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High-Tech Companies and the Decision to "Go Public": Are Backdoor Listings (Still) an Alternative to "Front-door" Initial Public Offerings?

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HIGH-TECH COMPANIES AND THE DECISION TO "GO PUBLIC": ARE BACKDOOR LISTINGS (STILL) AN ALTERNATIVE TO "FRONT-DOOR" INITIAL PUBLIC OFFERINGS?

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INTRODUCTION

Financial and capital markets play a key role in the funding of high growth technology companies. There is little doubt that companies in highly capital-intensive, often volatile, and disruptive sectors will eventually have to float their shares on a stock exchange to obtain access to capital to grow and expand their operations, enhance the company's reputation and visibility, attract and retain talented employees, and provide liquidity to shareholders. The traditional path to a listing in an equity market is an initial public offering (IPO). However, the companies that consider a first sale of stock to the public are often overwhelmed by the costly and time-consuming legal and financial regulations that must be complied with while pursuing an IPO.

These costly and lengthy regulatory barriers, together with sluggish IPO markets and their unavailability to smaller firms, have been reasons for high-tech companies and their shareholders to look for alternatives to IPOs.[1] A popular alternative is to pursue a backdoor

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[1] *See* Stephen Bell, *As IPOs Struggle in Australia, Reverse Takeovers Shine*, WALL ST. J.: DEAL J. AUSTL. (Jan. 23, 2013, 11:52 AM),

listing, most often accomplished through a reverse merger or reverse takeover.[2] Both alternatives "transform" a private company into a publicly traded company by combining directly or indirectly with a listed company (whether through a merger, exchange offer, or otherwise). A backdoor listing has not only allowed companies to focus more on their business and less on compliance with "going public" rules and regulations, but also to gain access to more liquid and robust stock markets. In addition to the cheaper and quicker access to capital and liquidity, backdoor listings have also been employed to receive tax benefits that stem from "tax loss carry-forwards" in the public shell. If the reverse merger or takeover involves a public company that operates in the same or complementary industry or sector as the private company, synergies are often the reason for the backdoor listings. Moreover, besides the fact that a private company becomes instantly "listed" on a stock exchange, a backdoor listing usually gives shareholders of the private company the opportunity to receive the majority of the shares of the public entity, allowing them a tight grip on control (as if they still run a private company).[3]

Recently, backdoor listings have become increasingly popular among high-tech companies in the United States. Consider venture capital-backed RMG Networks, a Chicago-based global provider of smart visual solutions (particularly advertisements on airplanes and airport lounges), which went public through a reverse merger in the United States in April 2013, bypassing the IPO procedures. RMG Networks was first acquired by SCG Financial Acquisition Corporation. As a result, the shareholders of RMG Networks received

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http://blogs.wsj.com/dealjournalaustralia/2013/01/23/as-ipos-struggle-reverse-takeovers-shine/.

2 The terms "backdoor listing," "reverse merger," and "reverse takeover" are used interchangeably. These three approaches, mostly distinguished by legal differences at their implementation stage, are alternatives to an IPO.

3 *See* David N. Feldman, *Comments on Seasoning of Reverse Merger Companies Before Uplisting to National Securities Exchanges*, 2 HARV. BUS. L. REV. 140 (2012). *See also* DAVID N. FELDMAN, REVERSE MERGERS: TAKING A COMPANY PUBLIC WITHOUT AN IPO (2006).

stock in SCG. Subsequently, the listed company's profile was changed from SCG to RMG.[4]

Australia also experienced a surge in high-tech backdoor listings in 2014.[5] For instance, Australian Bitcoin focused company digitalBTC (which was acquired by the already listed Macro Energy and renamed to DigitalCC Limited) is another example of a high-tech (and disruptive) company that turned to a backdoor listing to go public in 2014.

Backdoor listings are also a common "IPO alternative" in the real estate development sector. For instance, in October 2013, the Hong Kong Parkview Group Limited acquired the commercial property portfolio in China from the non-listed subsidiary of Cofco Corporation and changed its name to Cofco Land Holdings Ltd.[6]

Since backdoor listings are often not excessively burdened by complex listing rules and regulations, they are prone to fraud and abuse. Certainly, there are probably more examples of instances where a backdoor listing has been a prudent and effective alternative to an IPO. However, there is also evidence suggesting that lower quality firms pursue listings through a reverse merger. It is therefore not surprising that policymakers and regulators have recently introduced (or are considering) special rules and regulations that govern backdoor listings. These rules and regulations vary depending on each country's respective experience with this "going public" alternative.

This paper attempts to shed light on the question of whether and when a backdoor listing is still a sustainable alternative to the "front door" IPO. There is no clear-cut answer to this question. For instance, stringent and complex rules and procedures for reverse

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4 *See* Sean Ludwig, *Digital Signage Biz RMG Networks Goes Public at $10 a Share in Reverse Merger,* VENTUREBEAT (Apr. 8, 2013, 1:36 PM), http://venturebeat.com/2013/04/08/rmg-networks-goes-public-reverse-merger/.

5 *See* Paul Garvey, *ASIC Snarls at Backdoor Listings*, AUSTL. BUS. REV. (July 31, 2014, 12:00 AM), http://www.theaustralian.com.au/business/asic-snarls-at-backdoor-listings/story-e6frg8zx-1227007785116.

6 *See* Esther Fung, *Chinese Developers Take the Backdoor to Hong Kong Listings*, WALL ST. J.: MONEYBEAT (July 1, 2013, 10:00 PM), http://blogs.wsj.com/moneybeat/2013/07/01/chinese-developers-take-the-backdoor-to-hong-kong-listings/.

mergers can be found in the United States due to the scandals surrounding backdoor listings involving Chinese companies, significantly reducing the attractiveness of backdoor listings. Sweden, which has minimal experience with the backdoor listing phenomenon, has adopted a more moderate (hybrid) approach that combines a case-by-case determination of the applicable rules with a system designed to create awareness among investors about suspicious backdoor listing activities. More specifically, the NASDAQ OMX Stockholm has the potential to give a reverse merger company a temporary "observation status" to alert investors about the risks and uncertainties associated with a backdoor listing. Theoretically, Swedish companies that are unable or unwilling to conduct an IPO (for instance, due to eligibility issues and/or a sluggish IPO market) would still have access to capital and/or liquidity more quickly and with fewer costs compared to their U.S. counterparts.

The paper proceeds as follows. Section I provides an overview of the general trends and facts regarding backdoor listings in countries with a history of alternative public offerings, such as the United States, the United Kingdom, and Australia. Section II discusses the general perception of backdoor listings from the perspective of high-tech companies. Since the availability of the IPO alternative also depends on the applicable rules and regulations, Section III compares regulatory responses to backdoor listings in the United States, Australia, and Sweden. Section IV provides a glimpse into the future of backdoor listings by taking into account the changing policy and regulatory landscape designed to make it easier for young high-tech companies to trade on stock exchanges. In fact, in an effort to spur economic growth and job creation, policymakers, regulators, and exchange operators are increasingly unveiling measures to relax rules and regulations governing IPOs. This is illustrated by the signing of the Jumpstart Our Business Startups Act (JOBS Act) in the United States on April 5, 2012. The Act introduces the Emerging Growth Company (EGC) status. Companies that are able to secure EGC status will be offered a transition period (or an "on-ramp" period) during which they are exempted from a number of regulatory requirements associated with going public. Such speedier and cheaper IPO process will have a reductive effect on the total number of backdoor listings, but will not make them completely obsolete.

I. Trends and Facts Regarding Backdoor Listings

Companies need capital as they go through the stages of their life cycles. These life cycles typically start with turning an idea into a start-up company. The start-up company attempts to raise capital from venture capital funds and other private investors. These investors support the start-up by contributing money and services, which brings the company to the next stage in its development. Ideally, this continues until the moment the company seeks to raise capital from the "public" by pursuing an IPO, giving private investors and venture capitalists an opportunity to gradually exit their investment.

The IPO, however, triggers the obligation to comply with a plethora of rules and regulations required by regulators to protect the shareholders (and other stakeholders) in listed companies and prevent managerial misbehavior. These rules and regulations can be divided into three categories: (1) listing requirements to determine whether a company is eligible to go public; (2) disclosure and transparency rules to provide financial and other information to the market and to enhance investor confidence; and (3) corporate governance requirements to ensure that the company's affairs are conducted in the interests of all concerned. Clearly, the regulatory framework makes the process of an IPO expensive and time-consuming. The costs of an IPO include the fees paid to investment banks, accountants, auditors, lawyers, and other service providers and consultants for advice and for preparing the registration statements, prospectus, and other legal documents. Low valuations and disappointing IPO performances are also reasons for companies to forego the IPO route.[7]

It is therefore probably not surprising that companies that need capital to fund growth and/or provide liquidity to investors have always been looking for quicker, cheaper, and more flexible alternatives to get access to stock markets. When it comes to floating the shares, the idea of avoiding the costs and complexities associated with IPOs is certainly very appealing, particularly to companies that operate in volatile, frequently changing, and quickly evolving markets,

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[7] *See* Stacy Lawrence, *Reverse Mergers Attract Top-Tier Biotechs in Sluggish IPO Market*, 24 NATURE BIOTECHNOLOGY 598 (2006).

such as the Bitcoin industry.[8] Moreover, control over the timing of the listing and the information released about the IPO process is usually very important to these companies. Clearly, control over both the timing and the information not only enables a smoother transition from the non-listed status to being listed on public markets, but also provides these companies with the opportunity to withdraw their plans without alerting the public. Backdoor listings, particularly through reverse mergers or reverse takeovers, are examples of these alternatives to IPOs that have gained popularity in recent decades. These alternatives, however, are often subject to controversy because an increasing number of alternative listings fail to meet the expectations of investors in the post-listing period.

Indeed, the growing trend of using backdoor listings is not necessarily the consequence of a shift toward a more preferable listing option. Literature denouncing reverse mergers as a suitable substitute to IPOs is plentiful, and some venture so far as to say that they are not even comparable. For instance, a recent empirical study argues that going public via an IPO is simply not feasible for many companies that do not exhibit significant growth potential, do not meet minimum revenue and income levels, or are unable to convince an investment bank (typically the gatekeepers to the public) to underwrite its offering. The study also shows that most reverse merger companies begin trading in over-the-counter (OTC) markets.[9] It should be noted that gaining access to traditional forms of additional capital and ensuring a liquid market for shares that typically come along with an IPO listing are virtually non-existent when pursuing a reverse merger. Therefore, a backdoor listing does not always facilitate a large infusion of new capital from new investors because it is inherently not a capital-raising endeavor where there is exchange of cash for shares in the transaction.[10] This observation raises the question of why a high-tech company should pursue a backdoor listing.

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[8] *See* Peter Brown, Andrew Ferguson & Peter Lam, *Choice between Alternative Routes to Go Public: Backdoor Listing versus IPO*, *in* HANDBOOK OF RESEARCH ON IPOS, 503, 503-30 (Mario Levis and Silvio Vismara eds., 2010).

[9] *See* Charles M. C. Lee, Kevin K. Li & Ran Zhang, *Shell Games: Are Chinese Reverse Merger Firms Inherently Toxic?* (Working Paper No. 3063, 2014).

[10] *See* William K. Sjostrom, Jr., *The Truth About Reverse Mergers*, 2 ENTREPRENEURIAL BUS. L.J. 743 (2008).

In this respect, it is remarkable that although backdoor listings occur on a global scale, there are significant differences between the characteristics, motivations, and implications of these listing options. These differences can be explained to a large extent by differences in the legal framework applicable to backdoor listings, and also by supply-demand dynamics (the market for backdoor listings). For instance, backdoor listings through reverse mergers have become an attractive alternative to an IPO in the United States throughout the previous decade. The number of reverse mergers was even higher than the number of regular IPOs in 2008.[11]

In a reverse merger, a private company that wishes to go public through the "backdoor" merges with a public shell. Clearly, in order to maintain the trading status, the public shell must survive the merger, which explains the term "reverse." As mentioned above, trades in the public shell companies are usually carried out through electronic quotation venues such as the Over-the-Counter Bulletin Board (OTCBB) or the "Pink Sheets" system (referring to the color of the paper the quotations were printed on). This over-the-counter (OTC) market mainly deals in low-grade securities issued by firms in economic distress or in "microcap" issues that fail to qualify for a regular listing on a stock exchange. Most of the shares traded in these OTC markets are of such low value—many of which are "penny stock" shares trading under U.S.D. $1 each—that they become perfect targets for reverse mergers.

It should be noted that backdoor listings in the United States are often accomplished through a reverse triangular merger instead of a direct merger. This form of merger enables the parties to circumvent expensive and time-consuming disclosures under the listing rules and securities regulations. Under reverse triangular mergers, the publicly listed company typically creates a new wholly owned subsidiary, which subsequently merges into the private company. The merger must be approved by the public shell (as shareholder of its new subsidiary) and the shareholders of the private company. Approval from the shareholders of the public shell company can be avoided if the

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[11] The number of reverse mergers was even higher than the number of regular IPOs in 2008. *See* Igor Semenenko, *Reverse Merger Waves, Market Timing and Managerial Behavior*, 2 INT'L RES. J. OF APPLIED FIN. 1453 (2011).

company trades on the OTCBB. As a result of the merger, the private company becomes the wholly owned subsidiary of the public shell, which in return issues shares to the shareholders of the private company. At the final stage, the name of the shell is usually changed to the name of the private company, and the directors and officers of the listed shell are replaced by those of the private company. Regardless of how effective reverse mergers might be for meeting the needs of a broad range of companies, the lack of regulatory scrutiny has clearly caused increasing concerns about the degree to which these mergers are used as a means of committing fraud or other securities violations, particularly in terms of misleading financial statements.

In other jurisdictions, supply and demand dynamics, rather than the lack of rules and regulations, explain the popularity of backdoor listings strategies and arrangements. Consider the Australian Stock Exchange (ASX), which is dominated by the volatile mining and high-tech sectors. Companies seeking access to the capital market have almost always been able to find a financially distressed listed vehicle that could serve as a shell for a backdoor listing. For instance, high-tech companies in Australia are often able to obtain the listed status through shell companies that are active in the mining industry. Undoubtedly, some of these high-tech companies have or will become targets themselves and are thus fundamental in attaining the backdoor listing aspirations of new mining companies.[12] Recent data on backdoor listings confirms this cycle: while seventy-six percent of the Australian backdoor listings were conducted by mining companies in 2012,[13] there was a surge in backdoor listings by high tech companies (using unloved mining shells) in the first half of 2014.

Finally, in the United Kingdom, backdoor listings are often used by companies that (1) are mainly interested in the synergies that can be achieved by merging with (or taking over) a listed operating company (this is often combined with raising new capital), and (2) seek access to a wider exposure to investors and liquidity when the IPO market is weak. What is interesting about the experience of the United

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12 *See* Owen Richards, *How Primary and Secondary Markets Work*, ASX INVESTOR UPDATE (2012) (on file with author).

13 *See* Stephen Bell, *'Back Door' May Be Closing for Miners*, WALL ST. J.: DEAL JOURNAL (Jan. 30, 2013, 5:36 PM), http://blogs.wsj.com/deals/2013/01/30/back-door-may-be-closing-for-miners/.

Kingdom is that it shows that specific rules and regulations do not necessarily make backdoor listings less attractive. On the contrary, the "backdoor listing" practice in the United Kingdom was more widespread than in the United States.[14] However, alleged irregularities at subsidiaries of Bumi, an Indonesian company that listed on the London Stock Exchange through a reverse merger in the summer of 2011,[15] quickly gave a negative notion to backdoor listings. This, together with the fact that the Financial Services Authority (FSA)—now the Financial Conduct Authority (FCA)—introduced new rules with the aim to prevent reverse takeovers of companies that are not eligible for listing, explains the sudden decline in the use and popularity of backdoor listings in 2012.[16] The experiences in the three countries show that, besides the applicable rules and regulations, the general perception regarding backdoor listings also appears to play a role in determining whether a backdoor listing provides a viable alternative to high-tech companies that seek to float their shares.

II. THE GENERAL PERCEPTION OF BACKDOOR LISTINGS

It is a common refrain that backdoor listings are prone to abuse and inappropriate transactions. In the early days of the reverse merger practice (1970s and 1980s) in the United States, a number of opportunistic promoters were fraudulently establishing new shell companies that subsequently raised capital through their IPOs.[17] After the shell company was established, they leaked speculative information about an upcoming (reverse) merger to the market in the hope that the stock price would rise, which would then give them the opportunity to sell shares and make a significant profit. In response to this fraudulent

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[14] *See* Peter Roosenboom & Willem Schramade, *Reverse Mergers in the United Kingdom: Listed Targets and Private Acquirers*, *in* INTERNATIONAL MERGERS AND ACQUISITIONS ACTIVITY SINCE 1990: RECENT RESEARCH AND QUANTITATIVE ANALYSIS 181, 182 (Greg N. Gregoriou & Luc Renneboog eds., 2007).

[15] *See* David Oakley, *City Watchdog to Tighten Listing Rules*, FIN. TIMES (Oct. 2, 2012, 9:11 PM), http://www.ft.com/cms/s/0/a2709378-0c8c-11e2-a73c-00144feabdc0.html#axzz3myolCy8a.

[16] Sylvia Pfeifer, *Genel Faces Delay to Premium Listing Plan*, FIN. TIMES (Feb. 23 2012, 7:05 PM), http://www.ft.com/intl/cms/s/0/6dedca2c-5e44-11e1-85f6-00144feabdc0.html#axzz3myolCy8a.

[17] *See* Aden R. Pavkov, *Ghouls and Godsends – A Critique of Reverse Merger Policy*, 3 BERKELEY BUS. L.J. 475 (2006).

practice, the Securities and Exchange Commission (SEC) passed a number of amendments to the Securities Act 1933 in 1992. The most important rule in this context is Rule 419. This Rule introduced a "blank check company," which is defined as a company that: (i) is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and (ii) is issuing "penny stock." Rule 419 introduced special rules for blank check companies. For instance, Rule 419 required virtually all cash raised during the IPO to be placed in escrow. Furthermore, under Rule 419, blank check companies were prohibited from trading in the shell's stock prior to a reverse merger. Rule 419 also introduced a time limit of eighteen months to complete a transaction, and failure to do so would lead to a return of the invested cash to the shareholders.[18]

The regulatory restrictions on blank check companies are the reason for the emergence of Special Purpose Acquisition Vehicles (SPAC). Interestingly, SPACs largely mirror the blank check companies of the 1980s that caused Congress to adopt Rule 419. The business plan for a SPAC is simple. A SPAC is a shell company without historical operations that was taken public through an IPO solely for the purpose of acquiring an operating business, which is typically not pre-determined prior to listing, within an eighteen to twenty four month timeline. For entities looking to list through a reverse merger, a SPAC can be a favorable partner by offering the operating company an immediate cash infusion directly from the proceeds of the SPAC's IPO as well as a liquid trading market for its securities. Though a merger with a SPAC eliminates the primary downsides associated with a traditional reverse merger, this type of merger is often only a pipe dream for less than exceptional operating companies, and the likelihood of such a deal is at the whim of the SPAC's management group.

Despite the introduction of Rule 419 and the restrictions on the use of SPACs, the reverse merger or reverse takeover was utilized at a greater frequency as a mechanism to list publicly in the lead up to 2010. In fact, the number of reverse mergers eclipsed the IPO count

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18 Offerings by Blank Check Companies, 17 C.F.R. § 230.419 (1992).

in 2008 for the first time in the United States. Clearly, there exists a cohort of promulgating instances where the use of a reverse merger has been effective. For instance, a reverse merger can be a viable mechanism to tap into previously untapped sources of additional capital for companies that have exhausted other financing options and do not meet the demanding performance criteria necessary to pursue an IPO. In such instance, the access to Private Investment in Public Equity (PIPE) financing, which is excluded as a financing source for private companies, becomes an important potential source of invaluable capital for entities with no other viable alternatives.[19] A track record of institutional investments in underperforming public companies with relatively illiquid stocks makes this financing option not only a realistic avenue for smaller, less reputable entities, but also a means to eventually obtain a listing in a higher segment of one of the major stock exchanges.[20]

In addition to access to additional avenues of capital, a reverse merger tends to be both a quicker and cheaper listing option relative to its IPO counterpart. On average, a backdoor listing through a reverse merger can be completed in as little as a couple of weeks and is unquestionably timelier than an IPO, which can take months. This is recently confirmed by the CEO of Bitcoin Shop, a U.S. company that operates a Bitcoin-based e-commerce website, who stated (after successfully concluding a reverse merger through which the company raised U.S.D. $1.875 million in a private placement in February 2014) that the reverse merger only took three weeks.[21] From a cost standpoint, IPOs can run a bill north of the six-figure mark while reverse mergers can be done for a significantly lower amount under the standard circumstances. However, it is important to qualify the speed and cost effectiveness of a reverse merger as it is often touted as

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[19] *See* David N. Feldman, *Reverse Mergers + PIPEs: The New Small-Cap IPO*, *in* PIPES: REVISED AND UPDATED EDITION—A GUIDE TO PRIVATE INVESTMENTS IN PUBLIC EQUITY (Steven Dresner & E. Kurt Kim eds., 2005), *reprinted in* 3 BUS. L. BRIEF 34 (2007).

[20] *See* Helen Luk & Heda Bayron, *Sneaking in Through the Back: Chinese Companies that have used Reverse Mergers to List on U.S. Regulators are Finally Taking Notice and Cosing the Door*, A PLUS, May 2011, at 18.

[21] *See* Bill Meagher, *Bitcoin Retailer Raises $1.9M in Reverse Merger*, THE DEAL PIPELINE, (Feb. 10, 2014, 4:03 PM), http://www.thedeal.com/content/consumer-retail/bitcoin-retailer-raises-19m-in-reverse-merger.php.

a surefire benefit in favor of reverse mergers when that is not always the case. In fact, reverse mergers on the slower end of the spectrum (more than four months) can take as long as some IPOs. Additionally, the cost argument in favor of a reverse merger becomes questionable after factoring for the expenses associated with a backdoor listing along with the consideration paid to shell promoters in the form of cash and sometimes an equity stake.

High-tech companies that face difficulties in accessing domestic capital markets and attracting funding to help them reach the next stage in their development also use backdoor listings to enter a foreign market. This is particularly true if stock exchanges have a competitive interest in encouraging foreign listings. Consider the Chinese companies that listed in the United States via reverse mergers. According to data collected by the Public Company Accounting Oversight Board (PCAOB), 159 Chinese companies completed a reverse merger between January 1, 2007 and March 31, 2010.[22] Because taking the reverse merger route let these companies avoid the scrutiny that would otherwise be required by state and federal rules and regulations in the United States, the reverse merger count outnumbered the number of Chinese companies that completed an IPO in the United States in the same period. Clearly, even though legally accepted, this trend was only possible with the help of a network of U.S. advisors and consultants, such as underwriters, investment banks, lawyers, and auditors.[23]

Despite the benefits of reverse mergers, there is a notion of adverse selection in the pool of entities pursuing a listing through the "alternative" listing route. This notion is supported by the delisting of forty-two percent of the entities listed via the backdoor within its first three years.[24] Reverse takeovers are typically exercised by smaller and

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[22] *See PCAOB Issues First Research Note on Chinese Reverse Mergers,* PUB. CO. ACCOUNTING OVERSIGHT BD., (Mar. 14, 2011), http://pcaobus.org/News/Releases/Pages/03152011_ResearchNote.aspx.

[23] David Barboza & Azam Ahmed, *China to Wall Street: The Side-Door Shuffle*, N.Y. TIMES (July 23, 2011), http://www.nytimes.com/2011/07/24/business/global/reverse-mergers-give-chinese-firms-a-side-door-to-wall-st.html?pagewanted=all&_r=0.

[24] *See* Frederick Adjei, Ken B. Cyree & Mark M. Walker, *The Determinants and Survival of Reverse Mergers vs IPOs*, 32 J. OF ECON. & FIN. 176, 189 (2008).

lesser-known entities relative to their larger, more reputable counterparts that list through an IPO, giving rise to a negative signaling effect for those that elect to pursue a backdoor listing.[25] This notion of an adverse selection in entities pursuing a reverse merger is echoed in the literature that showcases the decision tree that lay ahead of Chinese companies, which account for a large majority of the reverse mergers in the late 2000s, when pursuing a public listing.[26] Empirical data reveals that, despite the benefits of reverse mergers, the most well-known and profitable Chinese companies generally elect to pursue an IPO. By contrast, there are many examples of smaller Chinese entities that listed through a reverse merger that are subject to a greater frequency of class action lawsuits, are less profitable, exude lower balance sheet liquidity, and are highly leveraged.[27]

Indeed, many of these Chinese companies ended up being sued for securities law violations, particularly related to financial misrepresentation, failure to disclose material facts, and/or deficient internal control systems. Academic research reveals that U.S. listed Chinese companies that pursued a reverse merger were not always in compliance with the internationally accepted accounting standards.[28] Customarily, the adoption of these standards is a prerequisite as well as a requirement to maintain a public listing for entities pursuing a reverse merger, regardless of the accounting practices employed in local jurisdictions. This listing obligation underscores the growing

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[25] *See* Augusto Arellano-Ostoa & Sandro Brusco, *Understanding Reverse Mergers: A First Approach* (Bus. Econ. Series 11, Working Paper No. 02-17, 2002), available at http://orff.uc3m.es/bitstream/handle/10016/66/wb021711.pdf?sequence=1.

[26] *See* Jan Jindra, Torben Voetmann & Ralph Walkling, *Reverse Mergers: The Chinese Experience* (Working Paper No. 2012-03-018, 2014).

[27] The 159 Chinese firms that pursued a reverse merger in the United States in the period between January 1, 2007 and March 31, 2010 had a combined market capitalization of U.S.D. $12.8 billion (which is less than fifty percent of the market capitalization of the fifty-six Chinese companies that completed a U.S. IPO). *See Reverse Mergers: A Looming U.S.-China Showdown over Securities Regulation?,* WHARTON UNIV. OF PA. (March 5, 2013), http://knowledge.wharton.upenn.edu/article/reverse-mergers-a-looming-u-s-china-showdown-over-securities-regulation/.

[28] *See* Katherine T. Zuber, *Breaking Down a Great Wall: Chinese Reverse Mergers and Regulatory Efforts to Increase Accounting Transparency*, 102 GEO. L.J. 1307 (2014).

importance of audits and places a tremendous amount of responsibility on the auditors of these (often times) foreign entities because they usually serve as the only safeguard between the foreign entity and ensuring that domestic investors receive reliable statements.

What is remarkable in this respect is that filings with the SEC reveal that Chinese reverse mergers tended to retain their own auditors post-merger as opposed to those of the former shell company.[29] Audit quality concerns in these mergers were only to be expected when compliance with PCAOB accounting standards increasingly faltered. The large majority of accounting firms employed by Chinese reverse mergers were only inspected by the PCAOB on a triennial basis rather than the typical annual basis, which had only compounded concerns over fraud whirling around Chinese reverse mergers. The questionable audit quality and non-compliance has stemmed partially from added difficulty for U.S. registered accounting firms to conduct comprehensive audits on companies based abroad due to language barriers, accounting standard discrepancies, use of under qualified assistants, the lack of enforcement of accounting laws in China, and additional expenses as well.

The negative attention regarding backdoor listings has caused companies to look at other financing alternatives, such as direct private placements or private sales.[30] However, although poor performing Chinese reverse merger companies are inextricably tied to the general perception of reverse mergers, as they account for a large proportion of entities pursuing backdoor listing through public shell companies, research indicates that the negative spillover effects of fraudulent activity or reporting by Chinese companies have not always harmed other non-Chinese companies' backdoor listing activities. Reverse mergers involving non-Chinese entities appear to largely escape the wrath of investors, as the stock market reaction to news of fraud is focused on Chinese companies as opposed to questioning reverse

[29] *See* Benjamin A. Templin, *Chinese Reverse Mergers, Accounting Regimes, and the Rule of Law in China*, 34 T. JEFFERSON L. REV. 119 (2011).

[30] *See* David Thomas, *The IPO Road Less Traveled: Form 10*, BIOTECHNOW (Feb. 25, 2013) http://www.biotech-now.org/business-and-investments/inside-bio-ia/2013/02/the-ipo-road-less-traveled-form-10.

mergers in general as a viable mechanism to list publicly.[31] Still, the global turbulence in the credit markets, triggered by the turmoil in the subprime mortgage market in 2007-2008, largely brought an end to the laissez-faire era in the backdoor listing process. For instance, in response to the scandals, U.S. policymakers introduced legislation that subjects reverse mergers to registration requirements and provisions targeted at improving the companies' accountability. The backdoor listings rules and regulations—and their impact on high-tech companies—will be discussed in the next Section.

III. REGULATORY IMPACT ON BACKDOOR LISTINGS

Regulatory responses to the increase in backdoor listings vary significantly from country to country based on a country's respective experience in this area. These responses can be roughly split into three distinct approaches.[32] On one end of the spectrum, the United States has undertaken a number of initiatives spearheaded by organizations such as the SEC and the PCAOB to curb issues stemming from reverse mergers in the form of issuing investor warnings and more stringent listing rules for these transactions. On the other end of the spectrum, Sweden has only limited experience with backdoor listings (and has yet to express concern similar to that of the United States). However, to ensure that investors have sufficient information to distinguish between prudent and imprudent backdoor listings, the Rule Book of OMX NASDAQ Stockholm contains a light touch signaling system that enables regulators to give companies involved in backdoor listings a temporary "observation status."[33] Regulatory responses worldwide to the widely publicized backdoor listings/reverse mergers waver between the approaches taken by the United States and Sweden, as

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31 *See* Masako N. Darrough, Rong Huang & Sha Zhao, *The Spillover Effect of Chinese Reverse Merger Frauds: Chinese or Reverse Merger?* (Working Paper, 2012).

32 Rather than making a strict distinction between the different regulatory approaches, this Section argues that regulatory measures undertaken by national level regulators are best seen in terms of a spectrum of possible regulatory paths. It ranges from countries that introduced special rules and regulations for backdoor listings via countries that implemented rules and regulations that treat backdoor listings as IPOs to jurisdictions that adopted a more flexible regulatory approach.

33 *See* NASDAQ OMX STOCKHOLM, RULE BOOK FOR ISSUERS 17 r. 2.7 (2015), *available at* http://www.nasdaqomx.com/digitalAssets/96/96156_nasdaq-stockholm-s-rule-book-for-issuers—-1-january-2015.pdf.

evidenced by the changes (or lack thereof) in the respective listing rules following these developments in Australia.

A. Special Rules and Regulations for Backdoor Listings

In light of the string of alleged fraudulent activity and accounting gaffes concentrated within entities that have undertaken reverse mergers in the latter portion of the 2000s, the SEC and the PCAOB acted swiftly in an attempt to halt further incidents. In addition to issuing an investor bulletin highlighting the additional potential risks associated with investing in companies that were engaged in a backdoor listing process,[34] the SEC imposed a wave of more stringent listing rules for determining if and when companies are eligible to list publicly through the "backdoor." Additional listing requirements include maintaining a closing share price beyond a certain threshold, complying with all periodic filing requirements of financial reports, and having been traded in the United States on the OTC market or another regulated exchange for at least one year prior ("seasoning rules").[35] These amendments, which were ultimately approved by the SEC in November 2011, aim to address the concerns surrounding the inaccuracies of financial statements produced by reverse merger companies.[36]

In addition, the PCAOB proposed to implement a set of supplementary auditing standards in the fall of 2011 by requiring audit reports to disclose and identify the names of audit firms or individuals that provided more than three percent of the total hours spent on the most recent audit.[37] The rationale for this additional requirement is

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34 *See generally Investor Bulletin: Reverse Mergers*, SEC. & EXCH. COMM'N (June 2011), http://www.sec.gov/investor/alerts/reversemergers.pdf.

35 *See* David N. Feldman, *Comments on Seasoning of Reverse Merger Companies Before Uplisting to National Securities Exchanges*, 2 HARV. BUS. L. REV. 140 (2012).

36 *See* Press Release, Sec. & Exch. Comm'n, SEC Approves New Rules to Toughen Listing Standards for Reverse Merger Companies (Nov. 9, 2011), *available at* http://www.sec.gov/news/press/2011/2011-235.htm.

37 Moreover, the PCAOB and China entered into a cooperative agreement in October 2012 under which PCAOB inspectors are allowed to observe the oversight activities of Chinese regulators. In return, the agreement allows the Chinese regulators to observe the work of the PCAOB. *See PCAOB Taking Steps to Work with China*, NASBA STATE BOARD REP., Oct. 2012, at 2, *available at* http://www.nasba.org/files/2012/10/OctoberSBR_2012.pdf.

twofold. First and foremost, such a standard helps fulfill consistent requests from investors for further information about the firms that are performing audits on their investments. Second, the names of auditing firms that are located in jurisdictions beyond the PCAOB's current investigatory scope is publicized under this mandate and hence allows investors to be better informed about the quality of firms conducting a company's auditing. This is particularly relevant in China where the PCAOB and other foreign regulatory bodies are currently barred from inspecting China-based audit firms on grounds of sovereignty and state secrecy. Though the PCAOB has been trying to further cooperation with jurisdictions, such as China, which are particularly salient and which make up almost five percent of the PCAOB registered firms, additional measures, including the publication of the names of foreign auditing firms, are useful steps toward greater transparency in audit practices in favor of investors.

The impact of the seasoning rules and regulatory scrutiny on "backdoor listings" is significant. Data provider PrivateRaise recorded 257 reverse mergers in 2010. After the introduction of the rules, the number decreased to "only" 124 companies in 2013.[38] Interestingly, U.S. healthcare and biotech companies are increasingly willing to pursue a backdoor listing despite the seasoning rules. The benefits of the informal and flexible reverse merger process often outweigh the costs of applying the more cumbersome seasoning rules. According to data provider PrivateRaise, at least sixty-nine companies have availed themselves of the reverse merger option during the first half of 2014, and most of these companies were healthcare and biotech companies.[39] Surprisingly (recall that a backdoor listing is inherently not a capital-raising endeavor), twenty-eight companies in these reverse merger

[38] *See* Bill Meagher, *Alternative Public Offering Market Is Booming*, THE DEAL PIPELINE (Feb. 24, 2014, 1:58 PM), http://www.thedeal.com/content/healthcare/alternative-public-offering-market-is-booming.php.

[39] Bill Meagher, *Investment in Reverse Mergers Doubled in Second Quarter*, The Deal Pipeline (July 21, 2014, 2:43 PM), http://www.thedeal.com/content/healthcare/investment-in-reverse-mergers-doubled-in-second-quarter.php.

transactions were also able to raise a respectable total of U.S.D. $85.6 million in private placements.[40]

B. Re-Compliance Regulation

In contrast to the United States, the financial regulatory body in Australia has had a rather tepid response to the wave of fraudulent backdoor listings. In fact, the Listing Rules of the Australian Stock Exchange (ASX) makes no specific references to backdoor listings or reverse takeovers. However, ASX Listing Rules Guidance Note 12, which was published in December 2013 and revised in October 2014, provides legal certainty for the companies and their advisors by explaining how backdoor listings are regulated under Listing Rules 11.1 (including 11.1.2 and 11.1.3), 11.2, and 11.3.[41] The Australian Securities Exchange generally compels a listed entity involved in a backdoor listing to re-adhere to listing requirements under ASX Listing Rule 11.1 (proposed change to nature or scale of activities).[42] Non-compliance with the listing rules could lead to a suspension of the quotation.

Exceptions to the re-admission process exist only if the backdoor listing does not constitute a significant change to the nature or scale of the activities of the listed company. However, a close reading of the previously mentioned Guidance Note 12 shows that the most common backdoor listings will lead to a significant change in the nature of an entity's activity.[43] The following activities (associated with the mining industry) are explicitly mentioned in the Guidance Note: (1) an entity whose main business activity is manufacturing consumer goods deciding to switch its main business activity to mining exploration (or vice versa); and (2) an entity whose main business activity is exploring for minerals deciding to switch its main business activity to exploring for oil and gas.[44] As for the scale of the activities, the ASX considers a twenty-five percent change to the size of an entity's operations to be significant. It therefore comes as no surprise that empirical research found that approximately seventy-nine percent

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40 *Id.*

41 ASX Listing Rules, ch. 12 (Austl. Sec. Exch. 2014).

42 *Id.* at ch. 11.1.

43 *Id.* at ch. 12.

44 *Id.*

of the backdoor listings that took place between 1992 and 2007 would have been required to re-comply with ASX's listing requirements.[45]

However, the recently revised Guidance Note 12 arguably makes backdoor listings more appealing to high-tech companies by giving the ASX more flexibility and leeway in interpreting the re-admission rules. For instance, Guidance Note 12 includes more flexible policies on the requirements regarding the minimum spread of security holders (usually 400 shareholders each holding shares with a minimum value of AUD $2,000). Guidance Note 12 also has a "20 cent rule," which requires—with few exceptions—that shares (or other securities) offered as part of a backdoor listing should have a minimum issue price or sale price of A.U.D. twenty cents or more per share. Clearly, the ASX Guidance Notes not only increase the compliance rate with the regulatory requirements, but also enhance legal certainty and limit possible abuse of the rules, while taking the specifics of backdoor listings into account.

C. A Light Touch—Flexible—Regulatory Approach to Backdoor Listings

The Listing Rules of NASDAQ OMX Stockholm also embrace flexibility in assessing backdoor listing processes. First, Rule 3.3.8 requires listed companies to disclose information to the market about significant changes in its identity.[46] The information must be equivalent to what is required under the IPO regulations. In order to determine whether there is a significant change in identity, the Swedish regulator typically takes the following criteria into account: (1) changes in ownership structure, (2) the acquisition of a new business, and (3) the change in market value of the listed company following an acquisition. What is interesting is that the exchange has the possibility to give a company's shares a temporary "observation status" if the disclosed information is insufficient. The rationale behind this status is straightforward: it provides information to the market and warns investors and potential investors of the risks and uncertainties associated with the company or its shares. The observation status is a flexible, but powerful mechanism to remind investors to be cautious

45 *See* Philip Brown, Andrew Ferguson & Peter Lam, *supra* note 8.

46 NASDAQ OMX Stockholm, *supra* note 33*,* at r. 3.3.8.

about investing in companies that are subject to a reverse takeover.[47] The observation status can only be granted for a limited period of time, usually not more than six months.

Clearly, other measures in backdoor listing procedures available to the Swedish regulator are the cancellation or suspension of the trading in the shares of a listed company. However, if the regulator is of the opinion that more drastic interventions are necessary, flexibility remains an important element in the regulator's decision-making process. Consider Immune Pharmaceuticals Inc., the byproduct of a reverse merger between a privately held Israeli based bio-pharmaceutical company (Immune Pharmaceuticals Limited) with a listed American developer in pain and cancer treatment (EpiCept Corporation).[48] The newly merged entity hoped to achieve a public listing on the NASDAQ OMX in Sweden following the transaction.[49] It also intended to list on a U.S. securities exchange. Daniel Teper, Immune Pharmaceuticals Inc. Chairman and CEO, highlighted the limitations for Israeli capital markets to fulfill the financing needs of companies operating within the life sciences space that are not concurrently listed in the United States as the primary cause for pursuing a public listing.[50] A reverse merger was ultimately elected as the mechanism to list, since an IPO was initially not a feasible option at the time of the consummation of the merger.

However, even though an active listed company (such as EpiCept), as opposed to a shell company, was involved in the reverse merger, the newly merged Immune Pharmaceuticals Inc. was not immediately allowed to maintain its listing on the regulated NASDAQ OMX market in Sweden. Instead, the regulators approved trading of the shares of Immune Pharmaceutical Inc. on NASDAQ OMX First

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47 *Id.* at r. 2.7(v).

48 *See* Immune Pharmaceuticals, Inc., *Immune Pharmaceuticals' Common Stock Approved for Trading on NASDAQ OMX First North Premier,* NASDAQ GLOBALNEWSWIRE (November 26, 2013, 00:38 AM), http://globenewswire.com/news-release/2013/11/26/592383/0/en/Immune-Pharmaceuticals-Common-Stock-Approved-for-Trading-on-NASDAQ-OMX-First-North-Premier.html?parent=591162.

49 *Id.*

50 *See* Gali Weinreb, *Immune Pharmaceuticals Lists in US, Sweden After Reverse Merger*, GLOBES (Oct. 5, 2015 8:30 PM), http://www.globes.co.il/en/article-1000870466.

North Premier, a market for high growth companies that are in the process of preparing for a listing at the main market.[51] This decision reflects the importance of the introduction of less regulated and more accessible segments to smaller high-tech companies that would otherwise consider entering the market through the backdoor. The impact of segmented stock markets on high-tech companies and backdoor listings will be discussed in Section IV.

IV. SPECIAL LISTING SEGMENTS FOR HIGH GROWTH COMPANIES AND BACKDOOR LISTINGS

The Swedish experience indicates that the outlook for backdoor listings is dismal when high-tech companies can list on an accessible, vibrant, liquid, and high-growth market. The question, however, is whether the benefits of such a market are large enough for high-tech companies to completely turn away from the backdoor listing route to the stock market. What is important in this respect is the gradually changing regulatory landscape for companies that consider floating their shares on a stock exchange. Policymakers and regulators have introduced (or plan to introduce) more flexible listing rules and regulations to stimulate IPO activity by high-tech companies.[52] These initiatives appear to be successful. For instance, the increase of the number of high tech IPOs in the United States in 2013 and the first half of 2014 could arguably be attributed to the possibility of a firm to qualify as an emerging growth company (EGC) under the JOBS Act.[53]

The EGC label offers several benefits to high growth companies in the pre- and post-IPO period. In the pre-IPO period, an EGC will only be required to include two years—instead of the usually

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[51] Immune Pharmaceuticals, Inc., *supra* note 48.

[52] For example, in February 2015 the European Commission started a consultation process expected to evolve into a E.U.-wide Capital Markets Union. The idea is that a small company's access to financing would be significantly improved in a more harmonized capital market. *See Commission Green Paper on Building a Capital Markets Union*, COM (2015) 63 final (February 18, 2015).

[53] *See generally* Gillian Tett, *Investors Enjoy a Sweet Aftertaste to the Candy Crush Crunch*, FIN. TIMES (Mar. 27, 2014, 5:30 PM), http://www.ft.com/intl/cms/s/0/39e3e9ba-b418-11e3-a102-00144feabdc0.html.

required three years—of audited statements in its IPO registration.[54] More importantly, the special status introduces "testing-the-waters" provisions, which allow EGCs to communicate with professional investors (qualified institutional buyers or institutional accredited investors) to determine investors' interest in the company prior to or following the date of the IPO registration statement.[55] Moreover, the JOBS Act provides these companies with the possibility to confidentially submit a draft of its IPO registration statement for review to the SEC.[56]

Also, the "on-ramp" provisions grant important reliefs in the post-IPO period. For example, EGCs are exempted from the obligations under Sarbanes-Oxley Act Section 404(b) to provide an auditor attestation of internal control.[57] Furthermore, the Act excludes EGCs from (1) complying with the full range of executive compensation disclosures and (2) say-on-pay votes on executive compensation.[58] Finally, EGCs need not comply with any new or revised accounting standards until the date on which private companies are required to apply these standards to their organization. The success of the JOBS Act is reflected by the significant increase in the number of EGCs that have pursued a listing after having used the option to confidentially file their registration statements. According to data provider Renaissance Capital, approximately seventy to eighty percent of the 222 IPO companies (including non-venture capital backed companies) in 2013 have availed themselves of the JOBS Act's confidential filing provision.[59] This is not surprising since high-tech companies value increased control over the timing of the IPO, which is arguably provided by a confidential filing, more than the likely

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54 Jumpstart Our Business Startups Act (JOBS Act), H.R. 3606, 112th Cong. § 102 (2012) (enacted).

55 *Id.* at §105.

56 *Id.* at §106.

57 Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, § 404(b) (2002) (codified at 15 U.S.C. § 7262 (2002)).

58 Investor Protection and Securities Reform Act of 2010, Pub. L. No. 111-203, § 953(b)(1) (2010) (codified in 15 U.S.C. 78l note).

59 *See* David Gelles & Michael J. De La Merced, *'The New Normal' for Tech Companies and Others: The Stealth I.P.O.*, N.Y. TIMES: DEAL BOOK (February 9, 2014: 8:58 PM), http://dealbook.nytimes.com/2014/02/09/the-new-normal-for-tech-companies-and-others-the-stealth-i-p-o/?_r=0.

discount in the stock price due to the reduced disclosure and reporting requirements for EGCs.

Clearly, the JOBS Act is a success, but will it send the backdoor listing option to oblivion? It is already evident that high-tech companies have started to consider the IPO option again in the United States. In 2014, 116 high-tech (and venture capital-backed) companies floated their shares, compared to eighty-five companies in 2013.[60] However, despite the booming high growth market segment in the United States, there has been a surge in reverse mergers, particularly conducted by companies that operate in volatile industries. As discussed, despite the need to comply with onerous special reverse merger regulation, these companies still find that a reverse merger is quicker and easier than conducting a traditional IPO (even under the JOBS Act).

CONCLUSION

In the previous decade, backdoor listings became increasingly popular as a mechanism to list publicly in the United States, the United Kingdom, and Australia. However, empirical studies indicate that backdoor listing activity has significantly decreased due to negative publicity, the introduction of more stringent rules and regulations, and increased regulatory scrutiny. Therefore, the question is whether measures employed to strengthen the rules and regulations governing backdoor listings will eventually put an end to this alternative option of going public. The evidence is mixed. The number of and amount raised by Chinese reverse mergers has plunged approximately fifty-three percent and ninety-five percent respectively in 2011 (compared to 2010). In contrast, we observe a backdoor listing boom in the high-tech industry in the United States and Australia in 2014.

The answers to the question of whether backdoor listing is still a sustainable alternative for high-tech companies compared to the "front door" IPO vary depending on a country's respective experience with backdoor listings. These answers can be divided into four categories. In the first category, there are countries such as the United States that have a vibrant, accessible, and liquid stock market for high-

[60] *See* PitchBook, 2Q 2015 U.S. VENTURE INDUSTRY REPORT (2015).

tech companies as well as a long history with backdoor listings. In such countries, high-tech companies are willing to accept more stringent rules, such as the seasoning rules, if the backdoor listing strategy still offers them flexibility as well as low-cost and timing advantages compared to the regular IPO route.

Second, in countries such as Australia, which has no special high-tech segment on the stock exchange but has an active market for alternative listings, backdoor listings are there to stay even during the gloomiest days of the economy. Policymakers and regulators seem to understand the importance of alternative public offerings by allowing flexibility in the application of the "re-admission" rules.

The third category includes countries that have a robust and liquid high-tech stock market, but no recent experience with backdoor listings. The Swedish experience shows that, even though backdoor listings are permitted, high-tech companies rarely employ this alternative option. This can partly be explained by the lack of available shell companies.

Fourth, even if countries have no history with backdoor listings, policymakers and regulators should be wary of the fact that entrepreneurial high-tech companies may start to explore alternative public offerings if the high-tech segment of the stock market is not accessible through relatively cheap and fast means. They should realize that backdoor listings continue to provide a viable and legitimate listing option for high-tech companies that are always in search for capital and liquidity.