Bird & Bird

UK Listing Reform: The launch of the "UK SPAC" and wider listing regime consultations continue

FCA consultation and statement on changes to Listing Rules for Special Purpose Acquisition Vehicles (SPACs)

Special Purpose Vehicles (or SPACs) are cash shell companies formed with a view to making an acquisition. They have been particularly popular of late in US stock market listings, although they have had a mixed experience to-date in London. The main deterrent to SPACs listing on the London markets (and this applies to AIM as well as the Main Market) is the requirement for the shares in the SPAC to be suspended as soon as a deal is announced to the market. This could leave investors locked into the stock for a long period of time without the ability to trade while the SPAC is preparing a new listing document to re-list the enlarged group.

Following Lord Hill's report, the FCA published a consultation on 30 April 2021 which set out certain proposed changes to the Listing Rules relating to SPACs (a copy of the consultation can be found here: https://www.fca.org.uk/publications/policy-statements/ps21-10-investor-protection-measures-spacs-listing-rules).

Following the closure of the consultation, the FCA published a policy statement on the proposed changes (a copy of which can be found here: https://www.fca.org.uk/publication/policy/ps21-10.pdf).

The new rules and related guidance will come into force on 10 August 2021.

The main change is the removal of the existing presumption that trading in the shares of SPACs is suspended upon the announcement of a potential acquisition. However, the removal of this presumption is subject to certain additional safeguards to protect investors. These include:

Minimum Fundraising Requirement

The SPAC will need to raise gross proceeds from public shareholders at its initial admission of at least £100m. This amount excludes any funds the founders/sponsors provide to the SPAC (including through any participation in the IPO).

Ring-Fenced Proceeds

The SPAC must ensure that funds raised from public shareholders are ring-fenced (via an independent third party) to either fund an acquisition or be returned to shareholders, less any amounts agreed to be used for the operational costs of the SPAC.

Time limit for making an acquisition

A SPAC must not be "open-ended" and this should be built into its constitution. Accordingly, under the proposed changes to the Listing Rules, the funds raised must be returned to shareholders if the SPAC fails to find and acquire a target within 2 years of admission to listing (which may be extended by a further 12 months with the approval of shareholders).

Following the consultation, the FCA have also introduced an option to extend the time-limited operating period of a SPAC by a further 6 months, which could be used at the end of the initial 2-year operating period, or 3-year period. This means a maximum operating period of a UK-listed SPAC using the new alternative approach to suspension will be 42 months. The extension will only be available where: (i) shareholder approval of a

reverse takeover has been obtained but the takeover has not completed; (ii) a general meeting to obtain shareholder approval has been convened; (iii) the shell company has announced that such a general meeting will be convened for a date specified in the announcement, and that a notice to convene the meeting will be sent within a specified time; or (iv) an agreement for a reverse takeover has been entered into but not completed and the company has not made an announcement in accordance with (iii). Use of this additional extension must be notified to the market before the end of the 2-year (or 3-year) period.

Board and Shareholder Approval of Acquisition

The proposed acquisition must be approved by the board (excluding any conflicted directors). Proposed acquisitions must also be approved by a majority of public shareholders. Where any of the SPAC's directors are connected to the target or a subsidiary of the target, the board must publish a statement that the proposed transaction is "fair and reasonable" as far as the public shareholders of the company are concerned. This statement should reflect the advice by an appropriately qualified and independent adviser.

Shareholder Redemption Rights

Investors must be given the option to exit a SPAC prior to any acquisition being completed.

Disclosure

At the time of the acquisition the SPAC should release an announcement containing:

- A description of the target business and the material terms of the proposed transaction;
- An indication of how the SPAC has assessed the value of the target business;
- Any other details of which investors should be aware in order to make a properly informed decision.

It should be noted that, even in cases where a SPAC issuer satisfies the conditions set out above, the FCA's decision on whether or not to suspend a listing remains a point-in-time assessment when a SPAC has identified a target.

Supervisory Approach

The FCA has also modified its proposed supervisory approach such that it will work with issuers to provide comfort prior to admission that they are within the guidance disapplying the presumption of suspension, as part of vetting the prospectus and assessing eligibility for listing. At the point of announcement, the FCA would not expect to revisit its previous assessment, provided the SPAC issuer confirms the conditions are met.

Bird & Bird Comment

Nick Heap and Clive Hopewell comment:

"The plethora of SPAC listings in the US has prompted a number of exchanges to review their own rules. Hong Kong and Singapore, for example is undertaking a similar listing review. The review of the UK regime for SPACs is therefore welcome.

The FCA has put together a carefully considered approach to the listing of SPACs in the UK and the availability of this type of fundraising in the UK. Our international ECM practice is well placed to advise on these structures, having advised on a number of SPAC listings not only in the UK markets, but also in the wider Bird & Bird network."

Prospectus Regime Consultation

The UK Government published a consultation on proposed changes to the UK prospectus regime on 1 July 2021 (please see here for a copy of the consultation document: https://www.gov.uk/government/consultations/uk-prospectus-regime-a-consultation). The consultation identified 4 key objectives that the new regime should aim to achieve:

1 to facilitate wider participation in the ownership of public companies;

2 to improve the efficiency of public capital raising by simplifying regulation and removing the duplications that currently exist in the UK prospectus regime;

3 to improve the quality of information that investors receive; and

4 to improve the agility of regulation in this area.

Currently, the UK prospectus regime is largely based on the EU Prospectus Regulation ('**EUPR**'). Following the UK's departure from the European Union on 31 January 2021, the UK now has an opportunity to diverge from the EUPR and tailor its rules to suit the UK market. The EUPR is a comprehensive and complex piece of legislation, and the report recognises that careful consideration must be given to various aspects of the regulation through the consultation, before any changes are made.

With regards to the overall approach, the Government proposes to adopt Lord Hill's recommendation that the admission of securities to trading and rules around public offers of securities be separated. There is widespread support for a re-examination of the UK prospectus regime and these changes signify a step in the right direction.

The proposals on which the UK Government is seeking views include:

New FCA powers

The consultation proposes that:

- The FCA should have responsibilities that are framed in such a way that give it broad discretion to specify, in its rules, when a prospectus is required in connection with an application for securities to be admitted to trading on a UK Regulated Market, what exemptions are available, and to determine the content of the prospectus;
- Giving the Financial Conduct Authority ('**FCA**') greater discretion in relation to the regime to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK;

Scope of UK Public Offering Rules

- The UK Government proposes to retain the section 85(1) of FSMA prohibition on public offers of securities without an FCA-approved prospectus, but instead introduce new exemptions for companies with (or applying to have) securities admitted to trading on a regulated market. Companies with, or applying to have, their securities admitted to trading on various stock markets (including regulated markets and junior markets like AIM or the AQSE Growth Market) would be exempt from the rules governing public offers of securities on the basis that the securities are already freely trading or, in the case of an IPO, will be freely trading once the IPO completes.
- Separately, the FCA proposed to amend the definition of "the public" in a public offering of securities to ensure that fundraises to existing stakeholders in a company are not subject to the public offers of securities requirement. This aims to remove a disincentive against offering shares to a company's own shareholders and would have the effect of taking all rights issues outside the restrictions imposed by the public offering rules.
- The Government proposes to retain the 150-person threshold and the "qualified investor" exemptions currently contained in the current prospectus regime. The consultation also seeks views on the exemption that relates to public offers made to employees, former employees, directors and ex-directors.

Prospectus content

The consultation proposals in this area include:

- Retaining the "necessary information" test for the information that must be included in a prospectus

(as set out in Article 6 of the EUPR). The necessary information test requires that a prospectus must contain all information that is material to an investor to make an informed investment decision;

- Retaining clarifying wording that the 'necessary information' may vary depending on whether the issuer's securities are being admitted to a regulated market for the first time or whether the prospectus is being issued in connection with a further issue;
- The FCA are to be given discretion to set the rules on detailed disclosure requirements and not having them set out in legislation (which could include reduced disclosure requirements for further issues on a more wide-ranging basis than that currently set out in Article 14 of the UK Prospectus Regulation relating to the simplified disclosure regime for secondary issuances). The proposals envisage that the FCA will specify the component parts of the document should it wish to, as well as the detail of individual items of content.

Forward-looking information

Lord Hill acknowledged that forward looking information was the 'key' category of information that investors looked at in a funding round, but currently the existing prospectus regime deters issuers from including forward-looking information in their prospectuses. To combat this, the proposed approach is:

- to change the existing standard of liability from the "negligence standard" to the "recklessness standard" applied in relation to misleading statements (e.g. in Annual Reports) by section 463 of the Companies Act and Schedule 10A (3) of FSMA to these forward-looking statements. That lower liability standard is determined by reference to whether a person 'knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading';
- the reduction in liability would only apply to forward looking statements that project or predict a future state of affairs (and which are identified as being forward-looking with appropriate warnings) and not to statements of fact. Neither would it apply to the working capital statement in a prospectus. These types of statement would still be subject to the 'negligence' standard referred to above; and
- the information would need to be identified as forward-looking information in the prospectus, so as to warn investors that there is inherent uncertainty as to whether the projection or prediction will prove to be accurate and explicitly state that a lower standard of liability applies.

Junior markets

Currently, a prospectus is not required on initial admission to a multilateral trading facility ('**MTF**') such as the AIM market, unless a public offering above the requisite €8 million threshold is made. Instead, an "admission document" determined by the MTF operator's own rules is required.

The proposed changes outlined in the consultation include simplifying the process for companies admitted to an MTF, by:

- exempting those companies from the section 85(1) of FSMA restriction on public offering rules (i.e. meaning such companies would no longer need to prepare a prospectus for any size of public offer made by them); or
- recognising documentation published in relation to an admission to an MTF as a form of prospectus. The intention would be to bring such documents (such as an AIM Admission Document) within the scope of section 90 of FSMA, including the change to the standard of liability in respect of forward-looking statements as referred to above. Under this proposal, the exchange operating the MTF would be able to specify the content requirements of the 'MTF admission prospectus', together with procedures for ensuring it meets the requirements of the MTF.

Public offerings by overseas companies

The consultation contains three different proposals for the manner in which public offers of securities may be made into the UK by overseas companies. These include:

- maintaining the status quo whereby an overseas listed company would be able to extend an offer to the public in the UK provided that they publish an FCA-approved prospectus (though this is rarely done in practice as overseas listed companies tend to rely on the "qualified investors" exemption);
- creating a new regime of regulatory deference whereby overseas listed companies would be allowed to extend an offer on the basis of offering documents prepared in accordance with the rules

of the relevant stock market's jurisdiction, with no FCA review and/or approval of those documents. However, the overseas listed company would be required to notify the FCA where such an offer is made into the UK, and the FCA would have the right to order the closure of the offer to the public in the UK where it is of the view that the offer is detrimental to the interests of UK investors;

- not providing an equivalent right to make a public offer in the UK under the revised regime. However, this would not constrain the UK Government from including such a mechanism on a reciprocal basis in any Mutual Recognition Arrangement with overseas partners in the future.

Public offerings by private companies

There are three proposed ways outlined in the consultation to facilitate offers of securities by private companies (which are also not seeking a stock market listing) without the need to publish a prospectus These options are:

- The company making the offer of securities over a certain threshold would (instead of preparing a prospectus) need to register with and make the offer through an 'authorised firm'. This firm would still be subject to the FCA conduct of business rules;
- The offer of securities would need to be made through an 'authorised firm' with a bespoke permission, in the form of a new regulated activity; or
- Maintaining the status quo (i.e. to keep the requirement for a prospectus where consideration for the securities being offered exceeds EUR 8 million, though this amount would be re-stated to UK sterling). If this option is pursued, the FCA would need to write specific prospectus rules for the offering of securities in private companies into its handbook. The Government is currently proposing not to provide a mechanism for public offers of securities into the UK by overseas private companies.

The consultation closes on 17 September 2021.

Bird & Bird Comment

Nick Heap and Clive Hopewell comment:

"The consultation addresses a wide variety of issues in the existing prospectus regime. This is an excellent opportunity for those who regularly work in capital markets to raise issues and provide input to make significant changes. The report recognises the current failings in the existing regime, such as overly burdensome requirements and duplication, which may discourage companies from listing in London. This consultation should hopefully result in the creation of a prospectus regime that is not only more accessible to participants but also better tailored to the needs of its users and thus encourage more companies to list in London."

The consultation closes on 17 September 2021.

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