SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56176]

July 31, 2007

Order Granting The NASDAQ Stock Market LLC's Application for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934

I. Introduction

On June 28, 2007, the Commission received an application from The NASDAQ Stock Market LLC ("Nasdaq") for an exemption pursuant to Section 36[1] of the Securities Exchange Act of 1934 (the "Exchange Act"),[2] in accordance with the procedures set forth in Exchange Act Rule 0-12.[3] Nasdaq has requested exemptive relief from Section 12(a) of the Exchange Act[4] to permit certain qualified members, brokers, and dealers to trade certain securities that are not registered under Section 12[5] of the Exchange Act on The PORTAL® Market (the "PORTAL Market"). On April 25, 2007, the Commission issued a notice of a proposed rule change submitted by Nasdaq and a proposed exemption order that would reestablish an indicative quotation and trading system for securities that are designated by the PORTAL Market as PORTAL securities under Nasdaq's rules.[6] This order grants Nasdaq's application for an exemption.

In conjunction with its request for an exemption, Nasdaq also proposed a rule change, SR-NASDAQ-2006-065, to establish rules for the trading of securities pursuant to Securities Act of

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[1] 15 U.S.C. 78mm. Section 36 of the Exchange Act gives the Commission the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.

[2] 15 U.S.C. 78a et seq.

[3] 17 CFR 240.0-12. Exchange Act Rule 0-12 sets forth procedures for filing applications for orders for exemptive relief pursuant to Section 36.

[4] 15 U.S.C. 78l(a).

[5] 15 U.S.C. 78l(b).

[6] Release No. 34-55669 (April 25, 2007) (SR-NASDAQ-2006-065).

1933 Rule 144A[7] on the PORTAL Market.[8] The Commission, via authority delegated to the Division of Market Regulation, is also approving that rule change.[9]

II. Order Granting The NASDAQ Stock Market LLC's Application for an Exemption Pursuant to Section 36 of the Exchange Act

Section 12(a) of the Exchange Act provides in relevant part that "[i]t shall be unlawful for any 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 as to such security for such exchange."[10] Section 12(b) of the Exchange Act[11] dictates how the registration referred to in Section 12(a) must be accomplished. Accordingly, all equity and debt securities that are not "exempted securities" or are not otherwise exempt from Exchange Act registration must be registered by the issuer under the Exchange Act before a member, broker, or dealer may trade that class of securities on a national securities exchange.

Brokers or dealers who trade securities (other than certain equity securities) otherwise than on a national securities exchange may trade securities regardless of whether the issuer registered that class of securities under the Exchange Act. Exchange Act registration for securities traded other than on a national securities exchange is required only for certain equity securities. In

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[7] 17 CFR 230.144A.

[8] See Release No. 34-55669 (April 25, 2007).

[9] See Release No. 34-56172 (July 31, 2007).

[10] 15 U.S.C. 78l(a).

[11] 15 U.S.C. 78l(b).

particular, Section 12(g) of the Exchange Act,[12] the only Exchange Act provision other than Section 12(a) to impose an affirmative Exchange Act registration requirement, requires the registration of equity securities only.

As the Commission has stated in the past, we believe that steps should be taken to achieve a more efficient institutional resale market for unregistered securities.[13] In 1990, in an attempt to reach this goal, we approved a series of rules similar to those before us today.[14] Despite those efforts, the vast majority of secondary trading of Rule 144A securities by institutional investors continued to occur in the OTC market, and those rules were partially withdrawn by the NASD.[15]

We view the exemptive relief requested by Nasdaq as another step to improve the institutional resale markets for unregistered securities. The Commission believes that granting Nasdaq's application will serve the public interest by providing a central (but not an exclusive) location for the quotation, trade negotiation, and trade reporting of Rule 144A securities.[16] Currently, unlike on a national securities exchange, broker-dealers may trade securities pursuant to Rule 144A in the OTC market, but there is no established framework for quotation or trade reporting in Rule 144A securities. This exemption order is designed to allow increased liquidity in the institutional resale market without discouraging participation by holders of the securities of

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[12] 15 U.S.C. 78l(g). Section 12(g)(1) of the Exchange Act and Rule 12g-1 [17 CFR 240.12g-1] promulgated thereunder require an issuer to register a class of equity securities if the issuer of the securities, at the end of its fiscal year, has more than $10,000,000 in total assets and a class of equity securities held by 500 or more recordholders.

[13] Release No. 34-27956 (April 27, 1990) 55 FR 18781 (May 4, 1990).

[14] Id.

[15] Release No. 34-44042 (March 6, 2001) 66 FR 14969 (March 14, 2001).

[16] As indicated in Nasdaq's application, trade reporting in PORTAL Market-designated securities currently is submitted to the NASD's OTC Reporting Facility and trade reports in most PORTAL Market-designated debt securities are submitted to the Trade Reporting and Comparison Entry Service ("TRACE") system. Under the proposed rules related to this exemption request, dealers and brokers qualified to participate in the PORTAL Market will be permitted to negotiate and execute trades in PORTAL Market securities, and submit trade reports in PORTAL Market-negotiated trades that will be forwarded to TRACE and the NASD's OTC Reporting Facility for comparison, confirmation, and forwarding of confirmed trades to The Depository Trust Company for settlement.

certain issuers that would accompany a change in the information requirements for issuers from those established in Rule 144A.

The rules that would govern the PORTAL Market serve to protect public investors by limiting the nature of the participants in the PORTAL Market to those that may otherwise purchase securities pursuant to Rule 144A as a result of the exemption.[17] Further, such rules are designed to have no adverse effect on the rights of institutional investors in the Rule 144A market to receive certain information about an issuer, consistent with Rule 144A(d)(4).[18]

We received seven comment letters on the proposed rule change by Nasdaq. Three commenters supported the proposed rule change.[19] Another comment was a single sentence seeking "to know more information about the findings and possible 144A portal" that neither supported nor criticized the proposals.[20] Another commenter raised concerns regarding the access of and impact on QIBs not yet approved by Nasdaq as PORTAL-eligible and Accredited Investors, as well as liability concerns for brokers and dealers.[21] The final comment sought clarification on a number of matters including trade reporting, dissemination of information, the regulatory jurisdiction over parties to the market, the nature of subscriber agreements, Exchange Act compliance of brokers, dealers and issuers that participate in the PORTAL Market, and other mechanical and technical

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[17] See Release No. 34-56172 (July 31, 2007).

[18] 17 CFR 230.144A(d)(4).

[19] See letters to Nancy M. Morris, Secretary, Commission, from Deborah L. Wince-Smith, Council on Competitiveness, dated May 25, 2007; Lezlee Westine, President and CEO, TechNet, dated May 22, 2007; NYPPEX, dated May 18, 2007.

[20] Submission via SEC WebForm from John J. McGuire, Jr., who is affiliated with Morgan Stanley, dated May 9, 2007.

[21] See letters to Nancy M. Morris, Secretary, Commission, from William J. Ginivan, Friedman, Billings, Ramsey Co., Inc. ("FBR"), dated May 22, 2007; William J. Ginivan, FBR, dated July 18, 2007.

concerns.[22] None of the comments objected explicitly to the proposed exemption from Section 12(a).

The vast majority of the concerns raised in the comments noted above are addressed in Release No. 34-56172 (July 31, 2007) and the comments do not raise issues relevant to the requested exemption under Section 12(a) from registration pursuant to Section 12(b).

In granting this exemptive relief, we expect that Nasdaq will design and implement all rules related to the relief in a manner that protects investors and the public interest and limits participants in the PORTAL Market to those parties eligible to rely on Rule 144A under the Securities Act of 1933. We view the exemptive relief requested by Nasdaq as another step to improve the institutional resale markets for unregistered securities. Further, we believe that granting Nasdaq's application will increase transparency regarding prices and sales in that market.

For the reasons discussed above, the Commission finds that the exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

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[22] See letter to Nancy M. Morris, Secretary, Commission, from Mary Kuan, Managing Director and Assistant General Counsel, SIFMA (Securities Industry and Financial Markets Association), dated May 30, 2007.

Accordingly, IT IS ORDERED pursuant to Section 36 of the Exchange Act that a Nasdaq member, broker, or dealer may effect a transaction on the PORTAL Market, and any successor trading facility that maintains compliance for sales under Rule 144A, in a security that has not been registered under Section 12(b) of the Exchange Act without violating Section 12(a) of the Exchange Act.[23] This exemption does not extend to any other section or provision of the Exchange Act.

By the Commission.

Nancy M. Morris
Secretary

[23] Nasdaq members will be able to effect transactions on the PORTAL Market in accordance with the terms of this exemption without violating Nasdaq rules only after SR-NASDAQ-2006-065 becomes effective.