

## COMMENTS ON SEASONING OF REVERSE MERGER COMPANIES BEFORE UPLISTING TO NATIONAL SECURITIES EXCHANGES

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### Introduction

Blockbuster Entertainment, Occidental Petroleum, Turner Broadcasting, Tandy Corp. (Radio Shack), Texas Instruments, Jamba Juice, and Berkshire Hathaway are just a few well-known companies that went public through a "reverse merger." To the uninitiated, a reverse merger is a deceptively simple concept. Instead of pursuing a traditional initial public offering (IPO) utilizing an investment bank as an underwriter, a company arranges for its stock to be publicly traded following a merger or similar transaction with a publicly held "shell" company. The public shell has no other business but to look for a private company to merge with. Upon completion of the merger, the private company instantly becomes public. The shareholders of the private company typically take over the majority of the stock of the former shell, enabling them to still operate the business of the formerly private company.

As laid out below, the process is generally quicker, cheaper, simpler, less dilutive, and less risky than an IPO, but it has its own unique risks and challenges. Reverse mergers are typically complex transactions with hidden traps that even practitioners experienced in this technique easily fall into. When done right, however, these hidden dangers can be avoided and the transaction can move forward quickly and smoothly.

The dramatic increase in popularity of reverse mergers in the last decade resulted from a confluence of factors. These include the fickleness of the IPO market and its near universal unavailability for companies with less than \$150 million in market value, more willingness in certain hedge fund investors to seek greater potential upside in exchange for more patience with respect to liquidity, and SEC regulatory action in the area bringing greater transparency and legitimacy to the technique. In addition, a type of shell company

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known as a "special purpose acquisition company," or SPAC, became tremendously popular in the mid-2000s, attracting such luminaries as Goldman Sachs, Apple founder Steve Wozniak, and many more to the world of shells. Finally, as will be discussed below, there was until recently, a large number of companies from China seeking a US public listing through a reverse merger. On average, about 200 reverse mergers are completed each year.<sup>1</sup>

### Comparing Reverse Mergers and IPOs

The process of a reverse merger is much speedier than an IPO, allowing needed capital to be raised more quickly and more easily. Typically, reverse mergers can be completed in three to four months, whereas IPOs can take nine to twelve months or more.<sup>2</sup> Reverse mergers also are much less expensive. Depending on the cost of a shell, a reverse merger can be completed for less than \$1 million and sometimes even less than \$200,000. IPOs, on the other hand, cost millions.<sup>3</sup>

IPOs also are more dependent on market conditions than reverse mergers. In the end, an IPO comes down to how the market is behaving during the week that the IPO is slated to be carried out. If the market is down, the deal may be delayed, the offering price may be reduced, and some deals simply get shelved at the last minute. Because there is generally not much trading immediately following a reverse merger, current market conditions are simply less important.

IPOs also typically involve the sale of a fairly large percentage of a company's stock. In general, reverse mergers tend to raise less money initially, allowing a company's founder to retain a greater percentage of his company's equity. Additional funds are raised later, hopefully at a time when the stock price has risen and the offering would thereby be less dilutive.

It is often said that one advantage of an IPO is the robust trading that takes place after the offering. The primary goal of the syndicate of underwriters is to get initial investors in, and then out, of the stock relatively quickly, within hours or a few days. They support the stock during this time. Whether they support it after that initial burst of activity depends on many factors and cannot be assured.

It is true that initial trading after a reverse merger is often thin. Companies are trained to think differently with a reverse merger and work on building market support

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<sup>1</sup> See, e.g., Bill Meagher, *Year in Review: Deal Flow, APOs Grow Significantly*, 7 THE REVERSE MERGER REPORT, No. 1, Jan. 13, 2011 (reporting 246 completed reverse mergers in 2010, a 25% increase from the prior year).

<sup>2</sup> DAVID N. FELDMAN & STEVEN DRESNER, REVERSE MERGERS: TAKING A COMPANY PUBLIC WITHOUT AN IPO 23 (Bloomberg Press, 2d ed. 2009) (noting that most reverse merger "transactions involving legitimate players completing proper due diligence and negotiation of documents" can be completed within a "three- to four-month process if there is a contemporaneous financing," but that a typical IPO "usually takes nine to twelve months from start to finish and can easily take longer").

<sup>3</sup> *Id.* at 22 (noting that "[m]ost reverse mergers can be completed for under \$1 million" including "the cost of acquiring the public shell" and "transactions costing less than \$200,000 [are] not unusual;" however, an IPOs are "much more expensive, costing at least several million dollars").

over a reasonable period of time, rather than expecting a "pop" in the stock as with an IPO. Many reverse merger companies pursue larger public offerings after they go public to gain some of the trading benefit that attaches to an IPO.

## Basics of Reverse Mergers

In a 2005 rulemaking, the SEC defined a shell company as a registrant that has (1) no or nominal operations and (2) either: (i) no or nominal assets, (ii) assets consisting solely of cash and cash equivalents, or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets.<sup>4</sup> In a 2007 rulemaking, amending Securities Act's Rule 144,<sup>5</sup> the SEC further indicated that a start-up company with limited operations could be considered as having more than mere nominal operations, in other words as not a shell,<sup>6</sup> and in the aforementioned 2005 rulemaking, the SEC generally declared "that companies and their professional advisors often use shell companies for many legitimate corporate structuring purposes."<sup>7</sup>

Shells are valued in the marketplace based on how many shareholders they have, whether the stock is trading, whether the company is required to file periodic reports with the SEC, and how "clean" the shell is. Shells come about in one of two ways. In one type, a public operating business is sold or goes out of business; while the company remains public, its operations have ceased. This leaves behind a public shell whose shares typically can continue to trade. Shells can also be created from scratch, utilizing SEC Form 10 to register a shell's common stock so that the company becomes fully SEC reporting but has no shares to be traded until a business combination is completed and a full SEC registration process is undertaken. These "Form 10 shells" had become very popular in the last six years as they are completely clean, with no past operations to scrub for liability exposure.

If one is completing a reverse merger with an SEC reporting shell company, a variety of special rules apply. For example, SEC Form 8-K requires, within four business days after the completion of the transaction, a filing on that form of all information that would be in an SEC Form 10 for the combined company.<sup>8</sup> This is effectively the equivalent of an IPO prospectus, with fully-audited financial statements, detailed company description, executive compensation, ownership chart and the like. The industry refers to it as the "super" Form 8-K. In addition, certain rules allowing the public resale of shares that have not been registered with the SEC require a delay

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<sup>4</sup> Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Securities Act and Exchange Act Release No. 8587, 85 SEC Docket 2825 (July 15, 2005).

<sup>5</sup> General Rules and Regulations, Securities Act of 1933, Persons Deemed Not to Be Engaged in a Distribution and Therefore Not Underwriters, 17 C.F.R. § 230.144 (2012).

<sup>6</sup> Revisions to Rules 144 and 145, Securities Act Release No. 8869, 92 SEC Docket 110, at n.172 (Dec. 6, 2007) (noting that "Rule 144(i)(1)(i) is not intended to capture a 'startup company' ... in the definition of a reporting or non-reporting shell company, as [the staff] believe[s] that such a company does not meet the condition of having 'no or nominal operations'").

<sup>7</sup> Securities Act and Exchange Act Release No. 8587, *supra* note 4, at 2.

<sup>8</sup> *Id.* at 10.

following the completion of a reverse merger before these shares can begin to be sold.<sup>9</sup>

In the 2007 rulemaking on Rule 144, mentioned above, the SEC imposed an additional requirement on public companies that were at one point shell companies, mandating that such companies complete all of their regular filings with the SEC for the last 12 months if a shareholder wants to publicly sell shares that have not been registered.<sup>10</sup> This rule applies forever and the industry has dubbed it the "evergreen" requirement. In October 2008, this author, along with nine law firms, submitted a petition for rulemaking requesting that this limitation be reversed and that former shells be treated like any other public company.<sup>11</sup> To date, the Commission has not taken any action on the petition.

In addition, as will be discussed in greater depth below, the New York Stock Exchange, NYSE Amex, and Nasdaq have all imposed special limitations on when a company completing a reverse merger can be permitted to apply to "uplist" to their exchange.

### **Brief History and Rule 419**

In the 1970s and 1980s, a number of unsavory players entered the reverse merger space, forming new shell companies, raising money through IPOs of these shells, and simply taking the money as fees for themselves. Other abuses, some relating to trading of the stock of the shells, were also rather rampant. However, a number of legitimate players also emerged. Other fraudulent "boiler room" abuses also were common in lower priced stocks. This resulted in the passage of the Penny Stock Reform Act of 1990.<sup>12</sup> Among other things, it directed the SEC to segregate registration statements (including IPOs) that relate to offerings by shell companies. In response, in 1992 the SEC passed Rule 419 under the Securities Act of 1933.<sup>13</sup>

Rule 419 placed significant restrictions on any attempt to complete a traditional IPO for a shell company (they then called them blank check companies with a little bit different definition). The rule requires virtually all cash raised in the shell IPO to be placed in escrow, no trading in the shell's stock prior to a reverse merger, a time limit of 18 months to complete a transaction or return all invested cash, and shareholder approval of the merger transaction. Shareholders also have an "opt out" to receive their money back if they vote against the transaction. The restrictions do not apply to a public offering by a shell of at least \$5 million- this exception ultimately spawned the SPAC movement described above.

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<sup>9</sup> See Rule 144(d), *supra* note 5 ("Holding period for restricted securities").

<sup>10</sup> Securities Act Release No. 8869, *supra* note 6, at 21 (revising paragraph (i) of Rule 144).

<sup>11</sup> Letter from David Feldman, Esq., et al. to SEC (Oct. 1, 2008), *available at* <http://www.sec.gov/rules/petitions/2008/petn4-572.pdf>.

<sup>12</sup> Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990).

<sup>13</sup> Regulation C-Registration, Securities Act of 1933, Offerings by Blank Check Companies, 17 C.F.R. § 230.419 (2012).

Passing this rule eliminated most of the abusers from the market. But the rule also hurt many quality players. Most discovered quickly that, as a practical matter, it was going to be nearly impossible to take shells public under Rule 419, much less have an easy time getting the SEC to approve the proxy disclosure required to obtain shareholder approval for a transaction. As indicated above, this ultimately led many to acquire shells from the carcasses of former public operating companies or set up new shells using Form 10, which is not subject to the Rule 419 restrictions.<sup>14</sup>

## Recent Developments

As mentioned above, in the last decade hundreds of companies located in China became US public companies through reverse mergers. A number of other Chinese companies completed traditional IPOs during this time. But in the late 2000s, before the market meltdown, Chinese companies represented about one-quarter of all reverse mergers. The Public Company Accounting Oversight Board (PCAOB), which oversees auditing firms of public companies, discerned that of the 603 reverse mergers between January 2007 and March 2010, 159 were Chinese companies, about 26%.<sup>15</sup> However, starting in early 2010, the financial press and short sellers began reporting allegations of primarily accounting fraud in a number of these companies.<sup>16</sup> A number of class action lawsuits are now pending against Chinese companies, although some have been dismissed.<sup>17</sup>

These developments also led the SEC to begin actively investigating not only these companies but microcap fraud in general. This review also encompassed the reverse merger industry, including attorneys, accountants and investment banks. It also led the SEC to issue a recent "investor bulletin" on the risks of reverse mergers, which mostly described the risks inherent in investing in any small or microcap stock.<sup>18</sup> In addition, the PCAOB has issued warnings to accountants about reverse mergers.<sup>19</sup> The US Justice Department also is now involved in the investigation of alleged accounting fraud in reverse mergers.<sup>20</sup>

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<sup>14</sup> Form 10 is a registration under the Securities Exchange Act of 1934 while Rule 419 was promulgated under the Securities Act of 1933.

<sup>15</sup> *Activity Summary and Audit Implications for Reverse Mergers Involving Companies from the China Region: January 1, 2007 through March 31, 2010*, Public Company Accounting Oversight Board, Mar. 14, 2011, available at [http://pcaobus.org/Research/Documents/Chinese\\_Reverse\\_Merger\\_Research\\_Note.pdf](http://pcaobus.org/Research/Documents/Chinese_Reverse_Merger_Research_Note.pdf).

<sup>16</sup> See, e.g., Bill Alpert & Leslie P. Norton, *Beware this Chinese Export*, BARRON'S, Aug. 28, 2010, available at <http://online.barrons.com/article/SB50001424052970204304404575449812943183940.html>.

<sup>17</sup> See Timothy P. Harkness, *Chinese Companies Under Fire: The Recent Boom in U.S. Securities Cases Against Chinese Public Companies*, THOMSON REUTERS BUSINESS LAW CURRENTS, Feb. 24, 2012, available at <http://currents.westlawbusiness.com/Article.aspx?id=eff19be9-2bfc-4568-95b3-f0a263919b8e> (noting the increasing pace of securities class action filings against Chinese companies during 2011, especially against companies employing reverse merger techniques to raise money).

<sup>18</sup> *Investor Bulletin: Reverse Mergers*, Office of Investor Education and Advocacy at the SEC (Jun. 2011), available at <http://www.sec.gov/investor/alerts/reversemergers.pdf>

<sup>19</sup> *Activity Summary and Audit Implications*, *supra* note 15.

<sup>20</sup> See, e.g., Harkness, *supra* note 17 (noting an FBI raid on New York Global Group, a company known for

## "Seasoning" Requirements

In recent months, in large part as a result of the actions of the SEC, PCAOB, and others, the SEC approved rules permitting the three largest US stock exchanges to build a speed bump to exchange listing for companies completing reverse mergers.

The original proposals for a so-called "seasoning" period for post-reverse merged companies were first published in the middle of 2011. The Nasdaq proposal<sup>21</sup> (as amended) was filed on June 8, 2011. The New York Stock Exchange (NYSE)<sup>22</sup> and its affiliate's, NYSE Amex (Amex),<sup>23</sup> proposals were filed on August 4, 2011. The author submitted a comment letter<sup>24</sup> to the NYSE Amex proposal on August 29, 2011, and a comment letter<sup>25</sup> to the Nasdaq proposal on August 30, 2011. The NYSE and Amex proposals were virtually identical in both their justifications for the proposed action and the structure of the new limitations. Nasdaq's justifications were slightly different, as was their proposed solution.

### *NYSE and Amex Proposals*

The NYSE and Amex proposals would have required that a company completing a reverse merger with a shell company "season" its trading on an over-the-counter market or another national securities exchange for 12 months before an "uplisting" would be permitted to either of these exchanges. The only exception would be if the company were conducting a large public offering to raise net proceeds of at least \$40 million in a so-called "firm commitment" transaction. A broker-dealer acting as underwriter in raising this money must have substantial capital in order to be permitted to conduct a firm commitment offering. Strangely, while every other listing standard for NYSE is higher than those for Amex, the \$40 million minimum offering to avoid seasoning was the same in both the NYSE and Amex proposals.

The proposals also required that before uplisting after a year of trading over-the-counter, the company's stock must have been trading for a "sustained period" at the minimum price required to be listed. Finally, the company must have completed one full

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helping arrange so-called "reverse mergers" for Chinese companies).

<sup>21</sup> Proposed Rule Change to Adopt Additional Listing Requirements for Reverse Mergers, Exchange Act Release No. 64633, File No. SR-NASDAQ-2011-073, 2011 WL 2292155 (June 8, 2011).

<sup>22</sup> Proposed Rule Change Amending Sections 102.01 and 103.03 of the Exchange's Listed Company Manual to Adopt Additional Listing Requirements for Reverse Mergers, Exchange Act Release No. 65034, File No. SR-NYSE-2011-38, 2011 WL 3407846 (Aug. 4, 2011).

<sup>23</sup> Proposed Rule Change Amending Section 101 of the NYSE Amex Company Guide to Adopt Additional Listing Requirements for Companies Applying to List After a Reverse Merger, Exchange Act Release No. 65033, File No. SR-NYSEAmex-2011-55, 2011 WL 3407845 (Aug. 4, 2011).

<sup>24</sup> Letter from David Feldman, Esq. to SEC (Aug. 29, 2011), available at <http://www.sec.gov/comments/sr-nyseamex-2011-55/nyseamex201155-1.htm>.

<sup>25</sup> Letter from David Feldman, Esq. to SEC (Aug. 30, 2011), available at <http://www.sec.gov/comments/sr-nasdaq-2011-073/nasdaq2011073-1.htm>.

year of regular SEC filings. Interestingly, the proposal suggests that it will treat as reverse mergers combinations with certain public companies that would not technically qualify as shells under the SEC definition. If a company is not particularly active, they might consider it as a shell for purposes of seasoning.

The justifications offered as to why these actions are necessary: (1) allegations of accounting fraud, (2) suspension of trading or registration of some reverse merger companies, (3) an SEC enforcement action against an auditing firm involved with reverse mergers, and (4) the issuance of an SEC bulletin on reverse mergers.

Why is seasoning the best response to this? The proposals suggest greater assurance of reliable reporting, time for auditors to detect fraud, ability to address internal control weaknesses, and time for market and regulatory scrutiny of the company.

### *Nasdaq Proposal*

The Nasdaq proposal required only six months of seasoning, but it did not provide an exception for any public offering, even if firm commitment. Nasdaq originally proposed avoiding seasoning with a firm commitment offering, but the June 2011 amendment to its proposal eliminated that exception. It required maintenance of the price you would need to initially list for at least 30 of the 60 trading days before applying. It further required filing at least six months of activity on SEC reports, and similarly expanded the definition of shell company much as in the NYSE and Amex proposals.

Nasdaq used most of the same bases for the proposal as NYSE and Amex but added a few more: (1) concerns raised that certain promoters have regulatory histories or are involved in transactions that are "disproportionately beneficial" to them, (2) the PCAOB has cautioned accounting firms having "identified issues" with audits of these companies, and (3) Nasdaq's being aware of situations where it appeared that efforts to manipulate prices took place to meet Nasdaq's minimum price.

An additional reason they believed seasoning would be helpful was that the Financial Industry Regulatory Authority (FINRA), which regulates broker-dealers, can monitor trading patterns and "uncover potentially manipulative trading."

### *Final Rules*

Ultimately the final rules on the seasoning requirements passed<sup>26</sup> in November 2011, and each rule essentially harmonized all of the proposals into one so that all three exchanges are applying essentially the same seasoning requirement. In all three final rules, seasoning is required (trading on a market other than the larger exchange) for at least one full fiscal year of the company, the stock must trade for a sustained period at the

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<sup>26</sup> Approval to Rule Change, Release No. 65708, File No. SR-NASDAQ-2011-073, 2011 WL 5434020 (Nov. 8, 2011); Granting Approval to Rule Change, Release No. 65709, File No. SR-NYSE-2011-38, 2011 WL 5434021 (Nov. 8, 2011); Filing of Rule Change, Release No. 65033, File No. SR-NYSEAmex-2011-55, 2011 WL 3407845 (Aug. 4, 2011).

minimum level required to list before uplisting, and a “firm commitment” underwriting with gross proceeds of at least \$40 million allows a company to bypass seasoning on any of the three exchanges. In addition, SPACs that trade over-the-counter would also be subject to seasoning after they complete reverse mergers.

## Comment

Unfortunately, the rush to attack reverse mergers because of the issues with Chinese companies fails to acknowledge a number of things. First, a number of Chinese companies facing allegations of fraud completed IPOs rather than reverse mergers.<sup>27</sup> This includes Longtop Financial, whose IPO underwriter was Goldman Sachs and auditor was Deloitte.<sup>28</sup> Second, a good number of the Chinese companies accused of fraud did complete reverse mergers. However, these mergers combined with Form 10 shells that had no trading in the stock until they completed a full public offering, with all the same investor protections as an IPO.<sup>29</sup> Thus, the problem is not with the method by which these companies went public, it is about the companies themselves. It is disappointing that the regulators chose a broad brush, overly expansive approach in their offensive against reverse mergers.

Not long ago, regulators levied hundreds of millions of dollars in fines against major underwriting firms following illegal activities in the IPO market of the late 1990s.<sup>30</sup> One could therefore ask which approach is the most legitimate way to take a company public.

More specifically, the seasoning rules represent the wrong reaction to a very limited problem. This draconian idea is responding to what to this day remain essentially mere allegations of fraud. Currently the SEC and Department of Justice are investigating whether fraud took place and discovery is beginning in class action lawsuits.<sup>31</sup> There have been no new allegations of fraud in a number of months, leading one to assume that even if fraud is found, the issue is now essentially contained to the several dozen Chinese companies being accused. Also, a number of the cases have been thrown out of court for failure to provide specific evidence of fraud other than the allegations of short sellers.

The exchanges also suggest that seasoning is necessary because some reverse merger companies' trading was suspended. This has mostly occurred when companies fail and then cease their public reporting, or issue questionable press releases. Since companies completing reverse mergers are generally less mature than companies

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<sup>27</sup> Floyd Norris, *The Audacity of Chinese Frauds*, N.Y. TIMES, May 26, 2011, at B1.

<sup>28</sup> *Id.*

<sup>29</sup> David Feldman, *Reverse Merger Report Touts Form 10 Shells*, REVERSE MERGER BLOG, Feb. 21, 2011, available at <http://www.reversemergerblog.com/2010/02/21/reverse-merger-report-touts-form-10-shells>.

<sup>30</sup> See, e.g., Andrew Countryman, *Regulators Join Forces in Effort to Curb Conflicts, IPO Excesses*, CHICAGO TRIBUNE, Oct. 4, 2002, available at [http://articles.chicagotribune.com/2002-10-04/business/0210040097\\_1\\_ipo-process-analyst-conflicts-gen-eliot-spitzer](http://articles.chicagotribune.com/2002-10-04/business/0210040097_1_ipo-process-analyst-conflicts-gen-eliot-spitzer).

<sup>31</sup> See Azam Ahmed, *Chinese Reverse-Merger Companies Draw Lawsuits*, N.Y. TIMES DEALBOOK, July 26, 2011, available at <http://dealbook.nytimes.com/2011/07/26/chinese-reverse-merger-companies-draw-lawsuits>.

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conducting traditional IPOs, a larger percentage is inherently likely to fail. It is unclear how seasoning will address this problem. In fact, it is likely to make failure more likely since it is more difficult for a company to raise capital when trading over-the-counter.

Regarding the backgrounds of promoters, mentioned by Nasdaq, the exchanges have broad discretionary authority to examine the regulatory histories of and financial arrangements made with these individuals. The exchange can simply refuse to list a company which includes questionable characters or compensation they deem unreasonable. And again, it is not clear how seasoning the company addresses this issue at all.<sup>32</sup>

Nasdaq also suggests that it wants to impose seasoning because some companies uplisting from the over-the-counter markets may have artificially inflated their trading prices to meet the minimum initial listing price. But many reverse mergers are completed with Form 10 shells, after which a public offering is undertaken. In this case there is no trading at all until the company is listed on the national exchange, so the trading price inflation issue disappears completely. Indeed, seasoning might lead to the perverse result of incentivizing artificial price inflation to complete the uplisting after mandatory trading over-the-counter, whereas permitting the continuation of Form 10 shell mergers and public offering uplists would have clearly eliminated the concern.

To suggest that the issuance of an SEC bulletin warning of the risks of reverse mergers or the PCAOB's having "identified issues" with reverse merger audits is a reason for tightening exchange regulation, respectfully, does not in and of itself provide substantive support for this extreme reaction. And the fact that there has been only one SEC enforcement action against one accounting firm does nothing to suggest there is a systemic problem requiring such a dramatic response.

Even if one assumes the justifications for action are legitimate, requiring trading over-the-counter results in a number of unintended consequences without adequately addressing the alleged reasons for the proposals.

The exchanges all now require prices in over-the-counter trading during seasoning to be at the same level as they expect for an initial listing on the exchange. But as we know, governance and other obligations on the over-the-counter markets (such as the OTC Bulletin Board and the platforms of OTC Markets Group) are substantially less stringent than on exchanges. Therefore, it is a much greater challenge to develop volume in stock trading because analysts do not generally follow these stocks and certain funds and brokerages are prohibited from purchasing their stock.

As a result, the requirement to maintain a particular stock price as high as one expects on the exchange is simply unfair and unrealistic to achieve on the OTC markets. Trading in the stock should not be a requirement of seasoning. A period where all SEC filings are made in a timely and complete fashion and can be examined by exchange officials would have seemed sufficient enough. This could well result in the next great software or defense company being denied the opportunity for an uplisting because of the very challenges of the trading platform that the new rules relegate them to. Indeed, a

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<sup>32</sup> NYSE Listed Company Manual §703.08, *available at* <http://nysemanual.nyse.com>.

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primary reason that Form 10 shells became so popular was the opportunity to complete a reverse merger and private financing, followed by a public offering directly onto a national exchange, all while completely bypassing the over-the-counter markets and their unique challenges. Seasoning may well skewer this efficient and investor-protective method of financing and listing a company.

It also makes no sense that both the NYSE and the Amex have imposed the same minimum offering amount to bypass seasoning when all other listing criteria are lower on Amex than on NYSE. It would have been preferable, as pointed out in this author's comment letters, that there be no minimum to a public offering, or if a minimum is required, offer a lower one for Amex, perhaps \$15 million. This might also have worked for Nasdaq. The same investor protections apply in a small firm commitment public offering as a larger one.

Historically, regulators targeted reverse mergers because there was a period during which fraud was a serious problem. It was unfortunate that there is now another attempt to dismantle a technique which the SEC itself had declared to be legitimate, and where the alleged fraud took place, if at all, in a narrow and potentially severable corner of the space, and where the same alleged fraud may have occurred in IPOs and transactions where full public offerings took place.

In 2010, at the SEC's Government-Business Forum on Small Business Capital Formation, SEC Chairman Mary L. Schapiro said "reliable data suggests that small businesses have created 60-to-80 percent of net new American jobs over the last ten years. Making sure small businesses can attract the investments they need to grow and thrive is vital to America's economic recovery."<sup>33</sup> One can only hope that Chairman Schapiro and her fellow commissioners reconsider their position on this ill-advised set of new rules and instead do all they can to reduce impediments to capital formation for these key engines of the American economy, with an appropriate balance to ensure that small company investors are well protected.

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<sup>33</sup> Mary L. Schapiro, Remarks to the SEC Government-Business Forum on Small Business Capital Formation (Nov. 18, 2010), *available at* <http://www.sec.gov/news/speech/2010/spch111810mls.htm>.