRA) in connection with a de-SPAC transactions. In general, the PSLRA provides a safe harbor for forward-looking statements (including projections) made by issuers, when properly identified as a forward-looking statement and accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement. The PSLRA explicitly excludes statements made "in connection with an initial public offering" from the safe harbor. In recent years, the use of projections has helped fuel the market for de-SPAC transactions, as startups and other growth companies that would not typically pursue a traditional IPO, have merged with SPACs and impressed investors with strong projections for future results.

Certain commentators, Mr. Coates observed, "suggest or assert that the safe harbor applies in the context of de-SPAC transactions but not in conventional IPOs." Mr. Coates expressed his view that this perceived benefit is overstated and potentially misleading, in particular noting his views that:

- Notwithstanding the safe harbor provided by the PSLRA, any material misstatement or omission made by a SPAC in a registration statement or proxy statement is subject to liability under existing federal securities laws, including Section 11 of the Securities Act of 1933 (the Securities Act).
- The safe harbor does not protect against false or misleading statements made with actual knowledge that the statement was false or misleading.

- Statements and disclosures made in connection with a de-SPAC transaction may give rise to liability under state law, including in the case of Delaware corporations, with respect to the duty of candor and fiduciary duties.
- The PSLRA safe harbor applies only in the case of private litigation and does not prevent the SEC from taking action to enforce the federal securities laws.

In addition, while noting that the PSLRA does not apply to statements made in connection with an IPO, Mr. Coates observed that the term "initial public offering" is not defined in the PSLRA or, for these purposes, any relevant SEC rules. Accordingly, he stated, given that a de-SPAC transaction serves as the transaction in which a private operating company goes public, the phrase initial public offering "may include de-SPAC transactions."

Mr. Coates further raised the possibility that, in the future, the SEC could revisit the scope of the PSLRA safe harbor, through new rulemaking or guidance, particularly to better address the realities of a de-SPAC transaction and the extent to which it serves, from an economic and practical perspective, and from the perspective of investors, as the true go public transaction of a private company. He also noted that the SEC could reconsider the concept of "underwriter" in the context of de-SPAC transactions. In conclusion, Mr. Coates stated that, given the practicalities of SPAC transactions, the SEC may need to consider the de-SPAC transaction the "real IPO" and focus the application of the federal securities laws more fully on that aspect of a SPAC life cycle.

As noted in the statement, the statement represents the views of Mr. Coates. It is not a rule, regulation, or statement of the SEC. The extent to which the statement leads to any new rulemaking by the SEC or other change in policy is yet to be seen.

Mr. Coates' Statement

SEC Approves Amendments to NYSE Shareholder Approval Rules for Certain Equity Issuances and Requirements for Related Party Transactions

Earlier this month, the Securities and Exchange Commission approved amendments (the Amendments) to New York Stock Exchange (NYSE) rules that require listed companies to obtain shareholder approval of certain private placements and equity issuances to "related parties," as well as requirements related to transactions between a listed company and certain related parties. In particular, the Amendments, which were initially proposed in December 2020 and subsequently modified, modified Sections 312.03, 312.04 and 314.00 of the NYSE Listed Company Manual. According to NYSE, the Amendments to Sections 312.03 and 312.04 are intended to more closely align shareholder approval requirements applicable to NYSE listed companies with comparable requirements for companies listed on Nasdaq or NYSE American and, in doing so, provide greater flexibility to NYSE-listed companies seeking to raise capital. The flexibility provided by such Amendments tracks, in various respects, the flexibility provided through temporary rules adopted by NYSE in response to the COVID-19 pandemic, which are being terminated by the Amendments. The amendments to Section 314.00 clarify the role of the audit committee in approving related party transactions, and expand the scope of transactions to which related party transaction rules apply.

The chart below provides a summary of the NYSE's former shareholder approval requirements applicable to certain related parties and 20 percent equity issuances by NYSE-listed companies, as well as the related changes effectuated by the Amendments. The chart also includes a summary of the former approval requirement for related party transactions and the related changes effectuated by the Amendments.

NYSE Rule Prior to the Amendments	Effect of the Amendments
Sale of Equity to Related Parties Prior to the Amendments, Section 312.03(b) of the NYSE Listed Company Manual provided that shareholder approval was required for any issuance by an NYSE-listed company to (1) company insiders, including directors, officers and holders of 5 percent or more of the company's common stock (Significant	Pursuant to the Amendments, an issuance of common stock (or securities convertible into or exercisable for common stock) to a subsidiary, affiliate or other closely related party of an insider that would have otherwise been subject to the shareholder approval requirements of Section 312.03(b) will only be subject

Holders); (2) a subsidiary, affiliate or other closely related party of an insider; or (3) any company or entity in which an insider has a substantial direct or indirect interest (collectively, Related Parties), if the shares of common stock to be issued, including upon the conversion or exercise of the securities, would exceed one percent of either the common stock or the voting power, in either case, that was outstanding immediately prior to the issuance (the one percent Test). However, no shareholder approval was required for an issuance to one or more Significant Holders (but not to directors or officers) involving no more than 5 percent of the issuer's common stock or voting power prior to the issuance so long as the securities are sold for cash at a price that satisfied the Minimum Price Condition (the five percent Test). The "**Minimum Price Condition**" means that the per share sale price (or the conversion price, as applicable) is at least equal to the lesser of (1) the official closing price of the issuer's stock on the trading day immediately preceding the signing of the binding agreement; and (2) the average closing price of the issuer's stock for the five trading days immediately preceding the signing of the binding agreement.	to such requirements (i.e., it will only be treated as an issuance to a Related Party) if the insider's interest in the counterparty is 5 percent or greater. The Amendments also provide that Section 312.03(b) (i.e., the one percent Test) will not require shareholder approval of cash sales of equity securities to any Related Parties if the Minimum Price Condition is satisfied (although shareholder approval may still be required under other NYSE rules, such as in connection with an acquisition or change of control). As amended, Section 312.03(b)(ii) requires shareholder approval of any transaction or series of related transactions in which any Related Party has a five percent or greater interest (or all Related Parties collectively have a 10 percent or greater interest) in the company or assets to be acquired or in the consideration to be paid in the transaction, and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in the number of shares of common stock or voting power outstanding of five percent or more of the number of shares outstanding before the issuance. The Amendments also eliminated certain exemptions from Section 312.03(b) that NYSE determined were no longer relevant in light of the Amendments, including an exemption that had been available for early stage companies.

20 Percent Rule

Prior to the Amendments, under Section 312.03(c) shareholder approval was required for any issuance by an NYSE-listed company of 20 percent or more of its common stock or voting power, in either case, that was outstanding immediately prior to the issuance, unless the securities were issued for cash in either (1) a public offering; or (2) a "bona fide private financing" that complies with the Minimum Price Condition (the 20 percent Rule). For purposes of the 20 percent Rule, a securities offering is not considered a "public offering" merely because it is effected pursuant to a registration statement (e.g., in the case of a "registered direct" transaction). Rather, the status of a particular transaction as a public offering will depend on several factors, including the manner in which the offering is marketed. Under former Section 312.04, a "**bona fide private financing**" was defined as an issuance in which either (1) a registered broker-dealer purchased securities from the issuer for the purpose of effectuating a private sale of those securities to one or more purchasers (e.g., in a	The Amendments replaced the exclusion from the 20 percent rule for a "bona fide private financing" with an exclusion for any "other financing (that is not a public offering for cash) in which the company is selling securities for cash." As a result, the five percent limit for sales to any one purchaser or group of related purchasers previously required to constitute a bona fide private financing no longer applies. Additionally, if a private placement is effected other than through a broker-dealer acting as the initial purchaser, the offering may constitute an exempt financing under the 20 percent Rule, even if there is only a single investor rather than multiple investors. The Amendments also modified Section 312.03(c) to provide that, if the securities in a financing (that is not a public offering for cash) in which the company is selling securities for cash are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of the securities alone or when combined with any other present or potential issuance of common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of

Rule 144A offering); or (2) the issuer sold the securities to multiple purchasers, and no one purchaser or group of related purchasers acquired or had the right to acquire (upon the exercise or conversion of the securities) more than five percent of the issuer's common stock or voting power outstanding immediately prior to the issuance.	shares of common stock or 20 percent of the voting power outstanding before the issuance.

Related Party Transactions

Prior to the Amendments, Section 314.00 of the NYSE Listed Company Manual provided that related party transactions included transactions between officers, directors, and principal shareholders and the company, and that each related party transaction was to be reviewed and evaluated by an appropriate group within the listed company involved. Section 314.00 also stated that, while the NYSE did not specify who should review related party transactions, the NYSE believed that the audit committee or another comparable body might be considered as an appropriate forum for this task.	As amended by the Amendments, Section 314.00 expands the scope of transactions covered by the that provision by referring to transactions required to be disclosed under Item 404 of Regulation S-K under the Securities Exchange Act of 1934 (but without applying the transaction value threshold under that provision) and, in the case of foreign private issuers, the term "related party transaction" means transactions required to be disclosed pursuant to Form 20-F, Item 7.B (but without applying the materiality threshold of that provision). As a result, Section 314.00 now covers a broader range of "related parties" than had been the case previously. The amendments to Section 314.00 also clarify that a listed company's audit committee or another independent body of the board of directors must conduct a reasonable prior review and oversight of all related party transactions for potential conflicts of interest and prohibit any related party transaction it determines to be inconsistent with the interests of the company and its shareholders.

The Amendments also rescinded Section 312.03T, which temporarily waived certain requirements of Section 312.03 in response to the COVID-19 pandemic.

SEC's Approval

BROKER-DEALER

FINRA Reminds Members About Options Account Approval, Supervision and Margin Requirements

On April 9, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 21-15 (Notice) in response to the recent increase in the number of customers seeking to open brokerage accounts and trade options.

FINRA published the Notice to remind members of the requirements to determine whether to approve a customer to trade options. Those requirements include performing due diligence on the customer, regardless of whether the account is self-directed or options are being recommended, collecting information on the customer to determine if options trading is appropriate and considering the appropriateness of the full range of options trading approved for the customer. FINRA also reminded members to establish policies and procedures for options account approval, and to subject the options accounts to supervisory reviews. Further, FINRA reminded members of margin requirements for options transactions, anti-money laundering rules and customer identification requirements.

More specifically, the Notice emphasized several existing FINRA rules members must observe when deciding whether to approve a customer for options trading.

- FINRA Rule 2360 establishes the approval process members must comply with when opening a customer's brokerage account for options, as well as the requirement of ongoing supervisory reviews for options accounts.
- FINRA Rule 4512 specifies the information a member must maintain regarding a customer.
- FINRA Rule 2090 requires a member use "reasonable diligence" when opening and maintaining each account and to know the "essential facts" about each customer.
- FINRA Rule 3310(b) requires broker-dealers to establish and maintain a written Customer Identification Program to verify the identity of its customers.
- FINRA Rule 4210 sets forth the maintenance margin requirements for options transactions.

Additionally, the Notice reminded members to furnish the customer with the options disclosure document available on the Options Clearing Corporation's website. The Notice also reminded members of their obligations under Regulation Best Interest when making recommendations of options transactions to retail customers.

Regulatory Notice 21-15

FINRA Files With the SEC to Extend Time to Announce the Implementation Schedule for FINRA's Corporate Bond New Issue Reference Data Service

On April 12, the Financial Industry Regulatory Authority (FINRA) filed a proposed rule change with the Securities and Exchange Commission pursuant to Section 19(b)(3) of the Securities Exchange Act of 1934 to extend its time to announce the implementation schedule for FINRA's corporate bond new issue reference data service.

On January 15, the SEC approved a proposed rule change allowing FINRA to establish a new issue reference data service for corporate bonds. FINRA noted at the time of submitting the proposed rule change it would announce the effective date in a Regulatory Notice within 90 days of SEC approval, and that effective date would be within 270 days of SEC approval. FINRA has now requested an extension of time to establish and announce the effective date, and indicated it will provide market participants with enough time to prepare for implementation.

The proposed rule change would not alter any existing FINRA rule.

SR-FINRA-2021-007

FINRA Publishes Answer to Frequently Asked Questions Under Rule 4521(d) on Margin Balance Reporting

On April 13, the Financial Industry Regulatory Authority (FINRA) issued answers to several Frequently Asked Questions to aid members with their reporting obligations under FINRA Rule 4521(d) (the Rule).

The Rule provides that each member carrying margin accounts for customers must submit, on a settlement date basis, as of the last business day of the month: 1) the total of all debit balances in securities margin accounts; and 2) the total of all free credit balances in all cash accounts and all securities margin accounts.

Further, the Rule provides that under paragraph (d): 1) Only free credit balances in cash and securities margin accounts shall be included in the member's report. Balances in short accounts and in special memorandum accounts shall not be considered free credit balances. 2) Reported debit or credit balance information shall not include the accounts of other FINRA members, or of the associated persons of the member submitting the report where the associated person's account is excluded from the definition of customer pursuant to SEA Rule 15c3-3.

FINRA's answers to these Frequently Asked Questions included, among other guidance, clarifying that the definition of a "free credit balance" for purposes of the Rule is set forth in Rule 15c3-3(a)(8). A free credit balance means the liabilities of a broker or dealer to customers subject to immediate cash payment on demand. The liabilities may result from sales of securities, dividends, interest, deposits or otherwise, excluding funds in commodity accounts segregated in accordance with the Commodity Exchange Act or funds carried in a proprietary account.

Regarding the valuation of short positions, FINRA indicated that if a firm does not maintain separate sub-accounts for the margin debit balance and short credit balance, then the current market value of the settled short securities on the computation date should be used to determine the short market value.

If a firm maintains separate cash and margin accounts for customers where the cash accounts contain a balance that is neither a free credit balance nor a short credit balance, but the margin account does contain a balance, FINRA provided the following guidance: if the credit balance in a customer's cash account is neither a free credit balance nor a short credit balance, then it should be netted with the debit balance in the margin account for purposes of reporting, if the firm considers the credit balance in the cash account to determine the customer's maintenance excess or deficiency. However, if the credit balance in the cash account is a free credit balance, a short credit balance or is not considered to determine the customer's maintenance excess or deficiency, then it should not be netted with the debit balance in the customer's margin account for purposes of reporting.

Further, if a firm uses separate sub-accounts within the customer's margin account to track different trading strategies or types of securities, resulting in three sub-accounts for the customer — one with a credit balance, another with a debit balance and a third with a short credit balance — for purposes of reporting, the firm should consider the sub-accounts as a single margin account and accordingly net debits and credits together, except short credit and free credit balances.

A firm should not report balances in non-securities accounts (including commodities accounts) or balances in security-based swap accounts, as they are not considered cash accounts or margin accounts for purposes of the Rule.

Regarding Regulation T good faith accounts, a firm should report balances in such accounts when reporting the debit and free credit balances required by the Rule, as a good faith account, other than a non-securities account, is considered a margin account. FINRA also clarified that a member carrying the omnibus account of another member, pursuant to Regulation T 220.7(f), is not required to report the balances in the other member's omnibus account because each omnibus firm has its own, separate obligation under the Rule to report the debit and free credit balances in the accounts of its customers.

If a firm does not currently report debit balances and free credit balances per FINRA's guidance, members should begin reporting these balances consistent with this guidance as soon as practicable. If a member believes it will need an extended period of time to implement this guidance, it should contact its Risk Monitoring Analyst to discuss an implementation timetable.

Frequently Asked Questions Under FINRA Rule 4521(d)

DERIVATIVES

See "FINRA Publishes Answer to Frequently Asked Questions Under Rule 4521(d) on Margin Balance Reporting" in the Broker-Dealer section and "CFTC Staff Provides Further Brexit-Related Relief" and "NFA Issues Notice Regarding Effective Date of NFA's Rules Regarding CPO Notice Filing Requirements" in the CFTC section.

CFTC

CFTC Staff Provides Further Brexit-Related Relief

On April 8, the Market Participants Division (MPD), Division of Clearing and Risk (DCR), Division of Data (DOD) and Division of Market Oversight (DMO) of the Commodity Futures Trading Commission jointly issued no-action relief, effective immediately, to maintain the regulatory status quo for swap dealers (SD) following the withdrawal of the United Kingdom from the European Union. The no-action letter provides relief to SDs from certain transaction-level requirements for certain swaps between their foreign branches and non-US persons. MPD also provided no-action relief to SDs from the comparability determination requirement by allowing them to utilize existing relief provided in CFTC Staff Letter No. 20-39.

Staff Letter 21-09 and Press Release

CFTC Staff Issues Continuation of Certain No-Action Relief to Market Participants in Response to COVID-19

On April 14, the Commodity Futures Trading Commission's Market Participants Division (MPD) and Division of Market Oversight (DMO) jointly issued CFTC Staff Letter 21-10 to extend, for a limited time, parts of the temporary no-action relief granted in response to the COVID-19 pandemic, which expired on April 15.

CFTC Staff Letter No. 21-10 extends until September 30 the following relief:

- **Relief from Introducing Broker (IB) Registration and Location Requirements for Floor Brokers (FBs).** MPD is providing a limited continuation of relief from IB registration and location requirements for FBs that normally operate on an exchange's trading floor and/or other designated premises from which customer orders may be placed.
- **Relief for Designated Contract Markets (DCMs).** DMO is providing a limited continuation of targeted no-action relief for DCMs from certain CFTC regulations related to real-time market monitoring requirements as a result of the displacement of FBs from the trading floor.

CFTC Press Release

CFTC COVID-19 Pandemic Response

NFA Issues Notice Regarding Effective Date of NFA's Rules Regarding CPO Notice Filing Requirements

On April 13, the National Futures Association (NFA) issued Notice I-21-15 advising members firms that new NFA Compliance Rule 2-50 and its related Interpretive Notice become effective June 30. (The proposal of the new rule and Interpretive Notice was discussed in the March 12, 2021 edition of *Corporate & Financial Weekly Digest*.)

Compliance Rule 2-50 requires a CPO member to promptly notify NFA if it:

- operates a pool that cannot meet its margin call(s);
- operates a pool that is unable to satisfy redemption requests in accordance with its subscription agreements;
- operates a pool that has halted redemptions (not related to existing gates or lockups, or a pre-planned cessation of operations); or
- receives notice from a swap counterparty that a pool it operates is in default.

The related Interpretive Notice further describes each of the notification events identified in Compliance Rule 2-50 and provides guidance on whether specific events are deemed to trigger the requirement.

NFA Notice I-21-15

BREXIT/UK DEVELOPMENTS

See "CFTC Staff Provides Further Brexit-Related Relief" in the CFTC section.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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BREXIT/UK DEVELOPMENTS

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