

**SECURITIES AND EXCHANGE COMMISSION**  
**Release No. 34-54240**

**July 31, 2006**

**In the Matter of the Application of  
The Nasdaq Stock Market, Inc. and The NASDAQ Stock Market LLC  
For Section 12(b) Registration On Behalf Of Certain Issuers**

**I. Introduction**

On January 13, 2006, the Commission approved the application of the Nasdaq Stock Market, Inc. (“Nasdaq”) to register one of its subsidiaries, The NASDAQ Stock Market LLC (“Nasdaq Exchange”), as a national securities exchange.<sup>1</sup> Currently, companies listed on Nasdaq have one or more classes of equity securities registered under Section 12(g)<sup>2</sup> of the Securities Exchange Act of 1934 (“Exchange Act”),<sup>3</sup> registered under Section 12(b) of the Exchange Act<sup>4</sup> for listing on another national securities exchange, or exempt from registration pursuant to Section 12(g)(2)(B) or 12(g)(2)(G) of the Exchange Act<sup>5</sup> or Rule 12g3-2(b) promulgated under the Exchange Act<sup>6</sup> as permitted under NASD Rules 4310 and 4320. Under Section 12(a) of the Exchange Act,<sup>7</sup> brokers and dealers are prohibited from effecting transactions in a security on a national securities exchange unless it has been registered under Section 12(b) of the Exchange Act.

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<sup>1</sup> See Release No. 34-53128 (January 13, 2006) [71 FR 3550].

<sup>2</sup> 15 U.S.C. 78l(g).

<sup>3</sup> 15 U.S.C. 78a et seq.

<sup>4</sup> 15 U.S.C. 78l(b).

<sup>5</sup> 15 U.S.C. 78l(g)(2)(B) or 78l(g)(2)(G).

<sup>6</sup> 17 CFR 240.12g3-2(b).

<sup>7</sup> 15 U.S.C. 78l(a).

Accordingly, absent relief, Nasdaq's transition to the Nasdaq Exchange would require each of the companies currently listing securities on either the Nasdaq Global Market or Nasdaq Capital Market to individually register their Nasdaq-listed securities under Section 12(b) of the Exchange Act before the Nasdaq Exchange commences operations. This process would require each affected company to file a registration statement with the Commission or other appropriate regulatory agency.<sup>8</sup> The Nasdaq Exchange would then be required to certify to the Commission and other regulators that, with respect to each registration statement, the company's securities are approved for listing and registration on the Nasdaq Exchange.<sup>9</sup> The registration would become effective 30 days after the Commission's receipt of certification from the Nasdaq Exchange or within such shorter period of time as the Commission may determine.<sup>10</sup>

On behalf of its listed companies, Nasdaq and the Nasdaq Exchange have asked for relief with respect to this registration process, asserting that it would place an unnecessary cost and administrative burden on the listed companies, investors, the agencies that regulate the listed companies, and Nasdaq and the Nasdaq Exchange, and would not be in the public interest. With respect to the vast majority of its listed securities, Nasdaq and the Nasdaq Exchange assert that information that would be elicited by registration has already been required to be publicly disclosed. Since the vast majority of Nasdaq-listed companies already have registered their securities under

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<sup>8</sup> Section 12(i) of the Exchange Act requires filings relating to certain financial institutions to be made with the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision. 15 U.S.C. 781(i).

<sup>9</sup> See Section 12(d) of the Exchange Act [15 U.S.C. 781(d)].

<sup>10</sup> Id.

Section 12 of the Exchange Act<sup>11</sup> or have been required to file detailed public information with the Commission,<sup>12</sup> the resulting duplicative disclosure would not significantly benefit the marketplace or investors.

To ameliorate the cost and administrative burden resulting from the filing of individual Exchange Act registration statements that would otherwise be required, Nasdaq and the Nasdaq Exchange have submitted a letter, dated July 31, 2006, on behalf of certain Nasdaq-listed issuers (the “Issuers”) to the Commission requesting that this letter serve as the single application for registration with respect to the listed securities of these Issuers, as well as the Nasdaq Exchange’s certification of such application (the “Nasdaq Application”).<sup>13</sup> Nasdaq and the Nasdaq Exchange have made a similar request of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.<sup>14</sup> The Nasdaq Application is provided as an attachment to this Order.

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<sup>11</sup> These companies have filed registration statements pursuant to Section 12(g) or, in a limited number of cases, Section 12(b) of the Exchange Act. A separate Section 12(b) registration statement is required with respect to each national securities exchange on which a particular class of security is listed. Accordingly, a new registration statement on 12(b) will be required by the time the Nasdaq Exchange becomes operational, even as to those Nasdaq-listed companies that have previously filed 12(b) registration statements.

<sup>12</sup> Those Nasdaq-listed companies which have registered under the Investment Company Act of 1940 (the “1940 Act”) have filed registration statements with the Commission under the 1940 Act and have been required to make periodic filings under the 1940 Act identical in form to those required of investment companies that have registered their securities under Section 12(b) of the Exchange Act. These investment companies are exempt from registration under Section 12(g)(2)(B) of the Exchange Act.

<sup>13</sup> See Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006). For certain of its listed issuers whose securities are not currently required to be registered under the Exchange Act, Nasdaq and the Nasdaq Exchange have requested additional time for these securities to become registered under Section 12(b). That portion of the request is being addressed in a separate Order by the Commission. See Exchange Act Release No. 34-54241 (July 31, 2006).

<sup>14</sup> We understand these agencies will consider the request for relief with respect to the companies they oversee pursuant to Section 12(i) of the Exchange Act. We further understand that the Comptroller of the Currency does not currently oversee any affected company pursuant to Section 12(i) of the Exchange Act.

## **II. Statutory Standards**

Section 12(a) of the Exchange Act makes it unlawful for an exchange member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective with respect to that security on the exchange in accordance with the provisions of Section 12 and the rules and regulations promulgated under Section 12. Exchange Act Section 12(b) and related rules prescribe the form and content of the application that may be used to register a security on a national exchange. However, Section 12(c)<sup>15</sup> permits the Commission to require alternative information in lieu of the informational requirements of Section 12(b) if, in the judgment of the Commission, some or all of the information required under Section 12(b) is “inapplicable to any specified class or classes of issuers” and the substitute information is of comparable character as the Commission may deem applicable to such class of issuers.

Section 12(d) provides that the registration of a security under the Exchange Act becomes effective 30 days after the Commission’s receipt of certification from the national securities exchange that the security has been approved for listing and registration on the exchange, or within such shorter period of time as the Commission may determine.

## **III. Discussion of NASD Rule 4130 and Opt-out Process**

To provide notice of its plan to seek the requested relief on behalf of the Issuers and to assure sufficient authority for Nasdaq and the Nasdaq Exchange to submit the Nasdaq Application to the Commission, the NASD proposed a new rule specifically permitting Nasdaq and the Nasdaq Exchange to take the contemplated action. The

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<sup>15</sup> 15 U.S.C. 78j(c).

Commission approved this rule on April 6, 2006.<sup>16</sup> NASD Rule 4130 explicitly authorizes Nasdaq and the Nasdaq Exchange, in connection with Nasdaq's transition to a national securities exchange, to file an application with the Commission and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision to register each Issuer's listed securities under Section 12(b) of the Exchange Act and request any appropriate regulatory relief from the provisions of Section 12, unless the Issuer informs Nasdaq, pursuant to procedures set forth by Nasdaq, that it does not want to be included in this process.<sup>17</sup>

Accordingly, prior to filing the Nasdaq Application, Nasdaq provided notice of its intention to seek the requested relief.<sup>18</sup> In addition to general notice through the proposed rule filing, Nasdaq notified each Issuer, individually, of its plans to submit the request and allowed any Issuer that did not wish its securities to be included in the request to opt-out of the process.<sup>19</sup> At the expiration of the notice period, no Issuers had elected to opt-out of the requested relief.<sup>20</sup>

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<sup>16</sup> See Release No. 34-53606 (April 6, 2006) [71 FR 18790].

<sup>17</sup> The text of Rule 4130 reads as follows:

In connection with The Nasdaq Exchange commencing operations as a national securities exchange, each issuer authorizes Nasdaq and the Nasdaq Exchange to file an application to register under Section 12(b) of the Exchange Act any class of the issuer's securities that is listed on Nasdaq on the day immediately preceding the day the Nasdaq Exchange commences such operations; provided, however, that this provision shall not be applicable to any security that the issuer informs Nasdaq, pursuant to procedures set forth by Nasdaq, should not be so registered. The application to register under Section 12(b) of the Exchange Act will be filed with the Commission or, for those securities subject to Section 12(i) of the Exchange Act, with the appropriate banking regulator specified in Section 12(i). The authorization in this paragraph includes allowing Nasdaq and the Nasdaq Exchange to request any appropriate regulatory relief from the provisions of Section 12.

<sup>18</sup> See Nasdaq Application at 3 and Release No. 34-53362 (February 24, 2006) [71 FR 10734].

<sup>19</sup> See Nasdaq Application at 3. Notice was provided through a May 15, 2006 bulletin to Issuers and a May 17, 2006 press release requesting Issuers notify Nasdaq by May 30, 2006 if they did not wish to participate. The result of an Issuer choosing to opt-out is that the Issuer's securities will

#### IV. Findings

Pursuant to Section 12(c) of the Exchange Act, in the judgment of the Commission, based on the Nasdaq Application for Section 12(b) registration and the representations made therein and in light of the recent registration of the Nasdaq Exchange, the Commission will consider the Nasdaq Application in lieu of the information otherwise required under Section 12(b) of the Exchange Act. In reaching its determination, the Commission considered the following:

- (i) In recognition of the unique circumstances discussed above in Section I and in the Nasdaq Application, particularly the fact that the information to be elicited by registration under Section 12 of the Exchange Act or, in the case of investment companies registered under the 1940 Act, its substantial equivalent, already has been required to be made public by the Issuers, it is the judgment of the Commission that the Nasdaq Application is sufficient for purposes of registration of the securities listed in Exhibit A to the Nasdaq Application (the “Issuer Securities”);<sup>21</sup>
- (ii) Nasdaq and the Nasdaq Exchange have represented to the Commission in the Nasdaq Application that, as of the date of this Order:
  - a. They have conducted the opt-out process as described, particularly with respect to notice of the Nasdaq Application to all Issuers, generally, pursuant to NASD Rule 4130 and a press release and, specifically, to each Issuer through the opt-out option,
  - b. That authorization has not been withheld by any Issuer with respect to any of the Issuer Securities, and

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be ineligible to be listed and traded on the Nasdaq Exchange as of its operational date; such Issuer would instead trade on the pink sheets or OTC Bulletin Board unless it files an individual Section 12(b) registration statement on Form 8-A or Form 10, as applicable, in connection with listing on the Nasdaq Exchange or another national securities exchange, and such registration statement subsequently becomes effective.

<sup>20</sup> See Exhibit B to the Nasdaq Application.

<sup>21</sup> According to the Nasdaq Application, the Issuer Securities represent securities: (i) that are listed on Nasdaq immediately preceding the date that the Nasdaq Exchange begins operations; (ii) that are currently either registered under Section 12(b) or 12(g) of the Exchange Act or exempt from Section 12(g) registration pursuant to Section 12(g)(2)(B) or 12(g)(2)(G) of the Exchange Act or Exchange Act Rule 12g3-2(b); and (iii) that have not been requested by the issuer to be opted-out of the Nasdaq Application pursuant to the procedures established by Nasdaq as a result of NASD Rule 4130.

- c. The Issuer Securities listed in Exhibit A to the Nasdaq Application accurately reflect the securities that are to be the subject of its request;
- (iii) The Nasdaq Exchange has certified to the Commission in the Nasdaq Application that, as of the date of this Order, all of the Issuer Securities have been approved by the Nasdaq Exchange for listing and registration in accordance with the requirements of Section 12(d) of the Exchange Act; and
- (iv) In accordance with Section 12(d) and Rule 12d1-2(a)<sup>22</sup> of the Exchange Act, Nasdaq and the Nasdaq Exchange have requested in writing the acceleration of the effective date of the Nasdaq Application for Section 12(b) registration of the Issuer Securities on the date of this Order.

## V. Conclusion

The Commission, having reviewed the Nasdaq Application for Section 12(b) registration of the Issuer Securities and in reliance on the representations and certifications made by Nasdaq and the Nasdaq Exchange in the Nasdaq Application, has concluded that it is appropriate, in the public interest and consistent with the protection of investors, to approve the Nasdaq Application and grant the request by Nasdaq and the Nasdaq Exchange for registration of the Issuer Securities under Section 12(b).

The Commission recognizes that the use of its authority under Section 12(c) of the Exchange Act to consider information other than that prescribed by Section 12(b) for purposes of Section 12 registration is a variation on the customary registration process. As noted, however, the Commission believes the special circumstances of Nasdaq's transition to a national securities exchange and the existing public disclosure requirements applicable to the Issuer Securities constitute a unique situation meriting the application of Section 12(c).

With respect to the findings and conclusions in this Order, it is also to be expressly understood that the Commission has not made, and this Order does not

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<sup>22</sup> 17 CFR 240.12d1-2(a).

constitute, any determination regarding the Issuers' compliance with the listing standards of the Nasdaq Exchange or of any other exchange, securities association or facility on which the Issuers' securities trade, or any Commission rule or regulation, other than the Section 12(b) registration requirements as they relate to Nasdaq's transition to a national securities exchange. In addition, the Commission has not made, and this Order does not constitute, any determination regarding the regulation or oversight of Nasdaq or the Nasdaq Exchange with respect to the Issuer Securities, other than the Section 12(b) registration requirements as they relate to Nasdaq's transition to a national securities exchange.

Accordingly, IT IS ORDERED that the Nasdaq Application for Section 12(b) registration of the Issuer Securities, made by Nasdaq and the Nasdaq Exchange on behalf of the Issuers pursuant to NASD Rule 4130, be, and hereby is, granted, effective as of July 31, 2006.

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS and NAZARETH).

Nancy M. Morris  
Secretary