ALERT MEMORANDUM

# Final Rules For UK-Listed SPACs

*August 24, 2021*

On July 27, 2021, the Financial Conduct Authority ("FCA") published a policy statement that includes final rules amending the UK Listing Rules, and new associated guidance, applicable to special purpose acquisition companies ("SPACs").[1] The new rules and guidance came into force on August 10, 2021.

The final requirements are based on the FCA's earlier consultation launched on April 30, 2021 (the "Consultation").[2] The Consultation's proposals focused on the presumption of suspension of trading for a UK-listed SPAC that (under the prior FCA rules) would be triggered when the SPAC announced an intended acquisition. In line with the Consultation's proposals, the policy statement outlines key investor protections (described here as 'eligibility criteria') that must be embedded in the structure of a UK-listed SPAC in order for it to benefit from disapplication of the presumption of suspension. Where a UK-listed SPAC does not meet the eligibility criteria, the presumption of suspension will continue to apply. In accordance with the existing rules and guidance in Listing Rule ("LR") 5.6.8G(1) and 5.6.10G to 5.6.18R, a shell company can still avoid suspension on a reverse takeover if the FCA is satisfied there is enough publicly available information about the proposed transaction. However, the practical difficulties that SPACs targeting private companies experience in meeting the requirements of this regime are what has prompted the new rules and guidance.

In response to market feedback received during the Consultation, the final rules and guidance also provide for greater flexibility in relation to certain eligibility criteria. The FCA has also agreed to offer supervisory support to issuers seeking assurance, prior to admission to listing, that they are within the scope of the FCA's guidance for the disapplication of the presumption of suspension.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

LONDON

**Sebastian R. Sperber**
+44 20 7614 2237
ssperber@cgsh.com

**David Gottlieb**
+44 20 7614 2230
dgottlieb@cgsh.com

**Sarah E. Lewis**
+44 20 7614 2376
slewis@cgsh.com

**Ferdisha Snagg**
+44 20 7614 2251
fsnagg@cgsh.com

**Mohamed Taha**
+44 20 7614 2321
mtaha@cgsh.com

**Bree Morgan-Davies**
+44 20 7614 2223
bmorgan-davies@cgsh.com

**Katia Pritchard**
+44 20 7614 2363
kpritchard@cgsh.com

NEW YORK

**Nicolas Grabar**
+1 212 225 2414
ngrabar@cgsh.com

**Adam Brenneman**
+1 212 225 2704
abrenneman@cgsh.com

**Julian Cardona**
+1 212 225 2303
jcardona@cgsh.com

[1] *See* Policy Statement (PS21/10): Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules. For these purposes a SPAC refers to a 'shell company' (as defined in the FCA handbook) whose predominant purpose or objective is to undertake an acquisition or merger, or a series of acquisitions or mergers. The acquisition of a target by a SPAC is a 'reverse takeover' under the Listing Rules.

[2] *See* Consultation Paper (CP21/10): Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules and Press release: FCA consults on strengthening investor protections in SPACs.

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## I. The FCA's Final Rules and Guidance: Criteria for SPACs to Avoid the Presumption of Suspension

Under the final rules and guidance, the FCA may agree with a SPAC that a suspension is not required if the FCA is satisfied that the SPAC has sufficient measures in place to protect investors and ensure the smooth operation of the market is not temporarily jeopardised. The FCA will generally be satisfied that this requirement is met, and suspension is not required, if the SPAC meets the following criteria:

- *Size threshold*: aggregate gross cash proceeds of at least £100 million are raised from public shareholders (*i.e.*, shareholders other than founding shareholders, sponsors or directors) when the SPAC's shares are initially listed. The FCA lowered this threshold amount from the £200 million threshold proposed in the Consultation in response to market feedback;[3]
- *Ring-fencing of proceeds*: the SPAC has adequate binding arrangements in place with an independent third party (which need not be an authorised entity)[4] to ensure that funds raised from public shareholders are protected from being used for any purpose other than to provide the consideration for an acquisition that has been approved by the SPAC's board and public shareholders, or to be returned to shareholders in the event of investors redeeming shares or if the SPAC fails to complete an acquisition within the time limit for an acquisition (see further below) or is wound up. However, a specified amount or proportion of such funds may be excluded from the ring-fencing arrangements, and may be retained to be used by the SPAC to fund its operations, if that amount or proportion has been disclosed in the SPAC's IPO prospectus;
- *Time limit for an acquisition*: the SPAC's constitutional documents must provide for a two-year time limit after which the SPAC will cease operations and return funds to shareholders if no acquisition is completed within that timeframe. This time limit may be extended:

  a. by 12 months (*i.e.*, for a maximum operating period of three years) with shareholder approval; and/or

  b. by six months without shareholder approval, provided that, before the end of the original two-year time period or the extended three-year time period, the following conditions are met:

     - shareholder approval for an acquisition has been obtained but the acquisition has not yet completed;
     - a general meeting to approve an acquisition has been convened;
     - the SPAC has announced that a general meeting will be convened on a specified date to obtain approval for an acquisition and that a convening notice will be sent to shareholders within a specified time following the announcement; or
     - an acquisition agreement has been entered into but the acquisition has not completed and the SPAC

[3] The majority of Consultation respondents indicated that £100 million better reflected the size of SPACs typically seen in the UK or European markets, as well as the likely size of prospective target companies. The £100 million threshold was also seen as high enough to require a SPAC to seek institutional investment, which would, in turn, ensure scrutiny of the SPAC by institutional investors.

[4] However, the independent third party should be 'appropriate'. In particular, the third party should be a separate legal entity not under the SPAC's control or influence and have relevant experience. This would not necessarily exclude banks or other companies with which the SPAC has an existing affiliation or service relationship.

has not made an announcement as set out above.[5]

Use of the six-month extension option (under b. above) must be notified to a Regulatory Information Service before the end of the original two-year time period or the extended three-year time period.

While the ability to extend the deadline to complete an acquisition without shareholder approval will provide flexibility to SPACs that experience delays in completing an acquisition that is otherwise well-advanced (particularly in regulated industries where regulatory approvals could prolong an acquisition timeline), sponsors should discuss the marketing implications of this additional flexibility with their advisers before incorporating it into the terms of the deal.

- *Corporate approvals*: Board and shareholder approvals are required for an acquisition.[6] To mitigate risks arising from conflicts of interest:
  - any board member who is, or an associate of whom is, a director of the target or of a subsidiary of the target, or who has a conflict of interest in relation to the target company or any of its subsidiaries,[7] must be excluded from board discussions and voting on the acquisition;
  - the board must publish a 'fair and reasonable' statement if any of the directors have a conflict of interest in relation to the target or any of its subsidiaries, which reflects advice from an independent adviser.[8] We expect that SPACs will generally aim to satisfy this condition by obtaining a 'fairness opinion' on the terms of the acquisition; and
  - the SPAC's founders, sponsors and directors must be excluded from voting their shares on the acquisition. However, the FCA has clarified that founders and sponsors that are directors will be able to vote as part of the board approval, provided they are not excluded due to conflicts (as set out above).
- *Redemption option*: investors have the right to require the SPAC to redeem or otherwise purchase their shares for a predetermined amount before an acquisition is completed, regardless of how they voted in relation to the acquisition;[9] and

[5] The option for a further six-month extension offers more flexibility than initially proposed in the Consultation, which proposed only a 12-month extension subject to approval by a SPAC's public shareholders. Under the final rules, the maximum operating period of a UK-listed SPAC (*i.e.*, using the new alternative approach to suspension) will therefore be 42 months.

[6] These must be provided for in the SPAC's constitutional documents.

[7] The policy statement clarifies that this criterion seeks to exclude, for example, a director representing a private equity firm on the board of a SPAC that has an ownership stake in the target, a director who has loaned the target money, a director who holds an equity stake in the target or a director who has other direct links with the target. It is not intended to exclude directors who have general financial interests in the SPAC (which may often be the case), including where they hold 'sponsor' shares (instead, the shareholder vote and redemption right for investors criteria (see further below) are intended to provide separate protections in relation to such an inherent conflict).

[8] The FCA has decided not to add more prescriptive requirements or guidance on who may be considered an appropriately qualified and independent adviser.

[9] A SPAC is also free to provide an additional option to redeem if a shareholder does not agree with a 12-month extension, provided they still met the other criteria to avoid a presumption of suspension. Shareholders not wishing to remain invested in a SPAC for a further 12 months, if an extension is approved by a majority, also have the choice to sell their shares on the secondary market if they wish, although the market price may differ from the redemption value.

- *Disclosure requirements*: provision of sufficient disclosure to investors regarding key terms and risks from the time of the SPAC's initial listing through to announcement and conclusion of any acquisition (see Part II below for further details).

The SPAC must provide a written confirmation from its board to the FCA that the eligibility criteria have been met and will continue to be met until an acquisition is completed. The SPAC must supply evidence of the basis upon which it considers that it meets the criteria, if requested by the FCA.

**II. Disclosure Requirements for UK-listed SPACs**

Issuers are subject to existing UK disclosure requirements under the UK Prospectus Regulation, UK Market Abuse Regulation ("UK MAR") and the Transparency Rules (DTR 4 to 6). However, the FCA has also set out certain specific disclosures that a SPAC must include in its announcement[10] of an acquisition (where the FCA has agreed that the presumption of suspension does not apply as a result of the SPAC meeting the eligibility criteria):

- a description of the business carried on by the target;
- hyperlinks to all relevant publicly available information on the target;[11]
- all material terms of the proposed transaction, including the expected dilution effect on public shareholders from securities held by directors, sponsors or founding shareholders, or from new securities issued or expected to be issued as part of the transaction;
- the proposed timetable for the transaction;
- an indication of how the target has been, or will be assessed and valued by the SPAC, with reference to any selection and evaluation process for prospective target companies set out in the prospectus published in relation to the admission to listing of the SPAC's shares; and
- any other material details and information which the SPAC is aware of, or ought reasonably to be aware of, about the target or the proposed transaction that an investor in the SPAC needs to make a properly informed decision.

The FCA has acknowledged that certain information may not be available at the point of the announcement. In such cases, the announcement must also identify the missing information. The SPAC would then be required to publish such information when it is known, or the SPAC becomes, or ought reasonably have become, aware of it, and in any event in sufficient time before shareholder approval for the acquisition is sought. This means, for instance, that the FCA does not expect provisional due diligence or financial accounts being prepared to support a final deal to be published before they are finalised, but would expect such information to be provided in time to inform the shareholder vote.

In its policy statement, the FCA also noted the approach to disclosure taken in the United States ("U.S."), which requires more standardised disclosures that are filed with the Securities and

[10] Pursuant to LR 5.6.18E, the announcement must be published by means of a regulatory information service.

[11] The FCA has acknowledged that providing certain information regarding a target may be challenging for SPACs where the target company is a private company (as is typically the case). It is for this reason that the final rules and guidance do not require the provision of historical financial information on a target to the level required by existing shell company rules. However, the FCA does expect a SPAC to provide historical financial information where it is available as this is likely to be inside information in relation to the SPAC (so should be disclosed in line with UK MAR).

Exchange Commission ("SEC"). The FCA stated that it did not consider such an approach to be 'appropriate or proportionate in a UK context,' and noted that the majority of feedback received during the Consultation proposed that the FCA should rely on the existing UK disclosure requirements as far as possible.[12]

## III. The FCA's Supervisory Approach

The FCA's proposed supervisory approach reflects Consultation feedback on the need for greater certainty at the point of listing of the SPAC that the presumption of suspension would not apply at the point of announcing an acquisition. In summary:

- *At initial listing*: The FCA will work with SPAC issuers to ensure there is comfort that the presumption of suspension does not apply to the SPAC. Satisfaction of the eligibility criteria for disapplication of the presumption will be vetted by the FCA as part of the SPAC prospectus review process (and will need to be disclosed in the prospectus).
- *Before announcement of an acquisition*: Where the FCA has given comfort to a SPAC issuer before admission that it is within the FCA guidance for disapplication of the presumption, an issuer would still need to contact the FCA:
    - to provide a written board confirmation to the FCA that the eligibility criteria continue to be met and will continue to be met until the acquisition is completed; and
    - to discuss the draft acquisition announcement with the FCA (considering the requirements under the Listing Rules and UK MAR); *or*
    - in the event of a leak regarding the acquisition, to request a suspension of trading or to inform the FCA of the action the issuer has taken or will take to address the leak.

In the event of a leak, the FCA has clarified in its policy statement that it would not expect to reconsider its previous assessment of whether the SPAC met the eligibility criteria, or take action to suspend trading provided the SPAC acted in compliance with UK MAR and provides a written board confirmation to the FCA stating that it continues to meet the eligibility criteria. While suspension of listing may still be necessary, the FCA will consider the issue under its general suspension powers, as it would for other listed commercial companies.

A SPAC must contact the FCA as soon as possible if it ceases to meet any of the eligibility criteria. In that case, the presumption of suspension will effectively re-apply unless the SPAC can demonstrate that it meets the sufficient publicly available information requirements under Listing Rule 5.6.8G(1).

The FCA has amended the Primary Market Technical Note on 'Cash shells and special purpose acquisition companies (SPACs)' to reflect this approach.[13]

[12] In the U.S., forward-looking information (including projections) is typically included in disclosures relating to an acquisition (a "de-SPAC transaction"). Although feedback from the Consultation included suggestions for disclosure of projections used in a de-SPAC transaction, the FCA has not addressed this in the final rules and guidance. This is an area of focus for the U.S. Securities and Exchange Commission, which continues to scrutinise SPACs and private target disclosures to ensure there are appropriate safeguards in place against the dissemination of potentially problematic forward-looking information to investors.

[13] *See* Appendix 2 (Changes to Technical Note) of the Policy Statement (PS21/10): Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules.

## IV. The 'Units' Structure

The FCA indicated that it will give further consideration to the "unit" structure for SPAC listings that is common in the U.S. (whereby the issuer offers "units" representing shares and warrants, which trade separately after the end of a pre-defined stabilisation period). Questions which the structure raises include, among other matters, (i) whether, if the shares are listed at admission but do not yet trade separately, the minimum free float rule is satisfied from admission; and (ii) whether the proper characterisation of the unit under the Listing Rules is as a 'miscellaneous security', a 'convertible security' (each as defined in the Listing Rules) or a share in the SPAC. In our view, the shares, as a constituent security of the unit, should normally be regarded as in public hands from the time of admission, and the unit is properly categorised as a miscellaneous security that is neither a convertible instrument nor part of the SPAC's share capital. The FCA may issue further guidance in the future, and it will also consider use of the unit structure on a case-by-case basis.[14]

## V. Differences From U.S.-Listed SPACs Remain

While many of the final rules and guidance mirror certain investor protections embedded in U.S.-listed SPACs,[15] some notable differences remain as a result of different U.S. listing and reporting requirements[16] and U.S. market practice.

Pursuant to U.S. listing requirements:

- *Ring-fencing of proceeds*: In a U.S.-listed SPAC, 90% of the gross proceeds raised during the SPAC IPO must be immediately deposited and held in a trust account and subject to strict investment criteria.[17] While the FCA's final rules and guidance require funds to be ring-fenced, the FCA has not introduced more prescriptive requirements of this type at this stage in favour of allowing issuers greater flexibility in how this is achieved.[18]
- *Business combinations*: A U.S.-listed SPAC's initial business combination should be with one or more businesses having an aggregate fair market value of at least 80% of the value of the SPAC's trust account or (where there is no trust account) ring-fenced funds. The FCA has not proposed to adopt a similar requirement in the context of UK-listed SPACs.
- *Corporate approvals*:
  - While U.S. listing rules require the independent directors of a U.S.-listed SPAC to approve an acquisition, the rules do not exclude other directors from participating in board discussions regarding the acquisition. Under the FCA's final rules and guidance, conflicted directors must be excluded from board discussions and voting on the acquisition.

[14] The FCA also clarified that it did not intend for the proposed changes to bring a SPAC within the scope of the UK Alternative Investment Fund Managers regime. Whether or not a SPAC is an alternative investment fund is a matter for each SPAC to consider, seeking legal advice where appropriate.

[15] For a summary of the additional protections embedded in U.S. SPACs, please see our memorandum on the FCA's proposed changes: SPACs and More: Key Proposals for Change to the UK's Listing Regime.

[16] *See* Nasdaq Regulation IM-5101-2. Listing of Companies Whose Business Plan is to Complete One or More Acquisitions and Section 102.06 Minimum Numerical Standards – Acquisition Companies of the New York Stock Exchange Listed Company Manual.

[17] Despite this requirement, we note that most U.S.-listed SPACs currently deposit 100% of the SPAC IPO proceeds in the trust account.

[18] The FCA recognises that, for example, trust law is not consistent in all jurisdictions.

  - A U.S.-listed SPAC's sponsors and other insiders[19] are not precluded from voting their shares in the general meeting convened to approve an acquisition. Under the FCA's final rules and guidance, a UK-listed SPAC's founders, sponsors and directors must be excluded from voting their shares in relation to the acquisition but may vote as part of the board approval, provided they are not excluded due to conflicts.
  - There is no requirement for a U.S.-listed SPAC to obtain a 'fair and reasonable' statement from the board (as is required under the FCA's final rules and guidance where any of the directors have a conflict of interest), although it is common practice for a U.S.-listed SPAC to obtain a fairness opinion in situations where there is a conflict and to disclose any conflict in the proxy statement.
- *Redemption option*: U.S.-listed SPACs are only required to provide shareholders who vote against the proposed acquisition with the opportunity to redeem their shares (whereas, under the FCA's final rules and guidance, this option is afforded to all shareholders). However, it is market practice in the U.S. to allow all shareholders (even those who vote in favour of the acquisition) to redeem their shares before the acquisition is completed.
- *Time limit for an acquisition*: Different time limits for an acquisition apply for a U.S.-listed SPAC. A U.S.-listed SPAC is afforded a maximum operating period of three years during which time an acquisition must be completed. However, at listing, the constitutional documents for most U.S.-listed SPACs typically set a two-year deadline for an acquisition.

As noted above under Part II. (Disclosure Requirements for UK-listed SPACs), more standardised disclosures regarding U.S.-listed SPACs are required to be filed with the SEC.

Although certain differences between the U.S. and UK regimes remain and merit consideration, it remains to be seen whether market practice develops in the future to encompass these (or any other) protections to the extent that issuers seek to emulate even further the tried-and-tested practices within the U.S. SPAC market, or within other European jurisdictions.

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[19] In the U.S., insiders typically enter into a letter agreement whereby they agree to vote in favour of the acquisition. As a result, U.S.-listed SPACs usually need less than 50% of the public share votes to obtain the required consent for an acquisition.