Blogs
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Public Chatter

Is a SPAC an IPO? Thoughts on a Congressional “Forward-Looking Statement” Bill

Back in April, **we discussed** the **statement from John Coates** (then-Acting Director of the SEC's Division of Corporation Finance; now the SEC's General Counsel) that the PSLRA safe harbor for forward-looking statements shouldn't be available for private companies going public through a de-SPAC transaction. The PSLRA safe harbor is important. It protects public companies against private lawsuits based on forward-looking statements that don't come to fruition, so long as those statements are accompanied by meaningful cautionary statements. But the PSLRA safe harbor doesn't apply in all circumstances - notably, it doesn't apply to "initial public offerings." Coates argues that while a de-SPAC transaction may not be an IPO in the formal sense, it has the same "economic essence" as an IPO and should be treated as such for purposes of the PSLRA safe harbor. His argument is worth reading for sure, but it's not definitive. Absent legislation to clarify whether a de-SPAC transaction is an "initial public offering" under the PSLRA, this question will need to be resolved by the courts. Fortunately for Coates, Congress has been listening. The House Financial Services Committee has released draft legislation to amend the Securities Act and the Exchange Act to exclude SPACs from the forward-looking statement safe harbor. If the proposed legislation is enacted - or if Coates' interpretation of the PSLRA is adopted by the courts - SPACs and private companies pursuing a de-SPAC could be subject to increased liability for inaccuracies in forward-looking statements. This would be a meaningful change, since greater flexibility for the use of financial projections in marketing the deal is one of the often-cited advantages of a SPAC over a conventional IPO.

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