MORSE

Helping Smaller Public Companies Navigate the NASDAQ Delisting Process

By:Joseph C. Marrow
December 07, 2011

The dramatic market shifts in recent years have resulted in a significant number of public companies facing delisting from NASDAQ. This trend is especially prevalent with smaller public companies. As a result of reductions in the market price of their publicly-traded stock, many such companies are finding that they no longer meet the minimum bid price requirements for continued listing on NASDAQ.

In order to maintain a listing on the NASDAQ Capital Market (the "NCM") companies must comply with a number of qualitative and quantitative listing requirements. In our experience, the continued listing requirement that smaller public companies most often have trouble meeting is the requirement to maintain a minimum bid price of at least $1.00 per share. If a company fails to meet this listing requirement for a period of thirty consecutive trading days NASDAQ will initiate its delisting process.

To assist smaller reporting companies in navigating NASDAQ's delisting process, the following discussion outlines what to expect in the event a company fails to meet the minimum bid price requirement and provides guidance to companies facing delisting from the NCM.

The Delisting Process

1. Deficiency Notice:

If a company listed on the NCM fails to meet the minimum bid price requirement for a period of thirty consecutive trading days, it can expect to receive a deficiency notice from NASDAQ. The deficiency notice will identify the listing deficiency and will provide that the company has a period of 180 calendar days during which to regain compliance with the continued listing requirements. In order to regain compliance (if the deficiency is based on the failure to maintain the minimum bid price), the company's closing bid price must be at or above $1.00 for a minimum of ten consecutive trading days during such period.

Within four business days of the receipt of the deficiency notice, a company must publicly disclose the receipt of the deficiency notice by filing an 8-K with the SEC. The 8-K must disclose the date the deficiency notice was received, describe the listing requirement the company has failed to satisfy and detail any action it plans to take in response to such deficiency notice.

NASDAQ maintains a list of non-compliant companies which is updated daily and posted at www.nasdaq.com.

2. Additional Compliance Period for NCM Listed Companies:

If a company listed on the NCM is unable to regain compliance with the $1.00 minimum bid price requirement within the initial 180 day period, it will receive a second 180 day grace period provided the company (a) has at least $1 million in market value of shares held by non-affiliates and satisfies all of the other listing requirements for initial listing on the NCM (except the bid price requirement) and (b) notifies NASDAQ of its intent to cure the listing deficiency. If it does not appear to NASDAQ that it is possible for the company to cure the deficiency, this second grace period will not be granted.

3. Delisting Letter:

If a company is unable to regain compliance within the grace period (including the additional grace period, if available), NASDAQ will issue a delisting letter. Within four business days of the receipt of the delisting letter, the company must publicly announce the receipt of the letter by filing an 8-K with the SEC.

4. Hearing:

Upon receipt of a delisting letter the company will have seven days to submit a written request for a hearing before the NASDAQ Listing Qualifications Panel. The timely submission of this request will stay the delisting process pending the decision of the panel. At a hearing the company will be required to present a plan to regain compliance with the continued listing standards. The plan of compliance should describe the manner in which the company will regain and maintain compliance with the NASDAQ continued listing standards. NASDAQ has stated that the plan should include the implementation of a reverse stock split in the near term – no later than 180 days after receipt of the delisting letter. In determining whether to provide the company with the opportunity to implement its plan of compliance, the panel may consider other factors such as the company's fundamental financial strengths and weaknesses, the overall market, the company's historical bid price and impending corporate actions. Fees for a hearing range up to $5,000.

5. Failure to Request a Hearing:

If the company does not request a hearing, upon the expiration of the seven day period NASDAQ will suspend trading of the security and proceed with the delisting.

6. Additional Appeals:

If the panel determines to proceed with the delisting, the company will have fifteen days to appeal the panel's decision to the NASDAQ Listing and Hearing Review Council. It may also appeal any NASDAQ decision in federal court. These actions will not stay the delisting process.

Options for Companies Facing Delisting

A company facing delisting from NASDAQ due to the failure to meet the minimum bid price requirement has a few options to consider.

First, to maintain its NASDAQ listing a company may consider implementing a reverse stock split. A one-for-two reverse split will immediately double the trading price of the stock. However, there is no guarantee that the price will remain at this level or that a reverse split will provide a long-term solution. In fact, share prices often creep down after a reverse split. In addition, implementing a reverse split requires stockholder approval and advance planning.

A second option for companies wishing to maintain a NASDAQ listing is to implement a plan to repurchase a portion of the outstanding stock. A reduction in the number of outstanding shares may increase the per share price of the stock, but there is no guarantee that a stock repurchase will result in any significant increase in the stock price in either the short or long-term. A stock repurchase plan does not make sense for every smaller reporting company. The mechanics of implementing a stock repurchase plan are complex, and a repurchase plan requires that the company have sufficient cash available to fund the repurchase and may conflict with certain of the company's contractual obligations. In addition, companies with low trading volumes may find it nearly impossible to repurchase enough shares to make a significant difference in the stock price.

If a company determines that delisting from NASDAQ is likely, it should consider the benefits offered by alternate trading platforms. A common alternative is the Over-the-Counter Bulletin Board or OTCBB. The OTCBB is an interdealer electronic quotation system that displays real-time quotes for many equity securities that are not listed on NASDAQ or a national securities exchange. Companies quoted on the OTCBB must be current with all required SEC filings but are not required to comply with market capitalization, minimum share price, or corporate governance requirements.

A new option for companies delisted from NASDAQ may be on the horizon. NASDAQ is developing the BX Venture Market specifically to provide a trading platform for small companies who do not meet NASDAQ's continued listing requirements. NASDAQ has stated that the BX Venture Market will have lower financial listing standards than the major national securities exchanges, but will have similar corporate governance requirements. NASDAQ is expected to launch the BX Venture Market in 2012.

For additional information on this topic, please do not hesitate to contact **Joseph C. Marrow**.