A WORD FROM MINTZ

# Frequently asked questions for private companies considering a reverse merger

**Is a reverse merger a good alternative to an IPO?**

We believe this is the wrong question—we view a reverse merger as "going public" during your cross-over round, rather than as an alternative to an IPO. This is because the reverse merger process is a privately negotiated investment process that is more like a cross-over round than an IPO, with its marketing and price discovery efforts, including testing-the-waters and a road show. And having your company listed and registered with the Securities and Exchange Commission (SEC) as a result of the reverse merger sets up the company for a faster IPO (its first public offering) down the road when the time is right.

Reverse mergers can be very effective if the cash in the "fallen angel" (the existing public company) effectively supplements the amount of private financing available—including potentially via a concurrent PIPE, as further discussed below. In addition, the fact that the company will be listed at the end of the reverse merger process may make the deal more appealing to interested public investors than a traditional cross-over round.

**How easy is it to find a fallen angel to reverse merge with?**

There have been a large number of fallen angels in the last couple of years. However, for those fallen angels with significant cash, the competition to be picked as a reverse merger candidate is intense. Accordingly, the private company cannot control when or if it will find a dancing partner. That said, certain investment banks tend to represent a large number of fallen angels so that an interested private company can effectively get in front of many fallen angels by talking to those investment banks.

**Should we raise a PIPE at the same time as the reverse merger?**

The conventional view has been that a concurrent PIPE provides confirmation that public investors are interested in the business of the private company; validation of the valuation negotiated by the parties; and additional cash to support the combined company's operations.

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However, a concurrent PIPE poses a number of challenges:

- **Time to liquidity:** In a market that has been challenging, securing a PIPE for a reverse merger can be even more difficult than executing a PIPE for an "already public" company. In a PIPE for a public company, the financing is typically closed within a few days of signing the purchase agreement, and the shares are typically registered for resale and tradable after 30 to 60 days. In a reverse merger, the PIPE purchase agreement is signed when the merger agreement is signed, but the financing does not close until the merger agreement closes three to five months later after SEC review and shareholder approval. If the shares are then registered for resale, there is further delay until the investors are able to sell. This "time to liquidity" is a relevant factor for some investors.

- **Intersection of PIPE and merger negotiations:** If PIPE investors want a lower valuation than the company negotiates with its merger partner, that can inject uncertainty into the merger process.

Deal certainty and speed are critical in reverse mergers. If the combined cash balance of the fallen angel and the private company are sufficient to satisfy Nasdaq and fund operations for an adequate amount of time, it may make sense to close the reverse merger as quickly as possible, and then later do a PIPE (or other financing) as a public company with a stock listing. Potential investors can then see how the deal has traded and should not be faced with the prolonged illiquidity period associated with a concurrent PIPE.

**Can non-US companies access Nasdaq through a reverse merger?**

Yes—at least in many cases. Technically, a merger is a US state law statutory construct, so a reverse merger type transaction with a non-US entity will usually not be a statutory merger. But there is often a tax-acceptable alternative, such as a share exchange, under the laws of the applicable non-US jurisdiction.

Many private non-US issuers have gone public and listed on Nasdaq by means of a share exchange transaction. Even some non-US issuers that were traded on their local exchange have listed on Nasdaq via a reverse merger type transaction. This typically involves additional home country and local exchange rules, which must be navigated. In some cases, this can be managed by having the non-US company remain the "top-co" over the fallen angel, and having that company apply for an initial listing as part of the closing of the transaction.

**What is the impact of the SEC Staff position expressed in recent comment letters to the resale registration statements filed after the closing of reverse mergers and a recent release?**

This is a developing situation, so we will see how it plays out over time. Currently, it appears that the SEC Staff views transactions that they consider reverse mergers to be a merger with a shell company, and as a result, views the post-closing company as ineligible to file a Form S-3 at the outset. Because of this, it may be impractical to register affiliates of the combined company for resale for a year after the reverse merger closes. There are other positions the SEC Staff may take that would follow from a position that the transaction involved a shell company.

**Are there types of reverse mergers other than fallen angel deals?**

Yes. There is an alternative public offering process that has been used by a number of companies with prominent private investors: The company merges with a true Form 10 shell company; raises capital from institutional investors and retail investors in a concurrent PIPE; trades on the over-the-counter market after closing; and then uplists to Nasdaq when positive business developments or other circumstances permit it to raise $40 million or more in a public offering. This can be very attractive for certain private companies, as all shareholders after the deal will have decided to invest in that company (not the former business of a fallen angel), and the company's true IPO and up-listing to Nasdaq can be timed with good market conditions, positive business developments, or other results. In addition, the true IPO can then typically be closed in around a month, because the company's disclosure will have already been reviewed by the SEC as part of the reverse merger process.