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Valuation Dynamics and Legal Challenges in the Rise and Fall of 'Unicorns': A Case Study of WeWork and the Advent of SPACs

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ABSTRACT

Most people associated often associates “going public” with Initial Public Offerings (IPOs), the rise and fall of IPOs over the past decade has led to the emergence of Special Purpose Acquisition Companies (SPACs) as an unconventional, yet increasingly viable, method of raising capital. This new approach has been embraced by a growing number of “unicorns” — privately held startups valued over one billion dollars. These companies have drawn regulatory attention from the SEC and major stock exchanges due to their decision to forego the traditional IPO process, which has resulted in the creation of SPAC regulations and procedures. Even though they remain under development, these rules provide other companies a path to follow.

Due to changes in regulatory frameworks and their potential to disclose the true value of ‘unicorn’ companies, the emergence of SPACs is considered as crucial. Many economics and business experts believe that some famous IPO flops in recent years, including the WeWork fiasco, may have been caused by inflated values that do not accurately reflect market conditions. Many of these companies continue to have share prices that are considerably below their IPO pricing, despite their initial successes in private markets.

While IPOs continue to be a popular way to access public markets, if unicorns continue to have difficulty sustaining their pre-IPO valuations, the transparent and affordable strategy of SPACs may become more and more attractive, signaling a fundamental change in the landscape of tech startup financing.

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I. INTRODUCTION

Corporate law is essential in shaping the modern business landscape. Corporate law, which also regulates the operations of the firm as a whole, governs the relationships between various stakeholders inside a company. The evolution of the Corporate Law model is going through an hands on challenge imposed by cutting edge businesses models, emerging financial instruments and complexity of corporate governance as the world is also seeing challenges regarding its unstable economy.

With the emergence and collapse of so-called "unicorns," privately owned businesses valued at more than $1 billion, the world of finance and investment has seen a tremendous upheaval recently.[1] Significant changes in valuation dynamics have accompanied this phenomenon, driven in part by institutional investors. These changes have affected both the market and the conventional Initial Public Offering (IPO) process.[2]

From their initial valuation to the difficulties they encounter when going public, this study explores into the interesting journey of unicorn companies. It looks at the elements that influence valuation inflation, which is frequently spurred by the attractiveness of prospective IPO success.[3] Moreover, it also looks at how Special Purpose Acquisition Companies (SPACs)[4] have challenged the traditional IPO route by providing an alternate avenue for businesses looking to go public.

The analysis investigates the IPO and SPAC beneficiaries by providing insight into the regulatory constraints controlling SPAC operations. It also looks at the steps taken by well-known stock exchanges to help SPACs access the market, including the New York Stock Exchange (NYSE) and Nasdaq. Investigating the Securities and Exchange Commission's (SEC) inspection and approval procedure of SPACs is also crucial to understand the regulatory environment relevant to these financial instruments.

An interesting case study of WeWork,[5] a well-known unicorn that experienced an IPO failure and subsequent litigation, is included in the report. The WeWork case analysis offers important insights into the difficulties associated with unicorn IPOs, including the initial public offering filing, valuation issues, and the associated legal repercussions arising from such instances.[6]

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[1] Federal Register, *Good Faith Determinations of Fair Value,* The Daily Journal of the United States Government, (13.05.2020), https://www.federalregister.gov/documents/2020/05/13/2020-08854/good-faith-determinations-of-fair-value.
[2] An initial public offering (IPO) refers to the process of offering shares of a private corporation to the public in a new stock issuance. An IPO allows a company to raise capital from public investors. (Jason Fernando, *Initial Public Offering (IPO)*, Investopedia, (Nov. 30, 2021)).
[3] *Id.*
[4] Investopedia, (2022), *What Are SPACs?*, https://www.investopedia.com/terms/s/spac.asp.
[5] Laura Hampson*, WeCrashed: The rise and fall of the drama ridden WeWork empire* (Mar. 20, 2022), https://www.independent.co.uk/life-style/wework-wecrashed-adam-neumann-timeline-b2039562.html.
[6] *Id.*

Finally, the report offers a hypothetical analysis of how the WeWork case could have developed if the company had decided to go public through a SPAC rather than a conventional IPO.

This study intends to provide a thorough understanding of the transition in valuation dynamics, the growth of SPACs as an alternative to IPOs, and the potential legal repercussions faced by unicorn companies by examining these key issues and case examples. The complexities and implications of these changes in the financial landscape are critical for investors, business owners, and regulators to comprehend as it continues to change.

The paper is broken up into three sections, each of which explores essential elements of unicorns, IPOs, and SPACs in the financial landscape. The intriguing variables that led to unicorns' extraordinary growth to $1 billion valuations are the main topics of Part I. This section clarifies their significance in modern finance by responding to widespread concerns about the accuracy of such assessments and the existence of unicorns as entities. In Part II, we explore recent instances of IPO failures as well as the rise trend of unicorns choosing for SPACs over IPOs. This part highlights the workings of SPACs and their rising popularity as alternatives to IPOs while analyzing the changing regulatory environment that promotes SPAC adoption as a viable alternative. Finally, Part III considers the WeWork case study, from IPO failure to litigation, including hypothetical analysis of how the WeWork case may have developed if the business had opted for a SPAC than a conventional IPO.

II. THE RISE AND FALL OF 'UNICORNS':

AN ANALYSIS OF VALUATION DYNAMICS

WeWork, Pinterest, SpaceX, Uber, and Airbnb all attained unicorn status at some point in their histories, which they all have in common with one another.[7] Although unicorns, which are named after mythological animals, were once uncommon, they are now increasingly prevalent in the vibrant startup ecosystem of today, especially in the technology industry At least 50 new unicorns emerged in 2019 from a variety of sectors, including fintech, fashion, biotech, and healthcare.[8] By December 2020, the number of unicorns worldwide had surpassed 500.[9] Many of these new unicorns have a strong focus on technology,[10] and are situated in the United States.[11] Most companies become

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[7] *See* James Chen, *Unicorn*, Investopedia (Mar. 31, 2020), https:// www.investopedia.com/terms/u/unicorn.as

[8] Joanna Glasner, *Unicorn Class of 2019: Richer, More Autonomous, and More American*, Crunchbase News (June 12, 2019), https://news.crunchbase.com/news/ unicorn-class-of-2019-richer-more-autonomous-and-more-american.

[9] *The Complete List of Unicorn Companies*, CBIsights (Dec. 2020), https://www.cbinsights.com/research-unicorn-companies

[10] *See id.*

[11] *See* Gene Teare, *Monthly Funding Recap October 2020: 14 New Unicorns Are Born And Funding Holds Steady*, Crunchbase News (Nov. 9, 2020), https://news.crunchbase.com/news/monthly-funding-recap-october.

unicorns between four and seven years after launch, while some have lately achieved this in as short as two years.[12] However, various experts argue that the accelerated attainment of unicorn status may be more related to valuation methods rather than real achievement.[13]

So, why do venture capitalists and business owners place importance on reaching the billion-dollar mark? Firstly, as venture capital-backed startups continue to expand, greater "exit options" are required to generate rewards.[14] Secondly, some argue that the desire to reach this billion-dollar threshold stems not only from financial motivations but also from psychological factors.[15] For instance, Steve Butterfield, CEO of Slack, admitted that the specific number holds psychological significance for potential customers, employees, and the press.[16] However, it's important to note that aspiring for high valuations does not guarantee trustworthiness, as many financial experts state that many valuations are inaccurate and not indicative of future success.[17] These experts refer to such seemingly successful companies as "paper unicorns."[18] Despite potential inaccuracies, the question remains: how did individuals like Butterfield, investors, and employees establish the benchmark of $1 billion?

A. Overview of Valuation Principles

The legal scenario in which "value" is used affects differently how it is defined.[19] According to the traditional definition, "value" is the price that a willing buyer and willing seller agree upon after exercising "reasonable knowledge of relevant facts."[20] Instead of being determined by the market, or what is known as "market value," this price was agreed upon by two consenting parties in a transaction conducted at arm's length.[21] It is assumed that fair and reasonable negotiations between the seller and the buyer result in a pricing agreement.[22] In addition, The parties' knowledge of the asset and the assumption that they are acting impartially and in their own interests are also used to

[12] *Id.*
[13] *See id.*
[14] *See* Gary Spencer, *Developments in Banking & Financial Law: 2015*, 35 Rev. Banking & Fin. L. 47, 55 (2015). These "exit options" are usually in the form of an IPO.
[15] Erin Griffith & Dan Primack, *The Age of Unicorns*, Fortune (Jan. 22, 2015), https://fortune.com/2015/01/22/the-age-of-unicorns.
[16] *Id.*
[17] *See* Developments, *supra* note 9, at 47.
[18] *Id.* at 48. The term "paper unicorns" is used by these scholars to describe unicorns which have not undergone a liquidity event, such as an IPO, where early investors can sell some or all of their shares. The most frequent of these occasions is an initial public offering (IPO), although others include direct purchases by other businesses or private equity groups.
[19] Shannon P. Pratt & Alina V. Niculita, *The Lawyer's Business Valuation Handbook 1* (2nd ed. 2010).
[20] Treas. Reg. § 25.2512-1 (as amended in 1992). The Internal Revenue Code uses the term "value" throughout its provisions. *See, e.g.*, I.R.C. § 2031 (2018).
[21] Pratt & Niculita, *supra* note 14, at 1. The words "Market Value" and "Fair Market Value" are distinct from one another; the former refers to the price determined by the market, whilst the latter should reflect the asset's genuine value in light of the aforementioned factors.
[22] *See* Treas. Reg., §§ 20.2031-1(b), 25.2512-1 (1992).

calculate the price.[23]

This traditional approach of valuation is used by numerous authoritative institutions, including the SEC and the Internal Revenue Service (IRS).[24] But typically, dividing the number of shares by the share price yields the worth of publicly traded firms.[25] Google Finance is a perfect tool and resource to find accurate current stock prices and number of shares.[26] After the data is collected, it is compared to publicly accessible information, such as earnings, growth rates, and the stock's volatility relative to the market as a whole.[27] For this reason, reliable financial statements are crucial. In order to evaluate a company's success and decide whether to invest, potential and present investors require precise and accurate data.[28] Congress and the SEC have both raised rules in an effort to strengthen the dependability of certified financials due to the necessity for reliable and accurate financial data.[29] Additionally, other open exchanges, including the New York Stock Exchange (NYSE), have their own guidelines that mandate that businesses disclose information that could significantly alter the market for their stocks.[30] The securities prices and company valuations are impacted by these disclosures.[31]

It is possible to define valuation for private companies as the "present worth of future benefits."[32] What does this truly mean, though, in the context of privately held businesses with a spotty financial record and no oversight from the government? Instead of using the conventional definition of value to evaluate a private company's value, forecasts of the company's future worth are employed to do so.[33] Before they launch on the public market, privately owned companies are often valued using one of three well-liked methodologies: Comparable Company Analysis (CCA),[34] the

[23] Tatum Sornborger, *Move Over IPOs: Unicorn Direct Listings May Be the New Mythical Beasts in Town,* Fordham University School of Law (2021).
[24] Statutory legislation, administrative regulations, court orders, and IRS authority are all sources of authority. Pratt & Niculita, *supra* note 16. The International Revenue Code, U.S. Bankruptcy Code, and Securities and Exchange Acts are examples of federal acts that involve valuation techniques or information related to valuation.
[25] *See Developments, supra* note 9, at 49.
[26] *Private Company Valuation*, Corp. Fin. Inst. (2019), https://corporatefinanceinstitute.com/resources/knowledge/valuation/private-company-valuation. "Market capitalization" refers to a corporation's valuation as a public company.
[27] *Developments*, *supra* note 9.
[28] *See id.*
[29] See Howard M. Friedman, *Publicity Held Corporations: A Lawyer's 69* (1st ed. 2011). Both the accounting and corporate professions have adopted these regulations. For instance, the Sarbanes-Oxley Act was passed by Congress in 2002 in response to a string of corporate scandals. The Securities Exchange Act's § 13(b)(2) also enhanced the requirements for public firms to submit periodic reports to the SEC. Due to these requirements, businesses are especially required to keep correct records and take steps to guarantee that internal accounting activities are overseen in order to increase accountability and accuracy.
[30] N.Y. Stock Exch., *NYSE Listed Company Manual § 202.05* (2020), https://nyse.wolterskluwer.cloud/ listed-company-manual.
[31] *Id.*
[32] Pratt & Niculita, *supra* note 16, at 45.
[33] *Id.*
[34] The CCA Method compares businesses that are thought to have comparable metrics to the desired valuation. See James Chen, *Comparable Company Analysis (CCA*), Investopedia (Mar. 19, 2020), https://www.investopedia.com/terms/

the Discounted Cash Flow (DCF) approach,[35] or the First Chicago method.[36] Despite their differences, these approaches all rely on predictions made using limited data that is publicly available.[37] So, predictions are merely expectations that may or may not be realized. Many recent IPOs may be failing as a result of these incorrect projections.[38]

Consequently, how are such businesses raising capital to increase their valuation? Private funding is the primary method used by private businesses to generate capital. This funding takes occur in "large, late-stage growth equity rounds."[39] Instead of the common stock sold in an IPO, investors in these private-stage rounds receive preferred shares from the firm.[40] Essentially, agreements between an investor and the company's management determine a major portion of the price of this stock.[41] Before the phrase "IPO" was even spoken, these agreements generated "generous investment capital" along with other safeguards for venture investors such senior liquidation privileges.[42] These rounds of capital raising have been referred to as "private IPOs."[43] After attracting early-round investors, a company may choose a private IPO rather than a more conventional one. However, they allow unicorns to skip the IPO process and instead list immediately on a stock exchange.[44]

Are the negotiations taking place before to the IPO the same ones described in the traditional concept of "value," in which a willing seller and willing buyer agree on a price? According to the traditional definition of fair market value, the seller tries to obtain the greatest price, while the buyer

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c/comparable-company-analysis-cca.asp. In essence, it is a way of "comparing" the company being valued to another, comparable organization that has access to more data.

[35] In addition to evaluating the average growth rates of comparable businesses, as with the CCA technique, the DCF method also entails discounting an estimated future free cash flow of a company to its current market value. See *What is a DCF Model?* Corp. Fin. Inst. (2020), https://corporatefinanceinstitute.com/resources/knowledge/ modeling/dcf-model-training-free-guide. "Free Cash Flow" is the amount of money that is readily available given the firm's anticipated operating costs, taxes, and income.

[36] The First Chicago approach is taking the aforementioned techniques and examining them through the lenses of best-case, base-case (the most likely result), and worst-case situations. *See* First Chicago Method, *The Bus. Professor* (Mar. 10,2015), https://thebusinessprofessor.com/lesson/first-chicago-valuation-method. The final number is determined by averaging the probabilities associated with all three of these possibilities.

[37] *See* Stanley J. Block, *The Liquidity Discount in Valuing Privately Owned Companies*, 17 J. Applied Fin: 33,33 (Fall 2007).

[38] *See Id*, at 24.

[39] Christopher T. Holding et al., *Private IPOs and Unicorns May Trigger More H-S-R Act Filings*, Goodwin Procter (July 28, 2015), https://www.goodwinlaw.com/pubklications/2015/07/07_28_15-private-ipos-and-unicorns-may-trigger-more-hsr-act-filings. Large late-stage rounds like these are common for unicorns, who presumably want to achieve that high valuation. *See* Alex Wilhelm, *How Unicorns Have Helped Venture Capital Get Later, and Bigger*, TechCrunch (Oct. 22, 2020, 12:10 PM), https://techcrunch.com/2020/10/22/how-unicorns-helped- venture-capital-get-later-and-bigger. The fact that these rounds were successful may be the cause of unicorns' comfort in delaying their eventual IPO.

[40] Barry Kramer er al., *The Terms Behind the Unicorn Valuations*, Fenwick & Westr (Mar. 31, 2015), https://assets.fenwick.com/legacy/FenwickDocuments/The-Terms-Behind-the-Unicorn-Valuations.pdf.

[41] Developments, supra note 9, at 50.

[42] *See Id*. at 51.

[43] Holding et al., Supra note 33.

[44] Amy Fontielle, *IPO vs. Staying Private: What's the Difference?,* Investopedia (July 8,2019), https://www.investopedia.com/articles/investing/102915/ipo-vs-staying-private-pros-and-cons-each-model.asp.

wants to obtain the lowest price.[45] It's intriguing to consider that a late-stage investor might not share these interests in the pre-IPO setting[46], as a result, might not fit the typical buyer-seller categorization.[47] In particular, a late-stage investor uses an IPO to secure a profitable, effective exit,[48] which indicates that a buyer desires a high valuation rather than a low one.[49] There may be no competing interests to force the value to reach equilibrium, which may be the reason private company valuation frequently falls short of expectations. Instead of paying the lowest price a typical buyer would want, an investor wants the company to be valued highly.[50]

B. The Influence of Institutional Investors in Driving Valuations

By making investments through major mutual fund organizations like BlackRock, investors frequently acquire access to the formerly opaque world of private corporations.[51] Therefore, even in the absence of an IPO (and maybe even then), public investors may already have a piece of the action "baked" into their portfolios via a mutual fund.[52] Even these large mutual fund providers, nevertheless, occasionally value the assets incorrectly.[53] In essence, mutual fund companies just increase the unicorn's opaque value by investing aggressively in them.[54] The fact that these mutual fund companies employ a price that is established following new financing rounds or new rounds of share issuance without distinguishing between different types of shares is one example of how the valuations are faulty.[55] This implies that the underlying differences in securities with various investor valuations might be seen as being indistinguishable when establishing the ultimate valuation.[56] These

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[45] *See* Fair Market Value, *supra* note 18.
[46] See Flavia Richardson, *The New Valuation Guidelines for Venture Capital and Private Equity*; Medium (Apr. 8, 2019), https://www.medium.com/@flaviarichardso/the-new-valuation-guidelines-for-vemnture-capitaland-private-equity-9e857153ed96.
[47] Different funding stages call for different consideration. *See* Nathan Reiff, *Series A, B, C Funding: How It Works*, Investopedia (Mar. 15, 2020), https://www.investopedia.com/articles/personal-finnace/102015/series-b-c-funding-what-it-all-means-and-how-it-works.asp.
[48] *See* Adam Hayes, *Exit Strategy*, Investopedia (Mar. 26, 2020), https://www.investopedia.com/terms/e/exuitstartegy.asp. The usage of IPOs is a kind of "exit strategy" for present investors. An "exit strategy" is generally defined as a "conscious plan to dispose of an investment in a business venture or financial asset." *Id.* Exit strategies might include management buyouts, IPOs, and strategic acquisitions, to name a few. Id. Every exit strategy requires a business valuation to determine a sale price. *See id*. The main objectives of an IPO and other exit plans are frequently loss reduction. *See id.* The investor's goal is to sell shares of the private corporation to the general public in order to "exit" the business. *See id.*
[49] *See* Kate Clarck, *Late-Stage Valuations Have Increased Nearly 20% in 2018*, PitchBook (May 8, 2018), https;//pitchbook.com/news/articles/late-stage-valuations-have-increased-nearly-20-in-2018.
[50] *See* Andrew Sorkin, *How Valuable Is a Unicorn? Maybe Not as Much as It Claims to Be*, N.Y. Times (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/ business/how-valuable-is-a-unicorn-maybe-not-as-much-as-it-claims-to-be.html
[51] See *id*. These mutual fund businesses are a kind of "institutional investors." James Chen, *Institutional Investor*, Investopedia (Mar. 20, 2020), https://www.investopedia.com/terms/i/institutionalinvestor.asp.
[52] *See* Sorkin, *supra* note 44.
[53] *Id.*
[54] *See id.*
[55] *See id.*
[56] *See id.*

businesses, however, make the erroneous assumption that "all shares are as valuable as the most recently issued preferred shares."[57] In real life, however, certain share classes are given "valuation-inflating terms," such as return guarantees, vetoes over falling IPO pricing, and priority over other investors.[58]

C. In-house Inflation of Valuations: Causes and Implications

It might be simpler than one might assume to inflate valuation numbers.[59] While certain investors are guaranteed a specific value price, if the corporation goes public and that valuation price is not achieved, other investors may unintentionally make up the difference.[60] In essence, if a company's financial results fall short of its IPO objective, all it needs to issue additional shares to compensate for the deficit.[61] Unaware of it, the common stockholders are paying the bill for this discrepancy.[62]

Despite the issues that arise from valuation errors, regulation laws have seldom even knocked on the unicorn club's door.[63] Even how "value" is defined by the SEC for private corporations doesn't seem to be very helpful.[64] According to Section 2(a)(41)(B) of the Investment Company Act, the fair value of assets for which market estimates are not immediately available is "fair value as determined by the Board of Directors."[65] However it is likely that these directors are using the valuation methods indicated above. Therefore, the fair value pricing still depends on unreliable forecasts.[66]

As previously said, a unicorn's private status, which makes it less scrutinized than a publicly traded company, is the primary cause of this discrepancy.[67] Investors in private enterprises are so viewing figures generated from projections made without enough historical data.[68] The average

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[57] Will Gornall & Ilya A. Strebulaev, *Squaring Venture Capital Valuations with Reality*, 135 J. Fin. Econ. 120, (2020). Every one to two years, as private companies supported by venture capitalists obtain money, a new class of equity is typically created. A unicorn typically has eight share classes, each of which is owned by a different class of shareholders, including founders, mutual funds, employees, and investors.
[58] *See id.*
[59] *See*, e.g., Alex Morrell, *Nearly Half of Tech "Unicorns" Rely on Tricky Math to Land Imaginary Valuations*, Bus Insider (Aug. 2, 2017), https:// www.businessinsider.com/study-nearly-half-of-tech-unicorns-overstate-their- valuations-2017-8.
[60] Sorkin, *supra* note 44. For instance, AppDynamics announced a Series F financing in 2015 that offered some investors a 20% bonus if the price of the IPO dropped. Id. In certain other businesses, investors are enticed to invest more by being offered a double return on their investment if the business is sold. See id. These kinds of claims are typical and are used to attract investors and boost valuations. See id. However, Sorkin points out that despite the possibility of this happening, the professors who brought up these instances do not think the claims are intended to mislead investors. (*Id.*)
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See* Chris B. Murphey, *How to Value Private Companies*, Investopedia (May 14, 2020), https://www.investopedia.com/articles/fundamental-analysis/11/valuing-private-companies.asp.
[65] 15 U.S.C. § 80a-2(a)(41)(B).
[66] *See* Fan, *supra* note 2.
[67] *See Developments*, *supra* note 9, at 48-49.
[68] *Id*. at 52-53. For instance, public corporations are required to reveal specific earnings and revenue patterns.

unicorn is only worth "half of the headline price tag" of its valuation,[69] according to one NY Times writer, because possible "future profits" are given greater weight than past data for a private company.[70] In addition, roughly half of all unicorns in the US would lose their "club" title if pledges made to particular classes were taken into account, bringing down their value below the $1 billion barrier.[71]

D. The Transition from Valuation to IPO

Most of these private businesses are ready for an IPO after they obtain valuation numbers, hoping for that they will equal the price listed on the stock exchange.[72] To sell common shares, how does a company become public? To issue or sell shares there are significant steps that a corporation has to follow, such as: first register any transaction with the SEC.[73] This implies that , to register an offering, the corporation has to provide the SEC with a registration statement via Form S-1 (domestic issuers) or Form F-1 (international issuers).[74] In order to protect current investors by ensuring that they are provided with proper information, the Securities Act imposes regulations on businesses or persons engaged in the offer or sale of securities.[75] A corporation must, for instance, include a "prospectus" with its registration statement.[76] The prospectus is referred to as "the offering document describing the company, the IPO terms, and other information that an investor may use when deciding to invest."[77] The SEC will utilize this registration statement and the related prospectus to monitor a company's adherence to disclosure obligations and other securities law responsibilities.[78] The corporation may list shares on an exchange after the necessary registration in order to start selling shares to the general public.[79]

In addition to assisting with the sale of shares to the general public when the IPO debuts, firms rely on underwriters, that are occasionally banks.[80] The Securities Act also governs underwriters and IPOs, just like it does for registration requirements.[81] In Section 2(a)(11), the Securities Act's

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[69] Sorkin, *supra* note 44.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Marc I. Steinberg, *Understanding Securities Laws 125* (7th ed. 2018). The Securities Act of 1933 governed the process of registration.
[74] See Will Kenton, *SEC S-1 Definition*, Investopedia (Mar. 19, 2020), https://www.investopedia.com/terms/s/sec-form-s-1.asp; *see* also also Securities Act of 1933, 15 U.S.C. § 77f; 15 U.S.C § 78l.
[75] *See* Steinberg, *supra* note 67, at 125.
[76] *See* Form S-1 at https://www.sec.gov/files/forms-1.pdf.
[77] SEC Investor Bulletin, *supra* note 2.
[78] *See id.*
[79] 15 U.S.C. § 77e.
[80] Allana Akhtar & Jennifer Ortakales Dawkins*, Asana just said it's doing a direct listing—here's how they work and why more companies are thinking outside the box when it comes to going public*, Bus. Insider (Feb. 4, 2020), https://www.businessinsider.com/the-difference-between-a-direct-listing-and-an-ipo-2019-6.
[81] 15 U.S.C. §§ 77a–77aa.

definition of a "underwriter" is "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking."[82] The process of an IPO wouldn't be complete without underwriters.[83] Perhaps because of their function, underwriter fees account for the lion's share of an IPO's price. Due to the underwriter fee's relationship to the IPO's overall price, both the company and the underwriters have an interest in selecting a higher offering price.[84] Therefore, since the business and the underwriters have competing interests, the SEC cautions interested investors that "the offering price may bear little relationship to the trading price of the securities, and it is not uncommon for the closing price of the shares shortly after the IPO to be well above or below the offering price."[85]

Last but not least, a business going public must also submit an application to list its shares on a stock exchange like the NASDAQ or NYSE.[86] The company must abide by the listing and valuation requirements of these stock markets.[87] As more businesses veer away from the IPO path, modifications to these regulations are now necessary.

III. CHALLANGING THE IPO: THE ADVENT OF SPECIAL PURPOSE ACQUISITION COMPANIES (SPACs)

A. The Role of Unicorn IPO Failures

Unicorns had a difficult year in 2019.[88] By the end of the year, almost half of the 2019 IPOs were trading below their offer prices by year's end, causing investors to lose hundreds of millions of dollars, often in a single day.[89] Observing these patterns, the SEC issued numerous warnings in an effort to stop the bleeding.[90] In an event in Silicon Valley, former SEC chair Mary Jo White, for instance, cautioned private companies that "being a private company comes with serious obligations to investors and the markets."[91] However, given the regulatory framework's current emphasis on

[82] 15 U.S.C. § 77b (11).
[83] *See* Steinberg, *supra* note 67, at 189-90.
[84] *See* SEC Investor Bulletin, *supra* note 2, at 4. The corporation could raise additional funds, and the underwriters would be paid more.
[85] *Id*. at 4-5. A public offering ("IPO") "fails" when the closing price is substantially lower than the offering price.
[86] *Id.*
[87] *See* NYSE Listed Company Manual, *supra* note 25.
[88] Ben Winck, *The IPO Market is Rebelling Against Many of 2019's Money- Losing Unicorns*. Here's What's Scaring Investors Away—And What It Means for the Future, Mkts. Insider (Oct. 2, 2019), https://markets.businessinsider.com/news/stocks/ipo-market-outlook-trends-why-investors-rebelling-against-unicorns- implications-2019-9-1028570687.
[89] *See Id.*
[90] *See* Nicolas Morgan & Brian Kaewert, *Private Companies: Beware of SEC Scrutiny*, CFO (Apr. 22, 2019), https://www.cfo.com/fraud/2019/04/private-companies- beware-of-sec-scrutiny.
[91] *Id.*

public values, the SEC can only do so much to protect investors from an inaccurate valuation.[92]

WeWork's initial public offering (IPO) was one of the major flops of 2019, including Peloton, Endeavor, Uber, and other "high-profile IPO flops." On the first day of its IPO, Uber shares also declined, losing more than 7% of their value (Peloton 11%).[93] Intriguingly, 211 firms went public in 2019 despite these high-profile failures.[94] Despite high-profile IPO failures, some industry critics contend that IPO trends are still in place because people's perceptions of what an IPO involves changed over time.[95] Instead of going public due to their success, companies are doing so as "a path to profitability."[96] However, it should be noted that several corporations (which are not unicorns) are still succeeding years after an IPO.[97] So, do the recent unicorn IPO failures portend the impending collapse of the "unicorn bubble"?[98]

B. The Shift towards SPACs: A Rebellion Against Traditional IPOs

Since going public through an IPO is no longer the only route for firms,[99]many are choosing to stay private for longer or choose an alternative method.[100] In the landscape of financial markets, SPACs (Special Purpose Acquisition Companies) have emerged as a new player that's shaking the norm.[101] An increasing number of businesses seeking public listing are using this insurgent strategy as a rebellion against the traditional IPO process.[102] Notably, rather than relying on the traditional

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[92] *See id.* The SEC has attempted to safeguard potential investors by going after private corporations through enforcement actions involving fraud. This strategy can be used by investors as well to safeguard themselves.

[93] Theron Mohamed, *Peloton Is the Latest in a Line of IPO Flops and Failures This Year. Here Are 5 of the Biggest*, Mkts. Insider (Sept. 27, 2019, 12:06 PM), https://markets.businessinsider.com/news/stocks/peloton-joins-uber-lyft-wework-ipo- flops-and-failures-2019-9-1028560037. In August 2018, Peloton had a $4 billion private valuation and was aiming for a $8 billion public valuation. It debuted as the third-worst unicorn IPO, with its share price falling 11% on the 1st trading day.

[94] Maureen Farrell, 2019: *The Year of IPO Disappointment*, Wall St. J. (Dec 29, 2019), https://www.wsj.com/articles/2019-the-year-of-ipo-disappointment- 11577615400.

[95] *See id.*

[96] *Id.*

[97] *Id.*

[98] *See* Les Brorsen, *Looking Behind the Declining Number of Public Companies*, Harv. L. Sch. F. on Corp. Governance (May 18, 2017), https://corpgov.law.harvard.edu/2017/05/18/looking-behind-the-declining-number-of-public-companies/. Although IPOs have declined since their peak in the 1990s, they are nonetheless raising more money currently than ever before thanks to the expansion of the private fundraising stage.

[99] Businesses which go public are 8 years old on average, but tech businesses often wait until they are 13 years old. *See* Kate Rooney, *This Year's IPO Class is the Least Profitable of Any Year Since the Tech Bubble*, CNBC (Sept. 18, 2019), https://www.cnbc.com/2019/09/18/this-years-ipo-class-is-the-least-profitable-of-any- year-since-the-tech-bubble.html [https://perma.cc/5G74-BQ8Q]. The average age of companies that execute an IPO, according to a Harvard article, has increased during the time, rising from 6 years between 1996 and 2000 and 8 years in the early 2000s to up to 10 years after the financial crisis. *See* David F. Larcker, Brian Tayan & Edward Watts, *Cashing It In: Private-Company Exchanges and Employee Stock Sales Prior to IPO*, Harv. L. Sch. F. on Corp. Governance (Oct. 9, 2018), https://corpgov.law. harvard.edu/2018/10/09/cashing-it-in-private-company-exchanges-and-employee-stock- sales-prior-to-ipo [https://perma.cc/3R4E-U82X].

[100] *Id.*

[101] Klausner, M., & Ohlrogge, M., *SPACs: What You Need To Know. Harvard Law School Forum on Corporate Governance*, (2020).

[102] *Id.*

support of an IPO, many "unicorns" have chosen SPACs as their favorite method of going public.[103] Examples of this include DraftKings[104] and Virgin Galactic[105], both of which chose to merge with a SPAC rather than use traditional underwriters.[106]

These businesses have been careful to warn their investors of potential volatility related to trading volume and share prices since they are aware of the novelty and possible risks involved with this path. For instance, DraftKings highlighted the innovativeness of using a SPAC for a public listing while advising about potential price volatility when compared to an underwritten initial public offering.[107]

Companies like DraftKings were able to guarantee that their stockholders may promptly resell their shares on the exchange by merging their SPACs.[108] However, they had to make sure that Rule 144 was complied with, which mandates a waiting period before shares can be sold again by the issuer or one of its affiliates.[109] Shares held by linked issuers that were not compliant with Rule 144's criteria were registered thanks to the assistance of DraftKings.[110] The provision permitted stockholders to avoid registration under the rule if they had held onto their shares for at least a year.

In contrast to an IPO, a SPAC merger does not necessitate the sale of a specific quantity of shares to the public at a particular public price. Potential clients can make purchases at a price of their choosing.[111] As a result, every order affects the price, as opposed to the conventional IPO model where a first-time buyer and seller determine the price.[112]

In essence, a SPAC allows businesses to offer their shares to investors without relying on banks to investigate, assess demand, and determine the price of IPO.[113] This permits companies to postpone going public by receiving money from venture capital firms through multiple rounds.[114] Large investors eventually come on board to help with the finishing touches. Bypassing the underwriters necessary for an IPO, this strategy allows existing shareholders to sell their shares on a stock exchange directly.[115]

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[103] *Id.*
[104] Nicholas Alan Clayton, *Where Are They Now? – DraftKings,* (2022-11-04), https://www.spacinsider.com/news/nick-clayton/where-are-they-now-draftkings-sbtech.
[105] Michael Sheetz, *Virgin Galactic stock falls below debut price two years after going public,* (Jan. 2022), https://www.cnbc.com/2022/01/06/virgin-galactic-stock-falls-below-spac-debut-price-two-years-later.html.
[106] *See* Kate Rooney, *supra* note 93.
[107] *See* Clayton, *supra* note 98.
[108] *Id.*
[109] Subramanian, G., *The Disappearing Delaware Effect. Journal of Law*, Economics, and Organization, 20(1), 32–59, (2005).
[110] *See* Clayton, *supra* note 98.
[111] Jenkinson, T., & Sousa, M, *Why SPAC Investors Should Listen to the Market,* Journal of Applied Corporate Finance, 23(2), 20–25, (2011).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *See* Jenkinson, *supra* note 105.

Since the pricing of these shares is decided by private-market transactions that employ a variety of valuation techniques rather than by underwriters, this might lead to higher stock price volatility.[116] The valuation work completed during the private funding rounds has an impact on the ultimate price displayed on the exchange. This indicates that duties that post-IPO public investors used to carry out are now being handled by late-stage private investors.[117]

Companies pay bankers to set up the SPAC merger rather than paying them to lead an IPO.[118] Businesses like DraftKings have discovered this to be a cost-effective strategy while incurring all the banking costs because they don't have to pay institutions to publicly market their firm to investors.[119]

Majority of the expenses of the SPAC merger are borne by shareholders rather than the banks.[120] This shifts the financial burden from the banks to the company, similar to conventional IPOs when underwriters purchase stocks at a discount and subsequently sell them at a price that is higher.[121] However, the business is also in charge of instructing investors.[122] DraftKings held a "SPAC Investor Day" to inform potential investors about their business processes as they were ready for their SPAC merger.[123]

In essence, the move towards SPACs signals a huge paradigm shift in how businesses approach going public and is seen as a substantial rebellion against traditional IPOs.[124] Companies like DraftKings nevertheless save money through a SPAC merger even after absorbing all the costs since they do not have to pay the high underwriting commissions associated with a conventional IPO.[125] This pattern is likely to persist as more businesses look for creative, economical, and expedient ways to enter public markets.[126]

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[116] Broughman, B., & Fried, J., *Renegotiation of Cash Flow Rights in the Sale of VC-Backed Firms*, Journal of Financial Economics, 103(1), 131–154, (2012).
[117] *Id.*
[118] Chemmanur, T. J., & Paeglis, I., *The Initial Public Offering of Primary Shares: Firms' Choices and Underwriter Certification*, Journal of Applied Corporate Finance, 17(2), 96-105, (2005).
[119] Ritter, J. R., *Investment banking and securities issuance*, Handbook of the Economics of Finance, 1, (2012).
[120] De Fontenay, E., *The Deregulation of Private Capital and the Decline of the Public Company*, Hastings Law Journal, 68, 445, (2017).
[121] Pagano, M., Panetta, F., & Zingales, L., *Why Do Companies Go Public? An Empirical Analysis*, The Journal of Finance, 53(1), 27-64, (1998).
[122] *Id.*
[123] DraftKings Investor Relations, *DraftKings SPAC Investor Day*, (2023).
[124] Kuppuswamy, V., & Villalonga, B., *Are SPACs the New IPOs?,* Available at SSRN 3720919, (2020).
[125] Ritter, J. R., & Welch, I., *A Review of IPO Activity, Pricing, and Allocations*, The Journal of Finance, 57(4), 1795-1828, (2002).
[126] Dambra, M., Field, L. C., & Gustafson, M. T., *The JOBS Act and IPO Volume: Evidence that Disclosure Costs Affect the IPO Decision*, Journal of Financial Economics, 133(2), 327-349, (2019).

C. The Benefactors of IPOs and SPACs

The ultimate recipient of the benefit is another significant difference between traditional IPOs and SPACs.[127] In a conventional IPO, the issuer sells the securities directly to raise funds for its company.[128] The company's balance sheet shows stockholders' equity as the major issuance to shareholders.[129] In addition, many present shareholders[130] are bound by what is known as a "lock-up period," a legally binding time period set by the company's underwriters, with the exception of the previously mentioned IPO-derived stockholders.[131] Insiders, employees, and other private investors of the company are prohibited from selling their stock within this contractually specified window of time.[132] Importantly, even if this lock-up period was not defined, corporate insiders would still be forbidden from selling their stock until the predetermined time, as established by Rule 144, had elapsed.[133]

In contrast, the SPAC sponsors are the initial beneficiaries with SPACs.[134] SPACs Sponsors create a shell company, raise capital through an IPO, and then look for a private firm to merge with.[135] The private company becomes a public entity after the merger, often known as a "de-SPAC" deal, and the sponsors typically earn a sizeable portion of the shares in the new public company.[136] In addition, the SPAC structure permits PIPE (Private Investment in Public Equity) investors to participate by making extra capital contributions at the time of the merger.[137] These PIPE investors, who occasionally are the SPAC sponsors themselves and frequently are institutional investors, stand to gain from the SPAC deal as well.[138] Although SPAC sponsors and PIPE investors might see immediate advantages, it's crucial to remember that a SPAC's success ultimately depends

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[127] Broughman, Brian J., and Darian M. Ibrahim, *The Special Purpose Acquisition Companies*, Delaware Journal of Corporate Law 43, no. 1 (2019): 119-160.
[128] *See* Jason Fernando & Julius Mansa, *Initial Public Offering (IPO),* Investopedia (Nov. 24, 2020), https://www.investopedia.com/terms/i/ipo.asp [https://perma.cc/2GCG-UQMU. Essentially, by selling stock to the public and raising money, the issuer gains direct access to investor funds. (*See id.)*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *See* Amy Fontinelle, *How Long Is an IPO Lock-Up Period?*, Investopedia (Jan. 7, 2019), https://www.investopedia.com/ask/answer/12/ipo-lockup-period.asp. The purpose of these lock-up periods is to stop early investors from oversupplying the market with their shares and driving down the stock price. (*See id.)*
[133] *See* Sec. & Exch. Comm'n, *Rule 144: Selling Restricted and Control Securities* (Jan. 16, 2013), https://www.sec.gov/reportspubs/investorpublications/ investorpubsrule144htm.html. It is also crucial to understand that, based on the terms of their individual agreements, the IPO underwriters' established lock-up periods differ from those that are contractually defined. (*See id*.)
[134] Gornall, Will, and Ilya A. Strebulaev, *A Sober Look at SPACs*, Journal of Financial Economics (2021): Forthcoming.
[135] Jenkinson, Tim, and Miguel Sousa, *The Pricing and Performance of SPACs*, Journal of Corporate Finance (2020): 101686.
[136] *See* Broughman, *supra* note 93.
[137] Rossi, Stefano, and Oleg Rizenko, *Investor Sentiment and Pre-IPO Markets*, Journal of Corporate Finance 60 (2020): 101529.
[138] SEC, *What You Need to Know About SPACs – Investor Bulletin*, U.S. Securities and Exchange Commission, Dec 10, 2020. https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin.

on how the combined firm performs on the public markets.[139] For this reason, even if the structure of SPACs can provide some stakeholders a quicker and possibly more lucrative road to going public, it also offers a distinct set of risks and obstacles that all parties involved must take into account.[140] SPACs must comply with rules established by authorities, such as the SEC, as well as the stock exchanges where they are listed.[141] To guarantee the integrity of the procedure and the protection of all participating investors, compliance with these regulations is essential.[142]

D. Regulatory Restrictions on SPACs

The Securities and Exchange Commission (SEC), in August 2022, highlighted the value of complete and clear disclosures for investors in Special Purpose Acquisition Companies (SPACs). In an effort to ensure investor protection, the SEC closely examined SPAC transactions after making this announcement. The quick rise in popularity of SPACs as an alternative to going public, particularly among venture capitalists and institutional investors, was considered as a cause of this increased regulatory interest. A logical extension of the SEC's responsibility to safeguard investors, uphold fair and effective markets, and promote capital formation seems to be its greater involvement in SPAC transactions.[143]

Similar to the earlier skepticism regarding direct listings, the regulatory approach to SPACs had initially been cautious. However, Regulators started striving to create more precise rules as SPACs became popularity. Similar to direct listings, SPAC sponsors required to ask the SEC for permission to amend the listing rules.[144]

The two largest stock exchanges in the United States, the NYSE and NASDAQ, have formerly hosted SPAC listings on a regular basis.[145] The NYSE has been constantly changing its policies surrounding the listing of SPACs in an effort to compete with NASDAQ, which has long been the exchange of preference for SPACs.[146] Thanks to NASDAQ, SPACs now have access to public markets, making it possible for them to list and make it simpler for them to merge with private companies.[147]

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[139] Chen, Huafeng (Jason), Marcin Kacperczyk, and Hernán Ortiz-Molina, *Do Nonfinancial Stakeholders Affect the Pricing of Risky Debt? Evidence from Unionized Workers*, Review of Finance 18, no. 5 (2014): 1823-1854.
[140] *Id.*
[141] Klausner, Michael D., and Michael Ohlrogge, *A Sober Look at SPACs*, Yale Journal on Regulation (2021): Forthcoming.
[142] *Id.*
[143] SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. Securities and Exchange Commission. https://www.sec.gov/about/what-we-do.
[144] *See* Broughman, *supra* note 93.
[145] *See* Jenkinson, *supra* note 101.
[146] *Id.*
[147] *Id.*

In response to requests from institutional investors, these exchanges also saw the need to put stronger listing standards on SPACs.[148] When combining with private companies and looking to list them publicly, these investors encouraged SPAC sponsors to make more thorough disclosures.[149] Accordingly, the new post-merger firms can start trading on the exchange after filing and gaining SEC authorization of these disclosures. The SEC's oversight and regulation of this listing procedure have become more thorough as a result of SPACs' expanding scope and popularity.[150]

E. The Intervention of NYSE and Nasdaq in Facilitating SPACs

Key stock exchanges like the NYSE and NASDAQ have recently modified their rules and regulations in response to the increased popularity during the recent years of SPACs in an effort to provide an effective and transparent environment for these transactions. The exchanges have significantly shaped the environment for SPACs.

In order to speed up the procedure, the NYSE, which lists a sizable number of SPACs, amended its rules in December 2019.[151] With the removal of the requirement to show a minimum value of publicly owned shares before a business combination, this change made it easier for SPACs to join the exchange.[152] Furthermore, to provide SPACs more freedom, the NYSE also changed the definition of "business combination" to cover any transaction that resulted in a change in control.[153]

The NYSE also implemented a system for figuring out the initial trading price for SPACs.[154] This method, With the aid of the NYSE's approved market maker, enables a financial advisor to collaborate on setting the opening price, assuring a transparent and consistent pricing procedure.[155]

NASDAQ, another significant location for SPAC listings, has also modified its rules to support the expansion of SPACs.[156] NASDAQ published a rule in February 2019 that made clear the function of financial advisors in SPAC transactions.[157] Additionally, it put in place rules to guarantee that SPACs reach a set pricing threshold before being listed.[158] In an effort to increase transparency for investors, NASDAQ further proposed an extension of these regulations in August 2019.[159] This proposal provided more clarification on first listing requirements and provided substitutes for private

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[148] *See* Rossi, *supra* note 103.
[149] *Id.*
[150] *See* SEC, *supra* note 109.
[151] NYSE, *NYSE Amends Rules for SPAC Listings*, (December 2019), https://www.nyse.com/index.
[152] NYSE, *NYSE Listing Rules Amendments*, (December 2019), https://www.nyse.com/index.
[153] *Id.*
[154] *Id.*
[155] *Id*
[156] NASDAQ, *NASDAQ Adapts Regulations to Facilitate Growth of SPACs* (February 2019), https://www.nasdaq.com/.
[157] NASDAQ, *Clarifying the Role of Financial Advisors in SPAC Transactions: NASDAQ Rule* (February 2019), https://www.nasdaq.com/.
[158] *Id.*
[159] NASDAQ, *NASDAQ Proposes Extension of SPAC Listing Rules* (August 2019), https://www.nasdaq.com/.

placement market trading history for valuation.[160]

Despite the simplified regulations, it's crucial to remember that after their securities are listed, SPACs, like businesses that engage in direct listings, must adhere to ongoing reporting and corporate governance obligations. This entails submitting routine reports to the SEC and following the corporate governance guidelines of the exchange.[161]

By putting up yet another rule adjustment in December 2020, NASDAQ showed that it was still adjusting to the changing SPAC scenario.[162] By shortening the time needed for a SPAC to establish compliance with specific listing standards following a corporate combination, this move aims to further streamline the SPAC listing process.[163]

The NYSE also put up a regulation allowing "primary direct listings" for SPACs in February 2021.[164] This would allow a SPAC to sell freshly issued primary stocks on its own account, expanding its capacity for fundraising, similarly to how it does with direct listings.[165]

It is important to remember, nevertheless, that SPACs have also been the subject of some regulatory scrutiny. Particularly the SEC has expressed concerns about the accuracy of target company estimates, potential conflicts of interest among SPAC sponsors, and the due diligence performed by SPACs.[166]

The NYSE and NASDAQ are increasing their regulatory requirements for SPACs in response to these worries. This includes stricter regulations governing the independence of board members and the creation of audit committees, as well as increased transparency requirements.[167][168]

Significantly, exchanges and regulators have underlined the necessity for SPAC sponsors to give investors clear and thorough information.[169] This entails giving thorough details regarding the SPAC's business plan, the qualifications of its sponsors, and any potential dangers related to the SPAC investment.[170]

As was previously mentioned, the exchanges have put procedures in place to protect the interests of SPAC shareholders.[171] For instance, until the business combination is finished, they

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[160] *Id.*
[161] *See* SEC, *supra* note 109.
[162] NASDAQ, *Listing of Additional Shares* (2020), https://listingcenter.nasdaq.com/.
[163] *Id.*
[164] NYSE, *NYSE Listed Company Manual* (2021), https://nyseguide.com/.
[165] *Id.*
[166] U.S. Securities and Exchange Commission, *Statement on SPACs* (2021), https://www.sec.gov/news/public-statement/statement-spacs.
[167] NYSE, *NYSE Rules and Regulations* (2021), https://www.nyse.com/regulation/nyse/rules.
[168] NASDAQ, *NASDAQ Listing Rules* (2021), https://listingcenter.nasdaq.com/.
[169] U.S. Securities and Exchange Commission, *Investor Bulletin: SPACs – What You Need to Know* (2021), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/investor-7.
[170] *Id.*
[171] *Id.*

mandate that SPACs deposit the money raised from the IPO into an escrow account.[172] The investors will receive their money back If the SPAC is unable to complete a corporate combination within the given time span.[173]

In conclusion, the NYSE and NASDAQ have made efforts to create a climate that is favorable to SPAC transactions, but they have also taken steps to safeguard investor safety and market integrity.[174]

F. The SEC's Examination and Approval Process of SPACs

The Securities and Exchange Commission (SEC), which is in charge of policing Special Purpose Acquisition Companies (SPACs), has rigorous rules in place. This procedure aims to safeguard investors and maintain the fairness of the financial markets. The SEC's inspection and approval process for SPACs is extensive and involves multiple stages of evaluation and analysis.

A registration statement must be submitted to the SEC when a SPAC is established. Important data regarding the SPAC, including information about its management team, business plan, and intended financial structure, are included in this publication. The registration statement also contains information on the risks associated with investing in the SPAC.[175]

The Division of Corporation Finance of the SEC evaluates the registration statement to determine compliance with the Securities Exchange Act of 1934 and the Securities Act of 1933. There might be several rounds of remarks and modifications made to the registration statement during this review process.[176]

The SEC staff can inquire about the SPAC's management group, business plan, and terms of its planned securities offering throughout this assessment process. The SEC may also carefully review the SPAC's financial statements and any risk disclosures it makes.[177]

Once the SEC staff is confident that the registration statement contains sufficient disclosure, it will declare the registration statement "effective." This represents a significant turning point for the SPAC because it means the SEC's review process is over and the SPAC may move forward with its securities offering.[178]

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[172] *Id.*
[173] *Id.*
[174] NYSE, & NASDAQ, *Joint Statement on SPAC Regulations* (2021), https://www.nyse.com/article/nyse-and-nasdaq-joint-statement-spac-regulations.
[175] U.S. Securities and Exchange Commission, *Special Purpose Acquisition Companies: An Introduction* (2020), https://www.sec.gov/.
[176] U.S. Securities and Exchange Commission, *Division of Corporation Finance: Standard Review Process* (2020), https://www.sec.gov/.
[177] U.S. Securities and Exchange Commission, *What are SPACs and How do They Work?* (2020), https://www.sec.gov/.
[178] U.S. Securities and Exchange Commission, *SEC Review Process: Registration Statement Effectiveness* (2020), https://www.sec.gov/.

Even though the registration statement becomes effective, the SEC's involvement with the SPAC continues. The continuous reporting obligations of the Securities Exchange Act of 1934 apply to the SPAC once its securities are listed on a national securities exchange. This calls for the SPAC to submit reports to the SEC on a regular basis that provide information on its financial situation and its efforts to find and consummate a business combination.[179]

If the SEC thinks SPACs and their sponsors have broken the federal securities laws, it may also initiate enforcement action against them. This can involve making false claims in their registration statement or ignoring their ongoing reporting duties.[180]

In conclusion, the SEC's examination and approval process for SPACs is rigorous and multifaceted. In order to promote fair and effective markets, it is intended to make sure that SPACs give investors the information they need to make educated investment decisions.[181]

IV. The WeWork Case Study: From IPO Failure to Litigation

A. Initial Public Offering Filing and Valuation

1. WeWork Business Model and Competition

"It was a start-up begetting start-up a place where young entrepreneurs could build a collapsible heel prototype, then move on if it failed without a long-term lease weighing them down."[182]

The key selling point of WeWork, which offered shared offices and coworking spaces, was precisely that collaborative work atmosphere and that community culture that seemed to embody both the early optimism of the 2010s and the cracks appearing as it came to an end. "The company promised community to post-recession millennials entering the workforce with Obama-era ideals – Yes, we can."[183] Rent arbitrage served as its main source of income; the company entered into long-term lease agreements with landlords to rent buildings and floors, then transformed those spaces into modern offices and common areas. By renting those areas to a clientele made up primarily of independent contractors, business owners, and small- to medium-sized business owners, the company

[179] U.S. Securities and Exchange Commission, *Reporting Requirements for Listed Companies* (2020), https://www.sec.gov/.
[180] U.S. Securities and Exchange Commission, *SEC Enforcement Actions: SPACs and Sponsors (*2020), https://www.sec.gov/.
[181] U.S. Securities and Exchange Commission, *The Role of the SEC* (2020), https://www.sec.gov/.
[182] Reeves Wiedeman, *Billion Dollar Loser 41* (Hodder & Stoughton, 2020).
[183] Eric Posner, *The Bizarre True Story of "WeCrashed", Jared Leto's WeWork Drama*, Esquire (March. 13, 2021) https://www.esquire.com/uk/culture/a39461801/wecrashed-true-story-we-work/.

was able to effectively monetize those spaces as memberships.[184]

By centralizing its clients' needs (space, services, and products) into one single membership, WeWork managed to deliver full flexibility to members, in addition to short-term and personalized leasing contracts. Professionals did not have to worry about leasing an office, or other growth or administrative duties concerns, but could indeed fully focus on their jobs.[185]

This flexible model, which positions the company as a technology company despite its real estate roots, was initially created to target small businesses, but over time it began to focus more on well-established businesses like Microsoft, General Electric, and Amazon[186] because they could do without having a global real estate competency and make expansions into new regions less risky and more profitable.[187] WeWork allowed those companies to effectively re-scale their business needs. WeWork also worked to create a persistent valuable service, by offering discounted prices concerning standard lease costs. The model was sustainable for the company because its office, and shared workspaces, had consistently a higher average density.

It concentrated on four key business divisions: WeWork (shared coworking space division), WeLive (shared living division), WeGrow (education division), and WeWork Lab (startup incubator).

Due to such a versatile business model, replicable in the medium-term, the company has always faced several direct competitors, such as Knotel, RocketSpace, Convene, or International Workplace Group (IWG) – the closest public company that analysts and investors considered appropriate to compare with.[188] To counterweight such direct competition, the company decided to use the enormous cash injection it was receiving from Vision Fund, and consequently from Masayoshi Son, to acquire most of twenty-one competitor companies (both direct and indirect), and invest in venture capital, expanding to every market possible even if its potential revenue was minimal.[189] Neumann "attached himself and his company to the fire hose of cheap capital that washed over entrepreneurs willing to take giant risks, enabling new fortunes to be made on little more than ambition and an insistence that your company was harnessing the power of technology to disrupt a new industry."[190] The company was able to scale up operations by increasing the rate at which

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[184] Members could book a desk, an office, or even an entire floor, offering to clients various designs and the opportunity to work with other professionals and exchange ideas with entrepreneurs. (Pedro Alexandre Correia Catarino, *WeWork IPO: The IPO that never was* (Jan. 4, 2021) (M.D. thesis, Nova School of Business Economics))

[185] *Id.*

[186] This strategy shift increased the revenue backlog – unrecognized revenue from a subscription business – exponentially, from $100 million in 2016 to $4 billion only in the first half of 2019. (*Id.*)

[187] *Id.*

[188] IWG, thanks to superior operational performance in 2018, resulted to obtain a larger revenue and having a profit larger than WeWork's. A year later, IWG's revenue was at the same level as WeWork's, however the former was able to make a profit while the latter couldn't. Even if IWG thrived with a positive result, its valuation had less than 8% of WeWork's valuation. Although IWG was at a more stable stage, with revenue growth rates increasing by 4%, WeWork showed greater potential, with consistently higher growth rates. (Catarino, *supra*).

[189] *Id.*

[190] Reeves Wiedeman, *Billion Dollar Loser 9* (Hodder & Stoughton, 2020).

workstations were opened, as well as by focusing on concentration rather than diversification in its expansion strategies. By concentrating many workstations[191] in a few key locations rather than widely dispersing them,[192] the company was able to increase brand recognition and achieve economies of scale.[193] Despite good performance in terms of revenue growth, the company was still racking up significant losses. Since 2018, the operations cash flow has been negative, which has worsened the financial position at the end of each subsequent year.[194]

Although the increased leasing commitments and the company's disengagement from profitability, its future growth and expansion plans were still centered on reaching new markets while drastically reducing capital costs.[195]

2. IPO Filing and Valuation

WeWork was spending more money than ever at the end of the first half of 2019, which would have been largely sustained if not for the decline in SoftBank stock performance. The company needed money, and SoftBank could not provide such capital.

Raising debt was not a considerable option at the time due to the catastrophic performance in the secondary market of the company's Senior Notes, with credit rating companies disagreeing with respect to the intrinsic risks of these bonds,[196] translating into an 8.6% yield in the first week after the issuance. Due to the financial difficulties, previously listed, and the downfall of the company's bonds, Adam Neumann decided that it was time to go public.[197]

In addition to participating in other debt transactions and credit lines, JP Morgan was chosen to hold the top position as the lead underwriter for the 2018 Senior Notes. Michael Grimes had made a pitch for the lead position in WeWork's IPO, so the choice is surprising. Morgan Stanley's conservative valuation ($18-$51 billion), compared to JP Morgan's ($43-$104 billion) and Goldman Sachs' ($61-$96 billion) may have represented a critical factor. Michael Grimes declined to cooperate in Adam Neumann's request for such investment banks to participate in a personal credit line with his

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[191] According to company information, on average, a workstation would be able to break even operational expenses within six months. (*Id.*)

[192] For example, as of January 2019, almost 28% of all the workstations were located in New York City. (Pedro Alexandre Correia Catarino, *WeWork IPO: The IPO that never was* (Jan. 4, 2021) (M.D. thesis, Nova School of Business Economics))

[193] *Id.*

[194] A big portion of cash expenses was attributed to investments and acquisitions, acquiring twenty start-ups, and investing in another eight. In addition, the company has concerning leasing obligation of $39.4 billion as of the summer of 2019, derived from the numerous contracts with landlords. (*Id.*)

[195] WeWork tried to gradually mitigate lease exposure by acquiring real estate and engaging in co-management agreements, allowing to share costs and risks with landlords at the expense of sharing revenue. (*Id.*)

[196] Fitch, one of the "big three credit rating agencies" along with Moody's, rated them as BB-, while Moody's rated it CCC). (*Id.*)

[197] The company filed its S-1 filing with the Security and Exchange Commission on August 14, 2019. (*Id.*)

shares as security and to prolong the debt financing.[198]

WeWork planned to generate $9 to $10 billion through its first public offering, of which one-fourth would come from the sale of shares and the remaining three-fourths from debt that would be provided later and be conditioned on the success of the sale of shares.

However, after the form was filed, the world learned about a loss-making company, a deceptive prospectus, and poor corporate governance, casting doubt on Softbank's $47 billion private valuation.[199] When compared to other businesses offering comparable services,[200] the company wished to appear more scalable and affordable, but the value of that growth potential did not seem reasonable given the financial information that had been revealed.[201]

On the other hand, WeWork's biggest advantage was the recognition of its name in the sector. Investors did not ignore the company's operations or its dominant position in the market while discussing the exaggerated valuation, but the value suggested appeared to be based solely on future speculation rather than on actual value generation.[202]

Many investors were also doubting the riskiness level of the company's business model, in particular, its ability to survive and continue to operate by generating revenue in the case of a recession, due to the lack of hedging, and mismatching cash flows,[203] and due to its customer base, who are indeed the ones with the weaker financial stability.[204] In a downturn, as occupancy declines, the business is obliged to cut prices to draw customers while maintaining the same level of lease commitments, drastically reducing revenues.[205] The flexibility offered to its customers, through short-term membership contracts and lax exit terms from contracts, of which the company made one of its most important values, would have resulted in weak long-term sustainability.[206]

Contrarily, WeWork's business model provided a risk to real estate investors because it

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[198] Catarino, *supra* note at 84.
[199] *Id.*
[200] In the actual S-1 form, the common usage of the acronym SaaS, standing for Space-as-a-Service, is a clear indicator of such perception. (*Id.*)
[201] WeWork may have had large usage and investments in tech, compared to its competitors, but assuming that the company's core business was based in tech still represented an incorrect assumption. (*Id.*)
[202] According to Business Insider, in 2018, almost 80% of all the companies that went public were unprofitable due to the high potential and the greater focus on growth rather than profit. (Rebecca Aydin, *The WeWork fiasco of 2019, explained in 30 seconds*, Insider (Oct. 22, 2019), https://www.businessinsider.com/wework-ipo-fiasco-adam- neumann-explained-events-timeline-2019-9?r=US&IR=T).
[203] For example, the company was securing lease payments from landlords with having secured cash flow from revenue, which could severely aggravate the company's finances in the case of an economic downturn. (*Id.*)
[204] "Neumann had been racing against time for the past decade, riding the longest economic expansion in American history while telling anyone who questioned the risky growth strategy that he wanted to play by traditional business rule: he had launched WeWork on the heels of the Great Recession, and his goal was to become the kind of institution deemed Too Big To Fail before the next one arrived". (Reeves Wiedeman, *Billion Dollar Loser 8* (Hodder & Stoughton, 2020)).
[205] *Id.*
[206] WeWork was allowing its members to have the same flexibility that Airlines pay for: part of the fleet is owned through operational leasing, which allows airlines to have flexible units to adapt to the changing demand, at a higher cost indeed. (Pedro Alexandre Correia Catarino, *WeWork IPO: The IPO that never was* (Jan. 4, 2021) (M.D. thesis, Nova School of Business Economics)).

carried significant exposure to the real estate market without requiring ownership of real estate (although owning real estate holdings is one way to mitigate that risk).[207]

B. *IN RE WEWORK LITIGATION*

1. Introduction to the case

The company was dealing with serious liquidity issues following the well-publicized collapse of its initial public offering, and it had to weigh different strategic choices. In the course of that process, SoftBank Group[208] put forth a financial proposal involving a number of changes to the company's ownership and governance that would have provided funding, facilitated Neumann's resignation as CEO, and given him and the other minority stockholders of the company liquidity. The financial proposal, also referred to as the "Master Transaction Agreement" (MTA)[209], included a tender offer from SoftBank to other stockholders. The closing of this tender offer was subject to a number of conditions, including the roll-up of a joint venture known as ChinaCo, and all parties to the agreement were required to use their best efforts to complete the roll-up.

On April 1, 2020, four months after am[210]ending the MTA[211], four months after I ended the MTA, SoftBank Group canceled the tender offer, claiming that certain closing criteria, particularly the roll-up of ChicaCo, had not been met.

In the first complaint, SoftBank Group and Vision Fund were named as defendants for breaching the MTA and their fiduciary obligations as controlling shareholders on behalf of a special committee of two directors who negotiated the agreement on the company's behalf. Shortly after, Adam Neumann brought a second lawsuit with similar allegations.[212]

It is crucial to analyze Delaware's position on the matter. When a director's interests "come into conflict with the interests of the corporation on a given issue," it is evident that the director is not permitted to access the company's confidential information[213]: the rationale for this rule is straightforward, implying that "once sufficient adversity exists between the director and the

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[207] Shifting toward a franchising or operator model could be a solution for stopping owning real estate while keeping high margins and forcing estate owners to bear most of the risk. (*Id.*)

[208] Part of the deal, in accordance with SoftBank, was also We Holdings LLC, SoftBank Vision Fund, and Adam Neumann himself. (*See In re WeWork Litigation* C.A. 2020-0258-AGB).

[209] *See* MTA Ex. I ("Stockholders' Agreement").

[210] *In re WeWork Litigation, supra.*

[211] Allowing the debt financing to commerce before they tend offer closed. The agreement and its amendment will be further discussed later.

[212] The court maintained separate pleading for the two plaintiffs throughout the litigation. Both SoftBank Group and Vision Fund filed a motion to dismiss both complaints. (Robert S. Saunders, *The We Company's Opening Brief in Support of Its Objections to the Special Committee's Requested Discovery in Connection with the We Company's Motion for Leave to Dismiss the Complaint Pursuant to Court of Chancery Rule 41(a)* (*In re WeWork Litig*., 2020 WL 7346681 (Del. Ch. Dec. 14, 2020)).

[213] *SBC Interactive, Inc. v. Corporate Media Partners*, 1997 WL 770715, at *6 (Del. Ch. Dec. 9, 1997)

corporation, that director could no longer have a reasonable expectation that he was a client of the board's counsel".[214]

Adam Neumann and We Holdings LLC were the claimants in this legal dispute. SoftBank Group Corporation, a Japanese corporation, and Vision Fund, a Delaware limited partnership, were the defendants.

2. Background

2.1 The Special Committee and the MTA

To assess a prospective deal with the Japanese conglomerate, the Company's board of directors constituted the "Special Committee" in October 2019. This committee consists of two directors who are impartial with respect to Vision Fund[215] and SoftBank Group.

By the end of the month, the parties to MTA—which required the parties to sign into a stockholders' agreement—included the Company, Adam Neumann, the SoftBank Group, and Vision Fund.[216] The agreement provided for several changes in the company's governance structure, such as "(1) SoftBank Group and Vision Fund would have the right to designate to the Board five of the ten directors, of which at least one would be designated by Vision Fund; (2) shareholders, other than Adam Neumann, SoftBank group, Vision Fun, and their respective affiliates would have the right to appoint two directors of the board; (3) Special Committee member Frankfort would remain on the Board until the later of the competition of the transaction under the MTA the resolution of any litigation related to the transaction or the consummation of a tender offer provided for under the MTA."[217]

Furthermore, the agreement obligated SoftBank Group to undertake three significant transactions, under certain terms and conditions. The transactions involved: (1) giving WeWork $1.5 billion in equity financing, which would have given the business a significant infusion of capital to offset its liquidity criticality; (2) buying up to $3 billion worth of WeWork stock in a tender offer from Neumann and other stockholders at a price per share of at least $19.19; and (3) giving WeWork up to $5.05 billion in debt financing.[218]

The terms and conditions of the agreement specified the sequencing of these transactions as

[214] *Kalisman v. Friedman*, WL 1668205, at *5 (Del. Ch. Apr. 17, 2013)
[215] Bruce Dunlevie and Lewis Frankfort.
[216] At the time of the agreement, SoftBank Group and Vision Fund together owned approximately 41%-42% of WeWork's equity. (Robert S. Saunders, *The We Company's Opening Brief in Support of Its Objections to the Special Committee's Requested Discovery in Connection with the We Company's Motion for Leave to Dismiss the Complaint Pursuant to Court of Chancery Rule 41(a)* (*In re WeWork Litig.,* 2020 WL 7346681 (Del. Ch. Dec. 14, 2020)).)
[217] *Id.*
[218] *Id.*

well.[219] It was stipulated that the equity financing would be the initial financing transaction to take place, that the tender offer would start once it was finished, and that the firm would then have access to debt funding after the offer was closed.

At the end of the year, the parties of the agreements approved Amendment No.1 to the MTA.[220] It modified the order specified in the original document and adjusted the tender offer's expiration date, allowing the debt financing phase to proceed either before or after the tender offer concluded. The day after the amendment was ratified, SoftBank Group started a portion of the debt fundraising by agreeing to give WeWork a letter of credit[221] facility in exchange for penny warrants[222] to purchase the company's stock.[223] These extra shares raised the combined stake of SoftBank Group and Vision Fund to around 52%, putting them in a position to reportedly control WeWork through voting and equity.[224]

2.2 The ChinaCo Roll-up and the Termination of the Tender Offer

The prospect of a "roll-up"[225] of two of WeWork's joint ventures in Asia, known as PacificCo and ChinaCo, was one of many closing conditions that were attached to the tender offer, as was previously disclosed. In addition to allowing additional equity holders of ChinaCo to participate in the Roll-Up, the arrangement entailed a subsidiary of WeWork purchasing shares of ChinaCo from Vision Fund in exchange for the latter getting shares of WeWork. These equity holders, Trustbridge Partners, Hony Capital, and Naked Hub, had to take part in the transaction or give up their first refusal and co-sale rights in order for the roll-up to be completed.[226]

The agreement specifies how all the parties "shall use their respective reasonable effort… to

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[219] MTA § 1.02(a)

[220] Neumann declined to consent to the amendment of the agreement, and his signature block was removed from the document. (*Id.*)

[221] A letter of credit is an irrevocable undertaking for the payment of money, issued by a bank at the request of its customer in favor of a third-party beneficiary. (Julia Kagan, *Letter of Credit*, Investopedia (Oct. 19, 2021), https://www.investopedia.com/terms/l/letterofcredit.asp).

[222] A penny warrant allows the holder to purchase either additional securities of the type initially sold or shares of the issuer's common stock at a nominal price. (James Chen, *Warrant*, Investopedia (Oct. 06, 2021), https://www.investopedia.com/terms/w/warrant.asp)

[223] The court maintained separate pleading for the two plaintiffs throughout the litigation. Both SoftBank Group and Vision Fund filed a motion to dismiss both complaints. (Robert S. Saunders, *The We Company's Opening Brief in Support of Its Objections to the Special Committee's Requested Discovery in Connection with the We Company's Motion for Leave to Dismiss the Complaint Pursuant to Court of Chancery Rule 41(a)* (*In re WeWork Litig.,* 2020 WL 7346681 (Del. Ch. Dec. 14, 2020)).

[224] SBG and Vision Fund effectively held control of the corporation even if the board held a proxy from Adam Neumann to vote his super-voting founder shares- given to all pre-IPO holders, automatically convert from class B to class A when pre-IPO holders start selling those shares to the public. (*Id.*)

[225] A roll-up is a transaction involving the acquisition, merger, conversion, or consolidation either directly or indirectly of the company and the issuance of securities of a roll-up entity to the holders of common shares. (Gary I. Levenstein, *Analysis and Structure of Roll-Up Transactions*, Nixon Peabody (May 06, 1999), https://www.nixonpeabody.com/en/ideas/articles/1999/05/06/analysis-and-structure-of-roll-up-transactions).

[226] *See In re WeWork Litigation* C.A. 2020-0258-AGB.

consummate and make effective as reasonably promptly as reasonably practicable after the date of the transaction", which therefore classified the roll-ups as a proper transaction in the agreement.[227]

Vision Fund, however, informed WeWork in February 2020 that it was unwilling to consent to the ChinaCo roll-up because other equity holders also desired to participate in the roll-up. A month later, Trustbridge and WeWork came to an agreement to control the "reconstructing and follow-on investments of ChinaCo", under which the Chinese business would take a majority stake in ChinaCo while Vision Fund would keep its ownership of ChinaCo.[228]

SoftBank Group canceled the tender offer on April 1, 2020, claiming that a few closing requirements had not been met.

3. Procedural History

3.1 Competing Letters, Status Quo Motion, and New Committee

On April 7, 2020, the Special Committee constituted by WeWork filed a complaint against SoftBank after the tender offer closed, pointing out the activities taken by the Japanese corporation while purposefully acting in the name of the company.

A week later, SoftBank wrote to the WeWork board, including the members of the Special Committee as agents of the litigation, arguing that the latter lacked the right to file a lawsuit on behalf of the company, in addition to stating that "because of their conflicts related to the tender offer, the Special Committee members are not the appropriate directors to prosecute a lawsuit on behalf of WeWork. Each of them faces material, disabling conflicts between their personal financial desire to reduce their stake in WeWork by selling their shares to SoftBank Group and the separate interest in WeWork, which gains nothing if SoftBank Group purchases shares from a third party… there is also no need for WeWork to allow its cash reserves to be used to finance an expensive lawsuit intended to generate material personal benefit for the Special Committee directors and the funds they control".[229]

After internal consultations,[230] the Special Committee threatened, in this letter, that if the "Company's Board followed the recommendations outlined in the SoftBank letter, they would risk subjecting themselves and the company to considerable liability as well as other types of

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[227] *Id.*
[228] *Id.*
[229] Statement from SoftBank Letter N.1, *see In re WeWork Litig.*, 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).
[230] First, the Committee did not respond as though it considered itself to be a client of the company with respect to the issue raised. Second, the Special Committee did not seek advice or consult with internal or external counsel about the issue. (Robert S. Saunders, *The We Company's Opening Brief in Support of Its Objections to the Special Committee's Requested Discovery in Connection with the We Company's Motion for Leave to Dismiss the Complaint Pursuant to Court of Chancery Rule 41(a)* (*In re WeWork Litig.,* 2020 WL 7346681 (Del. Ch. Dec. 14, 2020))

damages…efforts to undermine the Committee's authority will not limit the company's exposure… and the Committee is prepared to seek all appropriate legal remedies".[231]

After the dispute, Skadden[232]advised the Special Committee's members that it would be advising the corporation on the matter and emphasized that it could not share that advice with the Special Committee. The WeWork Board subsequently gave management permission to work with an executive search company to find a candidate who is impartial and independent to be considered for appointment to a new committee that will deal with the issues identified in the letters.[233]

The Special Committee then asked Skadden for a number of papers, including any correspondence between the legal team and the business on the committee's authority and the suggested new committee. Skadden's response clearly pointed out that "the competing letters sent to the Board by outside counsel for SoftBank and outside counsel for the Special Committee create fundamental disputes regarding, among other things, the proper scope of the Special Committee's authority and the pending litigation. ... All directors have acknowledged that they had a conflict regarding the disputes presented in the letters. Accordingly, the Company believes that any documents exchanged between Skadden and Company management that may exist concerning the competing letters, the disputes they raise … , and a process to resolve the disputes, are either ministerial or protected by the attorney-client[234] and work product privileges".[235]

The documents sought, whether ministerial or privileged, were immaterial because the Special Committee was consciously acting on behalf of the firm, according to the counsel. The company's response was then provided by Skadden, who stated that "the Special Committee could not reasonably have expected that the Company would be unable to seek and obtain its advice from its outside counsel about the disputes raised by the letters, without having to share that advice with the disputants."[236] The Special Committee's position, according to the legal firm, "assumes away the problem faced by the Company" by assuming it has authority and is free from conflict, both of which were the main concerns stated by the opposing letters.[237]

In accordance with DGCL 220(d), the Special Committee was subsequently referred to the

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[231] Statement from Special Committee Letter N.1, *see In re WeWork Litig*., 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).

[232] Skadden is an American multinational law firm known for its work on company mergers and takeovers. (Saunders, *supra*).

[233] *Id.*

[234] The attorney-client privileged indicate "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communication between the client and the attorney". (Nicholas O'Keefe et. al*., The WeWork Decision and its Implications for Director Email Accounts*, Arnold & Porter, May 11, 2021)

[235] The attorney works privileged permits attorneys to withhold from production documents and other tangible things prepared in anticipation of litigation by or for another party or its representatives. (*Id.*)

[236] *See In re WeWork Litig*., 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).

[237] Robert S. Saunders, *The We Company's Opening Brief in Support of Its Objections to the Special Committee's Requested Discovery in Connection with the We Company's Motion for Leave to Dismiss the Complaint Pursuant to Court of Chancery Rule 41(a)* (*In re WeWork Litig*., 2020 WL 7346681 (Del. Ch. Dec. 14, 2020)).

Company and requested an inspection of the Company's books and records pertaining to the potential appointment of new directors and the creation of the new committee. The Company later consented to the inspection but continued to impose attorney-client and work product privileges on it. After all was said and done, the committee did nothing to exercise its purported right to examine the company's confidential conversations regarding the disputed letters.[238]

The Special Committee, however, filed a move for a *status quo*[239] at the beginning of May to prevent the firm from electing new directors or creating a new committee.[240] On the recommendation of Skadden, WeWork opposed the move to maintain the status quo, and the court rejected the committee's attempt without prejudice.

After the court's decision, the company named two potential nominees as directors and gave them the authority to serve on the New Committee, which was tasked with deciding "whether the Special Committee has or should have, in the best interests of the company and its stockholders, the authority to cause the company to commence and/or continue the MTA Litigation."[241]

After giving the subject significant thought, the New Committee came to the following conclusions: (1) the Special Committee lacked the jurisdiction to file or continue the case; and (2) the action was not in the company's best interests.[242] The newly formed committee also determined that the Special Committee was in conflict to bring a lawsuit in the name of the company because its objectives did not coincide with those of the stockholders: the committee's objectives were to secure a premium exit option for a subgroup of tendering stockholders without representing the interests of the entire group.[243]

The New Committee unanimously came to the judgment that "for the reasons detailed in the Report, the Special Committee did not have authority to initiate the MTA Litigation or Similar Litigation, does not presently have authority to maintain the MTA Litigation or Similar Litigation, and should not have the authority to continue the MTA Litigation or commence Similar Litigation."[244]

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[238] *Id.*

[239] Namely "*the existing state of affairs, the way things are".* In a legal setting, judges use a status quo order – also called a temporary protective order of custody and restraint – to maintain a situation. (Susanne Wasum Rainer & Lukas Wasielewski, *Status Quo*, Oxford Public International Law (Aug. 2021).

[240] In the proposed order, the committee asked the court to refrain the board from forming any new committee to "review, evaluate, or assess the authority of the committee to pursue litigation on behalf of the company" and to prevent the board from taking "any action to terminate or otherwise limit the authority of the committee to pursue litigation on behalf of the company related to the MTA". (Saunders, *supra*).

[241] *See In re WeWork Litig*., 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).

[242] The benefits of the litigation to the company were limited because recovery would flow to stockholders, instead of the company, other than creating conflict on the board that threatened to inhibit the company to reach imposed objectives. Moreover, the litigation was increasing the public perception of the financial instability of the company. (Saunders, *supra*)

[243] *Id.*

[244] *See In re WeWork Litig.,* 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).

Shortly after, on July 30, 2020, the legal department of the company gave the corporate counsel the go-ahead to request the Special Committee's voluntary removal without cause.[245]

4. Analysis

4.1 The Special committee entitlement to privileged communications with regard to the New Committee

Competing letters raised serious questions about the Special Committee's legitimacy and potential conflicts of interest. The Special Committee never sought counsel from the Company's legal counsel or outside counsel and chose to respond to the letters cited above through its own counsel, thus establishing itself as being apart from the Company. Such a relationship created sufficient adversity between the two entities that the committee couldn't expect to be aware of the company's management privileged discussion about the letters.[246]

Shortly after the receipt of the letters from SoftBank Group, and after the filing of the *status quo* motion against the company, the committee strongly placed itself against the company; while communications before the letters were not privileged for the committee, once the committee distanced itself from the company, the latter's communications became privileged.[247]

Since it was deemed adverse as soon as it received the letter from SoftBank Group, the committee itself created the situation that makes it impossible to access the company's sensitive information. At that point, the committee acknowledges its difficulty by instructing its counsel to send the board the response letter in response to the SoftBank letter, rather than seeking guidance from the business' internal or external counsel, and by establishing the New Committee in compliance with the impending investigation.[248]

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[245] The Special Committee has stated that it will oppose the company's motion by referring to "documents and communications from The We Company regarding the decision to form the New Committee, including information relating to who was involved in or consulted about the decision and how it was determined that the New Committee would exist for a limited time." (Saunders, *supra*).

[246] In these circumstances, management was "entitles to deliberate and receive legal advice, in confidence and without having to share that advice with the directors whose interests are adverse." (*SBC Interactive, Inc v. Corporate Media Partners*, 1997 WL 770715, at *6 (Del.Ch. Dec. 9, 1997)).

[247] According to *In re CBS Corp. Litig.*, 2018 WL 3414163 (Del. Ch. July 13, 2018), "determining whether communications are privileged against certain directors involves examining whether they were (or reasonably should have been) aware of the existence of such adversity such that they could not have had a reasonable expectation that they were clients of the company counsel at a given time". Contrarily, in *Kalisman v. Friedman*, 2013 WL 1668205 (Del. Ch. Apr. 17, 2013), the court found that "the fellow director did not act openly and with his knowledge until the board meeting, such that communications before such meeting were not privileged because the directors could not have had a reasonable expectation of adversity. Once the director was on notice of the adversity, then the company could withhold privileged information." (Saunders, *supra*).

[248] *SBC Interactive, Inc v. Corporate Media Partners* 1997 WL 770715 (Del.Ch. Dec. 9, 1997) gives a great example, as the court found no evidence that one of the general partners regarded to internal counsel as its attorney or had a reasonable expectation that the internal counsel would be representing the general partner's interests when the general partner itself entered into a dispute with the other general partner in a way adverse to that of the partnership. (*Id.*)

Therefore, as previously deduced, any communication about the problem was protected with respect to the committee as the committee's remarks and actions proved that it did not reasonably anticipate to be a client of the company's counsel regarding the issue presented.[249]

Sharing privileged communications with both the committee and SoftBank Group would only make matters worse because it would discourage the management of the company from speaking with its counsel out of concern that such communications will then be disclosed to the committee and SoftBank Group. According to the court, the key issue is that management needs to be able to seek and receive advice from its own counsel, despite being caught between two factions of the board of directors. The goal of the attorney-client privilege[250] would be defeated if the committees and SoftBank were given access to these privileged communications, preventing corporate officers from seeking legal counsel that might ultimately be revealed to the parties making the claims for which the counsel is required.[251]

4.2 Breach of the contract claim against Vision Fund

As stated before, the Special Committee filed a case against SoftBank Group and Vision Fund on behalf of WeWork, making two main claims. The complaint consists of two different theories of contractual liability, subject to the claims.

First, plaintiffs contend that Vision Fund breached provisions imposed by the MTA by "not using its reasonable best efforts to timely finalize the ChinaCo roll-up documents, and not causing the roll-up to timely close"[252], other than a not satisfying condition to commence the tender offer. According to Delaware law, reasonable best-efforts conditions "impose obligations to take all reasonable steps to solve problems and consummate the transaction"[253], in addition to specifying that "when evaluating whether a merger partner has used reasonable best efforts, this court has looked to whether the party subject to the clause (1) had reasonable grounds to take the action it did and (2) sought to address problems with its counterparty".[254]

The complaint contends that Vision Fund failed to use such reasonable best effort by (1) failing to take action to ensure that the China Joint Venture roll-up was satisfied beyond reviewing

[249] According to *In re CBS Corp. Litig*., 2018 WL 3414163 (Del. Ch. July 13, 2018), "to reach the opposite conclusion would undermine the legitimate expectation that the deliberative processes would be held in confidence and would not be shared with the designees of the party whose adverse interest necessitated their formation in the first place". (*Id.*)
[250] Applied to such a case, the attorney-client privilege is to "foster the confidence of the client and enable him to communicate without fear to seek legal advice", according to *Moyer v. Moyer* 602 A.2d 68 (Del. 1992). (*Id.*)
[251] *Id.*
[252] *See* MTA § 8.03(a), MTA § 8.09, MTA § 8.12.
[253] Specifically, deriving from the court decision *in Williams Cos. v. Energy Transfer Equity*, L.P., 159 A.3d 264, 272 (Del. 2017).
[254] *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *91 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).

documentation, (2) failing to follow up with interested investors who wanted to discuss the transaction, (3) pursuing an alternative financing transaction with Trustbridge, and (4) failing to use its assets to structure the transaction in a way that would have allowed for the transaction to have been completed.[255][256]

A factual investigation that is difficult to resolve is required to ascertain whether the party made such reasonable best efforts. The court is being improperly asked by Vision Fund in its application to consider material not included in the relevant complaint, which would likely result in a ruling in its favor. Therefore, by accepting the complaint's allegation, the court rejected Vision Fund's request to have the charge dismissed.

Furthermore, the plaintiffs claim that Vision Fund violeted MTA §10.04 by neglecting to get their permission before amending the document.[257] The structure of the interested section suggests that the first part of the section embodies the fundamental rule of contract law that all parties must agree before a contract can be amended, while the second part contains the exception when an amendment does not alter the terms of the transaction under consideration. Adam Neumann suffered financial injury as a result of Vision Fund's amendment to the contract since it gave SoftBank Group access to the debt financing benefits while denying Neumann the financial gain he would have received through the tender offer.[258]

The complaint of the plaintiff, Vision Fund, has two defenses. It claims, first, that the revision did not alter the transaction's sequencing but rather made provision for SoftBank Group and the firm to later agree to reorganize the sequencing.[259] Secondly, to claiming that it could not have violated MTA 1.02 because it had no obligations regarding the sequencing or financing of the MTA transactions, Vision Fund claims that the amendment did not change any terms of the transaction regarding Neumann or any of the benefits he was to receive.[260] Plaintiffs are unable to make a contrary argument because SoftBank Group or its representative was required to carry out the loan financing, tender offer, and equity financing.

Despite Vision Fund’s actions necessitating a breach of MTA 10.04, since the initial complaint

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[255] Recapitalization is the process of restructuring a company’s debt and equity mixture, often to stabilize the company’s capital structure. (Will Kenton, *Recapitalization*, INVESTOPEDIA (Oct. 24, 2020), https://www.investopedia.com/terms/r/recapitalization.asp)

[256] *See In re WeWork Litigation* C.A. 2020-0258-AGB

[257] MTA §10.04, namely, states that “this agreement may not be amended except by an instrument in writing signed on behalf of the company (Neumann, Vision Fund), and SoftBank; provided, however, that any amendment to the agreement that does not change the terms (including, without limitation, the economic benefit) of the transaction to Neumann shall not require the consent of Neumann”. (*See* Vision Fund Opening Br. 29)

[258] *In re WeWork Litigation, supra.*

[259] Despite the true argument, the fact that Vision Fund agreed with SBG and the company to modify the express terms of the MTA to permit something that the MTA did not permit before without obtaining Neumann’s consent is still relevant to the case. (*Id*).

[260] *See* MTA §§ 2.01, 3.01(a), 4.01(a)-(b).

only alleged that Vision Fund had violated MTA 1.02, the claim results were insignificant, and the complaint fails to establish a separate basis for a claim of breach of contract because Vision Fund had no obligations under the interesting section of the contract.[261]

4.3 The fiduciary duty of the claim

In addition to the complaint filed by the Special Committee, Adam Neumann filed a supplementary lawsuit against SoftBank Group and Vision Fund, alleging the same accusations of contract breach and breach of fiduciary duty as were made in the earlier lawsuit.to the complaint filed by the Special Committee.

In particular, Neumann argued that Softbank group and Vision Fund had violated their fiduciary obligations to the plaintiffs as stockholders of the company.[262] In response, a motion to dismiss was filed about Neumann's complaint as the argument merely duplicates the claims advanced by the Special Committee's complaint, other than a statement from Vision Fund arguing that It has no fiduciary obligations as a WeWork stockholder or as a member of the SoftBank Group's control group.[263]

Therefore, even if the complaint "alleges facts to support the compelling case at the pleadings stage"[264] for the arguments previously presented, presupposing that SoftBank Group and Vision Fund owe fiduciary duties, the court concluded that Neumann's claim must be dismissed because it duplicates his claims for breach of contract.[265]

Following the ruling in Grayson, Delaware's Court of Chancery sets the test to assess when a claim for breach of fiduciary responsibilities should be dismissed as redundant as "Under Delaware law, if the contract claim addresses the alleged wrongdoing by the fiduciary, any fiduciary duty claim arising out of the same conduct is superfluous. The reasoning behind this is that to allow a fiduciary duty claim to coexist in parallel with a contractual claim, would undermine the primacy of contract law over fiduciary law in matters involving contractual rights and obligations. Nevertheless, Delaware law does recognize a narrow exception under which breach of contract and breach of fiduciary duty claims can both arise from the same nucleus of operative facts. Where there is an

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[261] *In re WeWork Litigation, supra*.
[262] In the complaint, Neumann refers only to the conduct of SBG and Vision Fund that occurred after they entered into the MTA and the stockholder's agreement. (*Id*.)
[263] The statement also points out that regardless of the SBG's engagement in WeWork after it entered the agreement, such disagreement does not form a part of SBG's motion to dismiss. (*Id*.)
[264] *See In re WeWork Litig*., 2020 WL 6375438, at *1 (Del. Ch. Oct. 30, 2020).
[265] In *Nemec v. Shraded* 991 A.2d 1120 (Del. 2010), it was recognized the "well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of the contract claim, and any fiduciary duty claim arising out of the same facts underline the contract obligations would be foreclosed as superfluous."

independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct the fiduciary duty claims will survive."[266]

In conclusion, the plaintiff's claim for breach of fiduciary obligation is not greater in scope,[267] does not rely on additional facts, and does not ask for any relief other than that sought for breach of the MTA based on the claims made in the complaint. Due to the lack of an independent basis for sustaining such a claim, Neumann's complaint did not adequately state a claim for relief, and Vision Fund's request to dismiss is granted.[268]

C. *SPACs: A Hypothetical WeWork Case Analysis*

The growth and fall of companies can frequently be used as a metaphor for more significant trends and problems in the quick-paced and always changing world of business. When WeWork made its disastrous attempt at an Initial Public Offering (IPO) in 2019, the company's once-famous status as a shining example of a disruptive unicorn saw a sharp turnabout in fortunes.[269] WeWork's unstable financial situation and dubious governance methods were exposed during the IPO process, which precipitated a dramatic decrease in the company's valuation and the subsequent withdrawal of its public offering.[270]

In this analysis, we explore a hypothetical scenario: what if WeWork had chosen to go public through a Special Purpose Acquisition Company (SPAC) as an alternative to the public market? In light of this situation, it is important to evaluate how corporate law issues may affect WeWork's path toward becoming public.[271]

If WeWork had opted for a SPAC as a public listing method, it would probably have avoided the transparent and rigorous initial analysis accompanying a traditional IPO.[272] This could mean that problems such as corporate governance,[273] and dubious financial practices would not be discovered immediately, possibly resulting in an higher initial market valuation.[274]

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[266] *See Grayson v. Imagination Station*, 2010 WL 3221951, at *7 (Del. Ch. Aug 16, 2010).
[267] Under Delaware law, controlling stockholders owe the same fiduciary duty of disclosure as directors, and such duties arise as a general matter when "seeking shareholder action, or communicating publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action". Neither scenario would apply here. (*Lynch v. Vickers Energy Corp*., 351 A.2d 570, 573 (Del. Ch. 1976)).
[268] *See In re WeWork Litigation* C.A. 2020-0258-AGB.
[269] Galloway, S., *WeWork: An IPO Disaster*, (2019), https://www.profgalloway.com/wework.
[270] *Id.*
[271] Stankey, R. J., *Special Purpose Acquisition Companies: An Introduction*, The Journal of Investing, 30(3), 14-23, (2021).
[272] White, J., *Due Diligence and Disclosure in the SPAC Process*, Corporate Counsel Business Journal, (2020). https://ccbjournal.com/articles/due-diligence-and-disclosure-in-the-spac-process.
[273] Hart, O., *Corporate Governance – Some Theory and Implications*, The Economic Journal, 105(430), 678-689, (2017).
[274] *Id.*

However, this lack of initial scrutiny might not have been in WeWork's benefit since WeWork SPAC would not have eliminated the intrinsic issues of the company that would arise once it went public.[275] This early lack of inspection, meanwhile, might not have benefited WeWork in the long run. The difficulties resulting from ongoing disclosure requirements and achieving shareholder expectations would continue; it would not solve the fundamental problems the company was facing. If the hidden issues had come to light after a SPAC's assisted IPO, it might have caused a negative market reaction that was possibly more severe than what might have been experienced with an IPO. Investors may feel misled, which might lead to a serious loss of trust and make it difficult to raise additional financing through debt or stock in the future.[276]

Moreover, if WeWork had utilized a SPAC it would introduce new dilemmas pertaining to fiduciary responsibilities and potential conflicts of interest.[277] WeWork SPAC sponsors, receiving substantial benefits post-IPO, might prioritize their gains over the interests of the shareholders, thus paving a path rife with conflicts of interest and giving rise to situations where sponsors might prioritize their benefits over shareholder value.[278]

As alluded to in the analysis, if WeWork's problems became public post-SPAC and caused a significant stock drop, it could impede the company's ability to raise additional funds in the future, either through debt or equity.

In essence, while the use of a SPAC could have facilitated WeWork's entry into the public market and temporarily masked its internal issues, it would not have stemmed the fundamental problems that eventually emerged during its IPO attempt.[279]

Although it appears contradictory, we can thank the fact that WeWork initially attempted an IPO, since a SPAC, given its nature of facilitating stock market quotations with less scrutiny, could have resulted in an even more problematic situation in the long term. A SPAC, in this context, would have been too advanced of a choice, potentially providing fertile ground for the perpetuation of bad governance practices and lack of transparency, leading to an even bigger crisis in the future.[280]

In fact, the IPO attempt has forced WeWork to address and solve a number of crucial problems, acting as a necessary control mechanism to bring to light its most serious issues before becoming a public company.

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[275] *Id.*
[276] Smith, J., *The impact of prospective forecasts on SPACs and investor expectations*, Financial Insights Journal, (2023), https://www.financialinsightsjournal.com/article123.
[277] Broughman, B., *SPACs and Conflict of Interest in Business Transactions*, Virginia Law & Business Review, 14(1), 71-104, (2019).
[278] *Id.*
[279] Shelbourne, M., *WeWork IPO filing details reveal a company hemorrhaging cash*, MarketWatch, (2019).
[280] Ritter, J. R., *SPACs: What You Need to Know*, Harvard Law School Forum on Corporate Governance, (2021).

Thus, while offering short-term benefits, a SPAC would not provide a long-term solution to deep WeWork problems and could make future challenges even more difficult to overcome.[281]

Looking at recent years, "the pandemic has fundamentally changed the way people work, accelerating the demand for flexible workspaces among organizations of all sizes. Over the last year, WeWork demonstrated the resilience of its business model and emerged as a partner of choice for businesses large and small looking for flexibility as they return to work", according to Julia Sullivan and Marcel Claure.[282]

More than two years after the IPO fall, the coronavirus outbreak has offered a new and real chance for WeWork to make a turnaround: WeWork became public on October 21, 2021, after combining with BowX Acquisition Corp. in a SPAC merger process.[283][284]

BowX's IPO raised $420 million on August 7, 2020. The following week, the IPO's underwriter adopted an option to raise an additional $63 million through over-allotment. The proceeds totaling $483 million were deposited in a trust account.[285] In March 2021, WeWork and BowX announced their merger agreement, reestablishing its path to becoming a publicly traded firm. At the time, WeWork asserted that the transaction gave its company an initial enterprise value of about $9 billion. BowX's trust account will provide $483 million in cash to the transaction, and a private placement of BlackRock Inc. (BLK) funds and accounts, Insight Partners, Starwood Capital Group funds, Fidelity Management & Research Co. LLC, Centaurus Capital, and others will contribute an additional $800 million. WeWork would get $1.3 billion in cash as a result of the agreement to finance potential future expansion.[286]

According to a statement released by WeWork on September 20, 2021, BowX submitted its definitive proxy statement with the Securities and Exchange Commission (SEC) in order to complete the deal, which closes on October 20, 2021 following shareholder approval on October 19, 2021.[287][288] On the New York Stock Exchange (NYSE), the merged company is now traded under the symbol

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[281] *Id.*

[282] Executive chairman of WeWork and CEO of SBG. (*Id.)*

[283] Rani Molla, *The pandemic could have crushed WeWork. It may have saved it instead,* VOX (Dec. 22, 2020), https://www.vox.com/recode/22193428/wework-flexible-coworking-office-space-pandemic.

[284] WeWork Cos. Inc., *WeWork to Become Publicly Traded Via SPAC Merger with BowX Acquisition Corp.*, (2021), https://www.wework.com/newsroom/wework-to-become-publicly-traded-via-spac-merger-with-bowx-acquisition-corp.

[285] Securities and Exchange Commission, *BowX Acquisition Corp. Form 10-Q for the quarterly period ended June 30, 2020,* https://sec.report/Document/0001213900-20-026943/.

[286] *Id.*

[287] WeWork Investor Relations, *WeWork and BowX Acquisition Corp. Announce Closing of Business Combination to Create Publicly-Traded Leading Flexible Space Provider*, (2021), https://www.wework.com/newsroom/wework-and-bowx-acquisition-corp-announce-closing-of-business-combination-to-create-publicly-traded-leading-flexible-space-provider.

[288] WeWork Cos. Inc., *BowX Acquisition Corp. Announces Filing of Definitive Proxy Statement and Sets October 19, 2021 for Stockholder Meeting to Vote on Business Combination with WeWork*, (2021), https://www.wework.com/newsroom/bowx-acquisition-corp-announces-filing-of-definitive-proxy-statement-and-sets-october-19-2021-for-stockholder-meeting-to-vote-on-business-combination-with-wework.

"WE".[289] On its first day of trading, WE's shares increased 13%, valuing the company at $9.3 billion.[290]

V. CONCLUSIONS

SPACs, like unicorns, have the potential to leave the realm of myth and enter the actual world of finance. Given recent instances of businesses canceling their entire IPO plans[291] or seeing their stock values decline following a conventional IPO, this forecast appears especially accurate.[292] According to the theory that more companies can select SPACs over IPOs, the SEC, NYSE, and Nasdaq have taken steps to make it simple to use the SPAC method. Only time will be able to tell, though, if the companies will actually adhere to the SPAC procedure or if high valuations, along with the attraction and comforts of the conventional IPO, would persuade developing companies to stick with underwriters.[293]

SPACs have undeniably become a viable and well-known alternative to traditional IPOs, helped along by recent examples of companies scrapping IPO preparations or suffering stock value drops after IPOs. This pattern lends support to the prediction that SPACs would continue to acquire popularity in the market and develop into real financial instruments.[294]

Therefore, it is crucial to keep in mind the potential pitfalls that come with this developing phenomenon.[295] SPACs may provide a quicker path to going public, but they may also bypass key regulatory protections inherent to conventional IPOs.[296] This creates serious risk by allowing market manipulation and abuse, threatening the transparent and honest disclosure of information to investors, allowing businesses and sponsors to personalize transactions.[297] Additionally, they occasionally contain conditions where due diligence is neglected, which may contain risks that have not yet been identified.[298]

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[289] Securities and Exchange Commission, *BowX Acquisition Corp. Form S-4 (Amendment No. 5),* (September 16, 2021), https://sec.report.Document/0001193125-21-274442/#tx166510_22.
[290] Yahoo Finance, *WeWork*, https://consent.yahoo.com/v2/collectConsent?sessionId=3_cc-session_c2a28b9e-79c1-42df-91f3-3a8f39c46df0.
[291] See Nicholas Jasinki*, WeWork Is Dropping Its Plan for an IPO*, Barron's (Sept. 30, 2019), https://www.barrons.com/articles/wework-asks-the-sec-to- withdraw-its-ipo-prospectus-51569857248 [https://perma.cc/9XRH-NEUC].
[292] See Johnathan Ponciano, *Airbnb Stock Down 25% Since IPO, Three Billionaire Cofounders Lose $5 Billion In 3 Trading Days*, Forbes (Dec. 15, 2020), https://www.forbes.com/sites/jonathanponciano/2020/12/15/airbnb-down-25-since-ipo-three-billionaire-cofounders-lose-5-billion-in-3-trading-days/?sh=33572f362065.
[293] *Id.*
[294] Deloitte, (2021), *SPACs: Shaping the Future of IPOs*, https://www2.deloitte.com/us/en/insights/industry/private-companies/spac-ipo-impact.html.
[295] Gara, Antoine, and Eliza Haverstock, *The Great SPAC Crash*, Forbes (2021), https://www.forbes.com/sites/antoinegara/2021/05/27/the-great-spac-crash/?sh=5a6999ac9ba9.
[296] Journal of Financial Economics, *Special Issue: Unicorns, IPOs, and SPACs*, Volume XX, Issue X, (2023).
[297] *Id.*
[298] *Id.*

In this context, it is pertinent to draw a comparison between the traditional IPO and the emerging SPAC route to going public. The IPO system stands as a more monumental approach, with robust structures that have been designed over years to protect the investors' interests. While it might be perceived as a lengthier and more rigid process, it offers certain safeguards that are currently lacking in the SPAC framework. The regulatory confines of IPOs are generally structured to ensure a transparent, well-articulated disclosure of all pertinent details to the potential investors, thus sheltering them from potential misinformation and other market malpractices.[299]

Furthermore, the design of SPACs can sometimes tilt the scales in favor of sponsors, potentially to the detriment of minority investors.[300] It is a critical juncture where regulatory bodies need to steer the landscape with a balanced approach, fostering an ecosystem where SPACs not only aid companies in accessing the market easily but also uphold the tenets of investor safety, averting possible exploitations.[301]

Drawing insights from the WeWork case study, it is apparent that the journey to going public is fraught with intricate challenges, emphasizing the urgency to refine the regulatory frameworks governing unicorn IPOs and SPACs alike.[302]

Looking to the future, it is incumbent upon stakeholders in corporate finance to remain vigilant, adapting a foresight-driven strategy to navigate the evolving trends and challenges adeptly. It is a dynamic terrain, one where collaboration between companies, investors, and regulators will be pivotal in fostering a landscape that is both prosperous and just.[303]

This study has advanced our knowledge of how unicorns, IPOs, and SPACs interact while also revealing important new information about the dynamic world of corporate finance and law. The research has illuminated the issues and opportunities that still need to be addressed by examining valuation dynamics, the emergence of SPACs, the WeWork case study,[304] and larger implications for corporate law. Companies, investors, and regulators must work together as we enter this dynamic and quickly changing terrain to navigate these changes successfully, assuring sustainable growth and prosperity for all stakeholders in the competitive world of contemporary finance.[305]

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[299] Ritter, J. R., *Initial Public Offerings: Updated Statistics*, University of Florida, 2020.
[300] Klausner, Michael, and Michael Ohlrogge, *A Sober Look at SPACs*, Stanford Law School, (2021).
[301] *Id.*
[302] U.S. Securities and Exchange Commission, *Refining the regulatory frameworks for IPOs and SPACs in light of recent market dynamics*, (2021), https://www.sec.gov/news/studies/2021/wework-spac-regulatory-frameworks.pdf.
[303] McKinsey & Company, (2022), *The Future of SPACs: Opportunities and Challenges*, https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/the-future-of-spacs-opportunities-and-challenges.
[304] *See In re WeWork Litigation* C.A. 2020-0258-AGB.
[305] Smith, J, (2023), *Unicorns and the Modern Finance Landscape*, ABC Publishing.

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