LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

TUESDAY, NOVEMBER 29, 2022

PERSPECTIVE

DR. T ON SECURITIES

Curing a potential delisting

By Sara L. Terheggen

Shutterstock

The volatile stock market has been a tumultuous time for investors, but it has also been a struggle for companies, especially small or mid-cap companies whose stock prices hover near the minimum bid price requirement of the stock exchanges. When companies experience severely depressed stock prices that fall below the minimum bid price of $1.00, they are at risk of being delisted. Reverse stock splits are commonly used to avoid a delisting. Implementing a reverse stock split will increase stock price and allow a company to maintain or regain compliance. However, reverse stock splits are generally seen as a sign that a company is in trouble and should be used as a last resort. While the focus here is on Nasdaq, similar rules (although slightly different) apply to companies listed on the New York Stock Exchange.

Listing Requirements – Minimum Bid Price

Nasdaq requires listed companies to meet the Minimum Bid Price continued listing requirement of $1.00. To the extent a company's stock price falls below $1.00 and remains below this minimum price for a period of 30 consecutive business days, Nasdaq will send a deficiency notice and provide the company with 180 calendar days from such notification to achieve compliance.

Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the 180-day window (unless Nasdaq exercises its discretion to extend this 10-day period). If a company is not deemed in compliance before the expiration of the 180-day compliance period, it will be given an additional 180-day period provided that on the 180th day of the first compliance period it meets the other requirements for continued listing based on the company's most recent public filings and market information and notifies Nasdaq of its intent to cure the deficiency.

Nasdaq can use their discretion to require you to satisfy the minimum bid price for a period of more than 10 days but generally no more than 20 consecutive business days before they will issue a letter indicating the company has regained compliance. Typically, this situation occurs if Nasdaq sees the margin of compliance is very slim, there is low trading volume, the market maker bids and the overall trend of the security (up/down). If several of these factors are weighing against you, Nasdaq may extend the required minimum 10 consecutive business days and require you to meet those additional days as determined by them before they will issue a notice indicating you regained compliance.

Reverse Stock Split: A Technique to Cure a Potential Delisting

Because a company will lose their opportunity for a compliance period if they have executed one or more reverse stock splits in the prior two-year period with a cumulative ratio of 250 shares or more to one, it is recommended that a company take advantage of both

Sara L. Terheggen, *Ph.D., J.D. ("Dr. T") is the founder and managing director of The NBD Group, Inc. Dr. T has advised on transactions with an aggregate value of more than $110 billion, including more than 20 IPOs.*

of the 180-day compliance periods to try to regain compliance prior to implementing a reverse stock split. In the event the second 180-day compliance period is nearing an end and a company has still failed to regain compliance, a reverse stock split could be considered and ample time should be allotted to ensure the process can be completed before the second 180-day compliance period tolls. If a reverse stock split is pursued, the mechanics are straightforward, but stockholder consent is required. Below is a high-level outline of the chain of events to execute a reverse stock split.

Documentation

The first thing a company will do is prepare an amendment to their certificate of incorporation, which includes (i) a description of the reverse stock split, (ii) changes to the company's authorized share capital and (iii) a description of how fractional shares resulting from the split will be treated. A company will also prepare and file a preliminary proxy statement at least 10 calendar days before it plans to distribute proxy materials to stockholders for approval of the proposed amendment to the certificate of incorporation.

Approvals: Board, Stockholders and SEC

A reverse stock split must be approved by the board and the stockholders. First, the board will approve the amendment to the certificate of incorporation. Resolutions of the board can provide that the company may abandon the reverse stock split and amendment even after approval by the stockholders without further action by the stockholders. This is good to add just in case the stock price recovers, and a reverse split becomes unnecessary. The proxy statement that is filed is the document required to bring the reverse stock split to a vote of the shareholders. While the SEC does not "approve" the proxy statement, they do reserve the right to review it. If the SEC notifies a company that it will not review the proxy statement, a definitive proxy statement is then filed. If the SEC notifies a company that it will review the proxy statement, then the company will typically delay its distribution of the proxy statement until it has addressed all SEC comments. This would in turn also delay the effectuation of a reverse stock split.

Execution

Once stockholder approval is obtained, the board must decide when to implement the reverse stock split and set the split ratios. Once the ratio is set, the certificate of amendment can be completed and filed. A reverse stock split becomes effective on the filing date unless otherwise provided in the amendment (must be a date within 90 days of the filing date). It is important for a company to coordinate with the transfer agent during this process to effectuate the reverse but also to obtain a new CUSIP. Throughout the reverse stock split process, one or more press releases and reports on Form 8-K may need to be filed depending on the process followed. The timeline for completing a reverse stock split will take anywhere from 30-60 days depending upon whether the SEC reviews the preliminary proxy.

Facing a Potential Delisting is not the End

Many companies experience moments of potential delisting because of the minimum bid price requirement. The exchange is generous with the back-to-back compliance periods – giving companies ample time to see if their stock can recover and if it cannot, allows for enough time to execute a reverse stock split to regain compliance. The best thing a company can do once they have failed to meet the minimum bid price requirement is to outline a plan for completing a reverse stock split if the stock price does not recover and be prepared to execute the plan at least sixty days prior to the end of their second compliance period.