



## **The Attack of SPACs: A Primer on an Emerging Vehicle for Mergers and the Concerns and Risk Issues Connected with SPACs**

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The term SPAC was not in our lexicon for many years, but now, it is emerging as a major issue. This article discusses the emergence of SPACs, their history and how they developed, the manner in which the SPAC can effectively serve as an alternative for an IPO and in so doing creates concerns in terms of sufficiency of disclosures and sufficiency of due diligence, the conflicting interests that can be cited as bases for litigation, and the types of claims that have been arising. The article also considers some lawsuits that have been filed involving SPACs. A companion piece in this issue focuses on the specific directors and officers issues in connection with SPACs.

### **What is a SPAC?**

SPAC stands for special purpose acquisition company (“SPAC”).<sup>1</sup> At its formation, the SPAC has no operations.<sup>2</sup> Because of the nature of investors betting on the management, at times SPACs are referred to as “blank check companies.”<sup>3</sup> In many instances, the SPAC is set up to prepare for a merger with an existing company, taking the company public through the IPO of the SPAC.

The SPAC explosion has hit the mainstream in recent times, with various celebrities forming their own SPACs.<sup>4</sup> Former House Speaker Paul Ryan and former NBA star Shaquille O’Neal have SPACs.<sup>5</sup> And on a recent cover of *New York* magazine, the question raised was, “Can I SPAC My Stonks with NFTs?”<sup>6</sup>

The SPAC market is likely here to stay. The Russell 3000<sup>7</sup> is soon to welcome a number of de-SPACs<sup>8</sup> to its index.<sup>9</sup> SPACs have been around for some period of time, but as discussed, the explosion of utilizing this vehicle is a much more recent phenomenon.

For example, in 2003, 1 SPAC of 127 IPOs in the United States went public.<sup>10</sup> In 2020, as of mid-July, 374 SPACs out of 524 IPOs (70%) have taken place, with more than \$123 billion in funds raised.<sup>11</sup>

### **A Short History of SPACs**

Once upon a time in the United States, blank check companies were prohibited.<sup>12</sup> David Nussbaum<sup>13</sup> created SPACs in 1993 to circumvent such prohibitions. Despite the creation in 1993, for many years, the SPAC was not used very much.<sup>14</sup> In 2009, 1 SPAC IPO transaction was completed for \$36.0 million.<sup>15</sup> Those numbers increased to 248 and 349 IPOs and \$83.4 and \$108.6 billion in 2020 and year-to-date in 2021, respectively.<sup>16</sup> Not that long ago, the New York Stock Exchange did not list any SPACs and Goldman Sachs prohibited the organization from being involved in SPACs.<sup>17</sup> We are experiencing the attack of SPACs. As outlined below, the SPAC vehicle is becoming a major tool used to effectuate mergers, creating legal exposures and risks different than the traditional initial public offering (“IPO”).

### **The Traditional IPO**

IPO’s have been around for centuries. It is believed that the first IPO in recorded history is that of the Dutch East India Co., which offered shares to the public in 1602.<sup>18</sup> Companies in the United States must register with the Securities and Exchange Commission (“SEC”) by the filing of an S-1.<sup>19</sup> The company seeking to go public files its S-1 and Prospectus that contains substantial information about the company’s history, risk factors, its financial history, and details about the current company’s operations.<sup>20</sup> This is in contradiction to the filings that are made by SPACs.

While they too file a form S-1 with the SEC, the filing is different and creates potential conflicts and additional grounds for lawsuits and litigation, including in the directors and officers insurance (“D&O insurance”) arena.

### **The SPAC Formation and Filing**

A timeline for the SPAC commences with the formation of the company. The SPAC has a sponsor<sup>21</sup> who receives a percentage of the company as “founder’s stock.”<sup>22</sup> The SPAC then quickly turns towards getting the company ready for its IPO.<sup>23</sup> The SPAC governing documents specify the period of time for the SPAC to locate a target acquisition company,<sup>24</sup> and once public, the investor receives a unit, consisting of share of stock at a set price and a warrant.<sup>25</sup>

The SPAC has some definite advantages over the IPO as a vehicle to go public, including: 1) speed to the public listing; 2) a known price at IPO; 3) potential to raise additional capital simultaneous with the IPO; 4) lower costs to market the IPO to investors; and, 5) many sponsors have expertise and networks to assist the SPAC with that talent.<sup>26</sup>

But there are also a number of disadvantages to the SPAC transaction, leading to potential conflicts and lawsuits. These cons include: 1) potential shareholder dilution, given sponsors; 2) redemptions by the initial SPAC investors; 3) shorter timeframe to get the company ready for being public; 4) less financial diligence; and, 4) upon merging with a target company, lack of underwriting.<sup>27</sup>

### **SPACs in the Insurance Space**

In recent years, the insurance industry has gone from the staid and true nature that has existed since the beginning of the industry to one that is alive with insurtech<sup>28</sup> offerings and innovative insurance startups. Funding for insurtech reached \$7.1 billion in 2020.<sup>29</sup>

And SPACs are not new to the insurance arena. For many of the startups in recent years, SPACs have been used, and the approach has also been used in demutualizations.<sup>30</sup>

However, the SPAC can cause challenges in the insurance industry, as the “SPAC typically must identify, negotiate and consummate its de-SPAC transaction within 24 months of its IPO, subject to extension by the stockholders. This timeline can be challenging for some insurance industry transactions, such as acquisitions of—or mergers with—U.S. insurance companies or their holding companies.”<sup>31</sup>

Anyone who has worked on a Form A transaction understands that many variables dictate the time it takes to complete the acquisition process, and the timeline for a de-SPAC transaction might be problematic depending on the state domicile of the insurance company.

A good example of the use of a SPAC to acquire an insurance company is that of CF Corporation’s merger with Fidelity & Guaranty Life in a \$1.835 billion November 2017 transaction.<sup>32</sup> On April 21, 2016, CF Corp. filed its S-1 with the SEC. The filing made clear it was a blank check offering:

“CF Corporation is a newly organized blank check company formed for the purpose of effecting a merger, share exchange, asset acquisition, share purchase, reorganization or similar business combination with one or more businesses, which we refer to as our initial business combination. We have not selected any business combination target and we have not initiated any substantive discussions with any business combination target.”<sup>33</sup>

CF Corp. was co-founded by former The Blackstone Group Inc. senior managing director Chinh Chu and Fidelity National Financial Inc. Chairman William Foley II.<sup>34</sup> CF Corp. sought and raised \$600 million in its 2016 IPO. The S-1 was very broad in terms of opportunities the SPAC sought:

“Although we may pursue targets in any industry, we intend to focus on industries that complement our management team’s backgrounds in the financial, technology and services sectors. Our founders will deploy a proactive, thematic sourcing strategy and focus our efforts on companies where we believe the combination of our founders’ operating experience, deal-making track record, professional relationships, and capital markets expertise can be catalysts to enhance the growth potential and value of a target business and provide opportunities for an attractive risk-adjusted return to our shareholders.”<sup>35</sup>

CF Corp. pursued several opportunities aligned with the description, including a financial technology database company, a software company, an insurance brokerage business, a financial technology company, and a processing business. Eventually, CF Corp. entered into a merger agreement to merge with Financial & Guaranty Life.<sup>36</sup> The merger was “financed with \$1.2 billion from CF Corp.’s IPO and forward purchase agreements, and more than \$700 million in additional new common and preferred equity.”<sup>37</sup> As part of the merger, CF Corp. changed its name to FGL Holdings.<sup>38</sup> In June 2020, FGL Holdings gave notice to the SEC of another merger and resultant delisting from the New York Stock Exchange.<sup>39</sup>

### **The Risks That SPACs Present**

Given the nature of the SPAC IPO, as outlined above, with the typical blank check approach and proliferation of SPAC transaction, exposures and risks are sure to follow. In a recent article, “The SPAC Explosion: Beware the Litigation and Enforcement Risk,”<sup>40</sup> the Pillsbury Winthrop attorneys identify a number of potential exposures from the SPAC, including:

- “SPAC requires the filing of a registration statement with the SEC and exposes SPAC management to the risk of strict liability under Section 11 and other provisions of the Securities Act of 1933 (’33 Act) for misstatements and omissions in that document;”
- “If shareholders believe a proxy statement lacks adequate disclosures for them to make an informed decision, they can challenge the statement under Section 14(a) of the Securities Exchange Act of 1934 (’34 Act), which governs the solicitation of proxies, as well as Sections 10(b) and 20(a) of that statute:”
- “Although such [de-SPAC] registration statements generally include comparable content to proxy statements, they can expose the continuing public entity to strict liability under the ’33 Act:” and,
- “financial projections made in connection with a de-SPAC transaction can, and likely will, still be challenged by shareholders if they are not properly identified as forward-looking, not accompanied by meaningful cautionary language, or knowingly false when made.”<sup>41</sup>

### **The SEC Issues Concerns and Attacks the SPACs**

With the increase in SPAC offerings and concerns and exposures the market raises, including those outlined above, the SEC has issued several advisories in recent months. On December 22, 2020, the SEC’s Division of Corporate Finance issued disclosure guidance for SPACs.<sup>42</sup> The guidance in large part focused on the questions of potential conflicts of interest amongst various constituencies:

- “Have you clearly described the sponsors’, directors’ and officers’ potential conflicts of interest? Have you described whether any conflicts relating to other business activities include fiduciary or contractual obligations to other entities; how these activities may affect the sponsors’, directors’ and officers’ ability to evaluate and present a potential business combination opportunity to the SPAC and its shareholders; and how any potential conflicts will be addressed?”

- “Is it possible that you will pursue a business combination with a target in which your sponsors, directors, officers or their affiliates have an interest? If so, have you disclosed how you will consider potential conflicts of interest?”<sup>43</sup>

The issues raised in the guidance may influence some of the considerations in D&O

insurance for SPACs.

In March 2021, SEC Acting Chief Accountant Paul Munter issued a public statement on SPACs and financial complexities presented.<sup>44</sup> After describing the growth of the SPAC market and what SPACs are, Munter discussed how complex SPAC financial reporting can be and addressed numerous other “unique risks and challenges of a private company entering the public markets through a merger with a SPAC,” including:

- “Market and timing considerations;
- “Financial reporting considerations;
- “Internal control considerations;
- “Corporate governance and audit committee considerations; and
- “Auditor considerations.”<sup>45</sup>

These risks also raise significant concerns about the risk profile of SPACs and may impact insurance availability.

Also on March 30, 2021, the SEC Division of Corporate Finance staff issued a public statement, “Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies,”<sup>46</sup> addressing accounting, financial reporting, and governance issues. The Staff Statement notifies those planning to use the “shell companies” of certain restrictions placed on the shells, and warns the SPACs regarding internal controls:

“Upon consummation of the business combination, the combined company will need the necessary expertise, books and records, and internal controls to provide reasonable assurance of its timely and reliable financial reporting. A private

operating company may have viewed the necessity for those capacities differently prior to the business combination, and may not be able to develop those capacities without advance planning and investment in resources.”<sup>47</sup>

The SEC was not finished with its focus on SPACs. On April 8, 2021, SEC Acting Director of the Division of Corporate Finance John Coates issued another public statement, this one addressed and highlighted the SEC staff’s focus on the plethora of SPAC transactions, including the filing and disclosure requirements, and emphasizing legal liability exposures that disclosures may present when the SPAC engaged in a de-SPAC transaction.<sup>48</sup> Coates noted that the SEC continues “to be vigilant about SPAC and private target disclosure so that the public can make informed investment and voting decisions about these transactions.”<sup>49</sup> Some observers and experts have argued:

“[A]n advantage of SPACs over traditional IPOs is lesser securities law liability exposure for targets and the public company itself. They sometimes specifically point to the Private Securities Litigation Reform Act (PSLRA) safe harbor for forward-looking statements, and suggest or assert that the safe harbor applies in the context of de-SPAC transactions but not in conventional IPOs. This, such observers assert, is the reason that sponsors, targets, and others involved in a de-SPAC feel comfortable presenting projections and other valuation material of a kind that is not commonly found in conventional IPO prospectuses.”<sup>50</sup>

In his public statement, Coates challenges those arguments asserted, warning:

“It is not clear that claims about the application of securities law liability provisions to de-SPACs provide targets or anyone else with a reason to prefer SPACs over traditional IPOs. Any simple claim about reduced liability exposure for SPAC



participants is overstated at best, and potentially seriously misleading at worst. Indeed, in some ways, liability risks for those involved are higher, not lower, than in conventional IPOs, due in particular to the potential conflicts of interest in the SPAC structure.”<sup>51</sup>

Finally, on April 12, 2021, Coates and Munter issued a joint public statement, “Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”).”<sup>52</sup> This public statement caused concern in the SPAC world as it stated that in review of two SPAC fact patterns, the equity warranties issued by the SPAC should be considered liabilities. Coates and Munter indicated “certain features of warrants issued in SPAC transactions may be common across many entities” and that generally accepted accounting principles might lead to the warrants being treated as liabilities and not equity.

The SEC seems increasingly focused on SPACs and making sure that the investors and others are provided the information needed and that the financial reporting and accounting treatment are adequate. The flurry of advisories, public statements and other activities by the SEC suggests that the SEC is worried about the risks presented to the investor.

SPACs present unique issues in the area of conflicts of interest, given sponsors and the SPAC management. Amongst those risks are:

- “potential conflicts of interest between the investors and the sponsors,
- “any relationships between the officers and directors of the SPAC (or the sponsor) and those of the target,
- “any continued relationship that the SPACs officer and directors will have with the combined company
- “any conflict of interest a SPAC underwriter may have in providing services for the SPAC IPO in light of any deferred IPO underwriting compensation.”<sup>53</sup>

The SEC and litigation to date raises significant concerns in terms of sufficiency of disclosures and sufficiency of due diligence, the conflicting interests that can be cited as bases for litigation, and the impact those insufficiencies have on the investing public. Given the explosion of SPACs and the increased SEC focus, as well as the plaintiffs' bar, more litigation and SEC action is anticipated. The main focus of lawsuits to date has been on breach of fiduciary duty and on securities law disclosure litigation.<sup>54</sup>

These concerns include misleading disclosures and issues raised in the SPAC context.

### **A Recent SEC Action**

Recently, the SEC announced that it had filed charges against SPAC “Stable Road Acquisition Company, its sponsor SRC-NI, its CEO Brian Kabot, the SPAC’s proposed merger target Momentus Inc., and Momentus’s founder and former CEO Mikhail Kokorich for misleading claims about Momentus’s technology and about national security risks associated with Kokorich.”<sup>55</sup> The SEC complaint<sup>56</sup> and the Stable Road matter identify the risks that are present in the SPAC transaction, including the potential conflict of interest for those who stand to profit from the offering. SEC Chair Gary Gensler stated in the press release announcing the lawsuit:

“This case illustrates **risks inherent to SPAC transactions, as those who stand to earn significant profits from a SPAC merger may conduct inadequate due diligence and mislead investors.** Stable Road, a SPAC, and its merger target, Momentus, both misled the investing public. The fact that Momentus lied to Stable Road does not absolve Stable Road of its failure to undertake adequate due diligence to protect shareholders. Today’s actions will **prevent the wrongdoers from benefitting at the expense of investors and help to better align the incentives of parties to a SPAC transaction with those of investors relying on truthful information** to make investment decisions.”<sup>57</sup>

(Emphasis added.)

The SEC complaint includes four claims for relief against Kokorich:

1. Violations of Section 10(b) of the Exchange Act<sup>58</sup> and Rule 10b-5<sup>59</sup> Thereunder;
2. Violations of Section 17(a) of the Securities Act<sup>60</sup>;
3. Aiding and Abetting Momentus’s Violations of Section 10(b) of the Exchange Act;  
and,
4. Aiding and Abetting Violations of Section 17(a) of the Securities Act.<sup>61</sup>

The first count alleges that “Kokorich’s fraudulent violations included: misleading Stable Road and its representatives regarding Momentus’s technology and his own national security issues; participating in the creation, editing, or approval of investor presentations that contained misrepresentations or misleading omissions of material fact; making false and misleading statements and omissions of material fact directly to PIPE investors...” and other 10(b) violations.<sup>62</sup> The second alleges that Kokorich “(i) employed devices, schemes, or artifices to defraud; (ii) obtained money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or (iii) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.”<sup>63</sup>

The SPAC world will be watching this action by the SEC and other SPAC-related lawsuits to see how the law develops, as presently there is no mature body of law around SPACs and the issues they present.

### **Congress is Considering SPACs**

On May 24, 2021, the House Subcommittee on Investor Protection, Entrepreneurship and Capital Markets held a virtual hearing, “Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections.”<sup>64</sup> At the hearing, witnesses discussed that “all IPO vehicles,

whether traditional IPOs or SPACs, should operate on a level playing field and be subject to the same type of regulation of disclosure and liability.”<sup>65</sup> Amongst the topics covered, legislation that would “exclude certain special purpose acquisition companies from safe harbor for forward-looking statements” was also discussed.<sup>66</sup> While the current Congress cannot seem to find agreement on much that can pass, the issues and concerns raised by the SEC appear to also be held by some members of the House. Given the growth of SPACs, we can expect further scrutiny by Congress as well.

### **SPACs and D&O Insurance Availability**

In part due to the explosion in SPACs in 2020 and the already record breaking 2021, the likelihood of litigation involving SPACs is likely to increase in the coming months and years. With increased litigation and exposure, the D&O insurance market for SPACs has tightened. Shockingly, in recent months, the cost of D&O insurance for SPACs has doubled and the costs of the protections are steep:

“Tellingly, the price of D&O insurance for SPACs has reportedly nearly doubled in recent months, with insurers reducing their maximum exposure limits from \$10 million to \$5 million but continuing to charge similar premiums. In this climate, SPAC sponsors, investors and targets should be mindful of litigation risks presented by the SPAC process. In particular, any litigation filed after the de-SPAC transaction is complete will almost inevitably embroil all three of these constituencies and could prove a significant distraction to the continuing public entity that is the successor to the target’s business.”<sup>67</sup>

For \$5 million primary D&O insurance policy, according to some reports, the policy can cost the insured up to \$1 million in premiums.<sup>68</sup>

Small limits and increasing exposure will make for an interesting landscape in the coming years, where defense counsel eat through limits quickly and the nature and complexity of the claims increases. Also of concern is Side A coverage under D&O insurance policies.<sup>69</sup> Some SPACs buy only Side A coverage, given that the traditional A-B-C coverage can be cost prohibitive.<sup>70</sup> But the Side A coverage might not completely address the corporate exposures alleged in recent lawsuits involving SPACs.

### **Litigation Involving SPACs**

As noted, we can expect an uptick in lawsuits filed against SPAC registrants in the coming months. In addition to the SEC actions such as the one discussed involving Kokorich,<sup>71</sup> other litigation is likely to become frequent. Exposures can come in a wide variety of areas connected to the SPAC:

“Risks include litigation based on: (1) SPAC IPO registration statements; (2) de-SPAC proxy statements; (3) potential de-SPAC registration statements; (4) financial projections—which significantly distinguish SPAC disclosures from those made in traditional IPOS; (5) redemption of SPAC shares; (6) de-SPAC deadlines; and (7) post-SPAC public status.”<sup>72</sup>

In the first quarter of 2021, at least eight class action SPAC-related lawsuits have been filed.<sup>73</sup> For example, on April 2, 2021, Justin Kojak filed a class action lawsuit in the United States District Court for the Central District of California against Canoo Inc.<sup>74</sup> and the former directors and officers of the SPAC, Hennessy Capital Acquisition Corp. IV, into which Canoo merged.<sup>75</sup> Kojak alleged that as part of the SPAC merger documents, Canoo had touted its engineering services line, but just months after the merger, “Canoo revealed that the Company would no longer focus on its engineering services line.”<sup>76</sup>

Kojak alleges a number of false and misleading statements by Canoo, including:

“Defendants failed to disclose to investors: (1) that Canoo had decreased its focus on its plan to sell vehicles to consumers through a subscription model; (2) that Canoo would deemphasize its engineering services business; (3) that, contrary to prior statements, Canoo did not have partnerships with original equipment manufacturers and no longer engaged in the previously announced partnership with Hyundai; and (4) that, as a result of the foregoing, Defendants’ positive statements about the Company’s business, operations, and prospects were materially misleading and/or lacked a reasonable basis.”<sup>77</sup>

Kojak alleges among other things that there is no safe harbor for the forward looking statements made prior to the merger as well as that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 of the ’34 Act. Notably, all of the pre-merger directors and officers of Hennessy, the SPAC, are named defendants, and the lawsuit references much pre-merger activity and discussions by the SPAC officers and directors.

Canoo is not the only de-SPAC facing litigation. In New York, a spate of lawsuits against SPACs have been filed.<sup>78</sup> Since September 2020, through March 2021, “at least 35 SPACs have been hit with one or more shareholder lawsuits filed in New York state court.”<sup>79</sup> Allegations include that “SPAC directors breached their fiduciary duties to shareholders by providing allegedly inadequate disclosures regarding proposed de-SPAC mergers” and in some cases also “assert claims against the SPAC itself, as well as the target company and its board of directors, for allegedly aiding and abetting the SPAC directors’ breaches.”<sup>80</sup>

In addition to such allegations, lawsuits have been commenced for failed SPAC mergers. For example, in *Morgan Joseph Triartisan, LLC. v. BHN LLC*,<sup>81</sup> an investment bank sued the target company for failure to pay fees based on the investment bank’s successful introduction of the

target company to a SPAC, as the target company retained the investment bank to do. The target company cross-claimed against the SPAC seeking reimbursement under their deal documents.

A variety of claims and theories will be tried against SPACs and target companies for pre- and post-merger activities. Likely causes of action include: i) Section 10b of the Exchange Act and related Rule 10b-5 claims for misleading or false statements; ii) Section 14(a) of the 1934 Exchange Act and Rule 14a-9 claims for false and misleading statements in connection with proxy solicitations; and iii) Section 11 of the Securities Act by purchasers of securities for false statements in a registration statement. All of these allegations will invoke and involve potential D&O insurance claims.<sup>82</sup>

As seen in New York, directors of SPACs might also see state claims against them for breaching their duties of care and loyalty to shareholders.<sup>83</sup> One thing is for certain- “with...increased popularity, SPACs have become a target for shareholder litigation.”<sup>84</sup>

One potential solution for the tightening and expensive D&O insurance market might be captive insurance.<sup>85</sup> But there are many challenges to captives being the solution, including the finite nature of the SPAC versus more infinite time horizon for captives. In addition, there might not be capacity. According to Delaware Insurance Department Director of the Bureau of Captive and Financial Insurance Products, Steve Kinion, “It becomes a question of whether there’s enough capacity in the D&O insurance market right now to provide coverage for all these SPACs. If there isn’t, then at some point they will need to find coverage somewhere, because like all other companies SPACS want highly qualified directors and officers.”<sup>86</sup>

## **Conclusion**

With the spectacular growth in SPAC IPOs in recent years and the increased scrutiny by both the SEC and by plaintiffs lawyers looking for defendants, we will see increased exposures for SPACs

as they seek to become public and engage in de-SPAC merger transactions. Given the astronomical growth in SPAC IPOs and record setting numbers in the first half of 2021, litigation is likely to grow in a similar linear fashion. Finally, many questions of insurance will continue to emerge particularly in the D&O insurance arena.

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<sup>1</sup> Investopedia, “Special Purpose Acquisition Company (SPAC),” available at <https://www.investopedia.com/terms/s/spac.asp>.

<sup>2</sup> U.S. Securities and Exchange Commission, Special Purpose Acquisition Companies, available at <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies> (“A SPAC is a company with no operations that offers securities for cash and places substantially all the offering proceeds into a trust or escrow account for future use in the acquisition of one or more private operating companies.”)

<sup>3</sup> Investopedia, “Special Purpose Acquisition Company (SPAC),” available at <https://www.investopedia.com/terms/s/spac.asp>.

<sup>4</sup> Amrith Ramkumar, The Wall Street Journal, “The Celebrities From Serena Williams to A-Rod Fueling the SPAC Boom,” March 17, 2021, available at <https://www.wsj.com/articles/the-celebrities-from-serena-williams-to-a-rod-fueling-the-spac-boom-11615973578>.

<sup>5</sup> Amrith Ramkumar and Maureen Farrell, The Wall Street Journal, “When SPACs Attack! A New Force Is Invading Wall Street,” January 23, 2021, available at [https://www.wsj.com/articles/when-spacs-attack-a-new-force-is-invading-wall-street-11611378007?mod=article\\_inline](https://www.wsj.com/articles/when-spacs-attack-a-new-force-is-invading-wall-street-11611378007?mod=article_inline).

<sup>6</sup> Aude White, *New York* Press Room, On The Cover, “On The Cover of New York Magazine: The New World of Money,” Apr. 12, 2021, available at <https://nymag.com/press/2021/04/on-the-cover-of-new-york-magazine-the-new-world-of-money.html>.

<sup>7</sup> The Russell 3000 seeks to be a benchmark of the entire United States stock market.

<sup>8</sup> A de-SPAC transaction is one in which the publicly traded SPAC merges with a private operating company, with private company shareholders receiving SPAC shares or cash as consideration for the merger.

<sup>9</sup> David Pogemiller, The Street, “De-SPACs Get Set to Join the Russell 3000,” June 25, 2021, available at <https://www.thestreet.com/boardroomalpha/spac/june-good-month-spacs-cciv-eow>.

<sup>10</sup> SPAC Analytics, available at [https://www.spacanalytics.com/?gclid=Cj0KCQjw\\_8mHBhCIARIsABfGpjEBbHICnuTvMucqn0MmhePFiTBFCoGGNoghcu4V176-a9gvz39FAYaAuGGREALw\\_wcB](https://www.spacanalytics.com/?gclid=Cj0KCQjw_8mHBhCIARIsABfGpjEBbHICnuTvMucqn0MmhePFiTBFCoGGNoghcu4V176-a9gvz39FAYaAuGGREALw_wcB).

<sup>11</sup> *Id.*

<sup>12</sup> Excelsior Capital, “[Webinar] What is a SPAC and Why are They Suddenly so Popular?,” available at <https://www.excelsiorgp.com/resources/what-is-a-spac-and-why-are-they-suddenly-so-popular/>.

<sup>13</sup> *Id.*

<sup>14</sup> See SPACInsider, SPAC Statistics, available at <https://spacinsider.com/stats/> (showing the rise of SPACs in IPOs from 2009 to 2020).

<sup>15</sup> SPACInsider, SPAC Statistics, available at <https://spacinsider.com/stats/>.

<sup>16</sup> SPACInsider, SPAC Statistics, available at <https://spacinsider.com/stats/>.

<sup>17</sup> Excelsior Capital, “[Webinar] What is a SPAC and Why are They Suddenly so Popular?,” available at <https://www.excelsiorgp.com/resources/what-is-a-spac-and-why-are-they-suddenly-so-popular/>.

<sup>18</sup> Andrew Beattie, Investopedia, “What Was the First Company to Issue Stock,” March 10, 2021, available at <https://www.investopedia.com/ask/answers/08/first-company-issue-stock-dutch-east-india.asp>.

<sup>19</sup> SEC, Office of Investor Education and Advocacy, Investor Bulletin, “Investing in an IPO,” available at <https://www.sec.gov/files/ipo-investorbulletin.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> The SPAC management team is also known generally as the sponsor, those who create the company and seek to take it public to then find a target merger acquisition. See, e.g., Private Company Director, Mohsin Meghji, “SPACs: A Path to Public Ownership,” available at <https://www.privatecompanydirector.com/features/spacs-path-public-ownership>.



<sup>22</sup> Deloitte, “Private-Company CFO Considerations for SPAC Transactions,” September 2020, available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-private-company-CFO-considerations-for-SPAC-transactions.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Typically, 18 to 24 months.

<sup>25</sup> Deloitte, “Private-Company CFO Considerations for SPAC Transactions,” September 2020, available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-private-company-CFO-considerations-for-SPAC-transactions.pdf>.

<sup>26</sup> KPMG Advisory, KPMG SPAC Intel Hub, “Why so many companies are choosing SPACs over IPOs,” available at [https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html?utm\\_source=google&utm\\_medium=cpc&mid=m-00002702&utm\\_campaign=c-00099624&cid=c-00099624&gclid=Cj0KCQjw\\_8mHBhCIARIsABfGpjjMXT-BOUgg\\_rctq3jjnaNZV94QzttEK8BY9g3WMR8D9gUAuhLTNcaAtoaEALw\\_wcB](https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html?utm_source=google&utm_medium=cpc&mid=m-00002702&utm_campaign=c-00099624&cid=c-00099624&gclid=Cj0KCQjw_8mHBhCIARIsABfGpjjMXT-BOUgg_rctq3jjnaNZV94QzttEK8BY9g3WMR8D9gUAuhLTNcaAtoaEALw_wcB).

<sup>27</sup> *Id.*

<sup>28</sup> Insurtech generally refers to companies in the insurance space, primarily startups, disrupting the insurance industry through the use of innovate technologies and the analysis of big data.

<sup>29</sup> Willis Towers Watson, CB Insights, “Quarterly Insurtech Briefing: Q4 2020 & Year In Review,” available at [https://www.cbinsights.com/research-insurtech-report-q4-2020?utm\\_campaign=marketing\\_wtw-insurtech\\_2021-01&campaignid=270202443&adgroupid=115917991854&utm\\_term=%2Binsurtech&utm\\_campaign=Reports&utm\\_source=google&utm\\_medium=cpc&utm\\_content=adwords-reports-america&hsa\\_tgt=kwd-321042473751&hsa\\_grp=115917991854&hsa\\_src=g&hsa\\_net=adwords&hsa\\_mt=b&hsa\\_ver=3&hsa\\_ad=495056819247&hsa\\_acc=5728918340&hsa\\_kw=%2Binsurtech&hsa\\_cam=270202443&gclid=CjwKCAjwoNuGBhA8EiwAFxomA92FkfzghaO6pr2IUdb8hYFk6lM6cwrAiPMtHdIIAodZS0vH763xhoCgT4QAvD\\_BwE](https://www.cbinsights.com/research-insurtech-report-q4-2020?utm_campaign=marketing_wtw-insurtech_2021-01&campaignid=270202443&adgroupid=115917991854&utm_term=%2Binsurtech&utm_campaign=Reports&utm_source=google&utm_medium=cpc&utm_content=adwords-reports-america&hsa_tgt=kwd-321042473751&hsa_grp=115917991854&hsa_src=g&hsa_net=adwords&hsa_mt=b&hsa_ver=3&hsa_ad=495056819247&hsa_acc=5728918340&hsa_kw=%2Binsurtech&hsa_cam=270202443&gclid=CjwKCAjwoNuGBhA8EiwAFxomA92FkfzghaO6pr2IUdb8hYFk6lM6cwrAiPMtHdIIAodZS0vH763xhoCgT4QAvD_BwE).

<sup>30</sup> A demutualization is a process pursuant to which a private, member-owned company, such as a co-op, or a mutual life insurance company, changes its structure, in order to become a public-traded company owned by shareholders. States such as Illinois, Pennsylvania and a few others have been the leading states in the insurance demutualization process.

<sup>31</sup> Geoffrey Etehington, Rob Evans, Brett Pritchard, Bloomberg Law, “Using SPACs in the Insurance Industry,” February 5, 2021, available at <https://news.bloomberglaw.com/securities-law/using-spacs-in-the-insurance-industry?context=search&index=0>.

<sup>32</sup> PR Newswire, “CF Corporation Completes Acquisition of Fidelity & Guaranty Life,” November 30, 2017, available at <https://www.prnewswire.com/news-releases/cf-corporation-completes-acquisition-of-fidelity--guaranty-life-300564663.html>.

<sup>33</sup> CF Corp. S-1, p. i., <https://www.sec.gov/Archives/edgar/data/0001668428/000157104916014107/t1600950-s1.htm>.

<sup>34</sup> CF Corp., S-1, p. 2, <https://www.sec.gov/Archives/edgar/data/0001668428/000157104916014107/t1600950-s1.htm>.

<sup>35</sup> *Id.*

<sup>36</sup> SEC Form 8-K, May 24, 2017, available at [https://www.sec.gov/Archives/edgar/data/0001668428/000157104917005546/t1701700\\_8k.htm](https://www.sec.gov/Archives/edgar/data/0001668428/000157104917005546/t1701700_8k.htm).

<sup>37</sup> PR Newswire, “CF Corporation Completes Acquisition of Fidelity & Guaranty Life,” November 30, 2017, available at <https://www.prnewswire.com/news-releases/cf-corporation-completes-acquisition-of-fidelity--guaranty-life-300564663.html>.

<sup>38</sup> PR Newswire, “CF Corporation Completes Acquisition of Fidelity & Guaranty Life,” November 30, 2017, available at <https://www.prnewswire.com/news-releases/cf-corporation-completes-acquisition-of-fidelity--guaranty-life-300564663.html>.

<sup>39</sup> FGL Holdings 8-K, June 1, 2020, available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001668428/000119312520157208/d830740d8k.htm>.

<sup>40</sup> Bruce A. Ericson, Ari M. Berman, and Stephen B. Amdur, Pillsbury Winthrop Shaw Pittman LLP, Harvard Law School Forum on Corporate Governance, “The SPAC Explosion: Beware the Litigation and Enforcement Risk,” January 14, 2021, available at <https://corpgov.law.harvard.edu/2021/01/14/the-spac-explosion-beware-the-litigation-and-enforcement-risk/>.

<sup>41</sup> Bruce A. Ericson, Ari M. Berman, and Stephen B. Amdur, Pillsbury Winthrop Shaw Pittman LLP, Harvard Law School Forum on Corporate Governance, “The SPAC Explosion: Beware the Litigation and Enforcement Risk,” January 14, 2021, available at <https://corpgov.law.harvard.edu/2021/01/14/the-spac-explosion-beware-the-litigation-and-enforcement-risk/>.

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<sup>42</sup> Division of Corporate Finance, Securities and Exchange Commission, “Special Purpose Acquisition Companies,” CF Disclosure Guidance: Topic No. 11, December 22, 2020, available at <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies>.

<sup>43</sup> Division of Corporate Finance, Securities and Exchange Commission, “Special Purpose Acquisition Companies,” CF Disclosure Guidance: Topic No. 11, December 22, 2020, available at <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies>

<sup>44</sup> SEC, Public Statement, Paul Munter, “Financial Reporting and Auditing Considerations of Companies Merging with SPACs,” March 31, 2021, available at <https://www.sec.gov/news/public-statement/munter-spac-20200331>.

<sup>45</sup> SEC, Public Statement, Paul Munter, “Financial Reporting and Auditing Considerations of Companies Merging with SPACs,” March 31, 2021, available at <https://www.sec.gov/news/public-statement/munter-spac-20200331>.

<sup>46</sup> SEC, Public Statement, Division of Corporate Finance Staff, “Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies,” March 31, 2021, available at <https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31>.

<sup>47</sup> SEC, Public Statement, Division of Corporate Finance Staff, “Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies,” March 31, 2021, available at <https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31>.

<sup>48</sup> SEC, Public Statement, John Coates, “SPACs, IPOs and Liability Risk under the Securities Laws,” April 8, 2021, available at <https://www.sec.gov/news/public-statement/spacs-ipo-liability-risk-under-securities-laws>.

<sup>49</sup> SEC, Public Statement, John Coates, “SPACs, IPOs and Liability Risk under the Securities Laws,” April 8, 2021, available at <https://www.sec.gov/news/public-statement/spacs-ipo-liability-risk-under-securities-laws>.

<sup>50</sup> *Id.* (footnote omitted).

<sup>51</sup> SEC, Public Statement, John Coates, “SPACs, IPOs and Liability Risk under the Securities Laws,” April 8, 2021 (footnotes omitted), available at <https://www.sec.gov/news/public-statement/spacs-ipo-liability-risk-under-securities-laws>

<sup>52</sup> SEC, Public Statement, John Coates and Paul Munter, “Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”),” April 12, 2021, available at <https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs>.

<sup>53</sup> Baker Botts, Thought Leadership, “SPAC Litigation and Enforcement Update: Spring 2021,” 23 April 2021, available at <https://www.bakerbotts.com/thought-leadership/publications/2021/april/spac-litigation-and-enforcement-update-spring-2021>.

<sup>54</sup> *See infra.*

<sup>55</sup> SEC, Press Release, 2021-124, “SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination,” available at <https://www.sec.gov/news/press-release/2021-124>.

<sup>56</sup> *SEC v. Mikhail Kokorich*, Case No. 1:21-CV-1869, United States District Court for the District of Columbia, available at <https://www.sec.gov/litigation/complaints/2021/comp-pr2021-124.pdf>.

<sup>57</sup> SEC, Press Release, 2021-124, “SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination,” available at <https://www.sec.gov/news/press-release/2021-124>.

<sup>58</sup> Section 10(b) is the primary anti-fraud provision contained in the Securities Exchange Act of 1934.

<sup>59</sup> Rule 10b-5 is a regulation prohibiting the use of “any device, scheme, or artifice to defraud.” 17 CFR § 240.10b-5 - Employment of manipulative and deceptive devices, available at <https://www.law.cornell.edu/cfr/text/17/240.10b-5>.

<sup>60</sup> Section 17(a) of the Securities Act of 1933 is a key anti-fraud provision in the act, providing for liability for fraudulent sale of securities. 15 U.S. Code § 77q - Fraudulent interstate transactions, <https://www.law.cornell.edu/uscode/text/15/77q>

<sup>61</sup> *SEC v. Mikhail Kokorich*, Case No. 1:21-CV-1869, United States District Court for the District of Columbia, available at <https://www.sec.gov/litigation/complaints/2021/comp-pr2021-124.pdf>

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> U.S. House on Financial Services Committee, Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, “Virtual Hearing - Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections,” May 24, 2021, available at <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407753>.

<sup>65</sup> Cydney Posner, Cooley PubCo, “The House hears about SPACs,” June 1, 2021, available at <https://cooleypubco.com/2021/06/01/house-hears-spacs/>.

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<sup>66</sup> U.S. House on Financial Services Committee, Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, “Virtual Hearing - Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections,” May 24, 2021, available at

<https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407753>

<sup>67</sup> Bruce A. Ericson, Ari M. Berman, and Stephen B. Amdur, Pillsbury Winthrop Shaw Pittman LLP, Harvard Law School Forum on Corporate Governance, “The SPAC Explosion: Beware the Litigation and Enforcement Risk,” January 14, 2021, available at <https://corpgov.law.harvard.edu/2021/01/14/the-spac-explosion-beware-the-litigation-and-enforcement-risk/>.

<sup>68</sup> Peter M. Gillon and Sean Williams, Pillsbury Policyholder Pulse, “Navigating the Tightening D&O Insurance Market for SPACs,” April 19, 2021, available at <https://www.policyholderpulse.com/insurance-market-spacs/> (“In the first quarter of 2021, a SPAC could expect the premium for even a \$5 million primary D&O policy with a \$5 million retention to be \$1 million or significantly more.”)

<sup>69</sup> Side A coverage is the insuring agreement within a D&O policy that provides first dollar coverage for claims asserted against directors and officers, whose costs are not indemnified or advanced by the corporate entity. A great summary of Side A issues can be found in a Chubb paper, “Side A Claim Payments,” available at <https://www.gbainsurance.com/sites/default/files/2018-09/D%26O%20-%20Side%20A%20Claim%20Payments%20Chubb%20Whitepaper.pdf>.

<sup>70</sup> Side B coverage reimburses the company (often subject to a substantial deductible) for proper indemnification payments made to its directors and officers. Side C is entity coverage and generally covers the company (subject in most cases to a large deductible) for claims against it, such as securities law claims that are emerging in the SPAC context.

<sup>71</sup> *See supra*.

<sup>72</sup> Bruce A. Ericson, Ari M. Berman, and Stephen B. Amdur, Pillsbury Winthrop Shaw Pittman LLP, Harvard Law School Forum on Corporate Governance, “The SPAC Explosion: Beware the Litigation and Enforcement Risk,” January 14, 2021, available at <https://corpgov.law.harvard.edu/2021/01/14/the-spac-explosion-beware-the-litigation-and-enforcement-risk/>.

<sup>73</sup> Kevin LaCroix, The D&O Diary, “Another Post-SPAC Merger Electric Vehicle Company Securities Suit,” April 4, 2021, available at <https://www.dandodiary.com/2021/04/articles/securities-litigation/another-post-spac-merger-electric-vehicle-company-securities-suit/> (“I note in closing that this lawsuit is by my count the eighth SPAC-related securities class action lawsuit to be filed this year.”)

<sup>74</sup> Canoo is an electric vehicles company. The Canoo website is at <https://www.canoo.com/>.

<sup>75</sup> The complaint can be found at <https://www.dandodiary.com/wp-content/uploads/sites/893/2021/04/Canoo-complaint-Kojak-plaintiff.pdf>.

<sup>76</sup> *Kojak v. Canoo*, para. 4, <https://www.dandodiary.com/wp-content/uploads/sites/893/2021/04/Canoo-complaint-Kojak-plaintiff.pdf>.

<sup>77</sup> *Kojak v. Canoo*, para. 6, <https://www.dandodiary.com/wp-content/uploads/sites/893/2021/04/Canoo-complaint-Kojak-plaintiff.pdf>.

<sup>78</sup> Douglas A. Rappaport, Jacqueline Yecies, and Stephanie Lindemuth, Akin Gump Strauss Hauer & Feld LLP, Harvard Law School Forum on Corporate Governance, “Recent SPAC Shareholder Suits in New York State Courts: The Beginning Wave of SPAC Litigation,” April 23, 2021, available at <https://corpgov.law.harvard.edu/2021/04/23/recent-spac-shareholder-suits-in-new-york-state-courts-the-beginning-wave-of-spac-litigation/>.

<sup>79</sup> *Id.*

<sup>80</sup> Douglas A. Rappaport, Jacqueline Yecies, and Stephanie Lindemuth, Akin Gump Strauss Hauer & Feld LLP, Harvard Law School Forum on Corporate Governance, “Recent SPAC Shareholder Suits in New York State Courts: The Beginning Wave of SPAC Litigation,” April 23, 2021, available at <https://corpgov.law.harvard.edu/2021/04/23/recent-spac-shareholder-suits-in-new-york-state-courts-the-beginning-wave-of-spac-litigation/>.

<sup>81</sup> *Morgan Joseph Triartisan, LLC v. BHN LLC*, 2017 WL 3951623 (N.Y. Sup. Ct. 2017).

<sup>82</sup> *See* [Title of Companion Piece, information about The Brief.]

<sup>83</sup> Board members generally owe the duties of loyalty and care in performing their duties. *See, e.g.*, LeadingAge, “Duties of Care and Loyalty,” available at <https://leadingage.org/duties-care-and-loyalty>.

<sup>84</sup> IFLR, Capital Markets, “SPAC litigation gains momentum,” April 27, 2021, available at <https://www.iflr.com/article/b1rlf6lyg66llg/spac-litigation-gains-momentum>.

<sup>85</sup> Claire Wilkinson, Business Insurance, Risk Management, “SPACs face challenges buying D&O cover: Can captives provide right solution?,” May 4, 2021, available at

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<https://www.businessinsurance.com/article/00010101/NEWS06/912341451/SPACs-face-challenges-buying-D&O-cover-Can-captives-provide-right-solution?-&->.

<sup>86</sup> Claire Wilkinson, Business Insurance, Risk Management, “SPACs face challenges buying D&O cover: Can captives provide right solution?” May 4, 2021, available at <https://www.businessinsurance.com/article/00010101/NEWS06/912341451/SPACs-face-challenges-buying-D&O-cover-Can-captives-provide-right-solution?-&->