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TO Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
rule-comments@sec.gov

13 JUNE 2022

Dear Ms. Countryman

File Number S7-13-22: Special Purpose Acquisition Companies, Shell Companies, and Projections

We hereby submit these comments in response to the Securities and Exchange Commission's (**SEC**) proposed rules regarding special purpose acquisition companies (**SPACs**) and related issues (**Proposed Rules**).

1.1 Background

We are not commenting on the merits or otherwise of the Proposed Rules, but rather wish to highlight certain unintended consequences that may arise in their application as currently proposed on certain transactions. This is even more so in the context of a deSPAC transaction where the target is a foreign entity.

As we understand the position, the mischief which the SEC is seeking to address is the practice whereby private operating companies are increasingly utilizing deSPAC transactions to access the US public securities markets without providing investors with some of the traditional initial public offering disclosure protections[1].

However, what the Proposed Rules do not accommodate (or exclude) from their ambit, is that species of transaction in which the target and/or its vendor, have not contemplated accessing the US public securities market, or indeed any securities market.

1.2 Private treaty mergers and acquisitions:

The objective of the Proposed Rules to align the procedural and disclosure requirements of deSPAC transactions more closely to that of traditional IPOs requires careful consideration in the context of private treaty mergers and acquisitions transactions.

More specifically the proposal to:

[1] See page 66 of the SEC Discussion Paper.

- expand the liability profile for a SPAC underwriter and other parties that take steps to facilitate a deSPAC transaction, or any related financing transaction or otherwise participates (directly or indirectly) in the deSPAC, to be an underwriter in the deSPAC transaction; and
- amend Form S-4 and Form F-4 to require that the SPAC and the target company be treated as a co-registrant and make additional signatories to the form (including the principal executive officer, principal financial officer and a majority of the board of directors or persons performing similar functions of the target company) subject to an enhanced liability regime by virtue of the application of section 11 of the Securities Act,

widens the liability net to capture parties that never intended or contemplated being subject to US securities laws. We do not however make any submission on the applicability of the Proposed Rules to SPACs and their promoters, advisors or underwriters.

An example of the species of transaction in respect of which the Proposed Rules require qualification is where a seller is proposing to sell a subsidiary/target company which has substantial assets and a lengthy and proven track record of operational and financial performance. The seller may be a major multinational company listed on a reputable stock exchange with comprehensive disclosure obligations.

As is customary for such sale processes, the seller, together with its advisers, prepare a data room and disclosures relating to the target ("sale") company in the context of a private treaty sale. At the time of running the sale process there is generally no intention on the part of the seller to IPO the target company.

Generally speaking, multiple bidders take part in a competitive sale process under which they are granted access to the data room, request further specific disclosures/information and carefully negotiate a sale and purchase agreement with a suite of warranties.

As part of any such sale process it is possible that a SPAC may ultimately be the successful bidder on the basis of the overall terms put forward and the liability profile under the sale and purchase agreement.

In the scenario we have described, the Proposed Rules have the potential to significantly alter the liability profile of the agreed transaction.

Additional liability to the seller, target company and their directors, officers and/or advisers, either through being treated as a "co-registrant" or as a deemed "underwriter", will not have been in the contemplation of the seller and its advisers at the time of negotiating and signing the sale and purchase agreement (especially in respect of transactions entered into prior to the Proposed Rules). The harshness of the Proposed Rules, is even more acute in the circumstances we have outlined when one takes into account that in many private treaty transactions the target company, and its directors and officers have little or no say in the conduct of the sale and purchase process or the negotiation of the sale and purchase agreement. Generally speaking they are mere spectators. This is also true of the seller, and its directors or officers as they would not be privy to the commercial objectives of the SPAC and its promotors.

It could be argued, that had the seller in the example we have outlined wanted to be subject to IPO level disclosures and regulations, it may have been simpler for that seller to pursue a traditional IPO avenue directly rather than agree to a bilateral deal with a SPAC and have exposure to statements made by and on behalf of the SPAC through its potential status as a "Co-Registrant" or "underwriter" (for example, the seller and target company would be in complete control over any prospectus disclosures rather than having to conduct detailed diligence in respect of any plans or future projects of the SPAC purchaser and its advisors).

In these circumstances, we submit that there should be a "carve out" from the Proposed Rules or at least a clear and expedited means to apply to the SEC for relief from certain aspects of the Proposed Rules so as to limit the potential exposure of the sellers, its directors and officers, its advisors and the target company directors and officers.

1.3 "Underwriter liability"[2]

Unlike a traditional IPO where underwriter liability is typically limited to the amount of securities each underwriter purchased, it is unclear how liability will be calculated and/or capped in respect of any "deemed" underwriter in respect of a deSPAC transaction.

If liability is referable to the entire amount of the securities being distributed in connection with the deSPAC transaction, this would pose a significant disincentive for any seller to enter into a private treaty sale with a SPAC and may have the effect of completely deterring advisers from advising on deSPAC transactions.

1.4 Application of Proposed Rules in foreign jurisdictions

We also submit that the Proposed Rules should not extend to capture transactions in foreign jurisdictions, governed by foreign laws, with the only nexus to US laws being that a SPAC is involved. This would place too great a burden on the seller, as it would have to comply with US securities laws (in addition to the laws of the jurisdiction where the transaction is being consummated) on the off chance that the successful bidder may be a SPAC which may deSPAC in the U.S.

The views expressed in these comments do no necessarily represent the views of all King & Wood Mallesons partners and employees or of our clients.

Yours faithfully

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King & Wood Mallesons

[redacted]

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[2] See for example pages 92-98 of the SEC Discussion Paper.