

April 16, 2020

Via Electronic Submission

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

Re: Comments to the SEC Proposed Rule and Concept Release (“Proposed Rule”) Pertaining to Submission of Quotations Without Specified Information (File Number S7-14-19)

Dear Members of the Commission:

This comment letter is being filed by the undersigned, who are legal and business practitioners in the smaller-cap public company ecosphere. This comment letter addresses only the SEC Rule 15c-211 proposed amendments that eliminate the broker-dealers’ ability to rely on the piggyback exception to publish or submit quotations for securities of “shell companies.”¹

Certainly it is true, as illuminated in the Proposed Rule, that “shell” companies can be used to perpetrate a fraud on innocent investors.² Nevertheless, the SEC’s contemplated removal of the piggyback exception with respect to shell companies would have at least three material first order negative consequences, as discussed below.³ We respectfully request that the SEC modify the Proposed Rule as noted below under “Proposed Solution.”

Negative consequence #1
Removes Critical Stepping Stone to Public Company Status

Shell companies can serve as a critical “stepping stone” on the path from privately held company to a fully-reporting NMS issuer. The path from private company to NMS issuer, generally speaking, follows these phases:⁴

- Phase 1: startup in a garage
- Phase 2: move to an office
- Phase 3: graduate to OTC Markets
- Phase 4: up-list to NMS market, often as a micro-cap/nano-cap issuer⁵
- Phase 5: (hopefully) become a larger cap issuer

There are only four stepping stones currently available for private companies to move from Phase 2 to become a publicly traded company,⁶ except for the tiny, tiny number of venture capital backed startups that might one day do a direct listing.⁷ Reverse merging into a publicly-held shell company is one of these four stepping stones for a private company to “go public.”

Between 2008 and 2018 we understand there to have been approximately 1,500 reverse mergers. Some were in connection with a change of domicile or business combination, but certainly many were transactions pursuant to which a private company went “public.” Indeed, there are a number of “success stories” of private companies becoming a publicly traded company via reverse merger into a shell company. A few examples include: Senseonics Holdings, Inc. (NYSE: SENS) (2019 Revenue: \$21.3M); eXp World Holdings, Inc. (NASDAQ: EXPI) (2019 Revenue: \$979.9M); Global Medical REIT, Inc. (NYSE: GMRE) (2019 Revenue: \$70.7M); and ViewRay, Inc. (NASDAQ: VRAY) (2019 Revenue: \$87.7M).

The removal of the piggyback exception with respect to shell companies will effectively kill or mortally maim the ability of privately held companies to become a publicly-traded issuer via reverse merger into a publicly-traded shell company. Without the piggyback exception, as noted in the Proposed Rule all broker-dealers that want to make a market in an issuer’s securities would be required to file a Form 211 and await FINRA clearance. It is well known by legal practitioners and others that operate in the smaller-cap company ecosphere that FINRA clearance of a Form 211 with respect to a shell company could take weeks, months, or might never occur. As a practical matter, this could result in there being only one market maker for the shell company’s securities, *e.g.*, the broker dealer that filed the original Form 211.

With only one market maker, we believe that no private company would seek to become a publicly-traded issuer via reverse merger because the company would have little comfort that one market maker would be sufficient to create a robust trading market in the company’s securities post-merger.⁸ With only one market maker, the market in the company’s securities would likely be less liquid and more subject to market manipulation.⁹ Moreover, having only one market maker creates a “single point of failure.” If that market maker goes out of business or ceases quoting the security, there would be **ZERO** market makers. Removal of the piggyback exception with respect to shell companies could thus have the practical effect of removing this stepping stone to publicly traded issuer status.

The US already has too few publicly listed companies. As widely reported, the number of US publicly-listed companies has declined an approximate 40% over the last 20 years.¹⁰ Moreover, it is estimated that the gap between the number of US publicly-listed companies and the number the US “should have” based on GDP was 5,436 as of 2012.¹¹ This “listing gap” has continued to widen since then. By way of comparison, The Nasdaq Stock Market alone listed more than 5,500 companies in 1997, its highwater mark, versus the approximate 3,300 it has today.¹²

In thinking about the need to keep this one stepping stone available to enable more private companies to go public, keep in mind the comment of the most recent former Chairman of the Financial Services Committee of the US House of Representatives: “There are more rusty cars in

America's garages today than entrepreneurs starting new businesses.”¹³ Recall also that, as widely reported, entrepreneurship in America is dying according to US Census Bureau data.¹⁴ These two indicia of the state of US entrepreneurship in America today are a direct and proximate consequence of the inhospitability of the US public markets to smaller-cap companies and how difficult it is for private companies to become an NMS issuer with robust trading volumes.¹⁵

Let's not through the Proposed Rule exacerbate a bad situation by eliminating one of the only four stepping stones¹⁶ currently available to privately held companies to becoming a publicly traded company.

Negative consequence #2

Deprives Legitimate Shell Company Incumbent Investors of Opportunity to Recover Value

Many/most shell company issuers at one point in their corporate history were bona-fide companies with incumbent (predominantly “Main Street”) investors who invested capital in the business. Often, the value of their investments in the shell company issuer is negligible. Maintaining the opportunity for shell companies to merge with operating businesses provides these investors the possibility of recovering their initially invested capital (and potentially realizing a gain).

As noted above,¹⁷ removing the piggyback exception with respect to shell companies will have the practical effect of few (if any) private companies will ever reverse merge into a shell company. This would then kill the chances of the incumbent mainly “Main Street” investors to ever recover their invested capital.

Negative consequence #3

Shell Company Definition is “Overly Broad” and Encompasses Legitimate Companies

The OTC Markets believes, as noted in its comments filed with the SEC,¹⁸ that the proposed shell¹⁹ company definition is so broadly written, that many legitimate, early-stage biotechnology (and technology)²⁰ companies (R&D heavy, with little assets and/or revenue) would fall within the definition and therefore become ineligible for public quoting. OTC Markets believes that the imprecision of the shell company definition creates an impossible test for broker-dealers and a potential compliance nightmare that will scare market makers away from startup, early-stage or smaller, financially challenged companies. Broker-dealers likely will take the most conservative approach and cease providing liquidity in a wide range of securities, including legitimate startups.

We agree. The SEC surely understands that many, many compliance departments (who are by definition risk adverse) of broker dealers will prohibit the broker dealer from making a market in any startup, early stage or financially challenged company with little assets and/or revenue.

The Proposed Rule effectively removes 25% of the stepping stones from private company to publicly traded status. It also makes life even more difficult in the public capital markets, which are already inhospitable to many legitimate startups, early stage or financially challenged companies. OTC Markets advocates that the SEC shift its focus away from shell companies to problematic activities of company insiders and affiliates. We agree as well.

Proposed Solution

The proposed solution is simple. The SEC should maintain the piggyback exception for shell companies for which the information about the issuer is “current and publicly available” as defined by the SEC in the Proposed Rule. Those shell companies that wish to remain a viable candidate for reverse merger with a private company can do so by complying with the “current and publicly available” information requirement.

We understand that the following categories of issuers would comply with the current and publicly available information requirement²¹:

- (1) filers of an S-1 initial registration statement under the Securities Act (“prospectus issuer”);
- (2) filers of a notification under Regulation A (“Reg A issuer”);
- (3) filers under the Exchange Act’s or Regulation A’s periodic reporting requirements (“reporting issuer”);
- (4) foreign private issuers exempt from registration (“exempt foreign private issuers”); and
- (5) “catch-all issuers.”

The Proposed Solution is better than the alternative discussed on page 201 of the SEC Proposed Rule because the compliance costs of making information current and publicly available are borne by the shell company/private company reverse merger candidate and NOT broker dealers. Moreover, the Proposed Solution does not require broker dealers to monitor issuers for reverse merger occurrence.

Implementing the Proposed Solution strikes a reasonable balance between, on the one hand, the interest of the SEC in combating those fraudulent schemes that employ shell companies and, on the other hand, (a) the interest of the US in having more publicly-listed companies, (b) maintaining a vital stepping stone to public company status for private companies that aspire to become NMS issuers, and (c) providing incumbent investors of legitimate shell companies the potential to recoup their capital investment. This proposed solution also addresses the concern of OTC Markets.²²

In conclusion, we thank the Commission for this opportunity to comment and we look forward to working with the Commission on our shared goals of (a) improving the health of the US capital markets, (b) fostering a more congenial public markets environment for smaller-cap issuers, (c) promoting capital formation, and (d) encouraging US entrepreneurship.

You may contact Ronald A. Woessner, Principal of Woessner & Associates, with questions or to request additional information at .

Very truly yours,

Ronald A. Woessner²³
Principal, Woessner & Associates

Brett Bushnell
Texas A&M School of Law J.D. Candidate 2020

ACTIVIST INVESTING LLC

By: /s/ David Lazar
David Lazar, CEO

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ENDNOTES FOLLOW NEXT PAGE

¹ See Release No. 34-87115; File No. S7-14-19 Publication or Submission of Quotations Without Specified Information at p. 55.

² SEC Proposed Rule at pgs. 52 - 54.

³ No doubt there will be a number of negative currently unknown second order consequences.

⁴ Excludes the 1/20 of 1% of startups funded by venture capital firms.

⁵ Those issuers with less than \$300M in market cap.

⁶ Private issuers have only four stepping stones to becoming an issuer whose securities are publicly traded on OTC Markets or listed on a US exchange: (a) 1933 Act public offering, (b) Reg A offering, (c) “[Slow PO](#)” process or (d) reverse merger with a shell company. The issuer’s securities would become “publicly traded” if there is an existing Form 211, an initial Form 211 is cleared by FINRA, or the issuer is accepted for listing on an exchange.

⁷ Venture capital firms fund only 1/20 of 1% of startups in America and the percentage of venture funded companies that go public has steadily declined and is but a fraction of the percentage that went public 20 years ago. *The US Need For Venture Exchanges*, Weild, March 4, 2015 at p. 14, available [here](#).

⁸ Moreover, that post-merger the private company would have little comfort it would cease to be considered a shell company and that multiple broker dealers immediately would begin quoting its stock pursuant to the piggyback exception because: (a) the definition of “shell company” is overly broad and does not create a “bright line” as noted by OTC Markets in its [comment letter](#), pgs. 15 – 18, and (b) broker dealer compliance departments are risk adverse and it could take months (if not years) for the compliance departments of multiple broker-dealers to authorize market making in reliance on the piggyback exception.

⁹ By way of comparison, The Nasdaq Stock Market requires a demonstration that a security will have at least three market makers to qualify to list on NASDAQ.

¹⁰ The number of publicly-listed issuers declined by 3,759 from 1996 – 2018. *Hunting High & Low: The Decline of the Small IPO and What to Do About It*. Lux and Peard, April 2018 at p. 3

¹¹ 9,538 is the estimated “should have” number as of 2012. *The U.S. listing gap* at p. 13. December 2015. C. Doidge, G. Karolyi, and R. Stulz.

¹² The NYSE has an approximate 2,400 issuers.

¹³ Response of R. Woessner and B. Bushnell (“Woessner & Bushnell”) to Commission Statement on Market Structure Innovation for Thinly-Traded Securities [Release No. 34-87327; File No. S7-18-19], available [here](#), at p. 15.

¹⁴ Census Bureau <https://www.census.gov/newsroom/blogs/research-matters/2018/02/bfs.html>.

¹⁵ See Woessner & Bushnell at pgs. 2 – 17; *What Ails the US Public Markets and US Entrepreneurship? Which Road Do We Follow To Fix Them?* R. Woessner, February 20, 2020, at [equities.com](#) [here](#).

¹⁶ See footnote 6.

¹⁷ See TAN note 8.

¹⁸ OTC Markets [comment letter](#), pgs. 15 - 18 filed in response to the Proposed Rule.

¹⁹ See p. 223 of the SEC Release.

²⁰ We believe many R&D heavy technology companies would be similarly and negatively impacted as well.

²¹ See p. 25 of the Proposed Rule and 17 CFR §240.15c-211(a).

²² See last two paragraphs on p. 3 *supra*.

²³ Mr. Woessner is former Senior Counsel to the Financial Services Committee of the US House of Representatives, where he served as special advisor to the Chairman for capital formation and fintech matters. He writes and speaks on capital markets topics, with articles appearing at <https://www.equities.com/user/RonaldWoessner> and elsewhere.