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Treating “Like for Like”: SPAC Disclosure, Marketing and Gatekeeping in 2022

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We reported last year that unprecedented SPAC deal volume signaled an increased risk for disputes given their unique structure, including risks associated with disclosure requirements, material non-public information, valuation, and conflicts of interest. Our assessment proved prescient, as the SEC began to flex its enforcement muscles vis-à-vis SPACs as the year progressed, and took specific notice of potential asymmetries between SPACs and traditional IPOs that may form the basis for disputes in 2022.

2021 was a record year for SPACs. In 2021, the Nasdaq had 613 SPAC listings, up from 248 in 2020 and just 59 in 2019. Those 613 listings raised $145 billion – a 91 percent increase over the amount raised in 2020 – and represented 59 percent of total new listings. While the number of all IPOs increased by 88 percent since 2020, SPACs increased 150 percent year-over-year.

And where capital goes, disputes and regulators follow. In April 2021 the SEC announced a change in accounting treatment applicable to most SPAC warrants and signaled that filings and disclosures by SPACs and their private targets would be the subject of increased scrutiny in a detailed statement by then Acting Director, Division of Corporate Finance, John Coates. On the heels of these warnings, the SEC brought its first major SPAC enforcement action last summer alleging that disclosures in a SPAC’s registration statement and other public statements were materially misleading.

As 2021 came to a close, SEC Chair Gary Gensler suggested that SPAC investors were not receiving the same protections they would receive in a traditional IPO – that like cases were not being treated alike. In particular, Chair Gensler noted the two-step structure of a SPAC transaction – an initial public fundraise, and then a “de-SPAC” merger with a target – could create asymmetries with traditional IPOs:

- There may be conflicts between investors who cash out after the initial fundraise, and those who stay for the de-SPAC transaction;

- There may be disclosure disparities between the transaction steps, includingaround how shares could become diluted over time; and
- The announcement of an acquisition target may be accompanied with fanfare that can prime the market, without a full disclosure or proxy.

Put simply, regulators view SPACs as special in purpose only – not exempt from traditional public-policy principles that govern investor protection (viz. leveling out information asymmetries, guarding against misleading information and fraud, and mitigating conflicts). Chair Gensler has asked SEC staff to propose new regulations to align SPAC offerings with traditional IPOs – to follow Aristotle's principle of treating like cases alike. Among other things, this means that the safe-harbor exemption for forward-looking statements in the Private Securities Litigation Reform Act (PSLRA) likely will not apply to de-SPAC transactions: while de-SPAC transactions are not technically IPOs (which are excluded from the PSLRA safe harbor), the lack of established track record for a private company combining with a SPAC, the logic goes, raises the same concerns that motivated excluding IPOs from the PSLRA safe-harbor in the first place.

Of course, regulators are not alone in seeking to police SPACs. Chair Gensler's remarks not only suggest where the SEC may be headed in the coming year, but also provide a blueprint for potential private plaintiffs to bring securities claims where SPAC sponsors allegedly treat either step of a SPAC transaction as something less than it is – an IPO.

Sponsors should be not just vigilant, but proactive in assessing how their handling of either step of a SPAC transaction could be perceived as contrary to the principles identified by Chair Gensler. SPACs remain an innovative and efficient path to liquidity, but the "cop on the beat" has issued a clear warning: sponsors violate the ancient principle of treating "like for like" at their peril.

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