Securities Regulation Daily Wrap Up, TOP STORY—49 top law firms unite against Jackson-Morley SPAC lawsuits, (Aug. 30, 2021)

Securities Regulation Daily Wrap Up

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The unusual show of unity by large law firms may prompt the plaintiffs and attorneys in three recent SPAC-related lawsuits to think twice about pursuing the litigation.

Raising the stakes in an already highly contentious set of lawsuits, 49 top law firms have issued a joint statement that they believe special purpose acquisition companies (SPACs) are not investment companies under the Investment Company Act of 1940 (ICA), so long as two commonplace conditions are met. The statement counters the central claim in three lawsuits recently filed by Robert Jackson, Jr., former SEC Commissioner and current NYU Law professor, and John Morley, a professor at Yale Law School.

The Jackson-Morley lawsuits contend that the three SPACs named as defendants in the actions are actually investment companies under the ICA and that the SPACs have paid illegal compensation. In the joint statement, the firms assert that the Jackson-Morley lawsuits are "without factual or legal basis."

Jackson-Morley lawsuits. Unlike other lawsuits against SPACs, which assert mainly fraud-related claims unique to each SPAC, the Jackson-Morley lawsuits mount an existential challenge to the very structure of SPACs. According to the complaints, the defendant SPACs are unregistered investment companies and, therefore, the compensation they have paid is illegal in form and amount, thereby injuring investors.

Jackson and Morley, along with several law firms, filed the first action on August 17 against Pershing Square Tontine Holdings, Ltd. (PSTH). According to the complaint, PSTH raised approximately $4 billion in its IPO, making it the largest SPAC in history. A few days later, the team filed two more suits asserting similar claims against Go Acquisition Corp. and E.Merge Technology Acquisition Corp. The suits assert that Go Acquisition and E.Merge IPOs raised $575 million and $600 million, respectively.

The three complaints assert the same basic claims:

- The defendant SPACs are investment companies under the ICA because their primary business is to invest in securities.
- Investing in securities is all the companies have ever done.
- The way the defendants have structured the companies poses the precise dangers the ICA sought to address.
- The defendants have used their dominance over the companies to pay illegal compensation at the expense of public shareholders and in violation of federal law.

Further, the PSTH and E.Merge complaints name additional defendants who are asserted to be unregistered investment advisers under the Investment Advisers Act (IAA).

PSTH CEO Bill Ackman returned fire in a letter to shareholders on August 19, calling the lawsuit "meritless." Ackman stated that the lawsuit had impaired PSTH's ability to complete a merger in the required timeframe.

"Because the basic issues raised here apply to every SPAC, a successful claim would imply that every SPAC may also be an illegal investment company," wrote Ackman. "As a result, the lawsuit may have a chilling effect on the ability of other SPACs to consummate merger transactions or to engage in IPOs until the litigation is resolved in PSTH's favor, as the consequences of being deemed an illegal investment company are extremely onerous."

Ackman announced that PSTH is working on obtaining approval for a new entity, a "SPARC," which if approved will return investor funds, preserve the opportunity for investors in Pershing Square's next business combination, and protect the long-term value of distributable warrants.

49 top firms say SPACs are not investment companies. According to the joint statement, SPACs are not engaged primarily in investing in securities, but rather in identifying and consummating a business combination with one or more operating companies within a specified period of time. While SPACs do invest in securities until a SPAC achieves the business combination is achieved or returns the money to investors, almost all the SPAC's assets are held in a trust account and limited to short-term treasuries and qualifying money market funds.

As a result, the firms believe that SPACs are not investment companies, provided two conditions are met:

1. The SPAC follows its stated business plan of seeking to identify and engage in a business combination with one or more operating companies within a specified period of time; and
2. holds short-term treasuries and qualifying money market funds in its trust account pending completion of its initial business combination.

The SEC's treatment of SPACs supports this position, in the firms' view. The firms state that more than 1,000 SPAC IPOs have been reviewed by SEC staff over two decades and have not been deemed to be subject to the ICA.

According to New York Times *Dealbook*, the joint statement was organized by Kirkland & Ellis, one of the top legal advisers to SPACs. According to data compiled by Wolters Kluwer *IPO Vital Signs*, Kirkland & Ellis has represented 152 SPAC issuer or underwriter teams since the start of 2020. So far in 2021, Kirkland & Ellis has represented 64 issuers and 24 underwriter teams, or 88 of the 412 SPAC IPOs YTD.

These are Docket Nos. 1:21-cv-06907-AT (Pershing Square)| 1:21-cv-07076-JPC (Go Acquisition)|1:21-cv-07072-JPO (E.Merge).

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