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America's Public Shell Trafficking Problem: Ripe for Reprocessing

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AMERICA’S PUBLIC SHELL TRAFFICKING PROBLEM: RIPE FOR REPROCESSING

ABSTRACT

The scourge of public shell trafficking has led to fraudsters taking advantage of and pilfering the hard-earned dollars of the American investing public for decades. These fraudsters seek to abuse the chapter 11 bankruptcy process by discharging the debt of such public shells, so that they can increase the profitability of schemes that target innocent investors, such as reverse mergers and pump-and-dump schemes. Regulators and lawmakers alike have fought back against this phenomenon through statutory reform and targeted regulatory programs; recently, their principal method of fighting back has been to consistently object to chapter 11 plans of reorganization that could potentially be used in such schemes. This Comment analyzes the strengths and weaknesses of the current regulatory approaches to combat public shell trafficking and proposes a new solution: the Shell Reprocessing Approach (“SRP Approach” or “Approach”). The SRP Approach involves regulators taking a more active role in debtor reorganization by moving for the appointment of a chapter 11 trustee and/or filing a competing plan as a party in interest. The Approach has the potential to enable regulators to stop bad actors seeking to abuse the bankruptcy process in a potentially more effective and innovative manner and to better protect the American public from fraudulent investment schemes. Ultimately, unlike objections to confirmation, the Approach promises to preserve the economic value of a debtor public shell by repurposing its ticker and to close the information gap by subjecting the entity to greater regulatory scrutiny via existing Special Purpose Acquisition Company (“SPAC”) regulations.

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INTRODUCTION

A public shell is a publicly traded company that generally has no active business operations and no significant assets.¹ Public shells are often microcapital companies (“microcap”), which means that the value of their stock is less than \$300 million.² Microcap stock is frequently sold on the over-the-counter (“OTC”) market.³ The OTC market includes the OTC Pink marketplace, which is “an open marketplace for a broad spectrum of equity securities, with no financial standards or reporting requirements.”⁴ Such an unregulated market

¹ Will Kenton, *What Is a Shell Corporation? How It’s Used, Examples and Legality*, INVESTOPEDIA (July 17, 2022), <https://www.investopedia.com/terms/s/shellcorporation.asp>; see also *In re Maxim Indus., Inc.*, 22 B.R. 611, 611 (Bankr. D. Mass. 1982) (“[W]hen Maxim filed its Chapter 11, it had no business, no employees and no assets except a potential tax loss.”); *In re Rath Packing Co.*, 55 B.R. 528, 531 (Bankr. N.D. Iowa 1985) (describing debtor as a “financial consulting and management firm which ‘has no significant assets and has not conducted any business other than in connection with the proposed acquisition of the stock and notes of the reorganized Debtor and Liberty’” (quoting the debtor’s proposed plan modification)).

² Jennifer Gardner, *VII: The SEC’s Operation Shell Expel*, in *Developments in Banking and Financial Law: 2013*, 33 REV. BANKING & FIN. L. 60, 61 (2013).

³ *Id.*

⁴ *Id.*; see also *THE WOLF OF WALL STREET* (Paramount Pictures 2013) (“you attempt to sell the pink sheets, where the real money is . . .”).

creates the ideal environment for bad actors seeking to exploit public shells in fraudulent schemes.⁵

One such fraudulent scheme by which individuals can exploit these public shells is through reverse mergers.⁶ A reverse merger involves a public shell (“the buyer”) acquiring a private company, usually one seeking access to funding in the United States capital markets.⁷ In the transaction, the shareholders of the private company will typically capture a controlling majority of the shares of the buyer, increasing these shareholders’ voting power and potentially permitting them to take over the board of directors and management of the buyer.⁸ Reverse mergers allow said private companies to enjoy the benefits of the capital markets, such as the liquidity that comes with having their shares priced on a stock exchange, that allow them to potentially increase their funding by accessing a wider pool of public investors.⁹ Moreover, reverse mergers are very attractive because they are considered to be a “quick and dirty” method of “going public” compared to the often expensive and lengthy process associated with an initial public offering (“IPO”).¹⁰

In order to make public shells more attractive candidates for reverse mergers, corporate actors will attempt to use chapter 11 bankruptcy to discharge a public shell of all its liabilities in order to create a “clean” public shell. The clean public shell can then be marketed to private companies seeking the advantages of the public trading status of a public shell, while avoiding the demands of securities registration requirements and other laws.¹¹ To achieve this, the public shell first

⁵ Gardner, *supra* note 2, at 61.

⁶ *Id.*

⁷ Off. of Inv. Educ. & Advoc., *Investor Bulletin: Reverse Mergers*, SEC (June 2011), <https://www.sec.gov/investor/alerts/reversemergers.pdf> [hereinafter SEC, *Reverse Mergers*].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (discussing legal and accounting fees typically being lower for a reverse merger than for an IPO and highlighting that there are “no registration requirements under the Securities Act of 1933 as there would be for an IPO[.]” which potentially increases value of companies that “go public” via a reverse merger); *see also* Anthony E. Hope, *Publicly Listed Shells of Corporate Debtors and Reverse Mergers Recycling Shells in Spite of Anti-Shell Trafficking Provisions*, AM. BANKR. INST. J., July 2013, at 52 (citation omitted) (“In a reverse merger, a private company merges with the debtor’s publicly listed shell to take control of the shell and obtain immediate access to the capital markets, avoiding the usual registration and disclosure requirements and the expense involved with a public offering.”); Gardner, *supra* note 2, at 63 (discussing inherent risk to investors who choose to invest in reverse merger companies including difficulty to investors in determining whether a company went public through a reverse merger).

¹¹ Hope, *supra* note 10, at 53. Plans of reorganization which seek to use chapter 11 to maximize or “capture” the value of public shells often come in the form of a plan which “provid[es] for a liquidation of a corporate debtor’s assets and creat[es] the appearance of a discontinuation of the debtor’s operations while at

files for bankruptcy under chapter 11. The debtor public shell must then have its chapter 11 plan of reorganization approved by a court at a confirmation hearing, among other requirements imposed by the Bankruptcy Code (the “Code”).¹² If a court approves a chapter 11 reorganization plan by entering a confirmation order,¹³ then the confirmed plan is binding on the debtor, creditors, and other parties, regardless of the effects of its terms; the plan will satisfy all claims of all parties according to the approved plan of reorganization.¹⁴

Public shell trafficking and its use in schemes like reverse mergers and pump-and-dumps¹⁵ is worrisome due to the nefarious effects such schemes can wreak upon the American investor.¹⁶ When investors invest in any stock, information is the investor’s “best tool” for “investing wisely.”¹⁷ Any rational investor would want to know as much as possible about an investment opportunity before investing their hard-earned money. Ample information is typically available when investing in the most “dominant” or well-known U.S. stock exchanges, such as the Dow Jones or the S&P 500, due to the relatively rigorous reporting requirements of the Securities and Exchange Commission (the “Commission” or the “SEC”).¹⁸ However, when investors seek to invest in penny stocks¹⁹ of microcap companies on the OTC markets, accurate information is often difficult to find,²⁰ creating havens for suspicious actors who use public shells to perpetrate their schemes through reverse mergers or pump-and-dumps.²¹ When information is scarce or unavailable, suspicious actors can

the same time requesting court approval for a discharge based on a minimal level of post-plan-confirmation activities.” *Id.*

¹² 11 U.S.C. § 1128(a) (setting forth the hearing requirement for chapter 11 plan confirmation).

¹³ See generally 11 U.S.C. § 1129(a)(1)–(13), (16) (listing the requirements for consensual plan confirmation, including compliance with applicable law, good faith, feasibility, and providing dissenting parties with at least the value they would have received in a liquidation under chapter 7).

¹⁴ See 11 U.S.C. § 1141; see also Hope, *supra* note 10, at 52.

¹⁵ See *Microcap Stock: A Guide for Investors*, SEC: INV. PUBL’NS (Sept. 18, 2013), <https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstock> [hereinafter SEC, *Microcap Stock*] (describing the “classic ‘pump and dump’ scheme” and its effect on investors).

¹⁶ See generally SEC, *Reverse Mergers*, *supra* note 7.

¹⁷ SEC, *Microcap Stock*, *supra* note 15.

¹⁸ See generally *Exchange Act Reporting and Registration*, SEC (Apr. 28, 2022), <https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting> (discussing reporting and registration requirements of publicly traded companies).

¹⁹ “A penny stock typically refers to the stock of a small company that trades for less than \$5 per share.” Chris B. Murphy, *What Are Penny Stocks?*, INVESTOPEDIA (Mar. 10, 2022), <https://www.investopedia.com/terms/p/pennystock.asp>.

²⁰ SEC, *Microcap Stock*, *supra* note 15.

²¹ See Gardner, *supra* note 2, at 61 (citing Max Stendahl, *SEC Halts Trading in 61 Companies in Fraud Crackdown*, LAW360 (June 3, 2013, 11:59 AM), <http://www.law360.com/articles/446773/sec-halts-trading-in-61-companies-in-fraud-crackdown>).

take advantage of the investing public's lack of knowledge of even the most basic facts of a company, such as the company's management or what the company even purports to do, which permits such actors to spread misinformation and take advantage of the "unsuspecting" investing public.²² As a result, said actors profit by swindling away investors' hard-earned dollars.²³

These risks are heightened even further through public shell trafficking via reverse mergers because the suspicious actors can remain largely anonymous and hide behind the shell as they utilize it in their schemes.²⁴ These shells are powerful tools; because they have "less than \$10 million in assets or fewer than 2,000 shareholders of record[.]" they do not have to file reports with the Commission.²⁵ If these shells have been cleansed through chapter 11 bankruptcy, they become the perfect debt-free vehicle to prey on investors, largely unseen by the watchful eye of the Commission.²⁶

For over four decades, Congress has been concerned with potential abuses of the chapter 11 bankruptcy process via public shell trafficking,²⁷ and took action in 1978 to revise the Code to remedy this very issue.²⁸ The most direct attempt to curb this problem from Congress came in the form of section 1141(d)(3).²⁹ Congress "clearly" indicated in the legislative history that it added that statutory provision to address concerns about public shell corporations exploiting the bankruptcy process in order to be marketed as "shell corporation[s] cleansed of [their] public debt."³⁰ This section operates primarily through the provision acting as a "corollary provision to [section] 727(a)(1)[.]"

²² SEC, *Microcap Stock*, *supra* note 15.

²³ *See generally id.* (discussing how "fraudsters" perpetrate schemes through microcap companies to profit off of American investors).

²⁴ *Id.* (discussing inherent risks for investors when investing in microcap stocks due to lack of information); SEC, *Reverse Mergers*, *supra* note 7.

²⁵ SEC, *Microcap Stock*, *supra* note 15.

²⁶ *See id.*; Gardner, *supra* note 2, at 61 (citing Stendahl, *supra* note 21).

²⁷ *See* H.R. REP. NO. 95-595, at 384-85 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6340; S. REP. NO. 95-989, at 98-99 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5785, 5787.

²⁸ *See* H.R. REP. NO. 95-595, at 384; S. REP. NO. 95-989, at 7, 98; *see also In re Maxim Indus., Inc.*, 22 B.R. 611, 613 (Bankr. D. Mass. 1982) (first citing *In re Int'l Horizons, Inc.*, 15 B.R. 798, 800 (Bankr. N.D. Ga. 1981); and then citing *Citicorp Bus. Credit, Inc. v. Blazon Flexible Flyer*, 407 F. Supp. 861 (N.D. Ohio 1976)) ("The purpose of a Chapter 11 reorganization proceeding is to enable a business to rehabilitate itself and become a profitable going concern.").

²⁹ *See In re Glob. Water Techs., Inc.*, 311 B.R. 896, 901 (Bankr. D. Colo. 2004); Steven J. Reilly & Ben Ellison, *An Individual Debtor's "Business" for Purposes of § 1141(d)(3)(b)*, AM. BANKR. INST. J., Nov. 2018, at 58 ("The legislative history of § 1141(d)(3) indicates that it was drafted to prevent trafficking in corporate shells . . .").

³⁰ *See Glob. Water Techs.*, 311 B.R. at 901.

which prohibits non-individual debtors, such as corporations, from receiving a chapter 7 discharge.”³¹ Section 1141(d)(3) was intended to ensure that corporations that are liquidating and trying to avoid the application of section 727(a)(1) are prevented from obtaining a discharge of their debt in a chapter 11 case.³² By preventing a discharge for public shells under the Code, public shells remain “subject to the debts and liabilities of a failed business venture” which “mak[e] the shell unattractive as a merger target.”³³ Despite such anti-trafficking provisions in the Code, bankruptcy courts still approve chapter 11 plans of reorganization which “contemplate” reverse mergers or “motions for the sale of a bankrupt corporate debtor’s shell to parties seeking to use shells for reverse mergers in the future.”³⁴

Two key problems exist based on the public shell trafficking schemes decried above: one that exists in bankruptcy (the “Bankruptcy Problem”) and one that exists in market regulation (the “Market Regulation Problem”) (collectively, the “Problems”). The Bankruptcy Problem threatens the integrity of the entire bankruptcy system; actors are presently able to rely on the Code itself to perpetrate public shell trafficking schemes. In doing so, they are circumventing the Code’s underlying intent: to alter the old “law, under which corporations and partnerships may be discharged in liquidation cases . . . [to] avoid trafficking in corporate shells and in bankrupt partnerships.”³⁵ Congress specifically drafted section 1141(d)(3) to avoid such abuse,³⁶ and the chapter 11 process itself primarily exists to facilitate the “reorganization” of entities, most commonly a corporation or partnership,³⁷ rather than to serve as a tool by which

³¹ See Reilly & Ellison, *supra* note 29, at 58.

³² See *id.* (“In other words, § 1141(d)(3) prevents nonindividual debtors from conducting a chapter 7 liquidation under the guise of chapter 11, and thus obtaining a discharge that would have otherwise been unavailable in chapter 7.”); 11 U.S.C. § 1141(d)(3) (“The confirmation of a plan does not discharge a debt if the plan provides for the liquidation of all or substantially all of the property of the estate[.]”).

³³ Hope, *supra* note 10, at 52. The authors note that plans of reorganization from those who seek to cleanse public shells in order to maximize their value “test” whether regulators, such as the Commission, the United States Trustee Program, or the court itself will object based on the “Code’s anti-shell trafficking provisions.” Moreover, even if objections are made, debtors may propose amended plans, which still seek a discharge and contemplate a future reverse merger. *Id.*

³⁴ *Id.* “[Section] 108 of Internal Revenue Code of 1986, as amended, also seeks to prevent shell-recycling efforts by limiting the carryover of a debtor’s operating losses.” *Id.* at 52 n.6.

³⁵ See H.R. REP. NO. 95-595, at 384–85 (1978) as reprinted in 1978 U.S.C.C.A.N. 5963, 6340; S. REP. NO. 95-989, at 98–99 (1978), as reprinted in 1978 U.S.C.C.A.N. 5785, 5787; see also *In re Maxim Indus., Inc.*, 22 B.R. 611, 613 (Bankr. D. Mass. 1982).

³⁶ See *In re Glob. Water Techs., Inc.*, 311 B.R. 896, 901–02 (Bankr. D. Colo. 2004); Reilly & Ellison, *supra* note 29, at 24, 58 (“The legislative history of § 1141(d)(3) indicates that it was drafted to prevent trafficking in corporate shells . . .”).

³⁷ Chapter 11—Bankruptcy Basics, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy>

actors can begin to perpetrate financial schemes. The Market Regulation Problem is caused by the Bankruptcy Problem; because of the failure of the Code to provide a reliable basis for regulators to address the Bankruptcy Problem, American investors are more susceptible to having their money misappropriated through public shell trafficking. This increased vulnerability arises because fraudsters may rely on the Code to avoid regulatory disclosure requirements³⁸ that would allow investors to be more fully informed on their investment decisions.³⁹

This Comment seeks to provide an effective and novel solution to remedy both the Bankruptcy Problem and Market Regulation Problem, and thereby prevent further harm to American investors via such abuse of the chapter 11 process. Part I provides an analysis of the objections often employed by regulators to prevent public shell trafficking within the current strictures of the Code. Part I will also home in on the particular weaknesses of the most prominent current approaches, demonstrating the need for a newer and more innovative solution, the SRP Approach, to combat both Problems. Part II will discuss a common thread among many of these cases: the “desirability” of a business’s reorganization. And, finally Part III will provide an overview of the SRP Approach, outline its mechanism step-by-step, explain how the Approach leverages the existing SPAC regulatory framework, and propose amendments to the Code. The SRP Approach promises to help regulators incorporate desirable⁴⁰ business plans within plans of reorganization.

I. EFFICACY OF CURRENT REGULATORY APPROACHES TO PUBLIC SHELL TRAFFICKING

Regulators, such as the SEC⁴¹ and the United States Trustee Program (“USTP” or the “U.S. trustee”) rely on various statutory methods to combat the

/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Feb. 8, 2023).

³⁸ See *supra* text accompanying notes 17–23.

³⁹ SEC, *Microcap Stock*, *supra* note 15 (noting that information serves as an investor’s “best tool” for “investing wisely.”). See generally *Exchange Act Reporting and Registration*, SEC (Apr. 28, 2022), <https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting> (discussing reporting and registration requirements of publicly traded companies).

⁴⁰ The Author uses the term “desirable” to connote business plans that are intended to legitimately contribute to positive economic activity rather than plans that allow newly cleansed-shells to act merely as pawns in potential financial schemes.

⁴¹ OFF. OF INSPECTOR GEN., SEC., AUDIT NO. 355, BANKRUPTCY PROGRAM (2003), available at <https://www.sec.gov/oig/reportspubs/aboutoigaudit355finhtm.html> (noting that section 1109(a) of the Code grants the Commission “authority to participate in bankruptcy proceedings” including “rais[ing] and appear[ing] and be[ing] heard on any issue in a case under [the Code].”); 11 U.S.C. § 1109(a).

involvement of chapter 11 in the cleansing of such public shells. These objections are vitally important, especially for the Commission, because the Code explicitly disallows the Commission from appealing “any judgment, order, or decree entered in [a bankruptcy case].”⁴² Therefore, regulators generally only have one opportunity to “get it right;” namely, to successfully object to the confirmation of the debtor public shell’s plan of reorganization in order to prevent the cleansing of that public shell through the bankruptcy system.

This Part analyzes the most common statutory approaches used by regulators to object to public shell chapter 11 plans of reorganization and aims to assess their relative strengths and weaknesses in combatting public shell trafficking and its harmful effects on the American investing public. Subpart A will analyze section 1141(d)(3); Subpart B will analyze “good faith” under sections 1129(a)(1) and 1129(a)(3); Subpart C will analyze “feasibility” under section 1129(a)(11); Subpart D will analyze the “tax law avoidance” side of section 1129(d); and finally, Subpart E will analyze the “securities law avoidance” side of section 1129(d). This Comment will demonstrate that each approach’s weaknesses permit courts to continue to find ways to approve chapter 11 plans of reorganization, despite Congress’s “clear” intent to combat public shell trafficking.

A. *Section 1141(d)(3)*

As mentioned, section 1141(d)(3) was added to the Code to address the concern that bankruptcy debtors could market themselves as public shells cleansed of corporate debt, and acts as a corollary to section 727(a)(1).⁴³ Despite the legislative history’s documentation of Congress’s intent, courts still primarily rely on “the plain language of the statute.”⁴⁴ Section 1141(d)(3) denies a chapter 11 debtor’s discharge when the elements of section 1141(d)(3) are satisfied; namely, that:

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

⁴² 11 U.S.C. § 1109(a) (“but the Securities and Exchange Commission may not appeal from any judgement, order, or decree entered in the case”).

⁴³ See *In re Glob. Water Techs., Inc.*, 311 B.R. 896, 900–01 (Bankr. D. Colo. 2004).

⁴⁴ *Glob. Water Techs.*, 311 B.R. at 901; see also *In re Quigley Co.*, 437 B.R. 102, 141 (Bankr. S.D.N.Y. 2010) (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)) (“The starting point for the construction of any statute is the plain language of the statute itself.”).

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of [title 11] if the case were a case under chapter 7.⁴⁵

Consequently, courts impose a relatively high bar on regulators.⁴⁶ For example, in *In re Global Water Technologies*, the Commission made the requisite showing for elements (A) and (C), but the debtor's plan of reorganization was ultimately approved because the court found that the debtor would engage in business post-confirmation, failing to satisfy element (B).⁴⁷ The court found the legislative history of section 1141(d)(3) insufficient to "override the plain language of the statute," thus concluding that the regulators did not carry their burden to show that the plan violated section 1141(d)(3).⁴⁸

The *Global Water Technologies* court left open the possibility for future regulators to succeed under section 1141(d)(3).⁴⁹ The court reasoned that if the Commission had brought evidence more substantive than "allegations or speculations that the Debtor may be in a position to act, sometime in the future" to violate the congressional intent of the statute, the court could find authority to reject a similar debtor's plan of reorganization.⁵⁰ In this case, however, the Commission failed to convince the court that a fraudulent reverse merger or potential pump-and-dump scheme was on the horizon. The court reasoned that, due to the Commission's lack of evidence, it could only rely on the evidence provided by the debtor regarding its alleged intent to operate its business operations after confirmation of its plan of reorganization.⁵¹

This case underscores the burden that regulators must overcome when asserting a section 1141(d)(3) objection to a plan of reorganization in order to

⁴⁵ 11 U.S.C. § 1141(d)(3); *see also Glob. Water Techs.*, 311 B.R. at 899–900 (holding that section 1141(d)(3) denies a discharge *only* when all three elements of section 1141(d)(3) are satisfied).

⁴⁶ *See, e.g., Glob. Water Techs.*, 311 B.R. at 899–901.

⁴⁷ *Id.* (holding that the debtor had satisfied this element due to "present[ation of] a business plan in its Disclosure Statement; core personnel . . . in place to recommence the business operations; and Debtor[']s present[ation of] testimony of business relationships that will be key to the Debtor reentering the marketplace").

⁴⁸ *Id.* at 900–01 (acknowledging concern of regulators regarding trafficking in corporate shells but ultimately holding that "[t]he Court simply may not use the legislative history to override the plain language of the statute").

⁴⁹ *See id.* at 901–02.

⁵⁰ *Id.*

⁵¹ *See id.*

avoid public shell trafficking.⁵² While the court does not lay out a formula for overcoming the “plain language” of the statute despite its “clear[]” congressional intent, the court’s indication that it requires evidence more substantive than allegations reveals that regulators will have to research and garner evidence to supplement the spirit and intent of the statute.⁵³ Admittedly, this is par for the course for regulators, who often bear the burden of proof regarding such allegations of a statutory violation.⁵⁴

Section 1141(d)(3) appears best utilized as a supplementary approach either combined with other statutory sections of the Code, such as arguments based on feasibility,⁵⁵ or merely included for its legislative history.⁵⁶ However, as noted above, if used for the latter approach, the plain language of the statute will trump an argument predicated primarily upon the legislative history.⁵⁷ Such use, in practice, appears generally useful to the extent that a bankruptcy court will have a legislative history argument to fall back on as perhaps a last resort, yet will not trump an argument predicated more specifically upon the language of the statute.⁵⁸

An example of this approach—using section 1141(d)(3) supplemented by another Code section—can be seen in *In re Repurchase Corp.*⁵⁹ There, the bankruptcy court denied the debtor’s discharge under section 1141(d)(3).⁶⁰ Upon review, the district court noted that the bankruptcy court’s reasoning for rejecting the plan of reorganization under section 1141(d)(3) was primarily due

⁵² See, e.g., *id.* (describing common evidence presented by regulators, such as the Commission, which the court found to be inadequate and also called for a higher degree of evidence to prove its arguments under the statute).

⁵³ See *id.*

⁵⁴ See *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (“Section 1129(d) prohibits a court from confirming a plan if the principal purpose of the plan is ‘the avoidance of the application of section 5 of the Securities Act of 1933.’ An objecting governmental unit bears the burden of proof on avoidance.” (quoting 11 U.S.C. § 1129(d)). *But see In re Sparta Surgical Co.*, No. 06-CV-02601, 2008 WL 878948, at *4 (D. Colo. Mar. 28, 2008) (holding that section 1129(d) did not require that the filing of an objection by a governmental unit serve as the exclusive avenue for a court to consider the avoidance issue); *In re Cici’s Holdings, Inc.*, No. 21-30146, 2021 WL 819330, at *15 (Bankr. N.D. Tex. Mar. 3, 2021) (holding that if no governmental unit objected to a reorganization plan, then court could look to the plan’s terms to say the principal purpose of the plan was or was not avoidance of securities laws under section 1129(d)).

⁵⁵ See, e.g., *Repurchase Corp. v. Bodenstein (In re Repurchase Corp.)*, No. 05 C 7075, 2008 WL 4379035, at *3 (N.D. Ill. Mar. 24, 2008).

⁵⁶ See Reilly & Ellison, *supra* note 29, at 24, 58; see also *Glob. Water Techs.*, 311 B.R. at 902.

⁵⁷ See *Glob. Water Techs.*, 311 B.R. at 900–01.

⁵⁸ See *id.* at 901.

⁵⁹ See *Repurchase Corp.*, 2008 WL 4379035, at *3.

⁶⁰ See *id.*

to an “evidentiary failure.”⁶¹ But, per the district court, the rejection was actually based on lack of feasibility under section 1129(a)(11), rather than nondischargeability under section 1141(d)(3).⁶² Such error was deemed insufficient to overrule the bankruptcy court’s ruling and demonstrates the importance of supplementing motions under the legislative history of section 1141(d)(3) with other Code sections.⁶³

B. Good Faith Under Section 1129(a)(1) and Section 1129(a)(3)

Another approach relied upon by regulators is an objection to confirmation based upon sections 1129(a)(1) and 1129(a)(3).⁶⁴ The plain text of both provisions is very general and vague, theoretically providing more leeway for bankruptcy judges to deny plans of reorganization under these statutory approaches.⁶⁵ Additionally, bankruptcy courts have “an independent duty to deny confirmation [of a chapter 11 plan of reorganization] when the requirements of [section] 1129 do not exist[.]” regardless of whether there is an objection from a party in interest.⁶⁶ These two sections can be relied upon together because “good faith” tests generally focus on whether a plan of reorganization “fairly achieve[s] a result consistent with the Code.”⁶⁷

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* (quoting approvingly the bankruptcy judge’s argument that debtor needed to demonstrate that it “would engage in business both in terms of feasibility and in terms of [section] 1141(d)(3)”).

⁶⁴ See *In re Maxim Indus., Inc.*, 22 B.R. 611, 613 (Bankr. D. Mass. 1982) (“Confirmation is denied pursuant to 11 U.S.C. § 1129(a)(1) and (3).”).

⁶⁵ See 11 U.S.C. § 1129(a)(1) (“The [reorganization] plan complies with the applicable provisions of this title[.]”); 11 U.S.C. § 1129(a)(3) (“The plan has been proposed in good faith and not by any means forbidden by law.”); *Glob. Water Techs.*, 311 B.R. at 902 (“There is no hard and fast definition of good faith[; instead,] the Court must look at the totality of the circumstances in any given case.”).

⁶⁶ *Maxim*, 22 B.R. at 613 (citing *In re Econ. Cast Stone Co.*, 16 B.R. 647 (Bankr. E.D. Va. 1981)); see also *Zipkin Whiting Co. v. Barr (In re Felix)*, 825 F. App’x 365, 367 (6th Cir. 2020) (noting that despite “party in interest” not being defined in the Code, the term is used throughout the Code and the Federal Rules of Bankruptcy Procedure, and ultimately concluding that “party in interest[.]” definition depends on its contextual use; with classic examples being “a party that has an actual pecuniary interest, one who has a practical stake in the outcome, or those who will be impacted in any significant way by the matter”).

⁶⁷ See *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Block Shim Dev. Co.-Irving*, 939 F.2d 289, 292 (5th Cir. 1991); *In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (arguing that a plan of reorganization is proposed in “good faith” when “there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code” (citing, for the second quotation, *In re Texaco, Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988))); see also *Glob. Water Techs.*, 311 B.R. at 902.

In practice, however, the vagueness of the statutory text makes relying upon a good faith approach much less certain for regulators.⁶⁸ Given the open interpretation permitted by this vagueness, courts rely on a variety of factors to assess good faith based on the totality of the circumstances.⁶⁹ Such factors include the applicability of the section 1141(d)(3) elements, creditor objections to a debtor's proposed plan of reorganization, and the nature and quality of the debtor's assets as of the date on which it petitioned the bankruptcy court for plan approval.⁷⁰ Additionally, courts may consider "[a]ll facts and circumstances leading up to [the] filing of [the] petition, and debtor's conduct during [the] case" in assessing good faith.⁷¹

Some courts have gone so far as to state there is "no single test for good faith[.]" further increasing the uncertainty for regulators when making good faith objections under section 1129(a)(3).⁷² In *In re Griswold Building*, the court not only called the good faith inquiry "amorphous," but also declined to consider a good faith objection after addressing objections based on feasibility under section 1129(a)(11).⁷³

C. Feasibility Under Section 1129(a)(11)

One of the most important objections of any regulator to a public shell's chapter 11 plan of reorganization is feasibility under section 1129(a)(11).⁷⁴ Feasibility is primarily concerned with whether confirmation of a debtor's chapter 11 plan of reorganization is "not likely to be followed by the liquidation,

⁶⁸ Compare *In re Four J's Leasing & Rentals, Inc.*, 68 B.R. 278, 280 (Bankr. M.D. Fla. 1986) (dismissing the chapter 11 petition due to bad faith), with *Glob. Water Techs.*, 311 B.R. at 902 (not dismissing the chapter 11 petition having found that the regulators had not carried their burden to establish bad faith).

⁶⁹ See *In re Piece Goods Shops Co.*, 188 B.R. 778, 790 (Bankr. M.D.N.C. 1995) (citing *Block Shim Dev.*, 939 F.2d 289) ("The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan."). See generally *Leslie Fay*, 207 B.R. at 780–81 (discussing how to determine if a plan of reorganization is proposed in bad faith).

⁷⁰ See *Four J's Leasing & Rentals*, 68 B.R. at 280 (holding that plan of reorganization was "filed in bad faith . . . where sole assets of debtor were five parcels of real estate which were subject to foreclosure sale," no business entity could be rehabilitated, and "it was clear that debtor was mere corporate shell"); *Glob. Water Techs.*, 311 B.R. at 902–03.

⁷¹ *Good Faith Assessed Under Totality of Circumstances*, [Jan. 2023] 5 Bankr. Service L. Ed. (Thomson Reuters) § 45:82 [hereinafter *Good Faith*] (citing *In re Silberkraus*, 253 B.R. 890 (Bankr. C.D. Cal. 2000)).

⁷² See *In re Griswold Bldg., LLC*, 420 B.R. 666, 708 (Bankr. E.D. Mich. 2009) (citing *Trident Assocs. Ltd. P'ship v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995)).

⁷³ See *id.* But see *Good Faith*, *supra* note 71, at § 45:82 (noting that despite courts' "considerable discretion in deciding, based on totality of circumstances, whether Chapter 11 plan has been proposed in good faith . . . 'the most important feature [tends to be] inquiry into plan's fundamental fairness'" (quoting *In re Hercules Offshore, Inc.*, 565 B.R. 732 (Bankr. D. Del. 2016))).

⁷⁴ See *In re Bashas' Inc.*, 437 B.R. 874, 915–16 (Bankr. D. Ariz. 2010).

or the need for further financial reorganization.”⁷⁵ Feasibility-based arguments are particularly strong starting points for regulators to object to public shell reorganization plans because the Code places the burden on plan proponents, rather than on regulators, to demonstrate that the debtor is likely to be “feasible”⁷⁶ after it emerges.⁷⁷

Although the burden of proof falls upon the debtors themselves, the Code only requires “a relatively low threshold of proof [to] satisfy [section] 1129(a)(11).”⁷⁸ More precisely, a court must still have a “reasonable and credible basis” to determine that the reorganized debtor is “feasible,” rather than a plan which purports to show that the debtor’s success is “inevitable.”⁷⁹ Reorganization scholar Richard F. Broude has commented that feasibility, as a concept, may be more “rigorous” because it focuses more on the viability of the debtor itself rather than on the plan itself.⁸⁰ This is reflected in the Ninth Circuit’s general approach to the feasibility requirement in chapter 11 cases, even those unrelated to attempted cleansing of public shells.⁸¹ The Ninth Circuit and other courts who apply its approach have an “obligation to scrutinize reorganizing debtors and not to release them until they are shown to be a viable business[.]”⁸² which includes “prevent[ing] confirmation of visionary schemes.”⁸³

Another weakness of feasibility objections is their highly subjective nature.⁸⁴ Not only is there no exhaustive list of factors a court may consider when

⁷⁵ See 11 U.S.C. § 1129(a)(11).

⁷⁶ See *id.* (defining feasible as “not likely to later result in a liquidation or the need for further financial reorganization of the debtor”).

⁷⁷ See *In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 390 (Bankr. E.D. Mo. 2003); see also *In re M&S Assocs.*, 138 B.R. 845, 848 (Bankr. W.D. Tex. 1992) (“The bankruptcy court has an affirmative obligation to scrutinize a reorganization plan to determine whether it is feasible. In order to confirm a plan, the court must make a specific finding that the plan, as proposed, is feasible.”).

⁷⁸ *In re Trans Max Techs., Inc.*, 349 B.R. 80, 92 (Bankr. D. Nev. 2006) (quoting *Comput. Task Grp., Inc. v. Broby (In re Broby)*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)).

⁷⁹ See *id.* (first citing *Broby*, 303 B.R. at 191; and then citing *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988)).

⁸⁰ *Id.* at 95 (citing RICHARD F. BROUDE, REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE § 12.14 (2006 ed.)).

⁸¹ See *Trans Max Techs.*, 349 B.R. at 95 (citing *Pizza of Haw., Inc. v. Shakey’s, Inc. (In re Pizza of Haw.)*, 761 F.2d 1374, 1382 (9th Cir. 1984)).

⁸² See *id.*

⁸³ See *id.* (citing *Danny Thomas Props. II, L.P. v. Beal Bank, S.S.B. (In re Danny Thomas Props. II L.P.)*, 241 F.3d 959, 963 (8th Cir. 2001)) (holding that courts have a duty under the feasibility requirement to protect creditors from “visionary schemes”).

⁸⁴ See Stephen D. Zide & David Z. Braun, *Feasibility Under Section 1129(a)(11) and the Importance of Liquidity*, KRAMER LEVIN (Mar. 31, 2017), <https://www.kramerlevin.com/en/perspectives-search/feasibility->

applying this analysis, but judges may also apply whichever factors they prefer at whichever weights they determine to be correct in a given case.⁸⁵ In applying this statutory approach, regulators can point to a variety of factors that courts consider. Common factors include the debtor's prepetition "financial and operational" performance, the debtor's capital structure, the debtor's business's earning power, and the debtor's management abilities⁸⁶—but there is no authoritative list.

A particular strength of this approach for regulators, such as the Commission, is the ability to rely upon their preexisting, congressionally-delegated authority.⁸⁷ Under federal securities law, the Commission possesses expansive statutory authority in the securities markets.⁸⁸ Such authority includes suspending trading in a stock for ten days and prohibiting broker-dealers⁸⁹ from soliciting investors to trade stocks until specific prerequisites are met.⁹⁰ All trading suspensions made by the Commission are easily accessible because they are archived online and updated quarterly.⁹¹ Such disciplinary actions taken by the Commission could be reasonably included in an analysis of feasibility.⁹² Therefore, if the Commission could point to actions it has taken against a debtor's management or against other proponents of a public shell's plan, a court

under-section-1129a11-and-the-importance-of-liquidity.html (discussing the subjective nature of the 1129(a)(11) feasibility test and noting that "feasibility analysis will necessarily vary according to the facts of the case, including perceived reliability of available business and market projections").

⁸⁵ See *id.* For a sampling of the various feasibility factors that courts have applied, see *Dish Network Corp. v. DBSD N. Am., Inc.* (*In re DBSD N. Am., Inc.*), 634 F.3d 79 (2d Cir. 2011); *In re Aleris Int'l, Inc.*, 2010 WL 3492664 (Bankr. D. Del. May 13, 2010); *In re Greater Bay Hotel & Casino, Inc.*, 251 B.R. 213, 226–27 (Bankr. D.N.J. 2000).

⁸⁶ See *In re Bashas' Inc.*, 437 B.R. 874, 915 (Bankr. D. Ariz. 2010) (noting that when proving a particular fact relating to feasibility of a proposed chapter 11 plan, standard of proof is preponderance of the evidence).

⁸⁷ See generally *How the SEC Protects Investors and Maintains Market Integrity*, SEC: THE INV.'S ADVOC. (Dec. 1999), archived at <http://www.columbia.edu/~hcs14/SEC.htm>. (providing background information on the Commission and its powers and abilities to protect the investing public of the United States).

⁸⁸ See, e.g., Press Release, SEC, SEC Suspends Trading in Multiple Issuers Based on Social Media and Trading Activity (Feb. 26, 2021), <https://www.sec.gov/news/press-release/2021-35>.

⁸⁹ "Broker-dealers effect securities transactions for customers, for which they typically charge a commission or other transaction-based fee. In connection with their services, broker-dealers often provide advice and make recommendations about securities transactions and investment strategies." *XY Planning Network, LLC, v. SEC*, 963 F.3d 244, 248 (2d Cir. 2020) (noting also that broker-dealers are generally subject to a standard of care arising from FINRA rules and Commission precedent); see also *id.* (noting that broker-dealers are not fiduciaries, unlike investment advisers, who are expected to uphold a standard of "utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading clients").

⁹⁰ See Press Release, SEC Suspends Trading, *supra* note 88.

⁹¹ See *Trading Suspensions*, SEC, <https://www.sec.gov/litigation/suspensions.htm>. (last visited Jan. 2, 2023).

⁹² See generally *In re Bashas' Inc.*, 437 B.R. 874, 874 (Bankr. D. Ariz. 2010).

could potentially use its discretion to apply more weight to this factor in order to stop the approval of such a plan.

Moreover, such regulatory action could lend credibility and weight to an argument that a plan of reorganization is likely a “visionary scheme” as decried in various circuits.⁹³ It is reasonable to conclude that a filing related to a public shell is more likely to be used for potentially fraudulent schemes if those involved in the reorganization process have a history of securities regulation issues; however, it is imperative for the Commission to provide substantive evidence to demonstrate this to a court, rather than mere assertions.⁹⁴

D. *The “Tax Law Avoidance” Side of Section 1129(d)*

Another approach employed by regulators is to rely on section 1129(d) to prevent the use of public shells in tax-avoidance schemes.⁹⁵ Section 1129(d) provides that “on request of a party in interest⁹⁶ that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes” and that “the governmental unit has the burden of proof on the issue of avoidance.”⁹⁷ This approach is not without its shortcomings; namely, regulators face the specific burden of proving the principal purpose of a plan, potentially without assistance from the Internal Revenue Service (“IRS”).

A common form of such tax-avoidance schemes is demonstrated in *In re Maxim*.⁹⁸ In *Maxim*, the debtor was a public shell with no assets to its name except a potential tax loss.⁹⁹ Despite these financial conditions, this public shell

⁹³ See *Danny Thomas Props. II L.P. v. Beal Bank, S.S.B. (In re Danny Thomas Props. II L.P.)*, 241 F.3d 959, 963 (8th Cir. 2001); *Pizza of Haw., Inc. v. Shakey’s, Inc. (In re Pizza of Haw.)*, 761 F.2d 1374, 1382 (9th Cir. 1985); see also *In re Glob. Water Techs. Inc.*, 311 B.R. 896, 903-04 (Bankr. D. Colo. 2004) (noting ability of Commission “to regulate the securities law and marketplace”).

⁹⁴ See *Glob. Water Techs.*, 311 B.R. at 901 (approving a plan of reorganization because the U.S. trustee and the Commission “failed to take those fears [of public shell trafficking after discharge] beyond the realm of speculation into something more substantive”).

⁹⁵ See *In re Rath Packing Co.*, 55 B.R. 528, 528 (Bankr. N.D. Iowa 1985).

⁹⁶ See *Krys v. Off. Comm. of Unsecured Creditors (In re Refco Inc.)*, 505 F.3d 109, 117–18 (2d Cir. 2007) (noting that the Code lacks a true definition of party in interest but that the Second Circuit had defined party in interest as “one who . . . has the legal right which is sought to be enforced or is the party entitled to bring suit” and that term is “broadly interpreted, but not infinitely expansive”); 11 U.S.C. § 1109(b) (providing that “party in interest” includes “the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee”).

⁹⁷ 11 U.S.C. § 1129(d) (“or the avoidance of the application of section 5 of the Securities Act of 1933 . . .”).

⁹⁸ See *In re Maxim Indus., Inc.*, 22 B.R. 611, 612 (Bankr. D. Mass. 1982) (demonstrating that a court may involve the Internal Revenue Service in cases that appear to involve such schemes).

⁹⁹ *Id.* at 611.

debtor was proposing a plan of reorganization and claiming that after reorganization it would purchase all the stock of a solvent corporation.¹⁰⁰

It is important to first understand some background on why such a scheme would even be contemplated. The Internal Revenue Code (“IRC”) provides for a tax benefit called a net operating loss (“NOL”).¹⁰¹ NOLs result from a company having allowed deductions greater than gross income¹⁰² within a taxable year.¹⁰³ NOLs are of great use to companies because they can be used to offset taxable income in a given year.¹⁰⁴ This is accomplished through a “loss carryforward” which can potentially offset up to 80% of taxable income.¹⁰⁵ Bearing this basic tax law in mind, schemes such as that seen in *Maxim* are advantageous for those who can successfully traffic in public shells. By executing a reverse merger with a public shell with NOLs on the balance sheet, the private company can gain the tax advantages left dormant in the shell.¹⁰⁶

A key weakness is the burden that regulators must meet in objecting to plans of reorganization under the “tax law avoidance” side of section 1129(d).¹⁰⁷ Under this approach, the burden shifts to regulators to prove by a preponderance of the evidence that *the* principal purpose of the plan is the avoidance of taxes, which is a “‘limited prohibition’ with a ‘narrow scope.’”¹⁰⁸ Returning to *Maxim* as an example, the debtor in that case had its plan denied where “the only purposes presented” for the transaction discussed in the plan of reorganization “were tax motivations.”¹⁰⁹ Courts, however, have discretion to determine if a plan of reorganization’s primary purpose is for the avoidance of taxes, even if a debtor asserts that the plan had a different purpose, such as to “avoid litigation.”¹¹⁰

¹⁰⁰ *Id.*

¹⁰¹ 26 U.S.C. § 172.

¹⁰² See generally 26 U.S.C. § 61(a) (defining gross income).

¹⁰³ 26 U.S.C. § 172(c).

¹⁰⁴ *Id.*; Alicia Tuovila, *Net Operating Loss (NOL)*, INVESTOPEDIA (June 29, 2022), <https://www.investopedia.com/terms/n/netoperatingloss.asp>.

¹⁰⁵ See 26 U.S.C. § 172; Tuovila, *supra* note 104 (noting that NOLs can be carried forward indefinitely under the Tax Cuts and Jobs Act on the balance sheet as a “deferred tax asset”).

¹⁰⁶ See *In re Maxim Indus., Inc.*, 22 B.R. 611, 612 (Bankr. D. Mass. 1982). See generally 26 U.S.C. § 172.

¹⁰⁷ See *In re S. Beach Secs., Inc.*, 376 B.R. 881, 894 (Bankr. N.D. Ill. 2007).

¹⁰⁸ *Id.* (quoting 7 COLLIER ON BANKRUPTCY ¶ 1129.08 (15th ed. rev. 2007)) (“Tax avoidance must be ‘the principal purpose of the plan, not merely a principal purpose.’” (quoting *In re Rath Packing Co.*, 55 B.R. 528, 536 (Bankr. N.D. Iowa 1985)) (emphasis in original)).

¹⁰⁹ *Maxim*, 22 B.R. at 611 (Bankr. D. Mass. 1982); see also *In re S. Beach Secs., Inc.*, 376 B.R. 881, 895 (Bankr. N.D. Ill. 2007), (“The principal purpose—indeed, the only purpose—of the [debtor’s] plan is tax avoidance.”).

¹¹⁰ *S. Beach Secs.*, 376 B.R. at 895–96.

This discretion can be immensely helpful to regulators in specific cases.¹¹¹ Even if the IRS is “silent” as an objector, this does not necessarily weigh against objections to a plan of reorganization for the public shell trafficking for tax avoidance purposes.¹¹² In *In re South Beach Securities*, the court emphasized that the IRS was served with a copy of the debtor’s plan and disclosure.¹¹³ Even though the IRS did not object to the plan, the court still ruled in favor of the objectors, holding that chapter 11 was being abused for the purpose of public shell trafficking under section 1129(d), basing this on its own assessment of the debtor’s plan and the evidence presented by objectors.¹¹⁴

E. The “Securities Law Avoidance” Side of Section 1129(d)

The “securities law avoidance” side of section 1129(d) is perhaps the most underutilized objection available to regulators who seek to prevent public shell cleansing.¹¹⁵ For a successful objection under this section, regulators must prove that the “principal purpose” of such reverse mergers was “the avoidance of the application of section 5 of the Securities Act of 1933.”¹¹⁶ The Securities Act of 1933 (“Securities Act”) has two principal objectives: (1) “requir[ing] that investors receive financial and other significant information concerning securities being offered for public sale; and” (2) “prohibit[ing] deceit, misrepresentations, and other fraud in the sale of securities.”¹¹⁷ In practice, these objectives are primarily accomplished via registration.¹¹⁸ Registration requires entities wishing to sell securities on the United States capital markets to provide specific information to the Commission¹¹⁹ which will later become available to the public.¹²⁰ In practice, the satisfaction of such requirements can be time-

¹¹¹ See, e.g., *id.*; *Maxim*, 22 B.R. at 611.

¹¹² *S. Beach Secs.*, 376 B.R. at 896.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (“Only a few reported cases have analyzed § 1129(d).”).

¹¹⁶ 11 U.S.C. § 1129(d). See generally 15 U.S.C. § 77e (requiring registration statements to accompany the public issuance of securities); SEC, *The Laws That Govern the Securities Industry*, INVESTOR.GOV (2021) [hereinafter SEC, *Laws That Govern*], <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> (providing background information of Securities Act of 1933 from perspective of the Commission).

¹¹⁷ SEC, *Laws That Govern*, *supra* note 116.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (summarizing this information as “a description of the company’s properties and business; a description of the security to be offered for sale; information about the management of the company; and financial statement certified by independent contractors”).

¹²⁰ SEC, *Laws That Govern*, *supra* note 116.

consuming and expensive, putting strains on companies that wish to access the capital markets.¹²¹

The seminal case for objecting to a public shell's reorganization plan under section 1129(d) is *In re Main Street AC, Inc.*¹²² In *Main Street*, the debtor began as a classic example of a public shell; it had no tangible assets or operations, yet its stock continued to be traded on an OTC market.¹²³ The debtor's CEO and president actively attempted to solicit the debtor as a public shell tradable on the public markets, going as far as to "declar[e] that the 'AC' in Main Street AC, Inc. no longer denote[d] its athletic club heritage, but instead signific[d] 'acquisition corporation.'"¹²⁴

To prepare itself to be trafficked as a shell, Main Street became an "easy acquirer," gathering property interests while conducting limited due diligence on its acquisitions.¹²⁵ Main Street did not receive audited financials from entities it acquired, and the property interests it received were "non-performing."¹²⁶ The only method for the shell to raise capital was by selling more authorized shares to its largest investor for ten cents per share because no financial institution would lend to the shell and no investment bankers would provide equity or debt financing.¹²⁷ Moreover, in order to generate the necessary income to fund these schemes, Main Street needed to avoid registering under section 5 of the Securities Act (which it could not afford) and relied on bankruptcy exemptions, such as section 1145(a), to do so.¹²⁸

This made the court's analysis in *Main Street* relatively straightforward, providing a guide for future cases. As with the "tax law avoidance" side of section 1129(d), the governmental unit that objects to plan confirmation bears the burden of proving the "principal purpose" element by a preponderance of the evidence.¹²⁹ However, "principal purpose" under the "securities law avoidance"

¹²¹ SEC, *Reverse Mergers*, *supra* note 7 (explaining costs and burdens associated with going public via an IPO).

¹²² *In re Main St. AC, Inc.*, 234 B.R. 771, 771 (Bankr. N.D. Cal. 1999).

¹²³ *Id.* at 772–73 (pointing to debtor's disclosure statement, in which debtor itself indicated that "the ability to trade on the public stock markets, was and perhaps still is, [its] most important asset . . .").

¹²⁴ *Id.* at 773.

¹²⁵ *Id.*

¹²⁶ *Id.* (noting also that "the sole consideration for the acquisitions was promissory notes totaling \$13,655,000 with no money down," that all notes were "secured by all of the acquired assets" and that "promissory notes will be exchanged for stock in the reorganized debtor").

¹²⁷ *Id.*

¹²⁸ *Id.* at 774.

¹²⁹ *Id.* at 775.

side is strictly and narrowly interpreted to mean a plan of reorganization's *most important* purpose.¹³⁰ This narrower interpretation stems from the safe harbors, such as section 1125,¹³¹ and exemptions, such as section 1145(a)¹³² and section 364(f),¹³³ available to reorganizing debtors under chapter 11.¹³⁴ The court found that the debtor could not shoulder the costs and burdens of registration, and despite its quantity of acquisitions, the debtor's actions revealed it to be merely a vehicle for these non-performing investments, which were only acquired to enable the debtor to trade on the stock exchange.¹³⁵ Additionally, the debtor had only set aside 28% of its newly issued stock under its plan of reorganization for the payment of creditors. The regulators successfully convinced the court that the debtor's "principal purpose" within the meaning of section 1129(d) was the avoidance of the application of section 5, not the satisfaction of the claims of its creditors.¹³⁶

The court in *In re Sparta Surgical Corp.* expanded upon the analysis in *Main Street*, making the "securities law avoidance" side of section 1129(d) an even more potent weapon against plan confirmation for public shells.¹³⁷ Importantly, the district court in *Sparta Surgical* held that section 1129(d) allowed bankruptcy courts to consider the securities law avoidance issue, even without objections from regulators such as the Commission and the U.S. trustee.¹³⁸ The court also added that if individuals associated with the debtor had a history or propensity to take advantage of the Code to avoid securities law, this in itself was a factor that could weigh against approval of the plan of reorganization and

¹³⁰ See *id.* at 775–76; *In re Rath Packing Co.*, 55 B.R. 528, 536 (Bankr. N.D. Iowa 1985).

¹³¹ See generally *Understanding the Ch. 11 Acceptance Process*, LAW360 (Aug. 14, 2013, 5:02 PM), <https://www.law360.com/articles/465021/understanding-the-ch-11-acceptance-process> (discussing the section 1125(e) safe harbor provision).

¹³² See generally Corinne Ball, *Section 1145: Theory Versus Practice*, 232 N.Y. L.J., Dec. 30, 2004, available at https://www.jonesday.com/files/Publication/47a1b911-4bd0-4f0f-82e2-52b7f31f1800/Presentation/PublicationAttachment/bab7e5cb-d8cf-429e-935a-543a593eb3f7/Ball_Section1145%5B1%5D.pdf. (discussing section 1145 exemption).

¹³³ See generally *In re Standard Oil & Expl., Inc.*, 136 B.R. 141, 147–51 (Bankr. W.D. Mich. 1992) (discussing section 364(f) exemption).

¹³⁴ See *Main St.*, 234 B.R. at 775–76.

¹³⁵ See *id.* at 772–76.

¹³⁶ See *id.* at 775–76 (“In the instant case, there is no doubt that the principal purpose of Main Street’s proposed plan of reorganization is the avoidance of securities registration laws for the entities it has acquired and for those it hopes to acquire in the future”).

¹³⁷ See *In re Sparta Surgical Corp.*, No. 06-CV-02601, 2008 WL 878948, at *2–5 (D. Colo. Mar. 28, 2008).

¹³⁸ See *id.* at *4 (“While it is true that Section 1129(d) suggests that consideration of a plan’s avoidance of the securities laws must be undertaken upon request of a “governmental unit,” I do not read that provision to require the filing of an objection as the exclusive avenue for a Bankruptcy Court to consider the securities law avoidance issue.”).

good faith under section 1129(a)(3).¹³⁹ This factor is especially important because it can strengthen objections under both approaches and allows the Commission to supplement its objections using its preexisting powers as the regulator of securities markets and laws as described in the “feasibility” section above.¹⁴⁰

II. MAKING THE CASE FOR CHANGE: DEFINING “DESIRABLE”

Whereas Part I analyzed five of the current approaches that are used to address the abuse of the chapter 11 process in public shell trafficking schemes, Part II will synthesize each approach to the Bankruptcy Problem and demonstrate how, together, these approaches paint a nuanced picture of what courts have held to be a desirable¹⁴¹ business plan embedded in a plan of reorganization. Each of these current approaches shares a commonality besides an imperfect ability to overcome the Bankruptcy Problem: they are directly supported by specific Code provisions. For example, all “feasibility” objections are necessarily brought under section 1129(a)(11), and all “securities law avoidance” objections are necessarily brought under section 1129(d). These approaches also share a weakness: none is a direct statement on the merits of a shell structure, which underscores that a public shell is not an improper chapter 11 debtor per se, and the use of a reverse merger is not always inappropriate. More explicitly, the approaches cited under the Code in their current forms both permit public shells as proper chapter 11 debtors, and permit such public shell debtors to potentially obtain reverse mergers. Therefore, the plain text of the Code alone cannot solve the Market Regulation Problem or the Bankruptcy Problem absent intervention from regulatory actors directly addressing these Problems.¹⁴²

Despite this weakness, the current approaches often involve factual disputes that require bankruptcy courts to evaluate a variety of factors in their determination of which debtors—in this context, public shells—are desirable or

¹³⁹ See *id.* at *2, *4 (quoting the bankruptcy court’s expression of “reservation” over the proposed plan being submitted in “good faith” as required under 1129(a)(3) because it had concerns that the plan “could breathe life back into a public shell only to have the . . . new shell controlled by folks who have successfully used Title 11 to avoid the securities law”).

¹⁴⁰ See *id.* at *4 (D. Colo. Mar. 28, 2008); see also *In re Bashas’ Inc.*, 437 B.R. 874, 874 (Bankr. D. Ariz. 2010).

¹⁴¹ See *supra* note 40.

¹⁴² I thank my professor and advisor Jack Williams for these insights, as well as the ones in the next paragraph.

worthy of reorganization under chapter 11.¹⁴³ Courts are more likely to rule in favor of the debtor when it has a desirable business plan embedded in its proposed plan of reorganization. A debtor is more likely to be successful if it has a plan that legitimately contributes to positive economic activity rather than one that enables a newly cleansed-shell to act as a pawn in a fraudulent scheme and shirk its obligations to creditors.¹⁴⁴ For example, in *In re Global Water Technologies*, the court held that the debtor's business plan to "provide water treatment programs for cooling water systems used in light industry and HVAC applications" was desirable, especially in light of management's stated intention to operate a legitimate business "in the commercial water processing industry."¹⁴⁵

By examining the analysis performed by courts in their discussions of each Code section-based objection scrutinized in section (b), the common theme of courts seeking to approve plans of reorganization that contain desirable business plans may be demonstrated. For example, the court in *Global Water Technologies* expresses this through its analysis of the regulators' objections under section 1141(d)(3).¹⁴⁶ The court engaged in a fact-specific inquiry to determine the validity of the section 1141(d)(3) objection and whether the emerging shell would employ a desirable business plan, rather than a business plan involving public shell trafficking.¹⁴⁷ The inquiry included looking to regulators' lack of "independent evidence"—such as directly incriminating witness testimony—to support the "[d]ebtor's bad motive" to "eventually seek to become a publicly held candidate for some future stock manipulation scheme; attempt[] to bypass the public reporting protections of the securities law; [and]

¹⁴³ See, e.g., *In re Main St. AC, Inc.*, 234 B.R. 771, 776 (Bankr. N.D. Cal. 1999) (describing debtor's business plan as undesirable through court's factual analysis which revealed that "Main Street is a vehicle for the sale of nonperforming investments, taking advantage of an active stock market.").

¹⁴⁴ See, e.g., *In re Glob. Water Techs., Inc.*, 311 B.R. 896, 901–02 (Bankr. D. Colo. 2004) ("The Court does indeed deplore the evils described by S.E.C.—that the Debtor may eventually seek to become a publicly held candidate for some future stock manipulation scheme; attempting to bypass the public reporting protections of the securities law; allowing slick promoters to prey on gullible investors The best evidence that the Court has before it indicates that this is a Debtor that will operate its historical business operations after confirmation of its Plan. As a consequence, this case does not present the situation that the drafters of the statute sought to avoid—a non-operating corporate entity obtaining a discharge."); see also *id.* at 898, 900 (describing debtor's pre-petition business plan as "selling treatment systems based upon its proprietary design [using] a combination of proprietary technology supplied by third party manufacturers and more commonly available components" and also noting that the "Debtor's CEO and 68% shareholder, George Kast, has been in the commercial water processing industry for 20 years and with the Debtor for over 10 years.").

¹⁴⁵ See *id.* at 898, 900 ("In short, the Debtor has a plan to recommence its business and customers desire the services it can provide.").

¹⁴⁶ See *id.* at 899–902.

¹⁴⁷ See *id.* at 901–02.

allow[] slick promoters to prey on gullible investors.”¹⁴⁸ Thus, the court was convinced that the debtor in fact had a desirable business plan because the regulators were unable to prove that the shell’s discharge of debt would lead to the above-decried public shell trafficking and that the debtor would return to its pre-petition business plan.¹⁴⁹

The inquiries under section 1129(a)(1) and section 1129(a)(3) regarding “good faith,” and under section 1129(a)(11) regarding “feasibility,” also rely on a similar underlying inquiry: Is the emerging debtor’s embedded business plan a desirable one? *In re Four J’s Leasing & Rentals, Inc.* provides the clearest example of this regarding “bad faith.”¹⁵⁰ In dismissing the plan of reorganization of the debtor, the court made clear that its rejection was predicated on the lack of a desirable business plan embedded within the debtor’s plan of reorganization, pointing out that the debtor “was nothing more than a bare corporate shell without any justification for its existence” and had no legitimate business goal that could lead to it “sustain[ing] a plan of reorganization or . . . mak[ing] adequate protection payments.”¹⁵¹

Looking to the statutory language alone, feasibility objections are clearly predicated upon a factual inquiry into the desirability of the business plan embedded within a plan of reorganization.¹⁵² The language of section 1129(a)(11) specifically homes in on whether “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan.”¹⁵³ Although this does not mean that a debtor has to be “inevitabl[y]” successful,¹⁵⁴ courts, including the Ninth Circuit, in applying their feasibility analysis apply a more rigorous standard in determining whether a plan is desirable by not “releas[ing] [debtors] until they are shown to be . . . viable business[es].”¹⁵⁵ For example, in *In re Trans Max Technologies*, the court held that the business plan embedded within the debtor’s plan of reorganization lacked feasibility because the debtor’s business plan involved developing a flying car in three years based

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 902 (Bankr. D. Colo. 2004).

¹⁵⁰ *See In re Four J’s Leasing & Rentals, Inc.*, 68 B.R. 278, 280 (Bankr. M.D. Fla. 1986).

¹⁵¹ *Id.* (“[T]here is no viable business to rehabilitate.”).

¹⁵² *See supra* note 71 and accompanying text; *see also* 11 U.S.C. § 1129(a)(11).

¹⁵³ 11 U.S.C. § 1129(a)(11).

¹⁵⁴ *See In re Trans Max Techs., Inc.*, 349 B.R. 80, 92 (Bankr. D. Nev. 2006) (quoting Comput. Task Grp., Inc. v. Brotby (*In re Brotby*), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)).

¹⁵⁵ *See id.* at 95 (citing *Pizza of Haw., Inc. v. Shakey’s, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985)).

on not-yet-developed technology, while also not incurring a single “cent of debt.”¹⁵⁶

Both the “tax law avoidance” side and the “securities law avoidance” side of section 1129(d) involve factual inquiries into the desirability of the embedded business plan within a plan of reorganization. Similar to section 1129(a)(11), the statutory language itself is helpful in revealing this: section 1129(d) provides that “on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933.”¹⁵⁷ It is clear that plans that seek to avoid either tax laws or securities laws do not serve desirable purposes in the view of both the courts and the Code.¹⁵⁸ For example, in *In re Maxim*, the debtor seeking a reorganization and a subsequent reverse merger had only an NOL listed on its balance sheet, indicating to the court that the only purpose of its reorganization was to abuse the Code to gain a tax advantage.¹⁵⁹ This potential tax scheme was not deemed to be a desirable business plan.¹⁶⁰

What unites all the bankruptcy courts is their concern for providing “desirable” business with relief through the bankruptcy system. That is the one consistent lodestar guiding the courts’ decisions when faced with the problem of public shell trafficking. Any proposed solution to that problem has to face the question of “desirability” head-on. Taking the lead from the bankruptcy courts, the Author has sketched out the contours of a solution that would enable the continuing viability of businesses through bankruptcy. Instead of throwing a business—or even the *shell* of a business—away, the SRP approach seeks to

¹⁵⁶ *Id.* (citation omitted); *see also id.* at 95 n.14 (“Or, put in a more colloquial way, the court does not think that investors will respond here the way investors did when they saw Professor Brainard’s flying car in the movie *Flubber*: ‘When they saw us flying, they couldn’t wait to write the check.’” (quoting *FLUBBER* (Walt Disney Pictures 1997))).

¹⁵⁷ 11 U.S.C. § 1129(d); *see generally* 15 U.S.C. § 77e (requiring registration statements to accompany the public issuance of securities).

¹⁵⁸ *See, e.g., In re S. Beach Secs., Inc.*, 376 B.R. 881, 894–95 (Bankr. N.D. Ill. 2007) (denying debtor’s plan of reorganization under 1129(d) because “[t]he principal purpose—indeed, the only purpose—of the [debtor’s] plan is tax avoidance.”).

¹⁵⁹ *See In re Maxim Indus., Inc.*, 22 B.R. 611, 611 (Bankr. D. Mass. 1982).

¹⁶⁰ *Id.* (“The purpose of a Chapter 11 reorganization proceeding is to enable a business to rehabilitate itself and become a profitable going concern. Chapter 11 was not designed to permit the use of shell corporations for the personal benefit of the officers of the corporation.”); *cf. In re Glob. Water Techs., Inc.*, 311 B.R. 896, 901–02 (Bankr. D. Colo. 2004) (denying regulator’s motion opposing plan confirmation because the court found that debtor intended to relaunch its legitimate prepetition business).

recapture the economic value latent in these shells in order to leverage that value for the good of the American investor.

III. PROPOSED SOLUTION: THE SHELL REPROCESSING APPROACH

Part III provides the Author's proffered solution to public shell trafficking: the Shell Reprocessing Approach ("SRP Approach," or the "Approach"). Subpart A will provide an overview of the Approach. Subpart B will describe the Approach's mechanism step by step. Subpart C will explain how the Approach leverages the existing SPAC regulatory framework, and Subpart D will suggest modifications to the Code that are necessary to optimize the Approach's implementation.

A. *Overview of the SRP Approach*

The SRP Approach is this Comment's proposed solution for the problem of public shell trafficking in chapter 11. Instead of regulators' standard approach that removes public shells from the bankruptcy process wholesale via objection, lack of plan confirmation, and eventual dismissal of the public shell's case, the SRP Approach suggests that regulators could propose the "reprocessing" of these shells through bankruptcy and use them for more desirable purposes, as described in Part II.¹⁶¹ For example, instead of only preventing a fraudster from abusing the chapter 11 process by denying its plan of reorganization, the Commission could file an alternative plan that would permit it to "reprocess" the public shell's ticker¹⁶² or stock symbol, thereby using the shell's access to the U.S. capital markets to potentially benefit the American economy. In simple terms, the public shell would cease to exist as a public shell on the OTC as it did prior to the chapter 11 proceeding and instead would emerge from the chapter 11 process as a new entity, distinct from its previous identity. Under the SRP Approach, management and control of the shell would be transferred to known or regulated actors, who could be held accountable by regulators and the American investing public. Thus, shells emerging from the SRP Approach would align with the aspirations of the courts—to promote desirable business plans and to produce a beneficial impact on the American economy—while simultaneously preventing public shells from persisting in the U.S. capital markets; a double benefit for regulators. The process described in the SRP

¹⁶¹ See *supra* Part II.

¹⁶² See Adam Hayes, *Stock Symbol (Ticker Symbol): Abbreviation for a Company's Stock*, INVESTOPEDIA (Jan. 5, 2023), <https://www.investopedia.com/terms/s/stocksymbol.asp> ("A stock symbol or ticker is a unique series of letters assigned to a security for trading purposes.").

Approach still permits regulators to operate within the existing structures of the Code by proposing alternative plans of confirmation during the chapter 11 process for those debtors likely engaging in public shell trafficking. This mechanism, and the steps within the Code, will be expanded upon in Subpart B below.

The SRP Approach therefore provides regulators with an opportunity to solve both the Bankruptcy Problem and the Market Regulation Problem. The confirmation of plans proposed under the Approach would not only limit the benefits of reorganization to the desirable businesses that both the courts and the Code deem worthy, but would also lead to increased market regulation that is in line with a key goal of the Commission: protecting American investors from fraud.

As described above, there are several features of a public shell that make it valuable, but perhaps the most valuable aspect of a public shell is the shell's ticker.¹⁶³ Typically when a company wishes to be listed on an exchange in the United States' capital markets it files a form S-1 with the Commission identifying its desired ticker.¹⁶⁴ These tickers are relatively static, but change when particular material events, such as mergers,¹⁶⁵ occur regarding the company represented by the ticker. This allows investors to recognize that they are investing in a new or modified company. The ticker is the coveted treasure that fraudsters seek to abuse in microcap schemes because, once obtained through a reverse merger, the stock's ticker represents the microcap's access to the United States' capital markets—access that was obtained without satisfying the expensive, lengthy, and revealing requirements associated with a traditional IPO.¹⁶⁶ Tickers obtained through the above-decried reverse mergers are

¹⁶³ See, e.g., SEC, *Microcap Stock*, *supra* note 15 (discussing how “fraudsters” perpetrate schemes through microcap companies to profit off of American investors and noting inherent risks for investors when investing in microcap stocks due to lack of information).

¹⁶⁴ Emily Norris, *Why Did My Stock's Ticker Change?*, INVESTOPEDIA (Sept. 13, 2022), <https://www.investopedia.com/ask/answers/why-did-my-stocks-ticker-change/>.

¹⁶⁵ *Id.* (describing reasons why tickers change, including companies merging with other companies and companies delisting from their exchanges).

¹⁶⁶ See Hayes, *supra* note 162 (“A stock symbol or ticker is a unique series of letters assigned to a security for trading purposes”); see also SEC, *Reverse Mergers*, *supra* note 7 (discussing legal and accounting fees typically being lower for a reverse merger than for an IPO; highlighting that there are “no registration requirements under the Securities Act of 1933 as there would be for an IPO[,]” which potentially increases value of companies who “go public” via a reverse merger); Hope, *supra* note 10, at 52 (“In a reverse merger, a private company merges with the debtor’s publicly listed shell to take control of the shell and obtain immediate access to the capital markets, avoiding the usual registration and disclosure requirements and the expense involved with a public offering.”); Gardner, *supra* note 2, at 63 (discussing inherent risk to investors who choose to invest in

particularly worrisome since the specific letters making up the tickers do not have to be changed once a company is acquired via reverse merger,¹⁶⁷ allowing fraudsters to hide behind the targeted shell company and its name. A company's name is information—but the company as it exists after the reverse merger resembles the previous company in name only. This deceptive practice harms the unsophisticated investor, who may assume that the company is what the ticker says it is.

The SRP Approach seeks to solve both the Bankruptcy Problem and the Market Regulation Problem by essentially doing the opposite of what the fraudsters want to accomplish by abusing chapter 11. It relies on the Code to facilitate the creation of legitimate investments that are regulated by the Commission. The court can work in conjunction with regulators to turn public shells into cleansed operating entities that are to be placed in the hands of specifically approved investors, who are regulated and picked by the Commission itself. This ensures that cleansed shells and their key assets—their ticker and its associated access to capital markets—are not permitted to fall into the hands of bad actors.

B. Defining the SRP Approach Step-by-Step

Bankruptcy courts, working alongside regulators, can implement the reprocessing mechanism contemplated by the Approach within the strictures of the current Code. The first step would be for the Commission to rely on its status as a party in interest under the Code.¹⁶⁸ Parties in interest have several powers at their disposal to respond to proposed chapter 11 plans of reorganization that could be utilized to initiate the application of the Approach. Such powers include moving for the appointment of a chapter 11 trustee under section 1104.¹⁶⁹ Under

reverse merger companies including difficulty to investors in determining whether a company went public through a reverse merger).

¹⁶⁷ See Norris, *supra* note 164 (describing reasons why tickers change including companies merging with other companies and companies delisting from their exchanges).

¹⁶⁸ 11 U.S.C. § 1109(a) (“The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter.”).

¹⁶⁹ 11 U.S.C. § 1104. Specifically, section 1104(e) provides that

The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

Id.

section 1104, if regulators successfully move to appoint a new trustee, that trustee would have duties that would include filing a proposed plan of reorganization—which could potentially implement the Approach.¹⁷⁰ Such a plan would call for installing vetted sponsors, discussed below, as new managers of the debtor; instructing the debtor to satisfy heightened disclosure requirements, such as the filing of Form S-1; and pursuing the discharge originally sought by the fraudsters—but with trusted management at the helm.¹⁷¹

Additionally—perhaps as a backup mechanism in case a chapter 11 trustee cannot be appointed—the Commission's status as a party in interest permits them to move for the termination of the debtor's exclusive plan filing period provided for in section 1121.¹⁷² If this motion is successful, section 1121 and the regulators' status as parties in interest would allow the regulators themselves to submit chapter 11 plans implementing the Approach.

The second step would be to address any objections that the debtor's management or other creditors raise to such plans. If the Commission or a trustee were able to file an alternative plan, there are at least two objections that such a plan would need to overcome. First, the Commission would need to overcome the “strong presumption” against appointing a chapter 11 trustee or other new management; such an appointment is considered an “extraordinary remedy”¹⁷³ and the default under chapter 11 is for the debtor to remain in possession.¹⁷⁴ The plan proponent would bear the burden of proof—most often by clear and convincing evidence—to overcome such an objection by demonstrating that the proposed chapter 11 trustee is better suited to manage the shell and the reorganization process than the debtor itself.¹⁷⁵ Second, the shell debtor's management will most likely oppose an alternative plan on feasibility grounds under section 1129(a)(11). Because the shell company *is* a shell without significant operations or assets, at least two different feasibility objections are foreseeable: (1) the debtor's inability to sustain specific payments due to the debtor's cash flow limitations,¹⁷⁶ or (2) the restrictions placed upon the debtor

¹⁷⁰ 11 U.S.C. §§ 1104, 1106(a)(5).

¹⁷¹ See discussion *infra* Part III.C, especially text accompanying notes 210–15.

¹⁷² 11 U.S.C. § 1121(d)(1).

¹⁷³ Off. Comm. of Unsecured Creditors of Cybergene Corp. *ex rel.* Cybergene Corp. v. Chinery, 330 F.3d 548, 548 (3d Cir. 2003) (citing *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1991)).

¹⁷⁴ See 11 U.S.C. §§ 1107, 1108.

¹⁷⁵ See *Adams v. Marwil (In re Bayou Grp., LLC)*, 564 F.3d 541, 541 (2d Cir. 2009) (citing 11 U.S.C. § 1104). *But see Tradex Corp. v. Morse*, 339 B.R. 823, 832 (D. Mass. 2006) (citing 11 U.S.C. § 1104) (applying minority standard of proof of preponderance of the evidence).

¹⁷⁶ See, e.g., *Canal Place, LP v. Aetna Life Ins. Co.*, 921 F.2d 569, 579 (5th Cir. 1991).

would not allow for the debtor's management to effectively and profitably run the business.¹⁷⁷

If the Commission or its allies are able to successfully get an SRP-style plan of reorganization approved, the debtor shell will obtain a discharge—but this cleansed entity would be out of the hands of the fraudsters who originally sought to use it for nefarious ends. Special Purpose Acquisition Companies (“SPACs”) therefore represent a potentially ideal opportunity for regulators and courts to achieve such a result and thereby solve both the Bankruptcy Problems and the Market Regulation Problem.

C. *The Role of SPACs in the SRP Approach*

SPACs and their sponsors offer a potential opportunity for regulators to embed desirable business plans within their own submitted plans of reorganization under the Approach to solve both Problems. The SPAC regulation process solves key issues associated with the Market Regulation Problem, namely that (1) public shells are often run by managers seeking to become complicit in bad faith business practices,¹⁷⁸ and (2) investors may be tricked into investing in trafficked public shells due to a lack of proper information or disclosures.¹⁷⁹

SPACs, commonly referred to as “blank check companies,”¹⁸⁰ are essentially shell companies that generally go public via a traditional IPO and can be used as a vehicle for several transactions.¹⁸¹ Pertinently, one of the most common

¹⁷⁷ See, e.g., *In re* U.S. Truck Co., Inc., 800 F.2d 581, 588–89 (6th Cir. 1986).

¹⁷⁸ See, e.g., *In re* Sparta Surgical Corp., No. 06-CV-02601, 2008 WL 878948, at *2, *4 (D. Colo. Mar. 28, 2008) (quoting the bankruptcy court's expression of “reservation” over the proposed plan being submitted in “good faith” as required under 1129(a)(3) because it had concerns that the plan “could breathe life back into a public shell only to have the . . . new shell controlled by folks who have successfully used Title 11 to avoid the securities law”).

¹⁷⁹ See *supra* notes 24–26 and accompanying text.

¹⁸⁰ Julie Young, *Special Purpose Acquisition Company (SPAC) Explained: Examples and Risks*, INVESTOPEDIA (Oct. 16, 2021), <https://www.investopedia.com/terms/s/spac.asp>. SPACs are called “blank check companies” because their founders do not disclose the SPAC's acquisition target during the SPAC's IPO process in order to avoid disclosure requirements. *Id.* This means that investors “typically have no idea about the company in which they will ultimately be investing.” *Special Purpose Acquisition Companies*, NEXTIAS, <https://www.nextias.com/current-affairs/23-04-2022/special-purpose-acquisition-companies-spacs> (last visited Jan. 2, 2023).

¹⁸¹ Off. of Inv. Educ. & Advoc., *What You Need to Know About SPACs—Updated Investor Bulletin*, SEC: INV. ALERTS & BULLS. (May 25, 2021) [hereinafter SEC, *What You Need to Know About SPACs*], <https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin>.

transactions in which SPACs are used is to transition a company from privately held to publicly traded.¹⁸²

The Commission describes a SPAC as existing in two stages.¹⁸³ The first stage is the “shell company stage,” which is when the SPAC is operating as a mere corporate shell, potentially even without a disclosed acquisition target.¹⁸⁴ In this stage, the SPAC can exist as a shell devoid of any business function or assets “other than cash and limited investments, including proceeds from the IPO,” for over one year.¹⁸⁵ During this stage, neither the SPAC nor its sponsors¹⁸⁶ is obligated to pursue any specific acquisition target or industry.¹⁸⁷

The second stage is “at the time of and following the initial business combination[,]” which is when the SPAC “acquires or merges with an operating company.”¹⁸⁸ To enter this stage, the SPAC’s sponsors first identify an “initial business combination” opportunity.¹⁸⁹ After this identification, the SPAC’s management then begins negotiating with an operating company.¹⁹⁰ If these negotiations lead to a deal in which the SPAC wishes to acquire the identified company, the businesses combine.¹⁹¹ Unsurprisingly, this business combination is often structured as a reverse merger.¹⁹² The newly combined business then operates as a publicly traded company “carr[ying] on the target operating company’s business.”¹⁹³

The SPAC obtains the necessary funds to enact the aforementioned business combination from its IPO.¹⁹⁴ As opposed to a traditional IPO, which most commonly involves the offering of common stock, SPACs offer investors a unique opportunity to purchase “units.”¹⁹⁵ Units are comprised of both “common

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* (defining “sponsors” as “the management team that formed the SPAC”).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ John Tishler, *SPACs 2.0: New SPAC Rules Changes Approved by NASDAQ and NYSE AMEX and New Market Features Make SPACs a More Attractive Investment Vehicle in 2011*, MARTINDALE (Mar. 23, 2011), https://www.martindale.com/legal-news/article_sheppard-mullin-richter-hampton-llp_1258884.htm.

¹⁹⁵ *Id.*

stock as well as discounted warrants.”¹⁹⁶ “A warrant is a contract that gives the holder the right to purchase from the company a certain number of additional shares of common stock in the future at a certain price.”¹⁹⁷ These discounted warrants have the potential to be particularly valuable for those investing in SPACs because purchasers of the units may sell the warrants immediately after a SPAC’s IPO to get speedy returns.¹⁹⁸

A key advantage SPACs offer to SPAC founders, also known as sponsors,¹⁹⁹ is that they can avoid the costly, time-intensive IPO requirements,²⁰⁰ similar to the benefits sought by unregulated fraudsters who engage in public shell trafficking. This raises the natural question of what differentiates SPACs from public shells ripe for abuse. First, the way SPACs are structured protects the money paid by investors during a SPAC’s IPO.²⁰¹ Such IPO-related funds “are held in trust until the SPAC uses the funds to consummate an acquisition.”²⁰² This means that if the SPAC cannot make an acquisition desirable to its shareholders within a specified period of time, then the SPAC will “liquidate[] and distribute[] the funds held in the trust account to its common stockholders.”²⁰³ This ensures that investors get their money back if the SPAC’s intended use of the funds is not aligned with their preferences.²⁰⁴ Second, the Commission has approved rules promulgated by major United States stock exchanges, including NASDAQ and AMEX, which help protect investors.²⁰⁵ Such rules include allowing investors who oppose a SPAC’s proposed business combination to get their money back from the SPAC’s trust fund through a process called a tender offer.²⁰⁶ The Commission further protects SPAC investors by regulating such tender offers under “Rule 13e-4 and Regulation 14E under the Securities and Exchange Act of 1934,” which includes “filing tender offer documents with the SEC.”²⁰⁷ The tighter controls placed on managers and

¹⁹⁶ *Id.*

¹⁹⁷ SEC, *What You Need to Know About SPACs*, *supra* note 181.

¹⁹⁸ Tishler, *supra* note 194.

¹⁹⁹ Young, *supra* note 180. Sponsors are founders of SPACs who are “commonly” investors and who bring their “expertise in a particular industry or business” to the enterprise. *Id.*

²⁰⁰ *See generally id.* (explaining the advantages of SPACs versus other traditional investments).

²⁰¹ Tishler, *supra* note 194.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See also id.* (noting that “[h]istorically, SPACs have had to obtain a super-majority vote of stockholders prior to consummating any acquisition and offer stockholders that vote against the acquisition the ability to redeem their shares of common stock in exchange for their pro rata share of the trust funds.”).

²⁰⁵ *See id.* (discussing stock exchange rules).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

sponsors represent another key difference between SPACs and public shells. Every SPAC must comply with specific registration requirements, which include providing public data to the Commission about its management and generating a potential prospectus about a targeted initial business combination.²⁰⁸ Hence, unlike public shell managers who seek to shirk disclosure requirements, SPAC managers must abide by and provide specific disclosures to the Commission.²⁰⁹ Moreover, the SEC has signaled willingness to implement even stricter management disclosure requirements, which would require even more information to be disclosed about sponsors.²¹⁰

Even though a SPAC is subject to enhanced regulatory protections, it retains its fundamental structural similarity to the public shell, making it an ideal vehicle to “reprocess” public shells in bankruptcy. There are two issues where the suitability of the SPAC for this purpose become especially clear.

The first issue—bad actor public shell management—may be solved by relying on approved SPAC sponsors to serve as replacement managers for the potentially fraud-prone current management of public shells. The main mechanism by which this can be accomplished via the Code is through the Commission submitting its own plan of reorganization as a chapter 11 party in interest, as discussed above in Part III.B.²¹¹ The SPAC approval process could provide an alternative database of potential managers for the debtor public shell: a list of investors who have been approved for the creation of a SPAC.²¹²

²⁰⁸ SEC, *What You Need to Know About SPACs*, *supra* note 181.

²⁰⁹ *See id.* (discussing specific SPAC disclosure requirements including SPAC IPO Prospectus); *see also* Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), <https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/> (explaining SPAC IPO registration requirements, including a comparison to traditional IPO requirements).

²¹⁰ Press Release, SEC, SEC Proposes Rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies, Shell Companies, and Projections (Mar. 30, 2022), <https://www.sec.gov/news/press-release/2022-56> (describing selections of the Commission’s recently proposed rules to “enhance disclosure and investor protection in initial public offerings by special purpose acquisition companies (SPACs) and in business combination transactions involving shell companies, such as SPACs, and private operating companies.”).

²¹¹ *See supra* Part III.B.

²¹² SPACs generate some materials which end up in the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) database; this information could form the basis for an alternative database of pre-vetted managers. *See* SEC, *What You Need to Know About SPACs*, *supra* note 181. (“If the SPAC seeks shareholder approval of the initial business combination, it will provide shareholders with a proxy statement in advance of the shareholder vote. In cases where the SPAC does not solicit the approval of public shareholders, . . . it will provide shareholders with an information statement in advance of the completion of the initial business combination . . . You can review a SPAC’s proxy, information or tender offer statement in the SEC’s EDGAR database.”).

Although SPACs do not go through as rigorous a registration process as a traditional company going public through an IPO,²¹³ a SPAC still has specific registration requirements, which include providing particular information to the Commission about its sponsors.²¹⁴ Furthermore, as discussed above, the Commission proposed new rules in early 2022, which seek to increase the disclosure requirements of SPACs by requiring more information about a SPAC's sponsors, which decreases the information disparity between a SPAC IPO and a traditional IPO.²¹⁵

An additional advantage of SPAC sponsors in this context is the trend that SPACs will select sponsors who are considered “high-profile” or well-known to investors to inspire trust and investment from the American public.²¹⁶ Such high-profile sponsors include corporate entities, such as Kohlberg Kravis and Roberts,²¹⁷ a private equity firm which manages over \$496 billion in assets,²¹⁸ and Bill Ackman, the famous hedge fund manager.²¹⁹ This trend helps illustrate the increasing trustworthiness of SPAC sponsors because high-profile investors are more subject to public scrutiny,²²⁰ which not only inspires increased confidence in investors but also adds an additional constraint on such high-profile individuals because their public reputations are linked to SPACs.

The second issue—investors being deceived due to a lack of accurate information—can be addressed through the disclosure requirements that the Commission imposes on SPACs.²²¹ For example, similar to any company wishing to be publicly traded on any United States Exchange, SPACs must file

²¹³ See Layne & Lenahan, *supra* note 209 (explaining SPAC IPO registration requirements, including a comparison to traditional IPO requirements).

²¹⁴ SEC, *What You Need to Know About SPACs*, *supra* note 181.

²¹⁵ Press Release, SEC Proposes Rules to Enhance Disclosure, *supra* note 210.

²¹⁶ Young, *supra* note 180 (discussing famous SPAC sponsors and investors Chamath Palihapitiya and Bill Ackman).

²¹⁷ *KKR-backed SPAC Raises \$1.2 Billion in U.S. IPO*, REUTERS (Mar. 17, 2021), <https://www.reuters.com/article/us-kkr-acquisition-i-ipo/kkr-backed-spac-raises-1-2-billion-in-u-s-ipo-idUSKBN2B9116>.

²¹⁸ *About KKR*, <https://www.krest.reit/overview/about-kkr/> (last visited Feb. 9, 2023).

²¹⁹ Young, *supra* note 180.

²²⁰ See Benjamin Bennet, René M. Stultz, & Zexi Wang, *Does Greater Public Scrutiny Hurt a Firm's Performance?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2023), <https://corpgov.law.harvard.edu/2023/02/06/does-greater-public-scrutiny-hurt-a-firms-performance/> (“Public scrutiny . . . can lead to more monitoring of firms.”).

²²¹ See Layne & Lenahan, *supra* note 209.

the Form S-1²²²—also known as a registration statement—with the Commission.²²³ Companies who file Form S-1 have to disclose a myriad of information, including historical financial results and business risk factors, which are either nonexistent or minimal for SPACs.²²⁴ However, under current regulations, when a SPAC begins its second stage of “acquir[ing] or merg[ing] with an operating company,”²²⁵ the SPAC is required to provide additional disclosures concerning the target business, similar to a traditional IPO, which include audited financial statements.²²⁶ These rounds of disclosures involve several filings with the Commission that provide important financial information to investors to help them make more educated and informed investing decisions.²²⁷ Moreover, the aforementioned proposed rule update from the Commission seeks to further increase these disclosures to help them align with the more rigorous requirements of traditional IPOs, which should further protect SPAC investors.²²⁸

In summary, the SRP Approach is this: The SEC, instead of objecting to the debtor’s plan, moves either to install a chapter 11 trustee, or to end the debtor’s exclusivity period for filing a plan. In either case, the SEC is involved in the filing of a non-debtor plan of reorganization. The provisions of that plan would incorporate the existing SPAC regulatory framework in order to effectively take the debtor shell out of the hands of bad actors, thereby increasing transparency for the American investor, and preserving the economic value in its ticker. The next steps of the SRP Approach take place outside of the bankruptcy system. As discussed above, the Commission already has preexisting disclosure requirements for SPACs,²²⁹ and can ensure that the entity is subject to these requirements through terms of its reorganization plan. Once subject to these requirements, the entity could be regulated by the SEC just like any other SPAC. This is what it means to reprocess a public shell.

²²² See Will Kenton, *SEC Form S-1: What It Is, How to File It or Amend It*, INVESTOPEDIA (Mar. 21, 2022), <https://www.investopedia.com/terms/s/sec-form-s-1.asp> (providing general information on Form S-1, including filing requirements).

²²³ See Layne & Lenahan, *supra* note 209.

²²⁴ See *id.*

²²⁵ SEC, *What You Need to Know About SPACs*, *supra* note 181.

²²⁶ See Layne & Lenahan, *supra* note 209.

²²⁷ See *id.*

²²⁸ See Press Release, SEC Proposes Rules to Enhance Disclosure, *supra* note 210.

²²⁹ Layne & Lenahan, *supra* note 209.

D. Congressional Intervention to Solve the Bankruptcy Problem

The SRP Approach suffers from one key issue that can be resolved by congressional modification of the Code and can prevent the Bankruptcy Problem. Currently the section 1104 appointment of a trustee is currently considered an “‘extraordinary remedy’ and there is a ‘strong presumption’ in the debtor remaining in possession.”²³⁰ This means that currently the appointment of a trustee is a “rarity[,]” even though under section 1104(e) the U.S. trustee is required to “move for [the] appointment of a trustee if there are reasonable grounds to believe that any of the parties in control of the debtor ‘participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or the debtor’s financial reporting.’”²³¹ Modification of this Code section to include reference to section 1141(d)(3) and its specific legislative history decrying public shell trafficking²³² could serve to supplement the ability of regulators, such as the Commission and the USTP, to move for appointment of a trustee and the eventual submission of a plan under the Approach. Furthermore, modification of the Code with clear congressional intent could convince courts to appoint trustees more often in specific instances in which regulators are able to present evidence that chapter 11 bankruptcy is being used for the purpose of public shell trafficking.²³³ Finally, assuming a chapter 11 trustee is appointed pursuant to section 1104, specific language added by Congress to that section could ensure that, where public shell trafficking is the reason for the appointment, the chapter 11 trustee would be required to consult with the SEC when drafting the plan of reorganization for the debtor.

CONCLUSION

Today, regulators continue to fight the good fight against the public shell traffickers abusing chapter 11. But in an age of increasing misinformation, the threat of unsuspecting investors being wooed by false siren songs of the potential gains on a “pumped up” penny stock is heightened now more than ever. The current regulatory approaches to public shell trafficking are inadequate to

²³⁰ See *supra* notes 173–74 and accompanying text.

²³¹ *Chapter 11—Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited Feb. 8, 2023) (citing 11 U.S.C. § 1104(e)). Implemented GA’s recommendation.

²³² See H.R. REP. NO. 95-595, at 384–85 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6340; S. REP. NO. 95-989, at 98–99 (1978), as reprinted in 1978 U.S.C.C.A.N. 5785, 5793.

²³³ *But see In re Glob. Water Techs., Inc.*, 311 B.R. 896, 901 (Bankr. D. Colo. 2004); see also *In re Quigley Co.*, 437 B.R. 102, 141 (Bankr. S.D.N.Y. 2010) (citing to *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)) (“The starting point for the construction of any statute is the plain language of the statute itself.”).

prevent fraudulent schemes from stripping hard-working Americans of their hard-earned dollars. Courts continue to approve discharges of debt for public shells ripe to be implicated in reverse merger and pump-and-dump schemes.

In seeking to provide an alternative and potentially more effective avenue, the Author's Shell Reprocessing Approach allows regulators, and the investing public as a whole, to benefit by transforming shells from tools of fraud to sound investments. The SRP Approach is a first step in stopping public shell traffickers dead in their tracks.

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