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# Going Public Transactions For Smaller Companies: Direct Public Offering And Reverse Merger

One of the largest areas of my firms practice involves going public transactions. I have written extensively on the various going public methods, including IPO/DPOs and reverse mergers. The topic never loses relevancy, and those considering a transaction always ask about the differences between, and advantages and disadvantages of, both reverse mergers and direct and initial public offerings. This blog is an updated new edition of past articles on the topic.

Over the past decade the small-cap reverse merger, initial public offering (IPO) and direct public offering (DPO) markets diminished greatly. The decline was a result of both regulatory changes and economic changes. In particular, briefly, those reasons were: (1) the recent Great Recession; (2) backlash from a series of fraud allegations, SEC enforcement actions, and trading suspensions of Chinese companies following reverse mergers; (3) the 2008 Rule 144 amendments, including the prohibition of use of the rule for shell company and former shell company shareholders; (4) problems clearing penny stocks with broker-dealers and FINRA's enforcement of broker-dealer and clearinghouse due diligence requirements related to penny stocks; (5) DTC scrutiny and difficulty in obtaining clearance following a reverse merger or other corporate restructuring and, significantly, DTC chills and locks; (6) increasing costs of reporting requirements, including XBRL requirements; (7) the updated seasoning requirements imposed by NYSE, AMEX and NASDAQ, including a twelve-month waiting period prior to qualifying for listing following a reverse merger; (8) the enactment of the Order Handling Rules in 1997; (9) Regulation ATS in 1998; (10) the enactment of Decimalization in 2001; (11) Sarbanes Oxley in 2002; and (12) Regulation NMS in 2006.

However, despite all of the adversity to small businesses going public, the U.S.'s optimistic, entrepreneurial, capitalist nature forges forward and with the enactment of the JOBS Act in 2012 and continued political pressure in support of small business

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capital formation, the reverse merger and IPO/DPO market has been making a slow and steady comeback.

The fact is that the vast majority of new jobs in the U.S. are created by early-stage enterprises, and the ability to access capital markets is critical to the growth and sustainability to these enterprises. To the contrary, mature enterprises engaging in mergers and acquisitions tend to reduce jobs as they realize economies of scale and eliminate duplicate jobs and functions within the merged entities or even close down underperforming divisions altogether.

Both Congress and the SEC recognize the importance of supporting small business capital formation and going public transactions to the general health of the U.S. economy and job creation. In addition to the enactment of the JOBS Act, the SEC created the SEC Advisory Committee on Small and Emerging Growth Companies to provide advice on SEC rules, regulations and policies regarding "its mission of protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation" as related to "(i) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization; (ii) trading in the securities of such businesses and companies; and (iii) public reporting and corporate governance requirements to which such businesses and companies are subject."

In addition, both the SEC and Congress are exploring and supportive of Venture Exchanges (see my articles Here and Here. Various other analytical studies and programs have been initiated as well, including the new pilot tick size program, a summary of which can be read Here.

Moreover, the general economy has improved; the backlash from the Chinese company reverse merger issues has dissipated; although still an issue, many have found workarounds to the Rule 144 issues using Section 4(a)(1) and 4(a)(1½) exemptions; and DTC chills have become less problematic as the DTC has established usable pre-notice and corrective procedures for issuers.

Despite difficulties, the fact is that going public is and remains the best way to access capital markets. Public companies will always be able to attract a PIPE investor, equity line or similar financing (the costs and quality of these financing opportunities is beyond the scope of this blog). For cash-poor companies, the use of a trading valuable stock

as currency is the only alternative for short-term growth and acquisitions and the attraction of key executives. At least in the USA, the stock market, day traders, public market activity and the interest in capital markets will never go away; they will just evolve to meet ever-changing demands and regulations.

Reverse Mergers

A reverse merger is the most common alternative to an initial public offering (IPO) or direct public offering (DPO) for a company seeking to go public. A "reverse merger" is a process whereby a privately held company goes public by acquiring a controlling interest in, and merging with, a public operating or public shell company. The SEC defines a "shell company" as a publically traded company with (1) no or nominal operations and (2) either no or nominal assets or assets consisting solely of any amount of cash and cash equivalents.

A public entity seeks a reverse merger with a private company for a variety of reasons. Pragmatically, it is common for a business, public or private, to fail to succeed, or fully succeed, in its planned business. When a public company business fails, there remains an intrinsic value in the public entity, including a shareholder base, trading symbol, trading history, either current or historical audited financial statements for reporting entities, and public filings and accordingly, instead of the business just shutting down as it would in the private world, the public company finds a new business venture and generally new management. Although in a reverse merger the existing public shareholder base is greatly diluted, those shareholders have an opportunity to recoup some or all of their investment in the new business enterprise, whereas if the business simply shut down, there would be a complete loss.

In a reverse merger process, the private operating company shareholders exchange their shares of the private company for either new or existing shares of the public company so that at the end of the transaction, the shareholders of the private operating company own a majority of the public company and the private operating company has become a wholly owned subsidiary of the public company. The public company assumes the operations of the private operating company. That is, at the closing, the private operating company has gone public by acquiring a controlling interest in a public company and having the public company assume operations of the private operating entity.

A reverse merger is often structured as a reverse triangular merger. In that case, the public shell forms a new subsidiary which merges with the private operating business. At the closing the private company shareholders exchange their ownership for shares in the public company, and the private operating business becomes a wholly owned subsidiary of the public company. The primary benefit of the reverse triangular merger is the ease of shareholder consent. That is because the sole shareholder of the acquisition subsidiary is the public company; the directors of the public company can approve the transaction on behalf of the acquiring subsidiary, avoiding the necessity of meeting the proxy requirements of the Securities Exchange Act of 1934.

In addition, many companies engage in capital restructuring (such as a reverse split) and a name change either prior to or immediately following a reverse merger, but it is not required.

Like any transaction involving the sale of securities, the issuance of securities to the private company shareholders must either be registered under Section 5 of the Securities Act or there must be an available exemption from registration. Generally, the public company relies on Section 4(a)(2) or Rule 506(b) of Regulation D under the Securities Act for such exemption.

Advantages of a Reverse Merger

The primary advantage of a reverse merger is that it can be completed very quickly. As long as the private entity has its “ducks in a row,” a reverse merger can be completed as quickly as the attorneys can complete the paperwork. Having your “ducks in a row” includes having completed audited financial statements for the prior two fiscal years and reviewed financial statements for quarters up to date (or from inception if the company is less than two years old), and having the information that will be necessary to file with the SEC readily available. If the public company is a shell, the SEC requires that a public company file Form 10 type information on the private entity within four days of completing the reverse merger transaction (a super 8-K). If the public company is operating, the SEC requires only a closing 8-K within four days and the financial statements of the acquired private entity must be filed within 71 days of the closing 8-K. Upon completion of the reverse merger transaction, the once private company is now public.

The reverse merger transaction itself is not a capital-raising transaction, and accordingly, many private entities complete a capital-raising transaction (such as a PIPE) simultaneously with or immediately following the reverse merger, but it is certainly not required. Raising money is difficult and much more so in the pre-public stages. Companies that may be less mature in their development and unable to attract sophisticated capital financing can use a reverse merger to complete a going public transaction and still benefit from being public while they grow and mature. Such benefits include the ability to use stock and stock option plans to attract and keep higher-level executives and consultants and to make growth acquisitions using stock as currency.

Another benefit is the existence of a shareholder base. A shareholder base is necessary for any company to have active trading and attractive liquidity in its stock. The more shareholders, generally the more active the trading in a stock and the less volatile the stock price will be from ordinary buying and selling pressures. In addition, a minimum number of shareholders (generally 300) is necessary to qualify to list on an exchange such as NASDAQ. Also, existing shareholders are often an overlooked but great source for capital raises via shareholder rights offerings.

Another benefit is the existence of a trading symbol. Generally in an IPO process, a trading symbol is not issued until the S-1 process has been completed and closed out and a market maker completes a 15c2-11 process with FINRA. The 211 process can be lengthy. A trading symbol is a necessary precondition to a secondary trading market and a precondition for many active capital investors.

Similarly a trading history can be seen as beneficial. Although really any pre-reverse merger trading history should not be indicative of future trading activity, it does show how active the public vehicle shareholder base is, and experience shows that it is easier for an active trading market to develop where one has previously existed.

Finally, since a reverse merger is a going public transaction, the newly public company will have all the benefits of being public, including the ability to use stock and stock option plans to attract and keep higher-level executives, use stock as currency to make acquisitions and of course to access capital markets and capital investors.

## Disadvantages of a Reverse Merger

There are several disadvantages of a reverse merger. The primary disadvantage is the restriction on the use of Rule 144 where the public company is or ever has been a shell company. That is, Rule 144 is unavailable for the use by shareholders of any company that is or was at any time previously a shell company unless certain conditions are met. In order to use Rule 144, a company must have ceased to be a shell company; be subject to the reporting requirements of section 13 or 15(d) of the Exchange Act; filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports; and have filed current "Form 10 information" with the Commission reflecting its status as an entity that is no longer a shell company and one year must have elapsed after the filing of the Form 10 information.

Rule 144 affects any company who was ever in its history a shell company by subjecting them to additional restrictions when investors sell unregistered stock under Rule 144. Under Rule 144, a company that ever reported as a shell must be current in its filings with the SEC and have been current for the preceding 12 months before investors can sell unregistered shares.

The second biggest disadvantage concerns undisclosed liabilities, lawsuits or other issues with the public shell. Accordingly, due diligence is an important aspect of the reverse merger process, even when dealing with a fully reporting current public shell. The second primary disadvantage is that the reverse merger is not a capital-raising transaction (whereas an IPO or DPO is). An entity in need of capital will still be in need of capital following a reverse merger, although generally, capital-raising transactions are much easier to access once public. The third primary disadvantage is immediate cost. The private entity generally must pay for the public shell with cash, equity or a combination of both. However, it should be noted that an IPO or DPO is also costly.

Another disadvantage is a trading history, which can be both an advantage and disadvantage – an inactive or volatile trading history may repeat itself.

In addition, the NYSE, NYSE MKT (formerly AMEX) and NASDAQ exchanges have enacted more stringent listing requirements for companies seeking to become listed following a reverse merger with a shell company. The rule change prohibits a reverse

merger company from applying to list until the combined entity had traded in the U.S. over-the-counter market, on another national securities exchange, or on a regulated foreign exchange for at least one year following the filing of all required information about the reverse merger transaction, including audited financial statements. In addition, new rules require that the new reverse merger company has filed all of its required reports for the one-year period, including at least one annual report. The new rule requires that the reverse merger company “maintain a closing stock price equal to the stock price requirement applicable to the initial listing standard under which the reverse merger company is qualifying to list for a sustained period of time, but in no event for less than 30 of the most recent 60 trading days prior to the filing of the initial listing application.” The rule includes some exceptions for companies that complete a firm commitment offering resulting in net proceeds of at least $40 million.

Next, FINRA can be very difficult when applying for a new trading symbol following a reverse merger, and concurrently with obtaining a new symbol or completing a name change, the DTC will want an updated eligibility letter, which may not be able to be rendered if the public vehicle was a shell.

Finally, whether an entity seeks to go public through a reverse merger or an IPO, they will be subject to several, and ongoing, time-sensitive filings with the SEC and will thereafter be subject to the disclosure and reporting requirements of the Securities Exchange Act of 1934, as amended.

Initial and Direct Public Offerings

One of the methods of going public is directly through a public offering. In today’s financial environment, many issuers are choosing to self-underwrite their public offerings, commonly referred to as a Direct Public Offering (DPO). An IPO, on the other hand, is the term of art generally used to refer to a public offering underwritten by a broker-dealer (underwriter). As a very first step, an issuer and their counsel will need to complete a legal audit and any necessary corporate cleanup to prepare the company for a going public transaction. This step includes, but is not limited to, a review of all articles and amendments, the current capitalization and share structure and all outstanding securities; a review of all convertible instruments including options, warrants and debt; and the completion of any necessary amendments or changes to the current structure and instruments. All past issuances will need to be reviewed to ensure prior compliance with securities laws. Moreover, all existing contracts and obligations

will need to be reviewed, including employment agreements, internal structure agreements, and all third-party agreements.

Once the due diligence and corporate cleanup are complete, the issuer is ready to move forward with an offering. Companies desiring to offer and sell securities to the public with the intention of creating a public market or going public must file with the SEC and provide prospective investors with a registration statement containing all material information concerning the company and the securities offered. Such registration statement is generally on Form S-1. For a detailed discussion of the S-1 contents, please see my article HERE. The average time to complete, file and clear comments on an S-1 registration statement is 90-120 days. Upon clearing comments, the S-1 will be declared effective by the SEC.

Following the effectiveness of the S-1, the issuer is free to sell securities to the public. The method of completing a transaction is generally the same as in a private offering. That is: (i) the issuer delivers a copy of the effective S-1 to a potential investor, which delivery can be accomplished via a link to the effective registration statement on the SEC EDGAR website together with a subscription agreement; (ii) the investor completes the subscription agreement and returns it to the issuer with the funds to purchase the securities; and (iii) the issuer orders the shares from the transfer agent to be delivered directly to the investor. If the issuer arranges in advance, shares can be delivered to the investors via electronic transfer or DWAC directly to the investor's brokerage account.

Once the issuer has completed the sale process under the S-1 – either because all registered shares have been sold, the time of effectiveness of the S-1 has elapsed, or the issuer decides to close out the offering – a market maker files a 15c2-11 application on behalf of the issuer to obtain a trading symbol and begin trading either on the over-the-counter market (such as OTCQB) or on an exchange. The market maker will also assist the issuer in applying for DTC eligibility.

A DPO can also be completed by completing a private offering prior to the filing of the S-1 registration statement and then filing the S-1 registration statement to register those shares for resale. In such case, the steps remain primarily the same except that the sales by the company are completed prior to the S-1 and the 15c2-11 can be filed immediately following effectiveness of the S-1 registration statement.

Basic Differences in DPO vs. Reverse Merger Process

Why DPO:

As opposed to a reverse merger, a company completing a DPO does not have to worry about potential carry-forward liability issues from the public shell.

A company completing a DPO does not have to wait 12 months to apply to the NASDAQ, NYSE MKT or other exchange and if qualified, may go public directly onto an exchange.

A DPO is a money-raising transaction (either pre S-1 in a private offering or as part of the S-1 process). A reverse merger does not raise money for the going public entity unless a separate money-raising transaction is concurrently completed.

As long as the company completing the DPO has more than nominal operations (i.e., it is not a very early-stage start-up with little more than a business plan), it will not be considered a shell company and will not be subject to the various rules affecting entities that are or ever have been a shell company. To the contrary, many public entities completing a reverse merger are or were shells.

A DPO is less expensive than a reverse merger. The total cost of a DPO is approximately and generally $100,000-$150,000 all in. The cost of a reverse merger includes the price of the public vehicle, which can range from $250,000-$500,000. Accordingly, the total cost of a reverse merger is approximately and generally $350,000-$650,000 all in. Deals can be made where the cost of the public shell is paid in equity in the post-reverse merger entity instead of or in addition to cash, but either way, the public vehicle is being paid for. NOTE: These are approximate costs. Many factors can change the cost of the transactions.

Why Reverse Merger:

Raising money is difficult, and much more so in the pre-public stages. In a reverse merger, the public company shareholders become shareholders of the operating business and no capital raising transaction needs to be completed to complete the process.

A reverse merger can be much quicker than a DPO.

Raising money in a public company is much easier than in a private company pre going public. A reverse merger can be completed quickly, and thereafter the now public company can raise money.

Reverse Mergers and DPO's Are Both Excellent Methods for Going Public

As I see it, the evolution in the markets and regulations have created new opportunities, including the opportunity for a revived, better reverse merger market and a revived, better DPO market. A reverse merger remains the quickest way for a company to go public, and a DPO remains the cleanest way for a company to go public. Both have advantages and disadvantages, and either may be the right choice for a going public transaction depending on the facts, circumstances and business needs of the company.

The increased difficulties in general and scrutiny by regulators may be just what the industry needed to weed out the unscrupulous players and invigorate this business model. Shell companies necessarily require greater due diligence up front, if for no other reasons than to ensure DTC eligibility and broker-dealer tradability, prevent future regulatory issues, and ensure that no "bad boys" are part of the deal or were ever involved in the shell. Increased due diligence will result in fewer post-merger issues.

The over-the-counter market has regained credibility and supports higher stock prices, especially since exchanges are forcing companies to trade there for a longer period of time before becoming eligible to move up. Resale registration statements, and thus disclosure, may increase to combat the Rule 144 prohibitions. We have already seen greater disclosure by non-reporting entities trading on otcmarkets.com. Also, venture exchanges designed specifically for and that support trading in smaller public companies appear to be on the horizon.

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC Market listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

On December 17, 2014 and again on March 4, 2015, the SEC Advisory Committee on Small and Emerging Companies (the "Advisory Committee") met and finalized its recommendation to the SEC regarding the definition of "accredited investor." The Advisory Committee unanimously approved the recommendation, which is decidedly pro small business and supportive of facilitating capital formation, and communicated

such recommendation to the SEC in a letter dated March 9, 2015 (the "Letter"). The Letter contains a pragmatic discussion of the importance of small business capital formation, the importance of the "accredited investor" definition, and the lack of connection between the definition and fraud prevention.

As set forth in the Advisory Committee Letter, the committee was organized by the SEC to provide advice on SEC rules, regulations and policies regarding "its mission of protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation" as related to "(i) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization; (ii) trading in the securities of such businesses and companies; and (iii) public reporting and corporate governance requirements to which such businesses and companies are subject."

The Advisory Committee made four recommendations related to the definition of "accredited investor," each of which I support fully. In particular:

(1) That if any change is made to the definition of "accredited investor," such change should "have the effect of expanding, not contracting, the pool of accredited investors." For example, they recommended that the definition include investors that satisfy a sophistication test that is not tied into income or net worth. In addition, the Advisory Committee recommended that that tax treatment of assets be excluded from any net worth calculation.

(2) That the SEC takes into account the effect of inflation and adjust the accredited investor thresholds in accordance with the consumer price index.

(3) "Rather than attempting to protect investors by raising the accredited investor thresholds or excluding certain asset classes from the calculation to determine accredited investor… the Commission should focus on enhanced enforcement efforts and increased investor education" and

(4) The SEC should continue to gather data on the subject.

Advisory Committee Considerations in Support of Its Recommendations

The Advisory Committee Letter lists practical facts and realities related to small business and emerging company capital formation in support of its recommendations. In particular:

- Smaller and emerging companies are "critical to the economic well-being of the United States," generating the majority of net new jobs in the last five years and continuing to add more jobs;
- Rule 506 of Regulation D is the most widely used private offering exemption, resulting in $1 trillion of raised capital in 2013;
- Most early-stage, venture capital and angel investments are made in reliance on Rule 506;
- Other than Rule 506(b), which allows up to 35 unaccredited investors (when certain disclosures and financial information are provided), all investors in Rule 506 offerings must be accredited;
- The Dodd-Frank Act requires the SEC to review the accredited investor definition to determine whether it "should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy."
- There are groups and commentators that advocate increasing the thresholds in the accredited investor definition to prevent fraud against investors. However, the SEC is not of "any substantial evidence suggesting that the current definition of accredited investor has contributed to the ability of fraudsters to commit fraud or has resulted in greater exposure for potential victims." In addition, "the connection between fraud and the current accredited investor thresholds seems tenuous at best."
- Some groups and commentators advocate excluding "retirement assets" from the calculation of net worth. The Advisory Committee rightfully and logically points out that "retirement assets" refer to a tax treatment and not a class of assets, and can be anything from an IRA to racehorses, to bitcoins, to real estate and anything in between. Retirement assets are not classified based on risk and are not somehow risk-protected. Many of the most experienced, wealthiest investors have the majority of their portfolio in assets that receive "retirement assets" tax treatment, and there is no justification for excluding tax-protected accounts from the accredited definition.
- There is little or no evidence to suggest that the existing definition of accredited investor has led to widespread fraud or other harm to investors; rather, there is substantial evidence that the current definition works.

The Advisory Committee concludes that if the income and net worth thresholds are increased, it "will materially decrease the pool of capital available for smaller businesses." It continues by stating that such a change "would have a disparate impact on those areas having a lower cost of living, which areas often coincide with regions of lower venture capital activity." Finally, the Advisory Committee expressed concern that the impact would disproportionately affect women and minority entrepreneurs.

## Refresher on Current Accredited Investor Definition

An "Accredited investor" is defined as any person who comes within any of the following categories:

1. Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act, whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;
2. Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
3. Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;
4. Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;
5. Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his or her purchase exceeds $1,000,000, not including their principal residence;
6. Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

7. Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii); and
8. Any entity in which all of the equity owners are accredited investors.

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Going public attorney Laura Anthony and her experienced legal team provides ongoing corporate counsel to small and mid-size OTC issuers as well as private companies going public on the over-the-counter market, such as the OTCBB, OTCQB and OTCQX. For nearly two decades Ms. Anthony has structured her securities law practice as the “Big Firm Alternative.” Clients receive fast, personalized, cutting-edge legal service without the inherent delays and unnecessary expenses associated with “partner-heavy” securities law firms. Ms. Anthony’s focus includes, but is not limited to, registration statements, including Forms 10, S-1, S-8 and S-4, compliance with the reporting requirements of the Securities Exchange Act of 1934, including Forms 10-Q, 10-K and 8-K, 14C Information Statements and 14A Proxy Statements, going public transactions, mergers and acquisitions including both reverse mergers and forward mergers, private placements, PIPE transactions, Regulation A offerings, and crowdfunding. Moreover, Ms. Anthony represents both target and acquiring companies in reverse mergers and forward mergers, including the preparation of transaction documents such as Merger Agreements, Share Exchange Agreements, Stock Purchase Agreements, Asset Purchase Agreements and Reorganization Agreements. Ms. Anthony prepares the necessary documentation and assists in completing the requirements of federal and state securities laws and SROs such as FINRA and DTC for 15c2-11 applications, corporate name changes, reverse and forward splits and changes of domicile.

Ms. Anthony is also the host of LawCast.com, the securities law network. Inquiries of a technical nature are always encouraged.

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