



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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March 29, 2006

VIA E-Mail: rule-comments@sec.gov

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Petition to Amend Rule 146(b) to Designate Securities Listed on the NASDAQ Capital Market as Covered Securities for the Purpose of Section 18 of the Securities Act of 1933
Rulemaking Petition File No. 4-5 13

Dear Ms. Morris:

The North American Securities Administrator's Association ("NASAA")¹ welcomes this opportunity to provide commentary in connection with the Petition dated February 28, 2006, filed with the Commission by the NASDAQ Stock Market, Inc. ("NASDAQ"). The Petition requests that the Commission designate securities listed on the NASDAQ Capital Market ("NCM") as federal "covered securities" for purposes of Section 18(b)(1) of the Securities Act of 1933, which allows such designations for exchanges that have listing standards substantially similar to those adopted by the New York Stock Exchange ("NYSE"), the American Stock Exchange ("AMEX"), or the NASDAQ National Market ("NNM").

NASAA does not oppose the Petition because NCM pledges to abide by certain regulatory principles that are important to investor protection.

NASAA strongly believes, however, that the Petition illustrates deficiencies in the administration of listing and maintenance standards by the major trading marketplaces and recommends the SEC undertake an SRO oversight initiative.

¹ The oldest international organization devoted to investor protection, NASAA was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grassroots investor protection and efficient capital formation.

1. Listing and maintenance standards are not effective unless they are vigorously enforced.

Most states have exempted nationally traded securities from state registration requirements for many years.² These exemptions were based on the determination that the listing and maintenance standards of the exempted exchanges, together with enforcement of those standards, could be relied upon in lieu of the states' securities registration and review process to provide protection for public investors.

The importance of enforcing these standards is illustrated by a Memorandum of Understanding ("MOU") between NASDAQ and NASAA concerning NASDAQ/NMS, which many states relied upon to exempt NASDAQ/NMS listed securities. The MOU provided that state securities administrators may "terminate the exemption upon a determination that the system's requirements for designation or maintenance ... have been so changed or insufficiently applied that the protection of investors contemplated by the exemption no longer exists" (emphasis added).

This history of meaningful listing standards, maintained with vibrant enforcement, should remain critical in the Commission's determination that the protections of state securities registration not apply to investors in securities listed on any exchange.

2. The Securities and Exchange Commission should establish a set of principles and practices for all exchanges under Section 18(b)(1).

The NASDAQ Petition identifies a number of SRO regulatory principles that should be considered for all the exchanges. The Commission should require a set of principles and practices at every exchange with covered securities under Section 18(b)(1).

The Commission should require each SRO to comply with following principles and practices (without limitation to other necessary principles and practices):

- A. No waivers to initial listing standards.
- B. Limited discretion to grant exceptions to maintenance listing standards.

² Such exemptions were typically based on section 402(a)(8) of the Uniform Securities Act of 1956, which exempts "any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, or the Midwest Stock Exchange [or listed on the (insert names of appropriate regional stock exchanges)]..."

- C. Strictly enforced minimum price requirements for initial and continued listing of securities of all companies.
- D. A “seasoning” period for companies that qualify for initial listing solely using a “market value of listed security” standard.
- E. Strictly enforced governance standards.
- F. Strong record with regard to enforcement of its listing and maintenance requirements.
- G. Denied initial listing for companies with significant investor protection issues.
- H. Strictly enforced financial report filing requirements.
- I. Notice to investors of all issuer filing delinquencies and deficiencies.
- J. Transparent enforcement program regarding its listing, maintenance, and governance requirements and uses, to the extent practicable, bright-line objective requirements.

3. Practices at certain exchanges create inappropriate risks for investors.

The NASDAQ Petition notes certain practices that raise serious concerns about the quality of regulation by other SROs. The NASDAQ Petition identifies a number of specific, substantive areas in which the NYSE and AMEX appear seriously remiss in their SRO oversight function. These areas include:

- A. **Excessive discretion to waive initial listing requirements.** NASDAQ states on page 3 of its Petition that the NYSE and AMEX have much more liberal authority to waive a listing standard or to grant extended exceptions of up to 18 months, and that the AMEX permits the listing of securities that do not satisfy any of the stated core initial listing standards.
- B. **No minimum price requirements.** NASDAQ indicates on page 4 that the NYSE has no stated price requirement for initial listing and that the AMEX can list certain companies with a price as low as \$2. It further indicates that the AMEX has no stated price requirement for continued listing and, as of January 20, 2006, at least 65 AMEX-listed securities, representing 10 percent of all AMEX-listed common stocks and equivalents, are trading at prices below \$1.
- C. **No seasoning period requirement.** NASDAQ states on page 5 that AMEX does not have a “seasoning” period requirement (requiring a company to satisfy both the market value and the bid price requirements for a period of 90 days) to prevent companies from qualifying for listing based solely on a temporary price

increase.

- D. **No consequences for failure to make filings.** NASDAQ states on page 7 that the NYSE does not consider whether issuers have timely made interim filings with the Commission and also allows issuers to be delinquent in annual filings, sometimes by 12 months or more.
- E. **Granting listings to “Blind Pool” offerings.** NASDAQ states that AMEX has listed a number of issuers whose offerings are essentially the latest incarnation of “blind pool” offerings (namely, special-purpose acquisition companies), even though it is not possible to determine whether the company to be acquired will satisfy the quantitative and qualitative listing standards.

4. NASAA recommends an SRO Oversight Initiative.

As a result of NSMIA, states are precluded from registration of exchange-listed “federal covered securities.” Thus the Commission has the sole regulatory authority over the extent and the quality of SRO oversight functions regarding the nature of the issuer, listing/maintenance standards, and reporting requirements.

NASDAQ’s identification of the items in Section 3, above, raises serious concerns about SRO deficiencies, the Commission’s level of oversight of SROs, and the Commission’s authority to require SROs to enforce their own requirements. The NASDAQ Petition, on page 4, disturbingly implies that the Commission is reduced to having to “encourage” AMEX (by a footnote in SEC Release No. 53050) to adopt a minimum price requirement for continued listing. Allowing AMEX to have no minimum price for continued listing of securities has apparently resulted in 10% of AMEX’s stocks trading below the \$1 per share benchmark that identifies a “penny stock.” This is not SRO quality control over its listed issuers. NASAA is also concerned about the Commission’s market regulation function when certain exchanges issue ad hoc waivers from listing and maintenance requirements with little or no objective, bright-line standards.

Investors must have confidence in the integrity of the trading marketplaces. This requires meaningful listing and maintenance standards that apply to all listed issuers, are appropriately enforced, and are not undercut by open-ended waivers. This also requires the Commission to play a strong role in overseeing the exchanges and protecting investors. This is particularly important in light of recent structural and organizational changes in the securities markets, such as the NYSE becoming a for-profit entity and proposals by certain exchanges to create additional “tiers” that appear to involve a “race to the bottom” to secure listings.

NASAA respectfully calls on the Commission to use the information presented in the NASDAQ Petition to conduct a comprehensive examination of its SRO oversight functions. This should particularly include minimum initial listing standards, continued listing standards, and appropriate treatment of issuers that are delinquent in filing required reports with the Commission.

Recognizing that the millions of public investors who daily invest their money through the major trading exchanges comprise investors from every NASAA jurisdiction, NASAA would welcome an opportunity to participate in a Commission initiative on this subject.

Conclusion

Thank you for seriously considering our comments on these important issues. Should you have any questions on this matter, please contact Rex Staples, NASAA General Counsel, at rs@nasaa.org or (202) 737-0900 or Randall Schumann, Wisconsin Securities Division Legal Counsel, at randall.schumann@dfi.state.wi.us or (608) 266-3414

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia D. Struck', with a long horizontal stroke extending to the right.

Patricia D. Struck
NASAA President and
Wisconsin Securities Administrator