National Conference: Climate, ESG, and the Board of Directors: "You Cannot Direct the Wind, But You Can Adjust Your Sails," at *fn 3-4 (June 28, 2021), available at https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors.

[19]*See* Regulation (EU) 2019/2088 of the European Parliament and of the Counsel on sustainability-related disclosures in the financial services sector (Nov. 27, 2019), available at https://eur-lex.europa.eu/eli/reg/2019/2088/oj.

[20]Press Release 2021-42, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), available at https://www.sec.gov/news/press-release/2021-42.

[21]Press Release 2008-157, SEC Charges Mutual Fund Manager for Violating Socially Responsible Investing Restrictions (July 30, 2008), available at https://www.sec.gov/news/press/2008/2008-157.html.

[22]Press Release 2020-230, Fiat Chrysler Agrees to Pay $9.5 Million Penalty for Disclosure Violations (Sept. 28, 2020), available at https://www.sec.gov/news/press-release/2020-230.

# SEC/SRO UPDATE: DOJ FOCUS ON CRYPTOCURRENCY ENFORCEMENT; SEC STAFF RELEASES REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021; De-SPAC'd MUSIC STREAMING COMPANY REACHES $38 MILLION SETTLEMENT WITH SEC IN FRAUD ACTION; CHANCERY COURT ELABORATES ON DIVIDEND REQUIREMENTS

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## DOJ Focus on Cryptocurrency Enforcement

On October 6, 2021, Deputy Attorney General Lisa O. Monaco of the Department of Justice (the "DOJ" or the "Department") announced the creation of a National Cryptocurrency Enforcement Team ("NCET")[1] and the launch of the DOJ's Civil Cyber-Fraud Initiative.[2]

According to the press release announcing the formation of NCET (the "NCET Press Release"), NCET was created to "tackle complex investigations and prosecutions of criminal misuses of cryptocurrency, particularly crimes committed by virtual currency exchanges, mixing and tumbling services, and money laundering infrastructure actors." Additionally, the NCET Press Release indicates that NCET will assist in tracing and recovery of assets lost to fraud and extortion, including cryptocurrency payments to ransomware groups. The NCET Press Release states that "NCET will foster the development of expertise in cryptocurrency and blockchain technologies across all aspects of the Department's work," paying particular attention to the use of cryptocurrency in a variety of criminal activities, including ransomware, money laundering, and trading in illegal drugs, weapons, malware and other hacking tools on "dark markets."

As described in the press release (the "Cyber-Fraud Initiative Press Release") announcing the DOJ's Civil Cyber-Fraud Initiative (the "Initiative"), the Initiative will "combine the department's expertise in civil fraud enforcement, government procurement and cybersecurity to combat new and emerging cyber threats to the security of sensitive information and critical systems." According to the Cyber-Fraud Initiative Press Release, the Initiative will utilize the False Claims Act to pursue cybersecurity-related fraud by government contractors


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and grant recipients and "will hold accountable entities or individuals that put U.S. information or systems at risk by knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."

## SEC Staff Releases Report on Equity and Options Market Structure Conditions in Early 2021

On October 18, 2021, the Securities and Exchange Commission published a Staff Report on Equity and Options Market Structure Conditions in Early 2021 (the "Staff Report"), which focuses on the January trading activity of GameStop Corp ("GME").[3] As detailed in the SEC's associated Press Release,[4] certain so-called "meme stocks" experienced dramatic increases in their share prices in January 2021 based on sentiments of individual investors expressed on social media platforms. At the end of January 2021, certain retail broker-dealers temporarily prohibited some activities in these stocks and options. As stated in the Press Release, "GME experienced all of the factors that impacted the meme stocks: (1) large price moves, (2) large volume changes, (3) large short interest, (4) frequent mentions on the social media platform Reddit, and (5) significant coverage in the mainstream media."

The Report includes areas of market structure and regulatory framework identified by SEC staff for potential study and additional consideration, including:

1. Forces that may cause a brokerage to restrict trading;
2. Digital engagement practices and payment for order flow;
3. Trading in dark pools and wholesalers; and
4. The market dynamics of short selling.

It is not clear what regulatory action, if any, the SEC will take in response to the findings of the report.

## De-SPAC'd Music Streaming Company Reaches $38 Million Settlement with SEC in Fraud Action

On October 27, 2021, the SEC announced that it had entered into a $38.8 million settlement with Akazoo S.A., a music streaming business based in Greece, for allegedly defrauding investors in connection with, and following, a 2019 "de-SPAC" merger between Akazoo and Modern Media Acquisition Corp., a special purpose acquisition company.[5] According to the SEC's complaint,[6] although Akazoo claimed to be a rapidly-growing music streaming company with millions of paying subscribers and over $100 million in annual revenues, it in fact had no paying users and minimal or no revenues. After the de-SPAC transaction closed, resulting in Akazoo being a Nasdaq-listed public company holding over $50 million in investor funds, a short seller issued a report alleging that Akazoo had engaged in fraud. Akazoo's board of directors then initiated an internal investigation into the allegations. Following the investigation, the company concluded, and publicly disclosed, that the fraud had in fact occurred.

This case is an extreme one—the SEC complaint describes Akazoo not only as having made false statements to the market but as "a complete sham"—but it reflects a broader concern of the SEC and others that de-SPACing companies may pose a heightened risk of misleading, or even outright fraudulent, disclosures. This concern may be set to increase in the coming months and years. A SPAC must complete a business combination within the time frame set forth in its governing documents, typically two years from its IPO. If it fails to do so, it must generally return all of its funds to investors, leaving the SPAC sponsors with a complete loss of their investment. Accordingly, SPACs have strong incentives to complete a business transaction within the allotted time. Moreover, the explosive growth in the number of SPAC IPOs in recent

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years has led to increasing levels of competition for target companies with which to de-SPAC. The SEC appears concerned that this dynamic has created an atmosphere in which SPACs and their target company partners have increased incentives to make aggressive, and sometimes fraudulent, statements to the market to get their de-SPAC transactions approved and funded. In this environment, it behooves those parties to ensure that the diligence and disclosure practices they employ prior to completing a de-SPAC transaction and after are sufficient to withstand a potentially high degree of scrutiny.

## Chancery Court Elaborates on Dividend Requirements

On November 1, 2021, the Delaware Chancery Court issued its opinion in *In Re the Chemours Company Derivative Litigation*.[7] The opinion applies and elaborates upon the requirements of Delaware General Corporation Law ("DGCL") Sections 160 and 173 and related provisions regarding limits on a corporation's ability to pay dividends and effect stock repurchases. Under those provisions, a corporation may generally only pay dividends or repurchase its own stock with its statutorily-defined "surplus." Under DGCL Section 174, directors may face the prospect of non-exculpable personal liability in connection with dividends or stock repurchases that do not comply with the DGCL.

The case arose from the spin-off of The Chemours Company ("Chemours") from E. I. DuPont de Nemours and Company ("DuPont") in 2015. In the spin-off, Chemours received certain environmental liabilities from DuPont that it subsequently alleged had been vastly understated. The estimated amount of the liabilities had been based on GAAP standards for accruing reserves, but actual losses exceeded those estimates. Chemours claimed that it was only liable for the estimated amounts, but DuPont maintained that Chemours was liable for the actual, higher amounts.

Chemours and DuPont went to arbitration to resolve this dispute. At the arbitration, Chemours argued that if it had assumed all the liabilities DuPont claimed, it would have been insolvent from inception. Nevertheless, before the arbitration commenced and while it was pending, Chemours paid dividends to its shareholders and executed stock repurchase programs, basing its decision to do so on a determination of surplus as calculated with reference to its GAAP financial statements. The plaintiffs alleged that this method of calculation was impermissible under the DGCL in light of the company's acknowledgement of the magnitude of the liabilities at issue in the arbitration.

The court dismissed the claims. It noted that, under prior case law, directors have considerable latitude in determining the methodology used to calculate surplus. While stopping short of holding that reliance on GAAP financial statements for this purpose is *per se* reasonable, the court determined that the plaintiffs had failed to allege facts from which one could conclude that such reliance was inappropriate in this case. The court further held that Chemours' litigation position in the arbitration with DuPont did not contradict this result—there, Chemours had argued it would have been insolvent if DuPont's position in that case (*i.e.*, that Chemours had assumed an uncapped amount of environmental liabilities) was correct. Because Chemours' argument was that DuPont's position was not correct, this was not an admission of insolvency.

The outcome of this case is not surprising in light of prior Delaware case law on the subject of surplus calculation methodologies. It should, however, provide additional comfort to boards of directors when considering dividend payments and stock repurchase programs in reliance upon GAAP financial information. While such reliance will not necessarily provide complete protection, this case suggests that plaintiffs will face a high bar when alleging that it is unreasonable.

**ENDNOTES:**

[1] https://www.justice.gov/opa/pr/deputy-attorney-


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general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team.

[2] https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative.

[3] https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf.

[4] https://www.sec.gov/news/press-release/2021-212.

[5] https://www.sec.gov/news/press-release/2021-216.

[6] https://www.sec.gov/litigation/complaints/2021/comp-pr2021-216.pdf.

[7]Del. Ch. Court Nov. 1, 2021, available at https://courts.delaware.gov/Opinions/Download.aspx?id=326030.

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