

Regulatory and Enforcement Alert

DOJ and SEC Fraud Charges Against Former Nikola CEO Signal Continued Scrutiny of SPACs and Media Statements

July 30, 2021

On July 29, 2021, the U.S. Attorney's Office for the Southern District of New York and the SEC announced parallel charges against Trevor Milton, founder, former CEO and executive chairman, and largest shareholder of Nikola Corporation, an electric- and hydrogen-powered vehicle and energy company. The U.S. Attorney's Office charged Milton with securities and wire fraud in a criminal indictment. The SEC charged Milton with securities fraud based on the same claims. These charges against Milton are notable for three reasons. First, they reflect the SEC's ongoing focus on the SPAC market and de-SPAC mergers, highlighted most recently in the announcement of charges earlier this month involving a proposed merger between SPAC Stable Road Acquisition Company and Momentus, Inc. Second, they contain the Southern District of New York's first allegations that touch upon the SPAC market. Third, the charges are a reminder that statements made on social or traditional media require as much care as statements made in formal SEC filings.

Nikola Corporation, the company Milton founded, developed electric and hydrogen cars as well as energy storage systems and infrastructure. As alleged in the U.S. Attorney's Office and SEC's charging instruments, Milton helped Nikola raise more than \$1 billion in private offerings and go public through a business combination involving a SPAC in 2020. Both before and after Nikola's initial public offering, Milton is alleged to have engaged in a scheme to defraud and mislead investors about Nikola's development of products and technology by making false statements about the company and its products on both social and traditional media platforms, including investor conference calls and in-person media events. Milton's statements included, among others, allegedly inaccurate boasts that Nikola had seen "early success" in creating a "fully-functioning" semi-truck prototype when Milton knew that the prototype was inoperable, and exaggeration about the volume and binding nature of Nikola's contracts with purchasers of certain vehicles.

In press releases about the charges against Milton, both the U.S. Attorney's Office and the SEC highlighted Milton's role in taking Nikola public through a SPAC in 2020. The U.S. Attorney noted that "[i]n carrying out his fraudulent scheme, Milton exploited features of the SPAC structure," and distinguished between certain institutional investors who had received more complete information about the company—specifically highlighting investors who had received shares of Nikola as part of the SPAC transaction—and retail investors who had been moved to invest primarily through Milton's public statements. The SEC underscored that the obligations under the securities law "exist[] for all public company officials, even those whose companies have only recently entered the public markets through SPAC transactions." While Milton allegedly used a variety of channels to mislead

investors, his conduct on social media is at the forefront of these actions. The U.S. Attorney emphasized that Milton had repeatedly used social media and other media appearances to disseminate his false and misleading claims. Likewise, a senior SEC official reiterated that public company officials “cannot say whatever they want on social media.”

These actions show that the SEC’s focus on the SPAC market continues, and that the Department of Justice will work in parallel with the SEC in SPAC cases where appropriate. These actions are also an important reminder that statements made on social media and traditional media channels, including by senior executives and directors, require the same level of care and diligence as statements made in formal SEC filings, a lesson perhaps most famously demonstrated by the SEC’s charges against Tesla’s CEO and Chairman in 2018. SPACs and all public companies should implement procedures, including a social media policy, designed to oversee and ensure the accuracy of statements made by company representatives across all channels.

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