FAIRNESS OPINIONS AND SPAC REFORM

ANDREW F. TUCH*

ABSTRACT

This paper assesses the emerging regulatory framework for special purpose acquisition companies (SPACs). According to this framework, mergers of SPACs, known as de-SPACs, must be "fair" to public (or unaffiliated) SPAC shareholders, and transaction participants face heightened liability risk for disclosure errors. In this environment, third-party fairness opinions have been regarded as a de facto requirement for de-SPACs.

A study of all fairness opinions used in de-SPACs from 2019 to 2023 shows that these opinions suffer profound methodological problems and fail in their intended purpose. To be fair to public shareholders, a de-SPAC should represent value to these shareholders of at least $10 per share, the amount they would receive if they chose to redeem. This requires a pro forma assessment of the post-merger entity's value, accounting for the effects of dilution, an assessment that will be highly contingent. Nevertheless, most opinions borrowed from the public mergers & acquisitions (M&A) playbook by addressing fairness to the SPAC, rather than to public shareholders, adopting assumptions that often produced implausible valuations while also being unresponsive to fiduciary concerns. Other opinions reflected poor practices, drawing either mistaken or ambiguous conclusions. Another set of opinions expressly purported to address the position of public shareholders. On their face, therefore, they were responsive. But, with one exception, these opinions failed to perform analyses to address the position of public shareholders. While the challenges of assessing fairness to public shareholders can be overcome, fairness opinions should be greeted with skepticism.

* Professor of Law at Washington University in St. Louis. Professor Tuch is currently consulting on SPAC-related litigation that relates to the analysis in this article. For helpful comments and discussions, the author thanks Scott Baker, William Clayton, Patrick Corrigan, Quinn Curtis, Jens Dammann, Danielle D'Onfro, Jens Frankenreiter, Mira Ganor, Todd Gormley, Michael Klausner, Ramey Layne, Mark Lebovitch, Hon. Lewis J. Liman, William Magnuson, Michael Ohlrogge, Neal Potischman, Usha Rodrigues, Joel Seligman, Holger Spamann, James Spindler, Roberto Tallarita, Eric Talley, Tobias Tröger, Linda Tuch, Hon. Lori W. Will, and participants at the American Law and Economics Association Annual Meeting, Institute for Law and Economic Policy 29th Annual Symposium, BYU Winter Deals Conference, University of Texas Workshop in Business Law & Economics, and Washington University Faculty Workshop. The author especially thanks Harald Halbhuber for insightful conversations, which greatly influenced the writing of this article. For outstanding research assistance, the author thanks Patrick Nolan.

The article argues in favor of other features of the emerging regulatory framework that would heighten incentives for complete and accurate disclosures of deal value to investors. With stronger incentives to assure complete and accurate disclosures, investment banks, SPAC sponsors, and target companies would be less likely to stand behind de-SPACs in their current form. Incentivizing complete and accurate disclosures, then, should lead to changes in transaction terms and structures that will result in greater fairness to public shareholders.

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INTRODUCTION

Briefly, mergers of SPACs, or special purpose acquisition companies, constituted a mainstream technique for taking companies public.[1] SPACs

1. Christopher M. Barlow, C. Michael Chitwood, Howard L. Ellin, P. Michelle Gasaway & Gregg A. Noel, *Skadden Discusses "The Year of the SPAC,"* SKADDEN (Feb. 18, 2021),

initially raise cash in their initial public offerings (IPOs), and then through a merger, known as a de-SPAC, confer public status on a target company and fulfill traditional IPO functions. To protect investors, SPACs integrate certain safeguards, such as the right of public shareholders to redeem their shares, effectively providing them a money-back guarantee if they believe a de-SPAC to be ill-conceived.[2] In situations where no de-SPAC occurs, the SPAC will liquidate, giving public shareholders their money back. De-SPACs have enabled record numbers of companies to enter public markets without a traditional IPO, reversing a decades-long decline in U.S. companies going public.[3]

Yet, the conventional SPAC structure compromises the incentives of SPAC sponsors and directors, who are fiduciaries, and can leave public shareholders—those unaffiliated with these fiduciaries—poorly informed about transaction risks.[4] SPAC sponsors and directors face conflicting interests, as their remuneration can give them powerful incentives to consummate a de-SPAC, even if it will be value-decreasing for other shareholders.[5] They also have incentives to discourage public shareholders from exercising their redemption rights, as high redemption rates may jeopardize a de-SPAC's viability.[6] Moreover, the SPAC structure dilutes public shareholders' interests, as SPAC sponsors and other investors receive shares at significant discounts, thereby reducing the net cash backing each share.[7] This dilution, or value transfer to SPAC fiduciaries, not only compounds SPAC fiduciaries' conflicts but also makes it less likely that the de-SPAC will be value-increasing for public shareholders, thereby

https://www.skadden.com/en/insights/publications/2021/02/skadden-discusses-the-year-of-the-spac [https://perma.cc/9LRW-844U] ("SPACs have clearly established themselves as legitimate and, in many cases, preferred alternatives to a traditional IPO or M&A transaction for target companies seeking liquidity.").

2. As to the conventional SPAC structure, see Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction [https://perma.cc/8XUR-N4MD].

3. "In 2020, SPACs undertook ninety-two mergers valued at $139 billion, more than doubling 2019 activity levels. Activity levels in 2021 doubled again, as SPACs merged with, and took public, 221 companies in transactions valued at $404 billion." Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 305–06 (2022) (footnote omitted). As to reversal of the trend, see Corrie Driebusch, *IPOs Keep Jumping Higher. How Long Will the Ride Last?*, WALL ST. J. (Nov. 19, 2021, 11:48 AM), https://www.wsj.com/articles/ipos-keep-jumping-higher-how-long-will-the-ride-last-11637339845 [https://perma.cc/J7HX-83WU].

4. Public shareholders, also known as unaffiliated shareholders, are shareholders other than the SPAC sponsor, and any person that controls it, SPAC directors, and investors in private investments in public equity (PIPEs). For empirical evidence of harm to public shareholders, see *infra* Part I. As to PIPEs, see *infra* Section II.D.3.

5. *See infra* note 30 and accompanying text.

6. *See infra* note 31 and accompanying text.

7. As to dilution, see *infra* Section II.D.3.

diminishing the prospect that public shareholders will be better off investing in the post-merger entity than redeeming their shares. Outcomes for public shareholders of de-SPACs have been dismal, prompting the Securities and Exchange Commission (SEC) and Delaware courts to propose or impose heightened investor safeguards.[8]

The emerging regulatory framework focuses on protecting public shareholders through two measures. First, de-SPACs must be "fair" to these shareholders, whose interests are distinct from those of other SPAC shareholders and the SPAC itself as an entity. To this end, recent Delaware Court of Chancery rulings hold that corporate fiduciaries should face entire fairness review, an exacting standard of judicial scrutiny that in its application seeks to protect public SPAC shareholders.[9] Expressing a similar concern, the SEC's recent reform proposal ("SPAC Reform Proposal") models rules on those for Rule 13e-3 going-private transactions, among other things, requiring SPACs to disclose whether they consider the de-SPAC to be fair or unfair to their public shareholders.[10]

The second protective measure aims to incentivize transaction participants to provide public shareholders accurate and complete information—in particular, information material to their decisions whether to exercise redemption rights. The SEC proposes increasing the prospect of underwriter liability for investment banks that participate in de-SPACs, thereby strengthening the deterrent effect of Section 11 of the Securities Act of 1933, the most potent liability provision in federal securities law.[11] Additionally, the SEC would abolish preferential treatment that de-SPACs are believed to receive under the Public Securities Litigation Reform Act (PSLRA) when communicating financial forecasts and other forward-looking statements to investors.[12] Meanwhile, the Delaware Court of Chancery considers disclosure deficiencies in de-SPACs "inextricably intertwined" with loyalty issues, allowing it to rigorously scrutinize the accuracy and completeness of disclosures made in de-SPACs when assessing fairness.[13]

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8. *See* Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29458 (proposed May 13, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249, 270) [hereinafter SPAC Reform Proposal]; *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784 (Del. Ch. 2022); Delman v. GigAcquisitions3, LLC, 288 A.3d 692 (Del. Ch. 2023); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821-LWW, 2023 WL 2292488 (Del. Ch. Mar. 1, 2023).

9. The standard requires that a transaction be "entirely fair to the corporation and its shareholders." *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d at 815 (quoting *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 52 (Del. 2006)). Since affiliated shareholders are usually fiduciaries, the reference to shareholders in the text accompanying this note focuses attention on unaffiliated shareholders. *See also GigAcquisitions3*, 288 A.3d 692.

10. SPAC Reform Proposal, *supra* note 8, at 29566 (Proposed Item 1606(a)).

11. *See infra* Section IV.A.

12. *See infra* Section IV.B.

13. *GigAcquisitions3*, 288 A.3d at 714.

This article examines the emerging regulatory landscape by analyzing the significance of third-party fairness opinions and the proposed disclosure-oriented reforms. These opinions—which, in the wake of the SEC's announcement of proposed reforms, have been regarded as a de facto requirement for de-SPACs[14]—typically assess whether the consideration paid in a transaction is fair, from a financial point of view, to a party or group. The assessment of fairness opinions sheds light on the difficulties associated with evaluating and demonstrating a de-SPAC's value for public shareholders. The heightened risk of disclosure liability adds to the stakes, given the transaction value's materiality to public shareholders and the potential ramifications of any misstatement or omission for those involved.

According to the analysis, a low quality market emerged for SPAC fairness opinions. To address fairness to public shareholders, financial advisors must estimate the value of the post-merger entity, adjusting for dilution. However, SPAC boards obtained fairness opinions, generally from less reputationally sensitive financial advisors, which failed to address the position of public shareholders. These opinions were unresponsive to fiduciary concerns and relied on assumptions that often yielded implausible valuations. Nevertheless, SPACs disclosed these opinions and their underlying analyses to public investors as these investors decided whether to exercise their redemption rights.

In Part I, I provide background on de-SPACs and their primary threats to investor protection. Part II examines the significant challenges involved in assessing fairness to public shareholders. To be fair from a financial perspective to public shareholders, a de-SPAC should represent value to these shareholders of at least $10 per share, the amount they would receive if they chose to redeem. For fairness opinions, this requires financial advisors to estimate the value of the post-merger entity, taking into account the position of public shareholders. This analysis would require a comparison of public shareholders' $10 redemption option with the per share value in the post-merger company, adjusting for dilution. Since the business combination and related transactions has yet to occur, the latter calculation must be performed on a pro forma basis considering various possible scenarios and generating a range of possible outcomes.

However, financial advisors face significant difficulties in applying this criterion for fairness. The required analysis deviates from the standard fairness opinion template for public M&A where buy-side opinions assess whether the transaction consideration paid by the buyer (here, the SPAC) is fair to the *buyer*. Additionally, the lack of a reliable pre-merger guide for transaction consideration would lead financial advisors using this template

14. *See infra* Section II.B.

to assume a value for SPAC shares for analytic purposes. If financial advisors follow SPAC parties' convention of assuming a value of $10 per share, they would likely be overstating the value of transaction consideration, making it harder to consider it fair in comparison with estimates of the target's value.[15] This overstated value can be expected to lead target companies to inflate their values.[16]

Even if a financial advisor concludes that the (likely inflated) transaction consideration is fair to the SPAC, such a conclusion, accepted at face value, offers no assurance of fairness to public shareholders, the analysis shows.[17] Dilution in the conventional SPAC structure means that the de-SPAC may still provide less than $10 per share value to public shareholders, rendering the transaction unfair to them. The underlying notion is that even if a target is worth $10 per share, combining it with a SPAC worth less than $10 per share may result in a post-merger company worth less than $10 per share. This reasoning undermines any argument that the use of a conservative valuation assumption (to overstate consideration) necessarily provides comfort to public shareholders.

Part III, an empirical analysis of all fairness opinions used in de-SPACs completed since 2019, shows that these opinions suffer profound methodological problems and fail in their intended purpose. Since the SEC put forward its SPAC Reform Proposal on March 30, 2022, almost two-thirds of announced de-SPACs have obtained such opinions, compared to only 13% before.[18] However, few opinions purported to address fairness to public shareholders, thereby avoiding the thrust of judicial and regulatory attention. With one exception, those that purported to address fairness to public shareholders failed to provide supporting analyses relevant to these shareholders or to adjust for SPAC dilution.[19] These opinions misleadingly concluded that the consideration was fair to these shareholders while their analysis failed to address the question. Other opinions reached ambiguous or obviously mistaken conclusions.

In providing opinions, financial advisors almost universally borrowed from the public M&A playbook, assessing the fairness of transaction consideration to the SPAC rather than the public shareholders. Moreover, advisors generally followed convention by assuming a $10 value for SPAC

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15. *See infra* Section II.D.

16. Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 YALE J. ON REG. 18, 32 (2022) ("Unless the target envisions noncash value in the merger, one would expect the target to inflate its value commensurately with the inflation in the SPAC shares."); *see also infra* notes 83–84 and accompanying text.

17. *See infra* Section II.D.3.

18. *See infra* tbl.1. Conventionally, fairness opinions have been used in de-SPAC involving targets affiliated with sponsors. *See* SPAC Reform Proposal, *supra* note 8, at 29474.

19. *See infra* Section III.B.

shares. Buoyed by optimistic estimates of target value, the financial advisor for each of these de-SPACs concluded that the transaction consideration was fair. These opinions appear dubious since they suggest that financial advisors valued targets more highly than did targets' own managers.

Notably, only smaller and lesser-known financial advisors provided fairness opinions in de-SPACs, while major investment banks took on other roles in the same or related transactions.[20] This apparent refusal by large firms to give fairness opinions may reflect the challenges advisors face in addressing fairness to public shareholders. Ultimately, advisors addressing the position of public shareholders must determine whether the de-SPAC can generate sufficient value to offset the dilution that is inherent in the conventional SPAC structure and find some measure of certainty in the face of incomplete information, which is a tall order. All advisors face these challenges, but smaller firms have less at stake reputationally, and in some cases have given implausible and apparently unsubstantiated opinions. There is more to the story, however, as major investment banks have not even given opinions addressing fairness *to SPACs*, even as these opinions are conceptually more straightforward to give.

Part IV evaluates the disclosure-oriented elements of the emerging regulatory landscape and argues that the SEC's proposed reforms are necessary from a policy perspective.[21] The reforms would deem SPAC IPO underwriters and certain other participants to be de-SPAC underwriters, make target operating companies co-registrants with SPACs, and deem any business combination of a reporting shell company involving another non-shell company to be a "sale" of securities to the reporting shell company's shareholders. Additionally, the reforms would limit the application of the PSLRA safe harbor to de-SPACs. These measures would address the preferential treatment that SPACs currently receive relative to traditional IPOs. They would also help prevent disparities in regulation for transactions that are similar in economic substance but vary in legal structure. Inevitably, these protections will fall short in some ways. The article discusses the potential shortcomings and suggests modifications that will better account for distinctive features of de-SPACs.

Part V considers implications of the analysis. A key takeaway is that fairness opinions and their underlying analyses have provided no assurance as to the fairness of de-SPACs to public shareholders. The evidence corroborates concerns expressed by legal scholars and aligns with a body of

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20. *See infra* Section III.A.

21. These arguments draw from and build upon comments I submitted to the SEC during the SPAC Reform Proposal's comment period. *See* Letter from Andrew F. Tuch, Professor, Washington Univ. Sch. of Law, to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (June 13, 2022) (on file with author).

empirical research examining the role of investment bank quality, finding poorer outcomes for lower-tier investment banks.[22] Moreover, it is doubtful that investment banks, SPAC sponsors, and target companies will stand behind de-SPACs in their current form with stronger incentives for complete and accurate disclosures. As a result, transaction terms and structures must undergo significant change in response to fairness-seeking reforms.

I. THREATS TO PUBLIC SHAREHOLDERS

Formed by sponsors, SPACs raise capital in their own IPOs, intending to merge with as-yet-unidentified private companies within a defined investment window, typically eighteen to twenty-four months (or longer with shareholder approval).[23] Although the SPAC structure, in its conventional form, poses serious threats to public shareholders, it also offers certain protections.[24] Whether buying in the SPAC IPO or afterward, public shareholders have the right to redeem their shares for cash if a de-SPAC is consummated; redemption typically occurs at the purchase price of $10—plus interest, thereby guaranteeing initial investors at least a nominal return.[25] If the SPAC fails to execute a de-SPAC during the investment period, it must liquidate and return its cash proceeds to investors.[26]

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22. *See, e.g.*, Matthew D. Cain & David J. Denis, *Information Production by Investment Banks: Evidence from Fairness Opinions*, 56 J. LAW & ECON. 245, 264 (2013) (finding that valuation errors in fairness opinions are significantly lower for top-tier investment banks than for lower-tier investment banks); Jack Bao & Alex Edmans, *Do Investment Banks Matter for M&A Returns?*, 24 REV. FIN. STUD. 2286 (2011) (finding evidence suggesting that quality of buyers' investment bank has a positive effect on M&A outcomes).

23. *See Family Offices and SPACs Part I: SPAC Overview and the Current Market*, KIRKLAND & ELLIS (Feb. 1, 2021), https://www.kirkland.com/-/media/publications/pifo/pifo_family-offices-and-spacs-part-i.pdf [https://perma.cc/K946-LWAR] ("Sponsor [founder] shares and warrants will have no value unless a business combination is consummated.").

24. In 2021, a U.K. Listing Review proposed changes to the United Kingdom's rules and prospectus regime, including redemption rights for shareholders, intended to make the U.K. market more attractive to SPAC sponsors and investors. *See generally UK Listing Review*, GOV.UK (Mar. 3, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf [https://perma.cc/7Y8H-3RAC]. *See also* Brian R. Cheffins & Bobby V. Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK?* (Eur. Corp. Governance Inst., Law Working Paper No. 653/2022, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4028930 [https://perma.cc/JVZ7-QDC8]; Jennifer Payne & Clara Martins Pereira, *The Future of the UK IPO*, *in* RESEARCH HANDBOOK ON GLOBAL CAPITAL MARKETS LAW (Iris H.-Y Chiu & Iain G. McNeil eds., 2023) (forthcoming June 20, 2023), https://ssrn.com/abstract=4029933 [https://perma.cc/9L2J-MN4L]; Bobby V. Reddy, *Warning the UK on Special Purpose Acquisition Companies (SPACs): Great for Wall Street but a Nightmare on Main Street*, 22 J. CORP. L. STUD. 1, 1 (2022).

25. *See, e.g.*, Churchill Capital Corp IV, Proxy Statement/Prospectus (Form 424(b)(3)) (June 25, 2021) at 37.

26. *Id.* at 38.

However, as the SEC and Court of Chancery keenly observe, the interests of SPAC sponsors and boards conflict with those of public shareholders.[27] As compensation for their work, sponsors receive a large stake of "founder" shares, typically giving them a 20% shareholding in the SPAC after its IPO, for a nominal consideration.[28] These are usually Class B shares, distinct from those (Class A) shares issued to public shareholders. Founder shares lack redemption rights and automatically convert into Class A shares, or shares of the post-merger entity, at the time of a de-SPAC.[29] Furthermore, SPAC directors may receive compensation in shares (typically the same class of shares as those of the sponsor), for which they pay little, and their interests generally align with those of the sponsor appointing them. Importantly, sponsors and directors will lose their entire compensation and not be reimbursed for out-of-pocket costs unless a de-SPAC occurs, which gives them powerful incentives to consummate a de-SPAC—even if it is value-decreasing—and especially as the acquisition window draws to a close.[30] Moreover, because extensive redemptions can jeopardize a de-SPAC's viability,[31] fiduciaries have an incentive to discourage shareholders

27. SPAC Reform Proposal, *supra* note 8, at 29461–62; *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 809–17 (Del. Ch. 2022); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 713–20 (Del. Ch. 2023); *see also* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REGUL. 228 (2022); Minmo Gahng, Jay R. Ritter & Donghang Zhang, *SPACs*, REV. FIN. STUD. (forthcoming) (manuscript at 25, 46), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775847 [https://perma.cc/C8L6-J2QY]; Usha Rodrigues & Michael A. Stegemoller, *Redeeming SPACs* (Univ. of Ga. Sch. of L., Rsch. Paper No. 2021-09, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906196 [https://perma.cc/Q6B3-L5BT]; Tuch & Seligman, *supra* note 3, at 339; Harald Halbhuber, *Economic Substance in SPAC Regulation*, 40 YALE J. ON REGUL. 44, 57 (2022); Minor Myers, The Corporate Law Reckoning for SPACs 34–41 (Aug. 2, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4095220 [https://perma.cc/FJQ7-RR27] (arguing that the conduct of fiduciaries of Delaware-incorporated SPACs should be reviewed under the entire fairness standard); William Magnuson, *The Failure of Market Efficiency*, 48 BYU L. REV. 827 (2022). Of course, traditional IPOs also pose conflicts for unaffiliated shareholders, but to a lesser degree. *Compare* Tuch & Seligman, *supra* note 3, at 342 (arguing that, relative to de-SPACs, traditional IPOs do not create such strongly misaligned incentives between transaction participants on the one hand and outside investors on the other), *with* Patrick M. Corrigan, Do the Securities Laws Actually Protect Investors? Lessons from SPACs 34–40 (Mar. 2, 2023) (unpublished manuscript) (on file with author) (rejecting the "standard story" that misaligned incentives in SPACs are more severe than those of underwriters in traditional IPOs).

28. *See, e.g.*, Second Corrected Consolidated Amended Complaint for Violations of the Federal Securities Laws at 19–20, *In re* Alta Mesa Res., Inc. Sec. Litig., No. 4:19-cv-00957 (S.D. Tex. Apr. 6, 2020) (describing general terms of SPAC transactions).

29. *See, e.g.*, Churchill Capital Corp IV., Proxy Statement/Prospectus (Form 424(b)(3)) (June 25, 2021), at 123.

30. Founder shares typically lack redemption and liquidation rights. *See, e.g.*, Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 702 (Del. Ch. 2023)

31. A common provision in a de-SPAC merger or business combination agreement imposes a minimum cash condition requiring SPACs, sponsors, and any PIPE investors to deliver a minimum amount of cash on closing, after giving effect to any redemptions. *See, e.g.*, Gores Guggenheim, Inc., Letter to Stockholders and Warrant Holders of Gores Guggenheim, Inc. (Form 424(b)(3)) (May 25, 2022), at 171 (defining Minimum Cash Condition).

from exercising their rights to redeem, which undermines the protective function of these rights.

The issuance of founder shares for negligible consideration, together with other features of conventional SPAC structure, dilutes the interests of public shareholders.[32] These shareholders paid $10 or more for their shares in the SPAC, but the issuance of additional (Class B) shares, at heavy discounts, to sponsors, dilutes the cash backing each SPAC share. This dilution is amplified by redemption. In addition to founder shares, SPACs typically issue warrants and/or other derivative securities to IPO investors, which entitle their holders to purchase a SPAC share (or a fraction of such a share) at a fixed price, typically $11.50.[33] These features diminish the net cash value of SPAC shares, and because a SPAC acquires a target using its shares as payment, these features also reduce the value of the SPAC's acquisition currency, reducing the likelihood that a de-SPAC will be worth more than $10 per share to public shareholders. Dilution therefore ensures that public shareholders' interests diverge from those of the corporate fiduciaries and the SPAC itself. The greater the dilution, the more likely that public shareholders will be better off redeeming their shares than participating in the de-SPAC.

SPAC fiduciaries may face lesser-known conflicts as well. Sponsors managing multiple SPACs and other investment entities may have competing fiduciary duties and contractual obligations.[34] It is for this reason that SPAC charters often permit sponsors and directors to honor those obligations by presenting corporate opportunities to those other entities first. Under a common term, SPACs:

> [R]enounce [their] interest in any corporate opportunity offered to any director or officer unless such opportunity is expressly offered to such person solely in his or her capacity as a director or officer of our

32. Klausner, Ohlrogge & Ruan, *supra* note 27, at 246–53. For discussion of other features of the conventional SPAC structure, see *infra* Section II.D.3.

33. *See* ROPES & GRAY, SPECIAL PURPOSE ACQUISITION COMPANIES (SPACS): AN INTRODUCTION 3, 15, https://www.ropesgray.com/-/media/Files/Brochures/SPACs-Overview-August-2020.pdf?la=en&hash=FC656560FD9F790B342EB8D2FE48A438D7DECAAA [https://perma.cc/XKT4-WV3F] (last visited May 9, 2023).

34. These sponsor conflicts of interest closely resemble those faced by investment advisers of investment funds. Sponsors and SPACs can be analogized to investment advisers and investment funds, as both settings involve external management of investment vehicles by separate firms with distinct ownership groups. ROBERT JACKSON & JOHN MORLEY, SPACS AS INVESTMENT FUNDS 6 (2022), https://wifpr.wharton.upenn.edu/wp-content/uploads/2022/07/Jackson-Morley-SPACs-as-Investment-Funds-2022.07.14-2.pdf [https://perma.cc/SFK4-VLFF]; *see also* John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228 (2014). However, sponsors are fiduciaries of SPACs due to their controlling shareholder status, while advisers owe fiduciary duties to investment funds because of their legal status as investment advisers. The status of sponsors matters since it is likely to subject their conduct to judicial review under the entire fairness standard. *See supra* note 9 and accompanying text.

> company and such opportunity is one [SPACs] are legally and contractually permitted to undertake and would otherwise be reasonable for [SPACs] to pursue.[35]

Consequently, SPACs in this position may only consider opportunities after they have been rejected by entities to which their sponsors, directors, or officers owe competing obligations.

Empirical evidence substantiates many of these concerns arising from the conventional SPAC structure.[36] First, in recent years, net cash per SPAC share has been well below $10. Reflecting the magnitude of dilution in conventionally structured SPACs, mean and median measures of net cash per share for a 2019–20 de-SPAC cohort were $4.10 and $5.70, respectively;[37] research into a cohort for 2020–21 reports mean and median net cash per share of $6.40 and $7.10, respectively.[38] Relatedly, SPAC mergers have often performed poorly for public investors, harming those SPAC shareholders who elected to hold their shares through the de-SPAC rather than sell or demand redemption.[39] Sponsors have nevertheless tended to earn outsized returns, even when SPAC mergers performed poorly.[40] According to a study by Michael Klausner, Michael Ohlrogge, and Emily Ruan, sponsor returns were on average 500%, measured twelve months post-merger on a market-adjusted basis.[41] Initial SPAC investors,

35. *See* Gores Metropoulos, Inc., Letter to Stockholders of Gores Metropoulos, Inc., (Form 424(b)(3)) (Oct. 29, 2020), at 226–27; *see also* Churchill Capital Corp III, Amended and Restated Certificate of Incorporation of Churchill Capital Corp. III (Form S-1, Ex. 3.2) (Jan. 29, 2020) (waiving the corporate opportunity doctrine and, with certain exceptions, renouncing any expectancy that SPAC directors or officers will offer opportunities to the SPAC).

36. *See* Klausner, Ohlrogge & Ruan, *supra* note 27, at 236–38; Gahng, Ritter & Zhang, *supra* note 27 (manuscript at 25, 43). For a summary of the empirical evidence, see Tuch & Seligman, *supra* note 3, at 346–52.

37. As to the extent of dilution, see Klausner, Ohlrogge & Ruan, *supra* note 27, at 252; *see also* Gahng, Ritter & Zhang, *supra* note 27 (reporting consistent results).

38. Michael Klausner & Michael Ohlrogge, *Was the SPAC Crash Predictable?*, 40 YALE J. REG. 101, 112 (2023).

39. *See, e.g.*, Lora Dimitrova, *Perverse Incentives of Special Purpose Acquisition Companies, the "Poor Man's Private Equity Funds,"* 63 J. ACCT. & ECON. 99, 99, 103 (2017) (reporting "extremely poor[]" average post-merger performance by a sample of seventy-three SPACs conducting de-SPACs between 2004 and 2010); Klausner, Ohlrogge & Ruan, *supra* note 27, at 232, 259–64 (reporting steep post-merger losses for non-redeeming investors in forty-seven SPACs that merged between January 2019 and June 2020); Johannes Kolb & Tereza Tykvová, *Going Public via Special Purpose Acquisition Companies: Frogs Do Not Turn into Princes*, 40 J. CORP. FIN. 80, 81, 88–93 (2016) (finding that a sample of 127 SPACs that undertook IPOs and mergers between 2003 and 2015 severely underperform comparable IPOs). For a general overview of empirical results, see Yochanan Shachmurove & Milos Vulanovic, *Specified Purpose Acquisition Company IPOs*, *in* THE OXFORD HANDBOOK OF IPOS 301 (Douglas Cumming & Sofia Johan eds., 2019).

40. Klausner, Ohlrogge & Ruan, *supra* note 27, at 264 (finding "that sponsors tend to do very well [from SPAC mergers] even where SPAC investors do quite poorly").

41. *Id.* at 263. Returns measured twelve months post-merger were somewhat lower but still suggest "that sponsors tend to do very well even where SPAC investors [that hold post-merger] do quite poorly." *Id.* at 264.

who are largely distinct from those public shareholders holding at the time of the de-SPAC and beyond, also tend to do well from their investments.[42] These empirical findings suggest that the SPAC structure incentivizes SPAC fiduciaries at the expense of public shareholders.

Although SPAC fiduciaries typically benefit at the expense of non-redeeming public shareholders, it is not inevitable that the latter will lose from a de-SPAC. Targets have incentives to account for the dilutive effects of founder shares and other securities, which reduce the amount of cash per share held by SPACs below their $10 nominal value. Empirical evidence suggests that targets tend to account for dilution when negotiating merger terms.[43] However, in some deals, shareholders in the target company may end up bearing the costs associated with de-SPACs. For instance, a target may exchange more than $10 of value per share for SPAC shares worth less than $10 on a net cash basis if the target is eager to merge, perhaps because it seeks the expertise of the SPAC's sponsors.[44] The ultimate outcome will depend on the terms negotiated between the merger parties.

II. Fairness to Public Shareholders

Given these threats to public shareholders, the SEC and Delaware courts have rightly focused on de-SPACs' fairness to these investors, leading commentators to emphasize the importance of third-party fairness opinions. While the criterion for fairness to public shareholders is clear, financial advisors face significant practical and conceptual challenges in assessing fairness. Despite this, SPACs have obtained these opinions, occasionally even before the SPAC Reform Proposal in March 2022, in order to address heightened concerns of sponsor conflicts, and much more frequently since then. While many of these valuation challenges can be overcome, they give reason for skepticism about fairness opinions and may make reputable financial advisors more reluctant to provide opinions than to present relevant financial analyses to SPAC boards.

42. *Id.* at 245. The primary role these SPAC investors perform "is to create a public vehicle that will be used later to bring a private company public through a merger in which new shareholders will invest." *Id.* at 246.

43. *Id.* at 254 ("The terms of a merger agreement determine which party bears a SPAC's costs."). Klausner, Ohlrogge, and Ruan suggest that, in negotiating with SPACs, targets protect their interest by accounting for SPACs' dilutive structure. *Id.* at 255. Nonredeeming unaffiliated shareholders "unwittingly subsidize" target companies. *Id.* at 233–34. This inference that non-redeeming unaffiliated shareholders—rather than target companies—bear the brunt of the expense is equivocal. *See* Tuch & Seligman, *supra* note 3, at 350–51. As to evidence on the extent of dilution, see *infra* Section II.D.3.

44. *Id.* at 254–55. For elaboration, see *supra* note 90 and accompanying text.

A. The Relevance of Fairness

The regulatory focus is on fairness to public shareholders, distinct from fairness to the SPAC fiduciaries (the sponsor and board members) or to the SPAC itself. The SPAC Reform Proposal models certain reforms on Rule 13e-3 of the Exchange Act, which is applicable to going-private transactions that harbor structural conflicts of interest comparable to those of de-SPACs.[45] Proposed Item 1606 requires SPACs to state whether they believe the de-SPAC and any related financing transaction are fair to the SPAC's unaffiliated (or public) security holders and to discuss the material factors supporting that belief.[46] The proposed rule effectively requires SPAC boards to determine that a de-SPAC is fair to public shareholders, as a negative determination would increase the likelihood of litigation and likely doom the deal. Meanwhile, in recent Delaware decisions, Vice Chancellor Will has highlighted the problem of conflicted SPAC fiduciaries, noting their potential to undermine the protection offered by redemption rights, such as by failing to provide shareholders with information allowing an informed redemption decision.[47]

The concern for fairness to public shareholders arises from the inherent conflicts in the SPAC structure. The SEC considers the conflicts in going-private transactions and de-SPACs analogous, justifying the application of rules that focus on fairness to public shareholders.[48] One distinction between the two settings lies in the ownership of securities by public security holders. In the SPAC setting, they typically hold securities in the buyer, whereas in going-privates, they hold them in the target company.[49] For its part, the Court of Chancery invokes entire fairness review because SPAC sponsors (who are controllers of SPACs) and the directors they appoint are fiduciaries involved in conflicted transactions.

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45. *See, e.g.*, SPAC Reform Proposal, *supra* note 8, at 29528–29 (proposed Items 1606 and 1607). Joel Seligman and I have argued that an analogy exists between de-SPACs and going-privates subject to Rule 13e-3. We propose reforms broadly consistent with those in the SPAC Reform Proposal. *See* Tuch & Seligman, *supra* note 3, at 353–54.

46. SPAC Reform Proposal, *supra* note 8, at 29528.

47. *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 816 (Del. Ch. 2022); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 718–20 (Del. Ch. 2023); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821-LWW, 2023 WL 2292488, at *10 (Del. Ch. Mar. 1, 2023).

48. See SPAC Reform Proposal, *supra* note 8, at 29472 n.88 (rules applicable to going-privates subject to Rule 13e-3 "are appropriate models for the proposed specialized disclosure requirements for de-SPAC transactions, in that . . . the same potential for self-interested transactions exists in de-SPAC transactions as in going-private transactions"); *id.* at 29473 n.96 (same).

49. As to difficulties arising from this difference for financial advisors giving fairness opinions in de-SPACs, see Section II.D.1.

B. The Appeal of Fairness Opinions

Although neither the SEC nor the Court of Chancery has explicitly required the use of fairness opinions in de-SPACs,[50] it is now broadly accepted that SPACs undertaking de-SPACs should consider obtaining these opinions.[51] A prominent law firm regards the SEC proposal as "creating a de facto requirement for obtaining a fairness opinion . . . in a manner consistent with market practice in Rule 13e-3 transactions."[52] The Chancery Court's recent *MultiPlan* decision was viewed by another prominent legal advisor as "concluding that the sponsor . . . and the board . . . were conflicted, and that the process was faulty because of a lack of independent financial advice or a fairness opinion."[53] In reviewing *Gigacquisitions3*, the same advisor pointed to the absence of a fairness opinion as a process infirmity with negative implications under the entire fairness standard of review.[54] Many other legal advisors have also recommended fairness opinions as a technique for addressing judicial concerns about fairness to public SPAC shareholders.[55] Major law firms

50. Nor does anything in pre-existing state corporate law or federal securities law require the use of fairness opinions in de-SPACs or other business combinations.

51. In assessing the impact of its proposed rules, the SEC observed that SPACs will make greater use of fairness opinions, noting that in mergers generally fairness opinions by bidders "can mitigate information risks and enhance communications between bidder boards of directors and their shareholders." SPAC Reform Proposal, *supra* note 8, at 29515 n.433 (citing Tingting Liu, *The Wealth Effects of Fairness Opinions in Takeovers*, 53 FIN. REV. 533 (2018)). In *MultiPlan*, the court noted the absence of a fairness opinion. *MultiPlan*, 268 A.3d at 798. In *GigAcquisitions3*, the court twice noted the absence of a fairness opinion, 288 A.3d at 704, 727, and contrasted the facts before it with those in two cases in which "the disinterestedness and independence of the directors were not in dispute" and "[t]he boards [nevertheless] undertook some efforts to assess the fairness of a transaction" (by obtaining third-party fairness opinions). *Id.* at 727 n.254.

52. Letter from Davis Polk & Wardwell LLP to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 10 (June 13, 2022), https://www.davispolk.com/sites/default/files/2022-06/davis-polk-comment-letter-sec-spac-rule-proposals.pdf [https://perma.cc/RXA8-RUEU].

53. HOWARD L. ELLIN, EDWARD B. MICHELETTI, GREGG A. NOEL, RICHARD C. WITZEL, JR. & SARAH RUNNELLS MARTIN, IN NOVEL SPAC RULING, COURT QUESTIONS FUNDAMENTAL SPAC STRUCTURE UNDER DELAWARE LAW, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 1 (Jan. 31, 2023), https://www.skadden.com/insights/publications/2023/01/in-novel-spac-ruling-court-questions-fundamental [https://perma.cc/N83Y-MBEM].

54. *Id.* at 2–3 (interpreting the court's opinion in *GigAcquisitions3* as treating "board failure to obtain a fairness opinion or even an informal financial presentation" as a deficiency creating a "fairness concern"); *see also Delaware Chancery Court Issues* Delman *Decision Potentially Increasing Scrutiny of the Actions of SPAC Sponsors and Board*s, KATTEN (Jan. 31, 2023), https://katten.com/delaware-chancery-court-issues-delman-decision-potentially-increasing-scrutiny-of-the-actions-of-spac-sponsors-and-boards [https://perma.cc/4J4J-ZVGF] (referring to "[a] fairness opinion from an independent investment bank whose compensation is not contingent on the closing of the de-SPAC merger" as a "Recommended Best Practice" in the wake of *GigAcquisitions3*).

55. Jenny Hochenberg & Justin C. Clarke, *SPAC Litigation: Current State and Beyond*, 55 REV. SEC. & COMMODITIES REGUL. 33, 40 (2022), https://www.cravath.com/a/web/s1q7XMGjLjQMubcJsjWCFp/3DuuWK/hochenberg_clarke_rscr_final-b.pdf [https://perma.cc/J3XJ-HW9D] ("Obtaining one or more fairness opinion(s) from independent financial advisors in connection

have similarly regarded fairness opinions as offering hope for boards seeking to comply with the SEC's newly proposed fairness requirement.[56]

Third-party fairness opinions are letters by investment banks or other financial advisors provided to corporate boards or special committees.

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with a de-SPAC transaction may be beneficial. Fairness opinions are one way a board can demonstrate both fair price and fair process in the event an entire fairness standard of review is applied."); *Delaware Court of Chancery Allows deSPAC Litigation to Proceed Applying "Entire Fairness" Standard*, MAYER BROWN (Jan. 7, 2022), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/01/delaware-court-of-chancery-allowes-despac-litigation-to-proceed-applying-entire-fairness-standard.pdf [https://perma.cc/X8LC-GCE6] ("If . . . a SPAC expects the 'entire fairness' standard to apply to litigation challenging its business combination, the SPAC should consider obtaining a fairness opinion from a financial advisor to support an analysis that the terms of the business combination are fair, from a financial perspective, to the SPAC's [unaffiliated] stockholders."); John A. Kupiec, Roger A. Cooper, Mark E. McDonald & James E. Langston, *Delaware Chancery Court Allows SPAC Merger Challenge to Proceed*, CLEARY GOTTLIEB (Jan. 5, 2022), https://www.clearygottlieb.com/news-and-insights/publication-listing/delaware-chancery-court-allows-spac-merger-challenge-to-proceed [https://perma.cc/RN9Q-W6BZ] ("SPAC sponsors and directors should consider, like controlling shareholders and directors of any other Delaware corporation, appropriate procedural steps to mitigate risk in a business combination transaction. These can include . . . third-party valuation reports or fairness opinions as to the value of the target business."); *Implications of the Court of Chancery's Decision that De-SPAC Mergers Will Be Reviewed under the Entire Fairness Standard*–Amo v. MultiPlan, FRIED FRANK (Jan. 11, 2022), https://www.friedfrank.com/siteFiles/Publications/FFMAPEAmovMultiPlan01112022.pdf [https://perma.cc/HTP2-ZSVY] ("[P]otential structural, practice, and disclosure changes that could be considered include . . . [p]roviding the SPAC board with an independent valuation of the target (i.e., a valuation or fairness opinion provided by a non-affiliated financial advisor) . . . ."); Keith M. Townsend, Robert J. Leclerc, Richard T. Marooney, Zachary J. Davis & Drew L. Pollekoff, *Delaware Chancery Court Issues Highly-Anticipated SPAC-Related Decision*, KING & SPALDING LLP (Jan. 14, 2022), https://www.kslaw.com/news-and-insights/delaware-chancery-court-issues-highly-anticipated-spac-related-decision [https://perma.cc/5X4G-8LHW] ("SPAC sponsors and directors looking to avoid entire fairness review in the future should consider . . . the feasibility of adopting and implementing appropriate procedural deal process safeguards . . . . In addition to and aside from ensuring full disclosure of all material facts and information in the proxy statement, certain safeguards that have historically been utilized in the traditional merger context—such as . . . third-party valuation reports or fairness opinions as to the value of the target business—may be helpful tools for reducing exposure in the context of de-SPAC deals going forward."); Doug Getten, Brendan F. Quigley & Travis J. Wofford, *Delaware Chancery Court Decides Motion to Dismiss in SPAC Case*, BAKER BOTTS L.L.P. (Jan. 18, 2022), https://www.bakerbotts.com/thought-leadership/publications/2022/january/delaware-chancery-court-decides-motion-to-dismiss-in-spac-case [https://perma.cc/5CBH-53CT] ("Existing SPACs and targets should therefore consider whether and how to address such a claim and scrutiny under the entire fairness standard. This may include . . . seeking fairness opinions, . . . , and other paths well-worn in traditional public mergers.").

56. *See, e.g.*, SULLIVAN & CROMWELL LLP, SEC PROPOSES SWEEPING CHANGES REGULATING SPAC FORMATION AND DE-SPAC TRANSACTIONS 1 (2022), https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-sweeping-changes-regulating-spac-formation-and-despac-transactions.pdf [https://perma.cc/S6S3-YUBG] ("[A]lthough the proposed rules would not require a SPAC to obtain a fairness opinion from a financial advisor, a SPAC may seek a fairness opinion to substantiate its 'reasonable belief' as to the fairness of the transaction . . . ."); *Expansive New SEC Rule Proposals Seek to Rewrite the SPAC Playbook*, SIDLEY AUSTIN LLP (Apr. 1, 2022), https://www.sidley.com/en/insights/newsupdates/2022/04/expansive-new-sec-rule-proposals-seek-to-rewrite-the-spac-playbook [https://perma.cc/G2V8-F8SC] ("SPACs should particularly note the proposed fairness disclosure requirement and consider whether to obtain fairness opinions for pending and future de-SPAC transactions." (italics removed)); ANDREW R. BROWNSTEIN ET AL., SEC PROPOSES NEW RULES FOR SPACS AND DE-SPAC TRANSACTIONS, WACHTELL, LIPTON, ROSEN & KATZ 2 (Apr. 1, 2022) (on file with author) (SEC proposed rules "could influence whether SPACs and their boards seek fairness opinions, which are not provided in a majority of de-SPAC transactions currently . . . .").

Conventionally, these letters express an opinion as to whether the consideration paid or received in a transaction is "fair" from a financial point of view to the party paying or receiving the consideration.[57] The financial advisors assess fairness by comparing transaction consideration with estimated values of the target. For buyside opinions, financial advisors regard the transaction consideration as fair from a financial point of view if it falls below or within a range of estimated values of the target.[58] Sell-side boards or special committees and often also buy-side boards obtain these opinions as an aid to satisfying their fiduciary duties and providing comfort to investors.[59]

The bulk of a fairness opinion's content articulates the scope of the opinion offered, states assumptions and qualifications, and disclaims responsibility for various matters.[60] Financial advisors rely on information either publicly available or provided by management. They do not address the merits of a transaction compared to alternative transactions or strategies, nor do they independently verify or assess the information on which they rely. They also express no opinion on the prices at which shares may trade or on their inherent value. Their opinions are not addressed to their clients' shareholders, nor is it intended that these shareholders will rely upon these opinions. Financial analyses used to derive estimates of the target's value are typically disclosed in the proxy statement but not in the related fairness opinion. These valuation analyses or methodologies include discounted cash flow analysis and analyses based on comparisons with similar companies (comparable company analysis) and with similar transactions (comparable transactions analysis).

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57. Kevin Miller, *The Obligations of Financial Advisors – New Decision Upholds Contractual and Other Limitations*, 2 DEAL LAWS. 10, 10 (2008). *See generally* Lucian Ayre Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can be Done About It?*, 1989 DUKE L.J. 27; Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557 (2006).

58. *See* Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881, 882–83 (2008) ("Fairness opinions are typically produced . . . by investment bankers who value the target company and come up with a range of values. The bankers then opine on whether the consideration to be received by the target company's stockholders in the business combination is fair, i.e., whether the consideration being offered is consistent with the range of fair values placed on the company."); *see also supra* note 66 and accompanying text.

59. *Smith v. Van Gorkom* has been interpreted as requiring sell-side boards to obtain fairness opinions to support their exercise of fiduciary duties. 488 A.2d 858 (Del. 1985).

60. *See* Miller, *supra* note 57, at 11; *see also In re* Pure Resources, Inc., S'holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002) (describing limitations to which fairness opinions are often expressed to be subject).

C. The Meaning of Fairness

The notion of fairness is susceptible to alternative interpretations,[61] yet the SPAC Reform Proposal offers no guidance on its meaning.[62] In the Delaware Court of Chancery, "fairness is a range, rather than a point,"[63] and it roughly equates with what parties would negotiate in arm's length dealings.[64] When requiring "entire fairness," Delaware courts look not only to fairness of price—an inquiry into the agreed financial terms—but also to fairness of dealing.[65]

In the context of de-SPACs, we can be more concrete in interpreting fairness. To determine if a de-SPAC is fair from a financial point of view to public shareholders, one must consider shareholders' clear alternatives at the time when the SPAC undertakes a business combination. Public SPAC shareholders may elect to redeem their shares in connection with a de-SPAC at $10 per share, plus interest. In the absence of a de-SPAC, public SPAC shareholders will receive a liquidation of approximately $10 per share. Based on these alternatives, for a de-SPAC to be fair from a financial perspective to public shareholders, the de-SPAC should represent value to these shareholders of at least $10 per share.[66] Otherwise, public shareholders would be better off redeeming their shares.

To assess the fairness of a de-SPAC to public SPAC shareholders, a fairness opinion must assess the post-merger entity's value, accounting for the dilutive aspects of the SPAC structure. This assessment requires a pro forma analysis because the de-SPAC has yet to occur when the fairness opinion is given. The opinion should be stated as contingent, as key details are unknown, including the extent of redemption and exercise of warrants. As a result, the opinion would not follow the standard valuation template.[67]

61. Bebchuk & Kahan, *supra* note 57, at 30–34.

62. Nor does Rule 13e-3 of the Exchange Act on which the proposed rule is modelled. 17 C.F.R. § 240.13-e3 (2023).

63. *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 450 (1993).

64. Gottlieb v. Heyden Chem. Corp., 90 A.2d 660, 663 (Del. 1952) (fairness requires that "the bargain had in fact been at least as favorable to the corporation as [its directors] would have required if the deal had been made with strangers").

65. For a detailed discussion, see David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395 (2012); Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 DEL. J. CORP. L. 1 (2020); Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019).

66. Financial advisors typically generate a range of values when estimating value, rather than providing a singular figure. *See* JOSHUA ROSENBAUM & JOSHUA PEARL, INVESTMENT BANKING: VALUATION, LBOS, M&A, & IPOS 51–53, 98, 143–46 (3d ed. 2022). An advisor may regard transaction consideration as representing value of at least $10 per share if $10 falls within the estimated valuation range, although this conclusion would be more plausible if the range were entirely or predominantly above $10. *See also supra* note 58 and accompanying text.

67. For elaboration, see *infra* Section III.C.

D. Practical and Conceptual Challenges

Determining whether a de-SPAC represents a value of at least $10 per share to public shareholders may seem like a straightforward criterion for fairness, but financial advisors encounter significant difficulties addressing it.

1. Existing Practices

The interests of public shareholders differ materially from those of affiliated SPAC shareholders, namely, the SPAC sponsor and directors, and also those of the SPAC itself. If a de-SPAC represents less than $10 per share in value to public SPAC shareholders, it may still financially benefit the SPAC sponsors and directors. This is because under a conventional SPAC structure, sponsors and directors pay little for their shares (and lack or waive redemption rights), so they may benefit even from a deal where the SPAC over-pays for the target.[68] In *MultiPlan*, Vice Chancellor Will illustrated the point using a hypothetical value-decreasing transaction in which, after the merger, MultiPlan shares turned out to be worth $5 each. In this scenario, "the directors holding the fewest amount of founder shares would still hold shares worth over half a million dollars post-merger," while "[public SPAC] stockholders would be left with $5 per share rather than the $10.04 they would have received had [the SPAC] liquidated (or had they been fully informed and chosen to redeem)."[69] Such a de-SPAC worth less than $10 per share to public shareholders may also benefit the SPAC because dilution in the SPAC's structure will mean that a SPAC often contributes significantly less than $10 per share in consideration to the target.[70] As long as the target's value exceeds the transaction consideration paid by the SPAC, per share, the de-merger will benefit the SPAC. Accordingly, what may be considered fair to the sponsors and directors and even the SPAC may not be fair to public SPAC shareholders.

Under the traditional template for fairness opinions, financial advisors address the fairness of transaction consideration to parties paying or receiving consideration, generally without examining the position of public shareholders. Buy-side opinions address the fairness of transaction consideration *to the buyer*, the party giving consideration, while sell-side opinions evaluate the transaction consideration's fairness *to the target company's shareholders*, the recipients of consideration.[71] A modification

68. For further discussion, see *supra* Part I.
69. *See In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 813 (Del. Ch. 2022).
70. The cash a SPAC contributes in a de-SPAC is also referred to as the SPAC's net cash per share. *See supra* Part 1.
71. *See* Miller, *supra* note 57, at 10.

occurs for typical going-private transactions subject to Rule 13e-3, in which sell-side fairness opinions assess the perspective of public target shareholders; although they are recipients of consideration, the interests of affiliated shareholders are disregarded because they stand on both sides of the transaction.[72]

Requiring fairness opinions to address fairness to public SPAC shareholders generally upsets the prevailing opinion practices of financial advisors. Public shareholders generally neither pay nor receive consideration in de-SPACs.[73] Their interests also differ from those of the SPAC, making the customary approach in public buy-side opinions unsuitable, given concern for public shareholders' interests, which differ from those of the SPAC. Moreover, a standard buy-side opinion that considers fairness to the SPAC would offer no guidance to boards on whether a de-SPAC would be value-dilutive to public shareholders. What matters to public shareholders is fairness to them rather than fairness to the SPAC. While financial advisors may vary their analytical approaches in fairness opinions, no other class of transaction provides a suitable analog for financial advisors in the de-SPAC context.

2. Value of SPAC Shares as Transaction Consideration

Another challenge for financial advisors under the traditional valuation template is that they may lack a market guide for transaction consideration. To determine the fairness of transaction consideration, financial advisors often compare the value of consideration with estimated values of the target company; if the latter values lie within or above the value of consideration, financial advisors regard the consideration as fair, from a financial point of view, to the buyer.[74] In a de-SPAC, financial advisors lack a reliable pre-merger guide for transaction consideration because redemption rights set a floor for the SPAC's pre-merger price, making the pre-merger price a potentially inaccurate measure of the transaction consideration.[75] Even if public shareholders value a proposed de-SPAC at less than $10 per share,

72. Publicly disclosed buy-side opinions are relatively rare in going-private transactions subject to Rule 13e-3 and, in any event, conventionally address fairness to the buyer rather than to its shareholders.

73. In conventionally structured de-SPACs, SPACs issue shares. In target-on-top and double-dummy structures, unaffiliated shareholders may receive consideration in exchange for their shares. *See* Tuch & Seligman, *supra* note 3, at 329–30. These latter two transactional forms accounted for about 21% of de-SPACs in 2021 and about 35% of a smaller pool of de-SPACs in 2022. FRESHFIELDS, 2022 DE-SPAC DEBRIEF 14 (2023), https://www.freshfields.us/490963/globalassets/noindex/documents/2022-de-spac-debrief.pdf [https://perma.cc/7ABE-KNDD]. In no de-SPACs do unaffiliated shareholders pay consideration.

74. *See supra* notes 58 and 66 and accompanying text.

75. Holger Spamann & Hao Guo, *The SPAC Trap: How SPACs Disable Indirect Investor Protection*, 40 YALE J. ON REGUL. 75, 77 (2022).

the SPAC's pre-merger price will not trade below $10, making market price unsuitable for determining a necessary valuation input.

Without a reliable pre-merger guide for transaction consideration, participants in de-SPACs conventionally assume a value of $10 per SPAC share.[76] While this assumption recognizes that a SPAC's value may be below or above $10 in theory, it significantly overstates the SPAC's net cash per share, which is a more reliable measure of its worth, as discussed next.

3. Dilution Inherent in SPAC Structure

If transaction consideration is needed, net cash per SPAC share will be a more reliable measure of a SPAC's value. As Klausner, Ohlrogge, and Ruan show in their seminal paper, the value of SPAC shares at the time of a de-SPAC is well represented by net cash per share, which adjusts for the dilution inherent in the SPAC structure.[77] For SPACs, this measure will often be materially less than $10 per share, a consequence of the dilution of value caused by the issue by SPACs of founder shares and warrants for nominal or no consideration.[78] Further dilution occurs as SPACs must pay offering expenses that deplete the cash available for the post-combination company.[79] When shareholders then redeem their shares, the value dilution will be concentrated on the remaining public SPAC shareholders, further reducing the SPAC's net cash per share. Other SPAC features may limit the extent of dilution; these include private placements by SPACs to selected institutional investors, known as private investments in public equity (PIPEs).[80] Yet, in recent years, net cash per share has been well below $10.[81]

Dilution matters for at least two reasons. First, dilution helps to explain why the interests of public SPAC shareholders diverge from those of the SPAC, its sponsors, and directors. Suppose a SPAC raises $10 million by issuing $1 million shares to public shareholders for $10 per share and,

76. This assumption is typically stated in SPAC merger agreements and public announcements of de-SPACs. For example, the merger of SPAC Social Capital Hedosophia, founded by Chamath Palihapitiya, and Virgin Galactic, announced in July 2019, expressed the common stock of the combined entity to be valued at $10 per share. *See* Press Release, Virgin Galactic and Social Capital Hedosophia Holdings Corp., Virgin Galactic And Social Capital Hedosophia Announce Merger To Create The World's First And Only Publicly Traded Commercial Human Spaceflight Company (July 9, 2019, 6:01 AM), https://www.prnewswire.com/news-releases/virgin-galactic-and-social-capital-hedosophia-announce-merger-to-create-the-worlds-first-and-only-publicly-traded-commercial-human-spaceflight-company-300881348.html [https://perma.cc/F9NL-PJ4M] ("The selling equity owners of VG will receive $1.3 billion in total consideration, inclusive of $1.0 billion of common stock of the combined company valued at $10.00 per share and up to $300 million in cash consideration."). For the use of this assumption in the period under analysis, see *infra* Section III.A.

77. Klausner, Ohlrogge & Ruan, *supra* note 27.

78. *Id.* at 232–33; *see also supra* Part I.

79. *Id.* at 250–51.

80. *Id.* at 253.

81. *See supra* notes 36–38 and accompanying text.

following convention, issues 250,000 founder shares to its sponsor for a nominal consideration. Assume that the SPAC merges with a target worth $40 million in a de-SPAC that values the target at $40 million. Following convention, the assumed price per SPAC share is $10. In this scenario, target shareholders will receive 4 million shares purportedly worth $40 million. This is a favorable deal for the sponsor and SPAC directors who are remunerated with these shares because the de-SPAC values them at far more than the nominal value these participants paid. The deal is also favorable for the SPAC because it effectively pays less than the target's $40 million value. We can see this by calculating the dilution inherent in the SPAC at the time of the de-SPAC. (This highly simplified example includes a single source of dilution, disregarding other possible sources).[82] The SPAC's 1.25 million shares were backed by $10 million, equal to $8 net cash per share pre-merger. In other words, the SPAC's shares, valued at $8 per share, acquired a company valued at $10 per share, a good deal for the SPAC. However, this transaction represents a value of less than $10 per share for public SPAC shareholders due to the dilution caused by the founder shares. Post-merger, the company's shares are worth less than $10 each: $50 million, the combined company's value, divided by 5.25 million, results in $9.50 per share, reflecting dilution.

The second reason dilution matters is that targets can be expected to adjust for it in merger negotiations, making net cash per share a relevant metric. As Klausner, Ohlrogge, and Halbhuber explain, a target is likely to inflate its value to offset the inflation in the assumed value of the SPAC shares unless it views the de-SPAC as offering non-cash value.[83] As they explain:

> In practice, a SPAC and a target negotiate a merger by coming to an agreement on the valuation of the target, not directly on a share exchange. To match the inflation in the value of the SPAC's shares, therefore, one would expect target shareholders to inflate the value of the target.[84]

This suggests that, in the hypothetical example immediately above, the target board would inflate its value above $40 million to avoid an unfavorable deal. Updating this example (and, again, leaving aside any of the de-SPAC's non-cash sources of value), one would expect the target to insist on a pre-merger value of $50 million, representing a value to it of $40

82. Features other than founder shares that dilute the cash backing each SPAC share include the warrants and other derivative securities issued by SPACs.

83. Klausner, Ohlrogge & Halbhuber, *supra* note 16, at 32 ("Unless the target envisions noncash value in the merger, one would expect the target to inflate its value commensurately with the inflation in the SPAC shares.").

84. *Id.*

million when using an assumed value of $10 per SPAC share. The target would then capture 80% of the combined company's $50 million value (giving it 5 million of the total 6.25 million shares).[85] Evidence indicates that targets do account for dilution in negotiating the terms of de-SPACs, suggesting they are aware of the possibly overstated value of SPAC shares given as consideration.[86]

Financial advisors, therefore, face basic challenges in preparing fairness opinions under the traditional valuation template. While market participants in de-SPACs conventionally assume a value of $10 per SPAC share, this value is likely to overstate the SPAC's value. A superior measure for transaction consideration is net cash per share, which would require financial advisors to account for various sources of dilution. Additionally, the extent of redemption must be considered, and because this information is not known until after a fairness opinion is prepared, the aggregate consideration figure would need to be contingently stated, for various levels of redemption.[87]

Even if the transaction consideration adjusts for dilution, what fundamentally matters to public shareholders is whether the pro forma estimate of the post-merger entity's value exceeds $10 per share. Next, we consider whether a fairness opinion adopting the traditional template—which assesses fairness to the SPAC by comparing the value of consideration with estimates of the target's value—can address this question.

4. Post-Merger Value

In considering this question, assume that financial advisors preparing a fairness opinion follow the practice of market participants by assuming a value of $10 per SPAC share. Notably, this is a conservative valuation assumption because it is likely to overstate the value of transaction consideration, making it more difficult for a financial advisor to consider it fair to the buyer in comparison with estimates of the target's value. As the assumed transaction consideration increases, so too must estimates of the target's value to sustain a finding of fairness. Nevertheless, a financial advisor may regard transaction consideration calculated on this basis as fair to the SPAC. Taken at face value, this finding would suggest that the target is fairly valued under an assumed $10 value for the SPAC shares. Such a

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85. An alternative approach for the target would be to focus on the SPAC's pre-merger dilution, that is, on the net cash per share of $8, in which case in negotiations the target's managers would inflate the target's value by 25%—to adjust for the pre-merger dilution—from $40 million to $50 million.

86. Klausner, Ohlrogge & Ruan, *supra* note 27, at 255 (finding evidence consistent with the implication "that targets tend to negotiate deals that protect themselves from SPACs' costs").

87. *See id.* at 25.

conclusion also suggests that the financial advisor valued the target more highly than did the target's own managers, who had incentives to exaggerate the target's value in response to an overstated transaction consideration.[88] However, if we accept the financial advisor's high view of the target's value, does it follow that the de-SPAC would be fair to public shareholders, representing at least $10 value per share to them, even if the opinion's conclusion only addresses fairness to the SPAC?

The answer is no. To be clear, the fairness opinion in this example has not concluded that the SPAC shares are worth $10 each; they may not be, given the dilutive effects of the SPAC structure. Instead, the conclusion is that the *target* itself is at least worth the assumed $10 per SPAC share in consideration paid. From public shareholders' perspective, one must consider the value of the combined entity rather than that of the target alone since these shareholders are left with post-merger shares if they forgo their redemption rights. One cannot be assured that the post-merger company is worth at least $10 per share. The reason, again, is dilution. The intuition is that the target itself may be worth more than the assumed consideration, but dilution in the SPAC can leave the combined company worth less than $10 per share. Accordingly, even accepting that a target is worth consideration valued at $10 per SPAC share does not guarantee that a de-SPAC represents at least $10 per share value to public SPAC shareholders.

Recall the simplified example in which a SPAC raises $10 million by issuing one million shares to public shareholders for $10 per share and issues 250,000 founder shares to its sponsor for a nominal amount. Assume that the target shareholders receive five million shares assumed to be worth $10 and, per a fairness opinion, that a financial advisor's estimates of target value exceed the consideration of $50 million calculated on this basis. The post-merger value of the company's shares, including those of public SPAC shareholders, will still represent less than $10 per share due to the dilution from founder shares. The company's post-combination value, disregarding non-cash sources of value, is $60 million, including the SPAC's $10 million cash, making the post-merger share value equal to $9.60, calculated as $60 million divided by 6.25 million shares. As this example illustrates, even if we accept at face value the financial advisor's opinion that the target is

88. Recall the example at *supra* text accompanying note 85 in which a target board would inflate the target's value above its $40 million valuation to avoid an unfavorable deal when receiving consideration assumed to be worth $10 per share. Leaving aside non-cash sources of value, the target board would insist on a pre-merger value of $50 million, representing a value to the target's shareholders of $40 million when using an assumed value of $10 per SPAC share. On these facts, a financial advisor finding the transaction consideration to be fair to the SPAC would value the target at $50 million or more—significantly above the target board's estimate.

worth consideration valued assuming a $10 SPAC price, the dilutive effects may not be offset.[89]

To be clear, the claim here is not that de-SPACs cannot be fair to public shareholders due to the impact of dilution. They can because a de-SPAC may generate non-cash sources of value that offset dilution, making the merger fair to public SPAC shareholders. These sources can include the benefits of the company's newly public status or the expertise brought by the sponsors to the target's business.[90] But what fundamentally matters to public shareholders is not the net cash per SPAC share, which represents the cash value a SPAC brings to a de-SPAC, but the post-merger value per share. If a SPAC offers, say, $5.25 of value per share as consideration, one would not expect a target to offer $10 per share in exchange. But even if the target did exchange $10 per share, the de-SPAC may be unfair to public shareholders.

Financial advisors can overcome these valuation challenges if they assess the value of the post-merger entity, accounting for the dilutive effects of the SPAC structure. They will face other challenges too, as discussed next.

5. Reliance on Management-Provided Projections

In providing fairness opinions, financial advisors must also grapple with the accuracy of management-provided financial projections, upon which their valuation analyses often depend. For example, the commonly used discounted cash flow (DCF) methodology includes the input of free cash flows, which is provided by the target company's managers. While financial advisors assume, without independent verification, that these projections are accurate, complete, and reasonably prepared on a basis reflecting management's best currently available estimates, recent systematic empirical evidence suggests that projections may be overstated in de-SPACs,[91] which raises doubts about the accuracy of financial analyses that depend on them.

89. Again, we can accept that the target is worth consideration valued assuming a $10 SPAC price without accepting that the SPAC shares are in fact worth $10 each. Here, accepting the advisor's opinion at face value requires us to disregard the target's incentives to overstate its value in response to the inflated assumed value of SPAC shares.

90. Klausner, Ohlrogge & Halbhuber, *supra* note 16, at 21–22.

91. *See* Elizabeth Blankespoor, Bradley Hendricks, Gregory Miller & Douglas Stockbridge, *A Hard Look at SPAC Projections*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 20, 2022), https://corpgov.law.harvard.edu/2022/01/20/a-hard-look-at-spac-projections/ [https://perma.cc/B5G7-G4VU] (SPAC targets make more optimistic projections than comparable firms in other settings); *see also* Elizabeth Blankespoor, Bradley Hendricks, Gregory Miller & Douglas Stockbridge Jr., *A Hard Look at SPAC Projections*, 68 MGMT. SCI. 3975 (2022). *But see* Kimball Chapman, Richard Frankel &

The suitability of a DCF model is questionable for newly formed and early-stage businesses, which is a concern for target companies in de-SPACs. Reliable cash flow estimates are crucial for the DCF model, but this can be a challenge for such companies.[92] The Delaware Court of Chancery has declined to apply DCF valuation because "in the absence of reasonably reliable contemporaneous projections, the degree of speculation and uncertainty characterizing the future prospects of [the relevant company] and the industry in which it operates make a DCF analysis of marginal utility as a valuation technique."[93] Investment banks have also noted the difficulty of valuing start-ups using a DCF model, as the range of potential outcomes is vast.[94] A valuation handbook warns against using unrealistic financial projections, which is "a common pitfall in the event that management projections . . . are used without independently analyzing and testing the underlying assumptions."[95]

Relying on management-provided projections can also compromise the use of other valuation methodologies. For instance, financial advisors often use a comparable company analysis to derive an implied enterprise value for a target from the market value and trading multiples of similar companies.[96] Forecasted earnings or revenue of the target, which management may provide, are used as an input.[97] Similarly, comparable transactions analysis estimates the value of a company using comparable transactions, and management-provided forecasts of earnings or revenue are

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Xiumin Martin, SPACs and Forward-Looking Disclosure: Hype or Information? 29–30 (Oct. 20, 2021) (unpublished manuscript), https://ssrn.com/abstract=3920714 [https://perma.cc/4DEZ-JW7Z] (finding evidence that "is consistent with the argument that forward-looking information mitigates information asymmetry, aiding price discovery" and "inconsistent with the supposition that disclosing such information enables SPACs to hype and mislead investors").

92. *See, e.g.*, *PwC Deals Insights: How to Value A Start-Up Business*, PWC, https://www.pwc.com/lv/en/news/how-to-value-start-up-business.html [https://perma.cc/7GL2-URNK] (last visited May 9, 2023); ANKUL AGGRAWAHL & NITIN BAHL, KPMG, START-UPS AND EARLY STAGE COMPANIES: A VALUATION INSIGHT (2021), https://assets.kpmg/content/dam/kpmg/kw/pdf/insights/2021/05/valuation-startup-web.pdf [https://perma.cc/6M9Z-GV39] ("For early-stage companies there are, without doubt, challenges associated with forecasting future cash flows, correctly reflecting the risks (specific and systemic) as well as capturing the evolving risk-return profile over time.").

93. Doft & Co. v. Travelocity.com Inc., No. Civ.A 19734, 2004 WL 1152338, at *7 (Del. Ch. 2004).

94. MICHAEL J. MAUBOUSSIN & DAN CALLAHAN, MORGAN STANLEY, COUNTERPOINT GLOBAL INSIGHTS: EVERYTHING IS A DCF MODEL 5 (2021), https://www.morganstanley.com/im/publication/insights/articles/article_everythingisadcfmodel_us.pdf [https://perma.cc/3ZQB-4C54] ("Valuation is tricky early in a company's life cycle. Start-ups are difficult to value using a discounted cash flow model because the range of potential outcomes is so great.").

95. ROSENBAUM & PEARL, *supra* note 66, at 145–46, 146 n.27.

96. *See id.* at 13–15.

97. *See, e.g.*, Delwinds Ins. Acquisition Corp., Joint Proxy Statement/Consent Solicitation/Prospectus (Form 424(b)(3)) (Aug. 30, 2022), at 157 (referring to analyses provided by financial advisor Houlihan Lokey); Gores Guggenheim, Inc., *supra* note 31, at 203 (referring to analyses provided by financial advisor Barclays Capital).

often used as an input.[98] In consequence, these alternative methodologies may be dependent on inputs from target management and, therefore, susceptible to overstatement.[99]

6. Identifying Comparable Transactions

As discussed earlier, targets have incentives to inflate their values during de-SPAC negotiations due to the convention of valuing SPAC shares at $10, an overstated amount.[100] SPAC fiduciaries have incentives to close deals, potentially exacerbating the issue by leading SPACs to overpay for targets.[101] Financial advisors may nevertheless rely on comparable transactions analysis to determine a target's value, under which they infer a target's value by using the financial metrics, including price, of peer companies that have recently undertaken comparable transactions, including de-SPACs.[102] Since the prices of these deals may themselves be inflated, financial advisors may gain false comfort from these comparisons—a reason for users to use caution in relying on these opinions.

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In sum, financial advisors face significant challenges under the traditional valuation template. They will be addressing the fairness of transaction consideration to the SPAC by comparing transaction consideration with estimates of the target's value; if the consideration lies below or within the range of estimated target values, financial advisors will typically regard the consideration as fair to the buyer. Even if advisors assume that SPACs are valued at $10 per share, we cannot be assured that the value of the post-merger entity exceeds $10 and is therefore fair to public shareholders.

Rather, to address fairness to public SPAC shareholders, a fairness opinion should assess the post-merger entity's value, accounting for the dilutive aspects of the SPAC structure. The opinion would need to be contingently stated as key inputs, such as the extent of redemption and exercise of warrants and perhaps even the terms of related financings, are

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98. *See, e.g.*, Queen's Gambit Growth Cap., Proxy Statement/Prospectus (Form 424(b)(3)) (Mar. 15, 2022), at 138 (referring to analyses provided by financial advisor Guggenheim Securities).

99. For greater discussion of these valuation methods, see DAVID P. STOWELL, INVESTMENT BANKS, HEDGE FUNDS, AND PRIVATE EQUITY 91–94 (3d ed. 2017).

100. *See supra* note 16 and accompanying text.

101. *See supra* note 30 and accompanying text.

102. *See, e.g.*, Gores Guggenheim, Inc., *supra* note 31, at 202–03 (referring to analyses provided by financial advisor Guggenheim Securities); Ignyte Acquisition Corp., Proxy Statement for Special Meeting of Ignyte Acquisition Corp. (Form DEFM 14A) (Oct. 7, 2022), at 170 (referring to analyses provided by financial advisor River Corporate Advisors).

unknown. While highly reputable financial advisors might perform these analyses addressing fairness to public shareholders, and even present them to a SPAC board, they may be reluctant to give a written opinion finding fairness given the magnitude of dilution associated with the conventional SPAC structure and possibly also the degree to which valuation depends on contingencies. These analyses may also rely on management-provided projections and comparable transactions analysis, producing optimistic values and suggesting that even these opinions ought to be greeted with caution.

III. EMPIRICAL RESULTS

This Part examines the use of fairness opinions in de-SPACs completed from January 1, 2019 to January 1, 2023. These de-SPACs and fairness opinions were identified using data obtained from DealPointData; fairness opinions, proxy statements, merger agreements, and, where needed, press announcements were then manually reviewed. All fairness opinions used in de-SPACs during this four-year period were identified.

Financial advisors giving fairness opinions generally adhered to existing norms among providers of fairness opinions, opining on the fairness of transaction consideration to the SPAC itself—the party paying consideration—rather than to public SPAC shareholders, thereby avoiding the thrust of regulatory concerns. This practice continued even after the SPAC Reform Proposal of March 30, 2022. Furthermore, financial advisors generally explicitly assumed a $10 value for SPAC shares, a conservative assumption generally making it harder to find fairness, and did not adjust for the dilution in a SPAC's structure. Despite this and the likelihood that targets overstated their values in negotiating merger terms, financial advisors found transaction considerations to be fair to SPACs from a financial perspective, which suggests that they formed highly optimistic views of targets' values.

A handful of financial advisors claimed to address a de-SPAC's fairness to public shareholders, but failed to provide supporting analysis. Additionally, almost all of the financial advisors that gave fairness opinions were small, boutique firms, even though in many of these transactions, major investment banks—including Goldman Sachs, Morgan Stanley, Credit Suisse Securities, Deutsche Bank Securities, Banc of America Securities, and Citigroup Global Markets—acted as SPAC IPO underwriters, M&A advisors, and/or placement agents.

A. Basic Data

Until recently, fairness opinions were significantly less common in de-SPACs than in public mergers, where target boards routinely obtain them. Typically, in de-SPACs, fairness opinions have been used for transactions in which the target company had some affiliation with the sponsor.[103] Out of 387 de-SPACs completed between January 1, 2019 and January 1, 2023, 59, or 15%, included a fairness opinion. The proportion is slightly higher for de-SPACs involving Delaware-incorporated SPACs (17%). However, following the SEC proposed SPAC reforms on March 30, 2022, fairness opinions have been used more frequently. For de-SPACs announced before this date, only 13% included a fairness opinion, while for those announced afterward, fairness opinions were obtained in 61% of deals. Corresponding data for deals involving Delaware-incorporated SPACs are slightly higher. Refer to Table 1 for details.

TABLE 1: PROPORTION OF COMPLETED DE-SPACS BETWEEN JANUARY 1, 2019 AND JANUARY 1, 2023 INVOLVING SPAC USE OF FAIRNESS OPINIONS.

	No. of de-SPACs	**No. of de-SPACs with Fairness Opinions**	**Proportion of de-SPACs with Fairness Opinions**
Announced before 1/3/22 (*MultiPlan*)	357 (DE: 228)	47 (DE: 34)	13% (DE: 15%)
Announced from 1/3/22 to 3/30/22 (date of SEC SPAC proposal)	12 (DE: 6)	1 (DE: 1)	8% (DE: 17%)
Announced after 3/30/22	18 (DE: 11)	11 (DE: 7)	61% (DE: 64%)
Total	387 (DE: 245)	59 (DE: 42)	15% (DE: 17%)

(Data in parentheses for de-SPACs involving Delaware-incorporated SPACs).

103. *See supra* note 18.

Almost all fairness opinions were provided by smaller boutique financial advisors. Moelis & Company, Duff & Phelps, and Houlihan Lokey were the most frequent authors of these letters, providing ten, nine, and six de-SPAC fairness letters, respectively. Other advisors include some active participants in high-end transactions and several with relatively low visibility.[104] The only major investment bank to provide a fairness opinion during the period studied was Barclays Capital, an affiliate of the major UK-based financial services firm.

In accordance with convention, all opinions determined that the de-SPAC's consideration was fair from a financial point of view. However, the party to whom transaction consideration was considered fair varied. Of the fifty-nine opinions obtained since 2019, forty-five (76%) explicitly addressed the fairness of consideration *to the SPAC*. Of the fourteen fairness opinions that did not, only six explicitly concluded that the de-SPAC's consideration was fair to public SPAC shareholders. The remaining eight opinions did not specify the party to whom the transaction consideration was considered fair (two fairness opinions), explicitly concluded that the transaction consideration was fair to the SPAC shareholders but did not distinguish between affiliated and public shareholders (five fairness opinions), or determined that the transaction consideration was fair to the *target* company (one fairness opinion). Prior to the SPAC Reform Proposal, 83% (forty out of forty-eight) of fairness opinions addressed fairness to the SPAC, but afterward, only 45% (five out of eleven) did. Of the other fairness opinions provided after the SPAC Reform Proposal, half addressed fairness to public SPAC shareholders (three opinions), while the remainder assessed fairness to SPAC shareholders generally, without limitation (three opinions). Please refer to Table 2 for more details.

104. The other providers of fairness opinions (and the number of de-SPACs for which they did so) were Barclays Capital (1), Benchmark (1), BTIG (1), Canaccord Genuity (1), Cassel Salpeter (3), Craig-Hallum Capital Group (1), EverEdgeGlobal (1), Guggenheim Securities (2), King Kee Appraisal & Advisory (1), Lake Street Capital Markets (1), Lincoln International (1), Mediobanca (1), Northland Securities (4), Primary Capital (1), River Corporate (1), Rothschild (2), Scalar Group (1), Scura Partners (2), Solomon (1), Stephens (1), SVB Leerink (1), ThinkEquity LLC (3), ValueScope (1), and Vantage Point Advisors (1).

TABLE 2. SUBJECT MATTER OF FAIRNESS OPINIONS—PER THE LETTER'S CONCLUDING OPINION—IN COMPLETED SPACS BETWEEN JANUARY 1, 2019 AND JANUARY 1, 2023.

	No. of Fairness Opinions	**Fair to SPAC (1)**	**Fair to public SPAC share-holders (2)**	**Fair to SPAC share-holders generally (3)**	**Fair (without saying to whom) (4)**	**Fair to target (5)**
Announced before 1/3/22 (*MultiPlan*)	47 (DE: 34)	39 (DE: 28)	3 (DE: 2)	2 (DE: 1)	2 (DE: 2)	1 (DE: 1)
Announced from 1/3/22 to 3/30/22 (SPAC Reform Proposal)	1 (DE: 1)	1 (DE: 1)	0 (DE: 0)	0 (DE: 0)	0 (DE: 0)	0 (DE: 0)
Announced after 3/30/22 (SPAC Reform Proposal)	11 (DE: 7)	5 (DE: 4)	3 (DE: 2)	3 (DE: 1)	0 (DE: 0)	0 (DE: 0)
Total	59 (DE: 42)	45 (76%) (DE: 33) (79%)	6 (10%) (DE: 4) (10%)	5 (8%) (DE: 2) (5%)	2 (3%) (DE: 2) (5%)	1 (2%) (DE: 1) (2%)

Each fairness Opinion Concerns a Distinct de-SPAC. (Data in parentheses for de-SPACs involving Delaware-incorporated SPACs).

Recall that fairness opinions in buy-side public mergers generally assess fairness by comparing the consideration paid in a transaction with the estimated values of the target. With an exception, discussed later, this approach was generally adopted by the de-SPAC fairness opinions examined in this analysis. Moreover, of the fifty-nine opinions given since January 1, 2019, forty-seven, or 80%, either assumed that the SPAC's shares offered as consideration in the de-SPAC were valued at $10 or referred to related proxy statements or merger agreements which made that assumption. Notably, many of these opinions acknowledged that the assumed $10 value did not account for dilution. As an example, one opinion explained that "such $10.00 value [is] based on Acquiror's initial public offering and Acquiror's approximate cash per Acquiror Class A Ordinary Share outstanding (excluding, for the avoidance of doubt, the dilutive impact of outstanding Acquiror Class B Ordinary Shares or any warrants to purchase Acquiror shares) . . . ."[105]

Six fairness opinions (10%) used a recent market price for the SPAC's shares, which was marginally above $10 in all cases. The remaining six opinions (10%) simply stated the merger consideration, apparently without assigning value to the share consideration.

In fifty-one of the total fifty-nine opinions examined, the financial advisors disclosed their fees. For these fifty-one opinions, the mean and median fees charged were $502,000 and $450,000, respectively, with a range spanning from $37,500 to $1.5 million. For some de-SPACs, financial advisors also advised the SPAC or a SPAC transaction committee, earning additional fees beyond those reported here. The most frequently observed fees were $1 million (for twelve opinions) and $500,000 (for six opinions).

B. Assessment

As Table 2 shows, forty-three fairness opinions explicitly addressed fairness to the SPAC without considering whether the de-SPAC consideration was fair to public SPAC shareholders (Column 1). The methodological approach and detailed financial analyses disclosed in these letters and the accompanying proxy materials[106] did not provide assurance to public SPAC shareholders either. Following convention, financial advisors assessed whether the aggregate transaction consideration paid by the SPAC was fair relative to estimated values of the target, without adjusting for dilution, including the possibility of redemption. Many financial advisors were explicit that their opinion "does not address the fairness of the [de-SPAC] or any aspect or implication thereof to, or any other consideration of or relating to, the holders of any class of securities, creditors or other constituencies of the [SPAC] or Target."[107]

All opinions were careful to avoid lending weight to the projections used as inputs in their valuation analyses, noting that these projections were supplied by management and had not been independently verified or assessed for reasonableness. Critically, many opinions assumed the SPAC shares offered as consideration were valued at $10, often an inflated value. However, even accepting the advisor's view that the target's value exceeded

105. Tailwind Two Acquisition Corp., Proxy Statement for Extraordinary General Meeting of Tailwind Two Acquisition Corp., Prospectus for Shares of Common Stock of Tailwind Two Acquisition Corp. (Form 424(b)(3)) (Feb. 14, 2022), at K-2 (letter from Houlihan Lokey Capital regarding Terran Orbital Corp/Tailwind Two Acquisition Corp. de-SPAC).

106. The methodological approach and detailed financial analyses tended to be disclosed in the accompanying proxy statement's description of the fairness opinion rather than in the fairness opinion letter itself.

107. Gores Metropoulos II, Inc., Proxy Statement/Prospectus (Form 424(b)(3)) (Dec. 23, 2021), at J-2.

this overstated value, it does not necessarily follow that the transaction represented more than $10 per share value to public shareholders,[108] which is the minimum criterion for fairness to these shareholders.[109] As explained above, what matters to public shareholders is the value of the SPAC post-merger rather than that of the target. Even if the target is worth consideration valued at $10 per SPAC share, the post-merger entity may be worth less than the redemption value due to dilution inherent in the SPAC.

Consider next the fairness opinions addressing the fairness of the merger consideration to shareholders in general (Column 3 of Table 2). In their conclusory statements, these opinions failed to distinguish between affiliated and public shareholders, stating simply that the transaction consideration was fair to the SPAC's shareholders. In theory, the interests of shareholders are often conflated with those of the company itself, and there was nothing in the methodological approaches used by financial advisors to suggest that they were doing anything other than addressing fairness to the SPAC itself. However, these opinions departed from the standard formulation that addresses fairness to the SPAC, and it is assumed that the authors intended to distinguish between the interests of the SPAC and its shareholders. Nevertheless, these opinions did not provide comfort for public shareholders as they failed to consider their distinct interests and to adjust for dilution.

One financial advisor was responsible for two of the other categories of opinions, namely those purporting to address fairness without identifying to whom (two fairness opinions) and one opinion purporting to address fairness to the target (Columns 4 and 5 of Table 2).[110] Nothing in the opinions of the former category suggested that the financial advisor was assessing fairness to any particular class of shareholder, as its methodological approaches were consistent with the opinions addressing fairness to the SPAC itself. Regarding the opinion on fairness to the target, it is noteworthy that the letter was addressed to the SPAC's board, yet it referred to the target in its concluding statement on fairness, which appears to be a mistake.[111] None of these opinions took into account dilution or the distinct position of public shareholders.

The final category of fairness opinions determined that the de-SPAC was fair to public SPAC shareholders (Column 2 of Table 2). This category included opinions from King Kee Appraisal and Advisory (or KKG), Scalar

108. *See* Section III.D.3.

109. *See* Section III.B.

110. The advisor was ThinkEquity LLC.

111. The letter conflicts with the proxy statement's description of the letter as having been prepared to express an opinion to the SPAC's board "as to the fairness . . . to [the SPAC] of the Merger Consideration, pursuant to the Business Combination." Aldel Financial Inc., Proxy Statement for Special Meeting of Aldel Financial Inc. (Form DEFM 14A) (Nov. 10, 2021), at 123.

Group, Barclays Capital, Stephens, Northland Securities, and Lincoln International.[112] Three of these opinions were provided after the SPAC Reform Proposal: by Stephens in the Grey Rock Investment Partners/Executive Network Partnering Corp. de-SPAC, Northland Securities in the RW National Holdings/PropTech Investment Corp. II de-SPAC, and Lincoln International in the NewAmsterdam Pharma Holding B.V./Frazier Lifesciences Acquisition Corp. de-SPAC. While these three opinions made conclusory statements addressing fairness to public shareholders, their analyses failed to distinguish these statements from the opinions explicitly addressing fairness to the SPAC itself. None of these opinions adjusted for dilution, including for the possibility of shareholders redeeming their shares, nor did they differentiate between the financial positions of affiliated and public shareholders. They compared the transaction consideration with estimated values of the target without assessing whether the SPAC's post-merger value exceeded $10 per share.

Despite their conclusions, the analyses by King Kee and Scalar in their fairness opinions and supporting presentations in the VIYI Algorithm/Venus Acquisition Corp. and the Revelation Biosciences/Petra Acquisition de-SPACs, respectively, also provided no explicit basis for their assessment of fairness to public SPAC shareholders.[113] For its opinion and supporting analysis, King Kee derived estimates of the target's value from a comparison with selected comparable public companies. The advisor's analysis "resulted in a wide range of equity values of between $4.26 million to $1.63 billion," leading the advisor to conclude that "the valuation of [the target] seemed fair and reasonable and may bring potential increased value to [the SPAC's] shareholders."[114] The advisor also performed DCF analysis, which, using a discount rate of 20%, "resulted in the equity values of $400 million, which support the consideration contemplated in the Merger Agreement."[115] Nowhere in its financial analysis does the advisor consider the position of public SPAC shareholders or the company's post-merger value. Its opinion nevertheless claims to be "limited to the fairness, from a financial point of view, of Merger Agreement to the independent holders of

112. The transactions were for de-SPACs involving VIYI Algorithm Inc./Venus Acquisition Corp. (King Kee Appraisal and Advisory); Revelation Biosciences/Petra Acquisition Inc. (Scalar); Polestar/Gores Guggenheim (Barclays Capital); Grey Rock Investment Partners/Executive Network Partnering Corp. (Stephens, Inc.); RW National Holdings/PropTech Investment Corp. II (Northland Securities); NewAmsterdam Pharma Holding B.V./Frazier Lifesciences Acquisition Corp. (Lincoln International).

113. *See* Venus Acquisition Corp., Proxy Statement for the Extraordinary General Meeting of Shareholders of Venus Acquisition Corp., (Form DEFM 14A) (Oct. 3, 2022), at 97–99; Petra Acquisition, Inc., Proxy Statement for Special Meeting of Petra Acquisition, Inc. and Prospectus for Shares of Common Stock of Petra Acquisition, Inc. (Form 424(b)(3)) (Dec. 16, 2021), at 105–12.

114. Venus Acquisition Corp., *supra* note 113, at 99.

115. *Id.*

the ordinary shares of [the SPAC]," an apparent reference to the SPAC's public shareholders.[116]

For its part, Scalar derived estimates of the value of the target from a comparison with selected comparable public companies in the biotech and pharmaceutical industries, allegedly chosen for the similarity of their operations to those of the target.[117] The supporting analyses applied adjustments to determine "a range of selected implied equity values" for the target of $43 million to $126 million, which "compares to the equity consideration of $106 million to be issued to [the target's] shareholders per the Business Combination Agreement."[118] In addition, the financial advisor reviewed de-SPACs and IPOs involving certain selected healthcare companies, listing their transaction or pre-money equity values.[119] Oddly, the advisor did not disclose any resulting valuation ranges for the target. Based on scant analyses, broadly mirroring those of fairness opinions addressing fairness to SPACs themselves, the advisor concluded that the merger consideration is fair not only to the SPAC but also to its public shareholders.[120] The opinion failed to consider the distinct position of public shareholders, having not attempted to assess the SPAC's post-merger value.

Turning to the opinion by Barclays in the Polestar Holding AB/Gores-Guggenheim de-SPAC, this letter and the supporting analyses would seem to provide a plausible basis for its view that the de-SPAC consideration was fair to the public SPAC shareholders. In contrast to other fairness opinions, Barclays undertook a pro forma analysis to assess the value of the post-merger entity. The parties adopted a double-dummy structure under which a newly formed holding company—here, ListCo—issued securities to SPAC and target shareholders.[121] Accordingly, public shareholders received consideration in the de-SPAC, allowing Barclays to give an opinion to these shareholders consistent with the established practice where opinions address the fairness of transaction consideration solely to the parties paying or receiving consideration.[122]

Focusing on ListCo, the post-merger entity, Barclays calculated a pro forma transaction equity value for ListCo, assuming a value of $10 for the stock of public shareholders. Barclays also calculated pro forma equity value reference ranges using comparable company and DCF

116. *Id.* at Annex C. The opinion concludes that the consideration is fair to "the shareholders of [the SPAC]," but states both that the financial advisor was asked to opine on fairness to "independent holders of the ordinary shares of [the SPAC]" and that the opinion is limited to fairness to this same class of shareholder. *Id.*

117. Petra Acquisition, Inc., *supra* note 113, at 107–08.

118. *Id.* at 108.

119. *Id.* at 110.

120. *Id.* at 111; *see also id.* at Annex D.

121. As to de-SPAC structures, see *infra* notes 176–78 and accompanying text.

122. *See supra* Section II.D.1.

methodologies.[123] For each of these valuation methodologies, the equity value reference range exceeded the transaction equity value for ListCo,[124] suggesting that ListCo would be worth more than the transaction consideration. Additionally, Barclays calculated the pro forma ownership percentage in ListCo of the public SPAC shareholders—that is, the public SPAC shareholders' percentage ownership of the post-merger entity. Barclays compared this figure (3.8%) to pro forma ownership percentages corresponding to ListCo's equity value reference ranges, assuming a constant value for public shareholders' stock consideration.[125] For each valuation methodology, public shareholders' pro forma ownership percentage significantly exceeded the pro forma ownership percentages corresponding to the equity value reference ranges, demonstrating that ListCo would be worth significantly more than the transaction consideration.

Though not explicitly calculated or the basis of its opinion, Barclays's financial analyses (disclosed in the SPAC's proxy statement), including its assumptions, appear to indicate that public shareholders received consideration in the de-SPAC worth more than the redemption alternative. This is key for Barclays's conclusion as to the fairness of the transaction consideration to public shareholders. Using public shareholders' ownership percentage in ListCo (3.8%) and pro forma equity value reference ranges, the value per share of the post-merger entity exceeded $10 per share.[126]

The analysis seemed to account for dilution inherent in the merger by allowing a comparison of public shareholders' share of the merger consideration with their estimated share of the post-combination company's value. But the opinion and summarized financial analyses made simplifying assumptions, including assuming a value of $10 per ListCo share and no redemption.[127] The opinion and financial analyses disclosed in the SPAC's

123. Gores Guggenheim, Inc., *supra* note 31, at 199, H-3 (analyses and fairness opinion of Barclays).

124. *Id.*

125. Specifically, Barclays calculated public SPAC shareholders' pro forma ownership percentage in ListCo (3.8%) as the quotient obtained by dividing of the value of these shareholders' stock in ListCo ($800 million) by ListCo's pro forma transaction equity value ($21,253 million). Barclays also calculated pro forma ownership percentages corresponding to the pro forma equity value reference ranges as the quotient of $800 million and the pro forma equity value reference ranges. The ownership percentage for each equity value reference range was less than 3.8%.

126. For instance, calculating 3.8% (representing public SPAC shareholders' pro forma ownership percentage in ListCo) of the lower bound of the lowest of the equity value reference ranges ($28,640 million) and then dividing the resulting number ($1,088 million) by the number of shares to be held by unaffiliated shareholders (80 million) equals $13.60, apparently representing a conservative estimate of the value per share of the post-merger entity. Alternatively, one might divide the same estimated value of ListCo ($28,640 million) by the total number of shares of ListCo after the merger.

127. Gores Guggenheim, Inc. *supra* note 31, at 197–204; *see also id.* at 25 (displaying a no-redemption scenario).

proxy statement therefore failed fully to adjust for relevant factors and arguably fell short of the sort of material on which a SPAC board should rely if it is to recommend a de-SPAC to its public shareholders. But the opinion and supporting analysis still provided some basis for assessing fairness to public shareholders.

In short, only six (10%) of the fairness opinions given in de-SPACs since January 1, 2019, on their face, addressed fairness to public shareholders. And upon deeper inspection, with one possible exception, none of these opinions addressed the substantive fairness concerns for public shareholders or overcame the valuation challenges inherent in the SPAC process. These opinions are therefore not responsive to Proposed Item 1606 and should not have weight in judicial proceedings focusing on fairness to public SPAC shareholders. The lone possible exception is also the only opinion provided by a major investment bank.[128] Apart from this opinion, none of the opinions attempted to adjust for the dilution inherent in the conventional SPAC structure. These results are consistent with those results, shown in Table 1 and Table 2, for de-SPACs involving Delaware-incorporated SPACs.

C. What Analyses Would Be Responsive?

To assess the value of a de-SPAC to public SPAC shareholders, it is necessary to determine the value of the post-merger entity, taking into account the position of nonredeeming public shareholders. This requires comparing public shareholders' $10 redemption option with per share value in the post-combination company, adjusting for dilution. Since the business combination has not occurred, the latter calculation must be done on a pro forma basis. Rather than adopt broad simplifying assumptions, the analyses should consider various possible scenarios—including different levels for redemption, contemporaneous financings (including any PIPE offering, assuming it is not already fully committed), and the exercise of warrants and any other derivatives. The analysis is likely to produce an extraordinarily wide range of possible outcomes. The results might be depicted as a matrix of values under various contingencies. This suggested approach differs from that used in the existing opinions.

The product might be considered a "has/gets" opinion, comparing what public shareholders have at the time of the opinion (a redemption right valued at $10 plus interest) with what they could receive under the de-SPAC based on the value of the pro forma post-merger entity. In theory, a financial advisor may regard the resulting values as suggesting a fair deal for public shareholders. In practice, however, a highly-reputable advisor may be

128. *See supra* notes 121–26 and accompanying text.

unwilling to give an opinion to this effect—and they have generally not done so—given the likely extent of dilution under the conventional SPAC structure and perhaps also the missing valuation inputs.[129] Even without a formal opinion, however, advisors' analyses addressing the value of the post-merger entity would be relevant to SPAC boards seeking to address concerns about fairness to public shareholders.

D. Summary

The evidence highlights the difficulty of establishing the fairness of a de-SPAC to public shareholders. The existing fairness opinions lack rigor. None of the opinions took into account the inherent dilution in the SPAC structure or adjusted for the possibility of redemption. Instead, the vast majority of fairness opinions relied on the public M&A model, where buy-side opinions address whether the transaction consideration paid by the buyer is fair from a financial point of view to the buyer (here, the SPAC), rather than whether the transaction is fair to a particular class of shareholders.

These opinions addressing only fairness to the SPAC nevertheless departed from the public M&A playbook by basing aggregate transaction consideration on a $10 value for SPAC shares. This assumption often produces an overstated figure, since it fails to adjust for dilution, and encourages targets to inflate their value in agreeing to merger terms. Despite this, the opinions, buoyed by optimistic estimates of target values, found that the aggregate consideration offered was fair to SPACs. Yet, as noted above, a de-SPAC should be considered fair to public shareholders only if it provides them with value of at least $10 per share, the amount they would receive if they exercised their redemption rights. Even accepting that the targets were worth the value of consideration offered (calculated assuming a $10 value per SPAC share), as this article demonstrates, we cannot conclude that a de-SPAC represented a value of at least a $10 per share to public SPAC shareholders due to the dilution in the SPAC. Accordingly, these opinions addressing fairness to the SPAC fail in their intended purpose, providing little informational content to SPAC fiduciaries and no comfort to public shareholders. These opinions and the supporting analyses were nevertheless disclosed to public investors, in an apparent attempt to offer them assurance.

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129. Subjecting advisors to heightened risk of Section 11 liability would increase their reluctance to provide opinions unless deal terms changed to enhance fairness for public shareholders. *See infra* Sections V.C–D. Arguments about advisor reluctance to give opinions are not meant to criticize the SPAC Reform Proposal or the Court of Chancery's approach, as neither mandates the use of opinions. Additionally, the anticipated reluctance from reputable financial advisors is largely influence by the significant dilution inherent in the conventional SPAC structure.

A handful of opinions purported to address fairness to public shareholders, the perspective that matters, although, with one exception, these failed to provide supporting analyses. These opinions appear to have misleadingly concluded that the consideration was fair to public shareholders while their analysis failed to address the question. The remaining fairness opinions appeared even less carefully prepared, by failing to specify to whom the transaction consideration was fair, concluding that the transaction consideration was fair to shareholders but without distinguishing between affiliated and public shareholders, or mistakenly concluding that the consideration was fair to the target.

Of course, a de-SPAC may provide public shareholders with value greater than $10, making a deal fair from their perspective. But demonstrating this requires financial analyses different from those that financial advisors have provided to date. These more revealing analyses would need to value the post-merger entity, factoring in numerous contingencies. This requires financial advisors to conclude that the de-SPAC generates sufficient value to offset the dilution that is inherent in the conventional SPAC structure.

Remarkably, only a single major investment bank has given a fairness opinion for de-SPACs despite these firms routinely serving as underwriters, M&A advisors, and placement agents during the period under review. In part, this apparent refusal by large banks may stem from the difficulty of addressing fairness to public shareholders, the issue of concern for boards, courts, and regulators. While meaningful opinions may be given (addressing pro forma post-merger value), highly reputable advisors may be reluctant to give such opinions due to the likely magnitude of dilution and possibly also the number of unknown valuation inputs. Still, these advisors may be willing to give board presentations with their analyses. (That alone is not problematic, because what should concern a board discharging its fiduciary duties is not the receipt of a fairness opinion but its consideration of relevant financial analyses). As for the sole opinion given by a major investment bank, this might be explained by the relevant de-SPAC structure, which enabled the calculation of post-merger value, and perhaps by the target's high promise as a public company under the sponsor's influence.

The apparent refusal of major investment banks to give opinions addressing fairness *to SPACs* may seem puzzling. Because transaction consideration is more likely to be fair to a SPAC than its public shareholders, these opinions would seem more defensible than those addressing fairness to public shareholders. These opinions would also be more straightforward conceptually, aligning with the principle that fairness opinions should evaluate the fairness of consideration to parties paying or receiving consideration.[130] Yet opinions addressing fairness to SPACs may also be seen as dubious, due to the convention of assuming a SPAC value of $10 per share when calculating transaction consideration. Overstating the transaction consideration requires an optimistic valuation of the target to support a finding of fairness to the SPAC. The reluctance of major investment banks to provide even these opinions may also stem from the risk of reputational damage.

In essence, a low quality market emerged for SPAC fairness opinions. SPAC fiduciaries obtained opinions that provided no substance from less reputationally sensitive financial advisors and disclosed these opinions to public investors in an apparent effort to give assurance as these investors decided whether to exercise redemption rights.

IV. ENHANCED DISCLOSURE

Another theme underlying the emerging regulatory framework concerns heightening market participants' incentives to provide complete and accurate disclosures to SPAC investors, especially information they need in order to decide whether to exercise their redemption rights. This part assesses these protections from a policy perspective.

A. Section 11 and Incentives for Due Diligence

The SEC's proposed SPAC reforms would significantly enhance the prospect of liability under Section 11 of the Securities Act of 1933, which imposes near-strict liability on corporate insiders and certain secondary actors, including underwriters.[131] Under Proposed Rule 140a, an underwriter of a SPAC IPO will be deemed a statutory underwriter for the associated de-SPAC if the underwriter takes steps to facilitate the de-SPAC transaction or any related financing transaction, or if it otherwise participates in the de-SPAC.[132] Proposed reforms would also make target operating companies co-registrants with SPACs of a registration statement[133] and deem the business combination of a shell company to involve a "sale,"[134] making it less likely that de-SPACs will escape potential Section 11 liability.

130. *See supra* Section II.B.
131. *See* Securities Act of 1933 § 11(a), 15 U.S.C. § 77k (2018).
132. *SPAC Reform Proposal*, *supra* note 8, at 29486 (Proposed Rule 140a).
133. *Id.* at 29479 (amendments for Form S-4 and Form F-4).
134. *Id.* at 29488 (Proposed Rule 145a).

1. *Deeming SPAC IPO Underwriters de-SPAC Underwriters*

Little risk of underwriter liability exists in de-SPACs, significantly limiting the force of Section 11. Relative to the incentives they face in traditional IPOs, all gatekeepers—not only investment banks but also auditors and legal counsel—therefore face weaker incentives to assure the accuracy of corporate disclosures.

Before briefly discussing why this is the case,[135] I note that the comparison between de-SPACs and traditional IPOs is apposite because, from private companies' perspective, SPAC mergers can be viewed as alternatives to traditional IPOs, providing capital for growth, giving companies registered securities, allowing existing shareholders to sell, and enhancing corporate brands.

As to the reasons why gatekeepers face reduced liability risk and therefore reduced incentives to assure accuracy of disclosures, some de-SPACs do not require registration statements, although a majority does; the need for a registration statement turns on the precise transaction structure adopted and, relatedly, the availability of an exemption from registration.[136] In the most common SPAC structure, in which the SPAC sets up a subsidiary that merges with the target (with the target surviving as a wholly owned SPAC subsidiary),[137] the SPAC issues securities to target shareholders in consideration for the merger. It will typically register these shares because no exemption from registration is available; commonly, the target has a large number of non-accredited investors, more than the number permissible under relevant exemptions.[138]

In de-SPACs, investment banks routinely act as M&A advisors to SPACs or target companies and as placement agents in PIPE transactions. In acting as M&A advisors or placement agents, investment banks will rarely perform any of the functions specified for underwriter status;[139] in

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135. For a more detailed analysis, see Tuch & Seligman, *supra* note 3, at 327–39.

136. For a detailed discussion of transaction structures adopted in de-SPACs, see *id.* at 328–32.

137. For an example, consider the merger involving Soaring Eagle Acquisition Corp and Ginkgo, on which see Soaring Eagle Acquisition Corp., Registration Statement (Form S-4) (May 14, 2021). As to de-SPAC structures, see *infra* notes 173–76 and accompanying text.

138. For example, Rule 506 under Regulation D provides an exemption from registration for private placements to accredited investors and up to thirty-five non-accredited investors. 17 C.F.R. § 230.506 (2023).

139. *See* Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1093–94 (2016) (specifying the functions M&A advisor typically perform); *see also* 2 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 1469–70 (6th ed. 2019) [hereinafter 2 SECURITIES REGULATION] ("[E]ven a professional investment banker is *not* a statutory underwriter . . . in arranging a private placement on behalf of the issuer or a person in a control relationship with the issuer." (footnote omitted)).

fact, they may deliberately avoid performing any of those functions, wary of the potential for Section 11 liability if they do.[140]

The absence of underwriter liability in de-SPACs can be expected to significantly weaken incentives for investment banks to perform due diligence to assure the accuracy of corporate disclosures. In large part, investment banks have little incentive to require comfort letters and negative-assurance letters from auditors and lawyers, respectively, of the type they require as underwriters in traditional IPOs. If freed from responsibility for providing these letters, on which liability can arise, auditors and lawyers would not face potential liability to underwriters for material misstatements in, or omissions from, non-expertised portions of registration statements, as they do in traditional IPOs.

Although investment banks and other transaction participants in de-SPACs can be held liable under federal securities law other than Section 11, these provisions are inadequate substitutes for Section 11.[141] Nor is it likely that the reputational constraints upon M&A advisors or placement agents will compensate for the weakening of liability incentives. There is no reason to think that investment banks acting as M&A advisors or placement agents for SPACs have greater reputational capital at stake than do underwriters in traditional IPOs that would compensate for the absence of Section 11 liability. Indeed, firm commitment underwriters act as principals, buying the securities at issue, which more closely associates them with the transaction than are M&A advisors and placement agents involved in SPACs, which have more distant and less visible roles.[142]

Respected commentators suggest that due diligence in mergers may be stronger than in traditional IPOs.[143] But it is doubtful that this is true of de-SPACs. The structure of SPACs' and sponsors' remuneration gives

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140. A similar argument has been made in the direct-listings setting, on which see Allison Herren Lee & Caroline A. Crenshaw, *Statement on Primary Direct Listings*, U.S. SEC. & EXCH. COMM'N (Dec. 23, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23 [https://perma.cc/3PMD-A3EB] ("Sophisticated institutions that advise on primary direct listings may be incented to structure their participation to avoid such [underwriter] status.").

141. Tuch and Seligman, *supra* note 3, at 333–35.

142. In other words, disclosure errors in de-SPACs are less likely to lead to reputational damage to M&A advisors and placement agents in de-SPACs than they are to underwriters in traditional IPOs. As to the process by which adverse events can result in reputational damages, see ROY SHAPIRA, LAW AND REPUTATION: HOW THE LEGAL SYSTEM SHAPES BEHAVIOR BY PRODUCING INFORMATION 21–23 (2020).

143. STEPHEN M. BAINBRIDGE & IMAN ANABTAWI, MERGERS AND ACQUISITIONS: A TRANSACTIONAL PERSPECTIVE 256 (2017) ("M&A due diligence may be either more or less extensive than the due diligence conducted by potential § 11 defendants, depending on the particular goals of the parties to the transaction."); LOU R. KLING, EILEEN T. NUGENT & BRANDON A. VAN DYKE, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 8.02 (1992) ("[I]n many circumstances a [due diligence] review in the context of an acquisition must go further [than a review in the public offering area] if the Buyer is to be placed in a position to make a reasonable judgment about the achievability of its plans for, and prospects of, the Company.")

them incentives to support a deal if the alternative is no deal, especially as the acquisition window closes, diluting their incentives to perform robust diligence.[144]

It is also doubtful that due diligence performed by PIPE investors substitutes for the due diligence underwriters perform in an IPO. PIPE investors seek to be "cleansed" of material nonpublic information for insider trading purposes and will generally want any such information they receive to be publicly disclosed by the time the de-SPAC either is publicly announced or is consummated.[145] That imperative necessarily limits the scope of PIPE investors' due diligence on a SPAC and its target. PIPE investors may also obtain more favorable terms than public SPAC investors, weakening their incentives to undertake due diligence that inures to the benefit of public SPAC investors.[146]

The SEC would make SPAC IPO underwriters statutory underwriters of the related de-SPAC.[147] This core proposal is justified in principle because, as Joel Seligman and I have argued, the case for underwriter liability is as strong in the setting of de-SPACs as it is in that of traditional IPOs.[148]

First, the benefits of underwriter liability are at least as great for de-SPACs as they are for traditional IPOs. Both de-SPACs and traditional IPOs introduce largely unknown and untested companies to public markets, and in such settings, information asymmetries between investors and companies seeking capital are likely to be substantial. In both transactions, information comes from the companies themselves, parties with incentives to act opportunistically.[149] Like traditional IPOs, SPACs represent companies' best shot at capitalizing on their innovations, so firms face pressure to attract funds on the most favorable terms. These environments of high information asymmetries are precisely the ones in which the investor "protections of . . . federal securities law[] are typically most needed."[150] If anything, the benefits of underwriter liability may be greater in the SPAC setting because of the extent to which SPAC sponsors and SPAC IPO

144. *See supra* note 30 and accompanying text.

145. *See* Anna Pinedo, Brian Hirshberg & Ryan Castillo, *Top 10 Practice Tips: PIPE Transactions by SPACs*, MAYER BROWN (2020), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/10/top-10-practice-tips-pipe-transactions-by-spacs.pdf [https://perma.cc/22RQ-CVGP]; BAKER MCKENZIE, GLOBAL PIPE GUIDE: YOUR QUESTIONS ANSWERED 2 (2020), https://www.bakermckenzie.com/-/media/files/insight/publications/2020/06/global-private-investment-in-public-equity-guide-050620.pdf [https://perma.cc/DG5J-C2KQ].

146. For more detailed discussion, see Tuch & Seligman, *supra* note 3, at 338–39.

147. *SPAC Reform Proposal*, *supra* note 8, at 29486 (Proposed Rule 140a).

148. *See* Tuch & Seligman, *supra* note 3, at 347–48.

149. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 595 (1984).

150. *See* Statement, John Coates, Acting Dir., Div. Corp. Fin., U.S. Sec. & Exch. Comm'n, *IPOs and Liability Risk Under the Securities Laws* (Apr. 8, 2021), https://www.sec .gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws [https://perma.cc/P6 K7-UKWP].

underwriters have incentives misaligned with those of SPAC investors, which magnifies the risk of disclosure error.[151]

Second, the costs of underwriter liability would seem to be no greater for de-SPACs than for traditional IPOs, provided, as this article recommends, statutory underwriters in de-SPACs are protected from Section 11 liability for forward-looking statements.[152] In both the de-SPAC and traditional IPO settings, investment banks have roles that allow them to perform due diligence. These firms have developed time-tested methods for assuring the accuracy of registration statements and other disclosures, methods that would seem equally applicable in both settings.[153] Indeed, some legal advisors have advised participants to consider performing IPO-style due diligence in de-SPACs without regarding cost as a barrier to banks.[154]

On the basis of this assessment of costs and benefits, the case for underwriter liability is as strong for de-SPACs as it is for traditional IPOs. On this reasoning, underwriter liability would generate benefits for de-SPACs at least as great as those accrued to traditional IPOs, without imposing additional costs. If Section 11 underwriter liability is justified for traditional IPOs, the same is true for de-SPACs.

2. Private Operating Company as Co-Registrant to Form S-4 and Form F-4

Proposed reforms to Forms S-4 and F-4 would make target operating companies co-registrants with SPACs.[155] The proposal has implications for the SPAC-on-top structure, in which the SPAC or a subsidiary of the SPAC issues securities in a proposed offering and itself becomes the registrant.[156] Of course, even where targets are not registrants, their shareholders, as holders of a majority of the shares in the post-merger entity, will effectively

151. Traditional IPOs do not create such strongly misaligned incentives between transaction participants on the one hand and outside investors on the other. In traditional IPOs, sponsors perform no role and while underwriters are contingently compensated, receiving a fee only if an IPO occurs, they have also powerful incentives to protect the interests of outside investors, and are regarded as underpricing securities, in part, with the intention of doing so. *See* Tuch & Seligman, *supra* note 3, at 320–21, 342.

152. *See infra* Section V.B.

153. In response to Section 11 liability, securities lawyers and investment bankers have "honed" the due-diligence investigation into "model" verification procedures. Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L., ECON. & ORG. 53, 83 (1986).

154. Adam Brenneman, Nicolas Grabar & Jared Gerber, *Rising Threat of Securities Liability for SPAC Sponsors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 9, 2020), https://corpgov.law.harvard.edu/2020/11/09/rising-threat-of-securities-liability-for-spac-sponsors [https://perma.cc/P4LY-MNR6] ("SPAC sponsors may consider performing the type of diligence associated with a traditional IPO, in addition to the valuation-focused due diligence typical of the merger context.").

155. SPAC Reform Proposal, *supra* note 8, at 74–78.

156. *See* Tuch & Seligman, *supra* note 3, at 329–30.

suffer if SPACs face liability, giving them reason to have SPACs avoid Section 11 liability. Still, by making target companies co-registrants, the proposed rules ensure that target operating companies and their directors and officers have strong incentives under Section 11 to deter disclosure errors and other misconduct, even in conventionally structured de-SPACs. For other transaction structures, these proposed reforms have less bite because targets are registrants in any case (as in the target-on-top structure).

To be sure, making target operating companies co-registrants would subject both SPACs and target operating companies to strict liability, increasing the range of potential defendants under Section 11 relative to traditional IPOs, in which there is a single registrant. While this risks over-deterring misconduct in de-SPACs, the proposal limits liability to those parties best informed about the accuracy and completeness of the registration statement and possessing the capacity to actively deter disclosure wrongs, making the proposed regime closely analogous to that for traditional IPOs.

3. Deeming Business Combination of a Shell Company to Involve a "Sale"

Proposed Rule 145a 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.[157] This would generally ensure the use of registration statements for de-SPACs, thereby subjecting them to Section 11 liability. This reform would also help prevent certain disparities in regulation for transactions that vary in legal structure but not in economic substance, ensuring that public security holders enjoy the protections that come from investing in a registered offering.[158]

4. Shortfalls

The proposed reforms may create unnecessary ambiguity. In justifying Proposed Rule 140a, the SEC suggests that a range of actors in addition to SPAC IPO underwriters may be liable as statutory underwriters without specifying when this would occur.[159] In doing so, the SPAC Reform Proposal casts doubt on the longstanding understanding that financial

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157. SPAC Reform Proposal, *supra* note 8, at 29487 (Proposed Rule 145a)

158. For further discussion, see Halbhuber, *supra* note 27.

159. SPAC Reform Proposal, *supra* note 8, at 29486 ("[F]inancial advisors, PIPE investors, or other advisors, depending on the circumstances, may be deemed statutory underwriters in connection with a de-SPAC transaction if they are purchasing from an issuer 'with a view to' distribution, are selling 'for an issuer,' and/or are 'participating' in a distribution.").

advisors in mergers and acquisitions ("M&A advisors") are not statutory underwriters,[160] without explaining when these advisors would be statutory underwriters or what implications exist for the role of M&A advisors in M&A transactions other than de-SPACs.

A risk with the SEC's approach is that SPAC IPO underwriters would now have powerful incentives to cease advising SPACs they have taken public that have yet to undertake de-SPACs.[161] However, these incentives would be offset considerably if de-SPAC underwriters were exempt from Section 11 liability for forward-looking statements used in registration statements. Such an exemption would make underwriter liability in de-SPACs closely comparable with that in traditional IPOs, in which underwriters rarely face Section 11 for forward-looking statements due to the practice of excluding them from registration statements.[162]

If SPAC IPO underwriters are to be statutory underwriters for de-SPACs, the SEC might consider giving these parties control over whether a de-SPAC proceeds. In traditional IPOs, underwriters are true gatekeepers in the sense that they can prevent a transaction from proceeding if they are, for example, concerned about the registration statement's accuracy or completeness.[163] The underwriting agreement is not executed until late in the offering process, typically only on the eve of the public offering, giving underwriters enormous sway over an issuer impatient to execute a transaction.[164] Auditors have similar influence, since their opinions are required before an IPO can proceed.[165] In contrast, it is not apparent that SPAC IPO underwriters have a similar veto power during a de-SPAC, even if they are serving as M&A advisors in the transaction. It may be that transaction participants can proceed with a de-SPAC over the objections of

160. As to the regulation of M&A advisors, see Andrew F. Tuch, *M&A Advisor Misconduct: A Wrong Without a Remedy?*, 45 DEL. J. CORP. L. 177 (2021).

161. Sridhar Natarajan, *Goldman Is Pulling Out of Most SPACs Over Threat of Liability*, BLOOMBERG (May 9, 2022, 10:20 AM), https://news.bloomberglaw.com/capital-markets/goldman-is-pulling-out-of-most-spacs-over-threat-of-liability [https://perma.cc/6H5Y-ADU6] ("Goldman Sachs Group Inc. is pulling out of working with most SPACs it took public, spooked by new liability guidelines from regulators . . . .").

162. For further discussion, see *infra* Section IV.B.

163. As to justifications for and operation of gatekeeper liability, see Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers To Improve The Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1048 (1993); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1589–97 (2010).

164. *See* 1 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 660–61 (6th ed. 2019) (in practice, "a few hours at most" exists between the signing of the underwriting agreement and the effectiveness of the registration statement).

165. Consolidated audited financial statements are a basic requirement of US public offerings. *See* LATHAM & WATKINS LLP, GLOBAL IPO GUIDE 15 (2023), https://www.lw.com/admin/upload/SiteAttachments/latham-global-IPO-guide.pdf [https://perma.cc/UMB5-5MZK]. Additionally, underwriters will require comfort letters from accountants before underwriting a transaction. *Id.* at 1.

SPAC IPO underwriters and M&A advisors. If the SEC intends to make SPAC IPO underwriters liable as statutory underwriters, it might consider allowing these actors to dissociate themselves from a transaction by making a statement to that effect. Such a mechanism would give potential statutory underwriters influence consistent with that of underwriters in a traditional IPO, discouraging SPACs and targets from proceeding with a de-SPAC in the face of a statutory underwriter's objections.

Finally, the potential for Section 11 liability may be limited for secondary market purchasers by the "tracing" requirement, under which purchasers must be able to trace each security for which they claim damages to an actionable registration statement.[166] Transaction structure is relevant to this issue. De-SPACs that adopt the double-dummy or target-on-top structures may satisfy the requirement for tracing since the relevant shares are likely to have been sold to SPAC investors via a single offering.[167] However, the requirement for tracing is unlikely to be satisfied for the majority of de-SPACs, in which the SPAC issues securities to target shareholders. For these de-SPACs, Section 11 will have weaker deterrent effect than for other de-SPACs and traditional IPOs.

B. PSLRA Safe Harbor

The SPAC Reform Proposal would limit the application of the PSLRA safe harbor to de-SPACs.[168] Federal securities law provides a safe harbor from liability for estimates, projections, and other forward-looking statements—a safe harbor widely interpreted as applying to de-SPACs but not to traditional IPOs.[169] Under provisions of the Securities Act and

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166. Section 11(a) limits recovery to "any person acquiring such security," a phrase interpreted narrowly to mean a security issued pursuant to the allegedly misleading registration statement. Slack Techs., LLC v. Pirani, 143 S. Ct. 1433 (2023); *see also* Barnes v. Osofsky, 373 F.2d 269, 271 (2d Cir. 1967); Securities Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (2018).

167. *See* Tuch & Seligman, *supra* note 3, at 331–32. As to de-SPAC structures, see *infra* notes 176–78 and accompanying text.

168. *See* Securities Act of 1933 § 27A, 15 U.S.C. § 77z-1; *id.* § 21, 15 U.S.C. § 77u.

169. *See, e.g.*, EDDIE BEST & ANNA PINEDO, DE-SPACING: OVERVIEW, SECURITIES LAW & FINANCIAL STATEMENT CONSIDERATIONS: DERISKING WITH A PIPE TRANSACTION 34, 38 (2021), https://www.mayerbrown.com/-/media/files/perspectives-events/events/2021/01/despacingmbpli-webinar-materials-jan2021.pdf [https://perma.cc/36VW-G2Q5] ("[F]orward-looking statements will benefit from the safe harbor . . . ."); Josh DuClos & Martin Wellington, *Two Paths, One Destination? How De-SPACs and IPOs Can Both Be Fruitful*, RECORDER (Mar. 31, 2021), https://www.sidley.com/-/media/publications/two-paths-one-destination-how-despacs-and-iposcan-both-be-fruitful.pdf?la=en [https://perma.cc/226R-DR9E] ("[I]n the de-SPAC context, the securities laws provide companies the benefit of a safe harbor for forward looking statements."); Robert Malionek & Ryan Maierson, *SPAC-Related Litigation Risks and Mitigation Strategies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 9, 2021), https://corpgov.law.harvard.edu/2021/08/09/spac-related-litigation-risks-and-mitigation-strategies [https://perma.cc/X45LCKK4] (referring to "[t]he general view that de-SPAC transactions would be shielded by the protections of safe harbor").

Securities Exchange Act enacted by the PSLRA,[170] issuers benefit from safe harbors from liability for certain forward-looking statements in private suits, provided that the statements are accompanied by meaningful cautionary language.[171] The safe harbors are subject to exclusions, including for forward-looking statements "made in connection with an initial public offering."[172] Accordingly, the safe harbor will not apply if a de-SPAC is an initial public offering within the terms of the rule.[173]

The perceived availability of these liability safe harbors for de-SPAC participants, but not for those in traditional IPOs, has been thought to explain differences in deal practices across these transactions.[174] Whether these differences in market practices result in harm to public SPAC investors awaits further evidence, although initial findings suggest that SPAC targets make more optimistic projections than they would without the perceived protection of the safe harbor.[175]

As Joel Seligman and I have argued, transaction structure is likely to shape the availability of PSLRA safe harbor protection just as it shapes Section 11 liability.[176] Some de-SPAC structures are more plausibly regarded as "initial public offerings" than others and may therefore fall beyond the scope of the safe harbor's protection. Consider the three main transactional forms for de-SPACs. In the target-on-top and double-dummy structures, a private target and newly formed holding company, respectively, make initial offerings of securities to the public during a de-SPAC.[177] These structures contrast with the SPAC-on-top structure—the most common structure, which commentators seem to have in mind—whereby the SPAC has already undertaken an initial offering of securities

170. *See* Securities Act § 27A, 15 U.S.C. § 77z-1; *id.* § 21, 15 U.S.C. § 77u.

171. For a detailed discussion of these safe harbors, see 2 SECURITIES REGULATION, *supra* note 139, at 127–61; Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 FORDHAM L. REV. 1953 (1995).

172. Securities Act § 27A(b)(2)(D). Also excluded are forward-looking statements made in connection with an offering of securities by a blank check company. Securities Act § 27A(b)(1)(B).

173. *See, e.g.*, BEST & PINEDO, *supra* note 169, at 34, 38 ("[F]orward-looking statements will benefit from the safe harbor . . . ."); DuClos & Wellington, *supra* note 169 ("[I]n the de-SPAC context, the securities laws provide companies the benefit of a safe harbor for forward looking statements."); Malionek & Maierson, *supra* note 169 (referring to "[t]he general view that de-SPAC transactions would be shielded by the protections of safe harbor"). However, after the general view had apparently formed, John Coates cast doubt on the interpretation, suggesting that "initial public offerings" as used in the exemptions "may include de-SPAC transactions." *See* Coates, *supra* note 150.

174. However, as Amanda Rose observes, "state fiduciary obligations [are considered to] compel [the] disclosure[] of projections" in SPACs. Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage*, 64 WM. & MARY L. REV. 1757, 1770 (2023).

175. *See supra* note 91 and accompanying text.

176. *See* Tuch & Seligman, *supra* note 3, at 329–30. *Compare* John C. Coates, SPAC Law and Myths 19–20 (Feb. 11, 2022) (unpublished manuscript), https://ssrn.com/abstract=4022809 [https://perma.cc/ZB59-QK4K] (suggesting that de-SPACs may be outside the PSLRA's protection irrespective of their transaction structure), *with* Tuch & Seligman, *supra* note 3, at 345–46.

177. *See* Tuch & Seligman, *supra* note 3, at 329–30.

before issuing securities in the de-SPAC.[178] The argument that de-SPACs are not "initial public offerings" within the PSLRA exclusions is more plausible for transactions adopting the conventional structure.[179]

Nevertheless, and without apparent regard for how they are structured, SPACs routinely use forward-looking statements in de-SPACs,[180] suggesting that the availability of the safe harbor is not regarded as essential protection by market participants. Interviews Joel Seligman and I conducted with market participants revealed that market participants regarded some de-SPACs as beyond the safe harbor's protection.[181] Accordingly, it is little surprise that prominent advisors to SPACs have not offered strong resistance to the SEC's proposal to limit the safe harbor's application to de-SPAC participants. As one prominent legal advisor to SPACs and SPAC underwriters puts it: "We do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices and we do not object to the disapplication of the safe harbor to de-SPAC transactions."[182]

Subjecting statutory underwriters to liability for forward-looking statements in de-SPACs would distinguish de-SPACs from traditional IPOs. Underwriters in traditional IPOs face no potential Section 11 liability for forward-looking statements, not because these statements are not made—they are—but because they are rarely included in registration statements. However, these statements are typically included in registration statements for de-SPACs; fewer alternative methods exist for communicating them to intending investors. Subjecting underwriters to this heightened liability risk would increase the cost of underwriter liability, possibly altering the cost-benefit comparison that otherwise favors imposing Section 11 liability on

178. *Id.*

179. SPAC mergers are occasionally also structured as tender offers. Forward-looking statements made in connection with a tender offer are outside the protection of the PSLRA safe harbors. *See* Securities Act of 1933 § 27A, 15 U.S.C. § 77z-2(b)(2)(C).

180. To my knowledge, forward-looking statements are generally provided in all de-SPACs. *See, e.g.*, *Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections: Virtual Hearing Before the Subcomm. on Investor Protection, Entrepreneurship, and Cap. Mkts. of the H. Comm. on Fin. Servs.*, 117th Cong. 56 (2021) (statement of Scott Kupor, Managing Partner, Andreessen Horowitz) ("[M]any SPACs provide 5-year forward forecasts that are used in connection with the marketing process for the pending acquisition.").

181. *See* Tuch & Seligman, *supra* note 3, at 344–45.

182. *See* Letter from Davis Polk & Wardwell LLP to Vanessa Countryman, *supra* note 52, at 7 ("While the potential benefits of the safe harbor for projections disclosure in the context of de-SPAC transactions has provided some comfort to parties to such transactions in the abstract, the safe harbor has never provided a meaningful shield from liability. Best practice for participants in de-SPAC transactions has always been to ensure that any prospective financial information is based on the best then available information and that the key assumptions are reasonable and appropriately disclosed. Therefore, we do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices and we do not object to the disapplication of the safe harbor to de-SPAC transactions.").

underwriters in de-SPACs.[183] For this reason, and to align the regulatory treatment of de-SPACs with that of traditional IPOs, the SEC should consider exempting de-SPAC underwriters from Section 11 liability for forward-looking statements.

V. POLICY IMPLICATIONS

A. The Value of Fairness Opinions

The SEC and courts are right to emphasize fairness to public shareholders, but transaction participants are wrong in apparently believing that fairness opinions have provided an effective response. Market participants' faith in fairness opinions has been misplaced. Overwhelmingly, opinions have failed to address fairness to public shareholders, and those purporting to do so have generally failed to provide supporting analyses. None have undertaken the rigorous analysis required to assist boards attempting to satisfy their fiduciary responsibilities by assessing whether a de-SPAC represents value to public shareholders.

Two recommendations suggest themselves. First, if opinions and financial analyses fail to grapple with fairness to public shareholders, they should receive no weight from regulators or courts. Convincing analyses would adjust for dilution and consider the value of the post-merger entity rather than that of the target alone. Bald statements regarding fairness to public shareholders should similarly carry no weight without supporting analyses. Courts might instead be skeptical of boards that rely on such opinions, given their evident shortfalls. Boards that do so may fail to appreciate the divergence between the interests of public SPAC shareholders and those of the SPAC.

Second, regulators and courts should give greater weight to board presentations of financial analyses by third-party financial advisors than to fairness opinions. As then-Vice Chancellor Strine put it, "[t]he real informative value of the banker's work [in delivering a fairness opinion] is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result."[184] This study assessed both board presentations as disclosed in proxy statements and the related fairness opinions. Only the former typically set out valuation analyses.

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183. *See supra* Section IV.A.1.

184. *In re* Pure Resources, Inc., S'holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002); *see also* Adam B. Badawi, Matthew D. Cain & Steven Davidoff Solomon, Does Voluntary Financial Disclosure Matter? The Case of Fairness Opinions in M&A 3 (Oct. 19, 2022) (unpublished manuscript), https://ssrn.com/abstract=4252984 [https://perma.cc/JBQ7-3DXB] ("While the letter is short, the value of a fairness opinion is in the underlying analysis.").

Reputation-conscious financial advisors will be reluctant to provide opinions addressing fairness to public shareholders unless transaction terms change significantly. The required analyses may not support a conventional conclusion as to fairness to public shareholders, given the possible extent of dilution, the contingencies involved, and the consequential breadth of the valuation ranges. Determining the capital structure of the post-merger entity—a necessary input of analysis—cannot be done with any degree of accuracy when the opinions are prepared. Nevertheless, presentations of such analyses would be more useful to SPAC boards than are the fairness opinions they have obtained to date. In other words, fairness opinions do not warrant the talismanic properties many have so far granted them. The comfort financial advisors provide should come from their board presentations of analyses, and a corresponding review by boards, rather than from their brief and highly qualified written opinions.

This assessment of de-SPAC fairness opinions does not undermine the emerging regulatory framework's focus on fairness to public shareholders, nor does it imply that courts should not give weight to fairness opinions that address fairness to these shareholders with appropriate supporting analyses. When the SEC observes that SPACs will now make greater use of fairness opinions, or when the Court of Chancery pointedly notes the absence of a fairness opinion in reviewing fiduciary conduct in de-SPACs,[185] they must have in mind appropriately tailored opinions, rather than the opinions that have been given thus far.

It is worth exploring why SPAC boards have accepted fairness opinions that courts are unlikely to credit. SPACs have long used fairness opinions for de-SPACs that present severe conflicts of interest, such as those arising from relationships between sponsors and target companies.[186] These opinions were intended to safeguard the interests of public shareholders, an objective that stands today. One possible explanation for boards' conduct is that they did not fully understand the limitations of the opinions they received. A more likely explanation is that financial advisors were unwilling to deviate from the standard fairness opinion template or were unable to plausibly conclude a de-SPAC was fair to public shareholders. In certain situations, boards demonstrated carelessness at best when accepting opinions, especially those with ambiguous or mistaken conclusions.

This study contributes to existing research on the use of fairness opinions in public M&A. Legal scholars have often taken a negative view of these

185. *See supra* note 51 and accompanying text.

186. *See, e.g.*, TradeUP Global Corp, Proxy Statement for Extraordinary General Meeting and Prospectus (Form 424(b)(3)) (Apr. 1, 2022), at 37 (citing the "related party nature" of the de-SPAC as a reason for the use of a fairness opinion); *see also supra* note 18.

opinions, citing their subjectivity and conflicts of interest.[187] Similarly, systematic empirical evidence suggests that when financial advisors provide fairness opinions to boost their league table rankings, the opinions are of lower quality, with less accurate valuations and higher levels of uncertainty in estimating value.[188] However, studies focusing on buy-side opinions produce mixed results. A study by Darren Kisgen, Jun Qian, and Weihong Song finds that buyers' announcement returns are lower for public M&A deals where buyers obtained a fairness opinion, suggesting that boards sought fairness opinions to entrench themselves in office.[189] However, more recent research by Tingting Liu, which purports to correct for sample selection bias that affected earlier studies, finds no link between buyer announcement returns and the use of a buy-side opinion, a conclusion consistent with the notion that buy-side fairness opinions mitigate information asymmetry between buyers' boards and shareholders, and suggests that the market views buy-side fairness opinions as informative.[190]

The upshot of the earlier empirical evidence is that one cannot dismiss buy-side fairness opinions as necessarily lacking in informational content, although caution is warranted. This article examines a distinct setting in which fairness opinions suffer profound methodological challenges and fail in their intended purpose. The results corroborate concerns expressed by legal scholars and align with a body of empirical research examining the role of investment bank quality, finding poorer outcomes for lower-tier investment banks.[191]

B. Redemption-Relevant Information for Public Shareholders

With this understanding of fairness to public shareholders, what information will public shareholders need to decide whether to exercise their redemption rights, valued at $10, or else invest in the post-merger company? The key from the standpoint of public shareholders is the value

187. *See, e.g.*, Bebchuk & Kahan, *supra* note 57, at 29–45.

188. François Derrien & Olivier Dessaint, *The Effects of Investment Bank Rankings: Evidence from M&A League Tables*, 22 REV. FIN. 1375, 1379 (2018).

189. *See* Darren J. Kisgen, Jun Qian & Weihong Song, *Are Fairness Opinions Fair? The Case of Mergers and Acquisitions*, 91 J. FIN. ECON, 179 (2009); *see also* Cain & Denis, *supra* note 22 (finding that buy-side fairness opinions, in contrast to sell-side information opinions, lack informational content as evidenced by stock price reactions to merger announcements).

190. *See* Tingting Liu, *The Wealth Effects of Fairness Opinions in Takeovers*, 53 FIN. REV. 533, 534–38, 60–61 (2018).

191. *See, e.g.*, Cain & Denis, *supra* note 22, at 264 (finding that valuation errors in fairness opinions are significantly lower for top-tier investment banks than for lower-tier investment banks); Bao & Edmans, *supra* note 22 (finding evidence suggesting that quality of buyers' investment bank has a positive effect on M&A outcomes).

per share of the post-merger entity.[192] It is shares in this entity that public shareholders will receive if they choose not to redeem.

If a reliable measure of this first item of information—the value of the post-merger entity to public shareholders—is not disclosed to public shareholders, a second item that is relevant to public investors deciding whether to redeem their funds is the net cash per share that the SPAC would invest in the combined company.[193] In *GigAcquisitions3*, the plaintiff calculated this figure at $5.25, after taking into account sources of dilution.[194] What this figure indicates is that the target had strong incentives to overstate its value, given the assumption that it received consideration valued at $10 per share. Had public SPAC shareholders known this figure, they would have realized they "could not logically expect to receive $10 per share of value in exchange" from the target[195]—unless there were significant non-cash sources of value from the de-SPAC.

However, the primary concern for public shareholders contemplating the exercise of redemption rights is the per share value of the post-merger company. Simply considering the net cash brought by a SPAC to the merger can, at best, provide a rough sense of the post-merger value. That value turns not only on the cash per share contributed by the SPAC but also on the target value and any non-cash sources of value, while accounting for founder shares, cash disbursements, and other dilution factors. Only when post-merger shares are worth at least $10 each can a de-SPAC be considered fair from a financial perspective to public shareholders.

GigAcquisitions3 also suggests that the "[t]he value that Gig3 [the SPAC] obtained in the merger would be highly relevant to stockholders' investment decisions."[196] However, it is unclear how useful this information is on its own. Assume that the value the SPAC gets from the target is $10 per share—that the target represents $10 of value for each of the SPAC's shares the target receives as consideration. Even then, as explained above, we cannot conclude that the de-SPAC is fair from a financial perspective to public shareholders.[197] Simply put, the fact that the target brings $10 per share value to the combined company does not assure that public shareholders will receive $10 per share from the de-SPAC. Due to the dilution inherent in the SPAC, shares of the post-merger entity may still be valued at less than $10 per share.

192. *See supra* Section III.C.
193. Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 725 (Del. Ch. 2023).
194. *See id.*
195. *Id.*
196. *Id.* (referring to Gig3, rather than its unaffiliated shareholders).
197. *See supra* Section II.D.3.

C. The Future of SPACs

To enhance the viability of de-SPACs for public shareholders, in response to the emerging regulatory framework, the compensation structure for SPAC sponsors' or directors' compensation must evolve. Simple structural changes would be insufficient, such as having de-SPACs approved by SPAC directors who are deemed independent for Delaware purposes. These directors would need to be compensated to align their interests with those of public shareholders or at least avoid material conflicts.[198] But such a change alone would not satisfy the fairness review required by the sponsor's status as a controller.

Nor would changes addressing the "empty voting" problem in de-SPACs satisfy or avoid fairness review. This problem arises because once a SPAC has negotiated and announced a merger, its shareholders must typically decide whether to approve the merger and whether to have their shares redeemed. Even shareholders who have decided to redeem their shares may vote in favor of a business combination, which produces empty voting.[199] Redeeming shareholders have incentives to approve even de-SPACs they regard as ill-conceived, because a failed merger vote prevents shareholders from redeeming their shares and keeps their cash tied up as the SPAC seeks a better target under greater time pressure.[200] Of course, empty voting might be addressed by permitting only nonredeeming shareholders, those with "skin in the game," to vote on approving the de-SPAC.

Even if these protections—approvals by independent directors and nonredeeming public shareholders—were adopted in tandem, though, they would likely be insufficient to satisfy the fairness review required by a sponsor's controller status. Under *Kahn v. M&F Worldwide Corp*. (*MFW*), courts apply deferential business judgment review to controlling shareholder mergers as long as they receive fully informed approval by both an independent special committee and a majority of the minority shareholders.[201] If *MFW* were applied to de-SPACs, independent directors and public shareholders would need redemption-relevant information to make informed decisions, in particular, the value per share of the post-

198. For thoughtful suggestions on achieving independence, see Hunter Fortney, SPAC Attack: An Examination of SPAC Director Compensation and Its Legal Implications 15–16 (Aug. 11, 2021) (unpublished manuscript), https://ssrn.com/abstract=3911337 [https://perma.cc/T88K-SQAE]; Myers, *supra* note 27, at 59–61.

199. For detailed explanations of such apparently contradictory voting behavior, see Mira Ganor, *The Case for Non-Binary, Contingent, Shareholder Action*, 23 U. PA. J. BUS. L. 390, 411–14 (2021); Rodrigues & Stegemoller, *supra* note 27, at 30–39.

200. Moreover, warrants are worthless unless a SPAC merger occurs, giving shareholders incentives to approve. Rodrigues & Stegemoller, *supra* note 27, at 30–39.

201. 88 A.3d 635 (Del. 2014). The transaction must be conditioned from inception on the satisfaction of these twin protections.

merger entity and perhaps even the net cash per share offered by the SPAC in the proposed de-SPAC.[202]

To satisfy its disclosure obligations, a SPAC board would need to disclose information to shareholders demonstrating directors' belief that the post-merger company will be worth more than $10 per share. Doing so, while also disclosing the deal dilution (bearing in mind that net cash per share has typically been significantly less than $10[203]), may require disclosure of expected sources of non-cash value—why, for instance, the public status of the target or the expertise of sponsors is likely to increase the post-merger value enough to offset the impact of dilution. These disclosures, critical for informed approvals, would carry increased risk given heightened Section 11 liability for transaction participants, including statutory underwriters, under proposed reforms. It seems that SPAC terms will need to change if market participants are to bear such Section 11 liability for claims in registration statements that post-merger value to public shareholders exceeds $10 per share despite the various sources of dilution. Specifically, dilution must decrease.

To avoid the entire fairness standard of review and the deal uncertainty it may produce, SPACs may incorporate outside Delaware. Common jurisdictions include the Cayman Islands and the British Virgin Islands or the Marshall Islands.[204] If U.S.-incorporation were important for tax or other reasons, a foreign-incorporated SPAC could redomicile in the United States in connection with the closing of a de-SPAC transaction.

D. Fairness Opinions

The evidence presented is damning of opinion-giving practices in de-SPACs. First, most opinions address the fairness of consideration to the SPAC, rather than the interests of public shareholders, thereby providing no assurance to SPAC fiduciaries concerned about conflicts of interests or even about the merits of the deal from the standpoint of public shareholders. That these opinions are unresponsive should have been clear to SPAC boards and financial advisors. Many of these opinions seem implausible as they suggest that financial advisors assigned higher values to target companies than targets' own managers did. A small number of other opinions reflect poor practices, either not qualifying their findings of fairness or wrongly referring to the target. These opinions were also clearly unresponsive to the

202. *See supra* Section V.B.

203. As to relevant empirical evidence, see *supra* Part I.

204. See Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction [https://perma.cc/8XUR-N4MD].

fiduciary concerns of SPAC sponsors and boards. Another set of opinions expressly purports to address the position of public shareholders. On their face, therefore, they were responsive. But, with one exception, these opinions fail to perform analyses to address the position of public shareholders. The inadequacies of these analyses should have been clear to SPAC fiduciaries and their advisors. It may be that these deals nevertheless represented at least $10 value per share to public shareholders, but that would require evidence that non-cash sources of value more than offset the dilutive impact of the SPAC structure. Nothing in the opinions supported that view.

As explained above, in theory, a responsive fairness opinion would compare the redemption value of a share to the valuation reference range in the pro forma combined entity. The valuation would need to adjust for the issue of founder shares, conversion or exercise of warrants, anticipated redemptions, and any PIPE (assuming a PIPE is not already fully committed). Rather than adopt simplifying assumptions, an advisor should calculate the post-merger entity's value using a range of inputs. The outcome may yield an extraordinarily wide range of possible values.

If a financial advisor is unwilling to provide a fairness opinion concluding that the consideration in a de-SPAC is fair to public shareholders, the advisor may still offer relevant analyses to the SPAC board. This would allow board members to form their own perspectives on fairness to public shareholders based on their judgment regarding various deal contingencies, such as the extent of redemption. When evaluating the fairness of a deal process, courts should give no less weight to such analyses than to a fairness opinion.

CONCLUSION

The emerging regulatory framework represents strong medicine for SPAC participants. The focus on fairness and the heightened incentives for accurate and full disclosure work hand-in-hand. Requiring fairness to public shareholders puts attention on the value of the post-merger entity to public shareholders and therefore on the extent of dilution in the SPAC and possible non-cash sources of value. Given the materiality of this information, it needs to be disclosed. But with substantial liability exposure for misstatements and omissions under proposed reforms, especially for investment banks under Section 11, market participants are unlikely to be willing to stand behind disclosures unless the dilution is significantly less than it is now.

An immediate lesson for the SEC, courts, and investors is to cast a skeptical eye over fairness opinions in de-SPACs. Fairness opinions pose distinct challenges that scholars had yet to recognize. Anyone relying on a fairness opinion must attend carefully not only to the precise subject matter of an opinion—that is, whether it addresses fairness to public shareholders or simply to the SPAC—but also to whether the analysis plausibly addresses that subject matter.

The SPAC Reform Proposal, intended to bolster the incentives of transaction participants to undertake due diligence, reflects an appreciation for the extent to which the particular structure a SPAC employs shapes its regulatory treatment. The proposed rules considered in this article respond thoughtfully to the regulatory leniency de-SPACs enjoy and to unintended gaps in regulation created by transaction structure. But these rules, too, may need some tailoring—further recognition that de-SPACs pose special risks and that techniques for protecting investors in some settings may not be well-suited in the SPAC setting.