

# UPLISTING MONTHLY

## Uplisting – More Than Meets The Eye

by Joseph Lucosky, Esq.

Trading on a national securities exchange is often the goal of most microcap companies. Unless a company qualifies to engage in an initial public offering directly onto a national exchange, reaching this goal is accomplished by uplisting. This is the process of moving a company from having its stock quoted on the OTC Capital Markets to trading on a national exchange, such as the NASDAQ or NYSE. The potential benefits of uplisting include increased marketplace attention, improved liquidity for existing shareholders and potential investors, ease of depositing shares, and improved availability of capital (including the possibility of doing an S-3 shelf takedown quickly following the uplist), among many other benefits.



As is the case in many things in life, how you begin often dictates how you end up. The first step is the most important. For a microcap company to succeed in this process, the company must engage a competent team of professionals – each of whom have a track-record of successfully bringing OTC companies to the next level. Typically, a competent attorney should quarterback the process – outlining the macro plan and keeping the team of professionals on track to meet each of the company’s micro objectives throughout the process.

The three main initial listing requirements are well-known: **minimum share price, number of shareholders, and stockholders’ equity**; however, there are often misconceptions as to the simplicity of these requirements. Upon committing to beginning the uplisting process, the company and its advisors should outline the timeline and requirements, keeping in mind possible contingencies, both generally and with respect to the three main uplisting criteria discussed in detail below.

### I. Minimum Share Price

Regarding the minimum share price, most people believe that a company simply needs to obtain a \$3 or \$4 share price prior to uplisting and that the company can simply complete a reverse stock split if its shares are below that price. In reality, however, the first question is the length of time the minimum share price needs to be sustained prior to uplisting. Is it five business days? Thirty of sixty trading days? Does the stock need to trade on every trading day? The answer to the timing question depends upon whether the company seeking to uplist is the product of a reverse merger. If so, how long ago did the reverse merger take place?

For the reverse split, the complexity arises because a reverse split raises numerous legal and business issues. Does the company have the legal authority to consummate the reverse split (common versus preferred votes)? From a business standpoint, there could be objections from existing shareholders concerned with a depressed stock price following such an action. When should the company effect the reverse split and how large of a split does the company need in light of possible price reductions in the market? Finally, as discussed below, reverse splits could negatively impact the company’s ability to comply with other listing requirements (there are very subtle yet inter-related correlations between doing a reverse split and other listing requirements that are often overlooked). Organic growth does not carry the dilution inherent to a reverse split, however, it brings uncertainty with respect to the timeframe in which (and whether) the threshold will be met.

### II. Number of Shareholders

A common misconception about the minimum number of shareholders required is that the company only needs to have 300 shareholders prior to uplisting. This seemingly straightforward requirement still leaves a number of questions unanswered: Do they have to be round lot shareholders? Do shares held in street name count or must they be held by shareholders of record? If the company is doing a reverse split, will the company still have the required number of shareholders following the split? If the company is doing a registered offering in connection with the uplist and it does not meet the shareholder requirement prior to the offering, can the company’s underwriter sell securities to enough small shareholders to meet this requirement? What is the minimum amount allowed by the NASDAQ or NYSE?

What about the value of the shares outstanding? The misconception is that there is just a \$15 million value requirement for the publicly held shares. Who counts as an affiliate? Has the company made a profit during the last year? What about a profit in two of the last three years? If so, the requirement could be \$5 million instead of \$15 million. These are all complicated and nuanced questions that need to be settled early on in the process.

### III. Stockholders' Equity

Far too often we hear that the \$5 million stockholders' equity requirement is simply a matter of converting liabilities into equity to increase the stockholders' equity on the balance sheet. However, is the company's debt widely held? Is erasing these liabilities as simple as a 3(a)(9) exchange? A tender offer? One or both? Who will coordinate those efforts and at what cost? Again, has the company made a profit during the last year? If not, what about Nasdaq's informal rule regarding burn rate which could require subtracting certain amounts from your stockholders' equity calculations?

The other initial listing requirements, while understandably rarely the focus of uplisting candidates, cannot be ignored: Will 1 million shares still be held by non-affiliates following the reverse split? Does the company have the required number of independent directors and does it have the needed Board of Director's committees in place? If not, does the company have enough D&O insurance and indemnification policies to attract quality directors? Does your D&O policy carve out securities offerings?

## The Way Forward: Seek Legal Counsel From A Proven Leader... Not Just A Lawyer

In summary, to uplist, companies need to have a clear path to meeting the seemingly straightforward yet often tricky requirements of a proven share price of at least \$3.00, at least 300 shareholders with a large enough float value, and sufficient stockholders' equity, among many other criteria.

In addition, prior to even beginning the uplisting process, there are even more legal, practical, and strategic questions that must be answered in addition to the above, including, for example, might the company qualify for an "organic" uplisting? Can the company afford to enter the "quiet period" associated with the registration process? Does the company have enough capital to complete the uplist process and, if not, must the company hire an investment bank to access bridge financing? Following a successful uplist, will the company have enough operating capital so that it does not need to do another private or public offering for at least 1 year? Each of these questions must be discussed with company counsel to properly outline a plan for achieving the company's uplist objectives.

A competent attorney should quarterback the process – outlining the macro plan and keeping the team of professionals on track to meet each of the company's micro objectives throughout the process. To be sure you are leaving as little to chance as possible when you are thinking of starting the uplisting process, please email the corporate and securities professionals at **Lucosky Brookman LLP** at [info@lucbro.com](mailto:info@lucbro.com) for a free analysis of your company's ability to uplist, a detailed action timeline, and a master strategic plan.

## LUCOSKY BROOKMAN, LLP

Lucosky Brookman is a corporate finance and securities law firm with offices in New York and New Jersey, representing both domestic and international clients in sophisticated corporate and securities transactions, mergers and acquisitions, secured and unsecured lending transactions, PIPEs, commercial and securities litigation, insurance coverage and defense, real estate, and general corporate matters.

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Joseph M. Lucosky is the founding and managing partner of Lucosky Brookman LLP and oversees both the transactional and litigation departments. Mr. Lucosky has a broad multidisciplinary practice that includes extensive experience in litigation and dispute resolution, regulatory investigations (including FINRA and SEC matters), negotiated mergers and acquisitions (including reverse mergers); domestic and cross-border investments/joint ventures; the representation of private equity; venture capital and other private investment funds; securities offerings; private and public financings (including secured and unsecured lending); bankruptcy transactions; real estate matters; and various other types of commercial transactions. In addition, he counsels corporate boards, board committees (including special committees) as well as being a personal adviser to many entrepreneurs, business leaders and corporate executives. He has counseled clients on significant litigation, regulatory and transactional matters across a number of industry sectors.

