

December 12, 2006

Nancy M. Morris
Secretary
Securities and Exchange Commission
Station Place
100 F Street NE
Washington, DC 20549-0609

Re: SR-NASDAQ-2006-040 Listing Fee Proposal

Dear Ms. Morris:

The NASDAQ Stock Market LLC (“Nasdaq”) has asked us, as their antitrust counsel,¹ to provide a comment in this docket addressing assertions by other commenters that certain aspects of Nasdaq’s proposed listing fee changes might be anticompetitive or violate the antitrust laws of the United States.² For the reasons set out below, those assertions are unsupported and inaccurate. As the Supreme Court has stated, the antitrust laws are designed for “the protection of competition not competitors,”³ and Nasdaq’s proposal will enhance competition.

As we understand it, Nasdaq has proposed to increase its listing fees, based upon the increased costs that it has incurred in implementing enhancements to its world-class regulatory programs and trading systems. At the same time, Nasdaq has indicated that it will provide additional benefits and value to those companies that list on Nasdaq.⁴ Those new benefits consist of a variety of services designed to assist companies listed on Nasdaq in fulfilling their disclosure and regulatory obligations and shareholder communications. While the new benefits are being offered to Nasdaq listed companies,

¹ The authors are partners in Arnold & Porter LLP’s antitrust practice group. Michael Sohn is a former General Counsel of the Federal Trade Commission. Donna Patterson is a former Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice.

² Nasdaq will file its own response to the comments in this proceeding.

³ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)

⁴ All listing exchanges provide a variety of services to their listed companies, and not all companies take advantage of each of those benefits and services.

Fact Sheet on SR-NASDAQ-2006-040

Section 6(b) of the Securities Exchange Act of 1934 establishes standards with respect to the rules of a national securities exchange. Section 6(b)(4) requires that the rules of the exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” Section 6(b)(8) provides that the rules of an exchange cannot “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Act.¹

- Nasdaq’s proposed fees are reasonable. Nasdaq’s proposed fees remain lower than the fees that the Commission has already approved for other markets:
 - The proposed \$27,500 Capital Market annual fee compares to generally higher fees of \$30,000 - \$85,000 on NYSE Arca and \$16,500 - \$34,000 on the American Stock Exchange.
 - The proposed annual fees for the Nasdaq Global and Global Select Markets of \$30,000 to \$95,000 compares to higher fees on the NYSE, which range from \$38,000 to \$500,000. In other words, for any amount of shares outstanding, Nasdaq’s fees would be less than those of the NYSE, and Nasdaq’s fees would be more than \$400,000 less for some Global and Global Select Market companies.
 - The proposed increase in fees reflects a number of Nasdaq initiatives:
 - Nasdaq devotes substantial resources to its regulatory programs.
 - Since Nasdaq last raised annual fees, Nasdaq has spent approximately \$1 billion to complete the Instinet transaction, primarily for its trading technology. Nasdaq is in the final stages of launching its “Single Book” platform, based on that technology, which will further enhance liquidity for Nasdaq-listed companies. Nasdaq has also implemented the Opening Cross and Closing Cross, which determine a single price for the opening and closing, respectively, and Nasdaq is developing an Intraday Cross and a Post-Close Cross. All these initiatives help issuers and investors by increasing liquidity and improving price discovery.
 - Nasdaq has made enhancements to the Market Intelligence Desk that will provide companies with additional information and analysis to help manage their investor relationship programs and understand movements in the market for their securities.

¹ It is also important to note that Congress has specified that a proposed rule change may take effect upon filing with the Commission if designated by a self-regulatory organization as “establishing or changing a due, fee or other charge imposed by the self-regulatory organization.” Section 19(b)(3)(A)(ii) of the Exchange Act. While the Commission has limited the application of this provision to fees charged on members, Rule 19b-4(f)(2), the statute nevertheless demonstrates the Congressional intent to avoid prior Commission review of fees.

- In addition, and what has been the focus of much of the comment on the proposal, Nasdaq intends to offer companies services to assist them in fulfilling their responsibilities as public companies, including their disclosure and investor relations needs.
- Nasdaq's proposed fees would be equitably allocated.
 - Fees for the Global and Global Select Markets would be assessed based on total shares outstanding. This is consistent with the way SEC-approved fees are currently charged, both by Nasdaq and by all other U.S. exchanges, recognizing that those companies with more shares outstanding tend to make more intense use of Nasdaq's trading systems.
 - All domestic companies on the Capital Market would be charged the same fee.
 - While not every company will use every service offered by Nasdaq, we believe that all companies will find something of value. Nasdaq's wide range of offerings reflects the diversity of companies we list – one size does not fit all. Moreover, while the services are valuable to listed companies, the incremental cost for Nasdaq to provide them is minimal.
- Nothing in Nasdaq's proposal would impose a burden on competition.
 - There exists a fierce competition for listings among exchanges.
 - The Commission has recognized that Nasdaq operates in a competitive global exchange marketplace for listings, financial products, and market services and competes in such an environment with other market centers, including national securities exchanges, ECNs, and other alternative trading systems, for the privilege of providing market and listing services to broker-dealers and issuers.²
 - NYSE, NYSE Arca, and the American Stock Exchange have all recently followed Nasdaq's lead and eliminated entry fees for companies switching from other markets.
 - Nasdaq has created a new tier with higher listing standards to better compete with NYSE for listings.
 - By enhancing its trading platform and providing listed companies with additional services, Nasdaq believes it will differentiate a Nasdaq listing and therefore be able to better compete against other exchanges.

² Securities Exchange Act Release No. 54155 (July 14, 2006), 71 FR 41291, 41298 (July 20, 2006) (approving SR-NASDAQ-2006-01).

- The Commission recently noted that it has “long held the view that ‘competition and innovation are essential to the health of the securities markets.’”³
 - These differentiated offerings are another example of Nasdaq’s innovation.
 - A number of commentators have noted that the products and services Nasdaq currently offers are an important aspect of their listing, and are viewed as a valuable part of their relationship with Nasdaq.
- Nothing in the proposal would limit the competition among exchanges. Rather, it would continue an existing race to provide issuers, and their shareholders, the best value for their listing dollars.
 - A commentator noted that Nasdaq’s successful programs have become the benchmark for all markets in terms of issuer services.⁴ Issuers, and their shareholders, benefit when other (more costly) markets are forced to match the quality of service we provide to issuers.
 - Other markets already provide certain of these services to their issuers.
- Nasdaq also believes that offering additional services will enhance competition among the providers of those services.
 - Nasdaq plans to offer its companies:
 - dynamic annual reports
 - customized insurance information
 - four audio webcasts
 - four press releases
 - four Form 8-K or 6-K filings.
 - These offerings do not fully satisfy the need for these services by a public company.
 - While the services are valuable to listed companies, the incremental cost for Nasdaq to provide them is minimal.
 - Based on the company’s satisfaction with their free sample of Nasdaq’s product, the company will decide whether to purchase additional products

³ Id. (citing Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001)).

⁴ Comment from Patrick J. Healy, CEO, Issuer Advisory Group (December 12, 2006).

from Nasdaq. If they are not satisfied, the company is free to continue to rely on its existing service provider for the remainder of its needs.

- Similarly, companies can continue to use their existing provider and not partake in the free sample.
 - Companies that provide comparable services are free to compete by adjusting their pricing plans or offering their own free samples to Nasdaq companies. Thus, Nasdaq companies will benefit from the proposal through enhanced competition for their business.
 - Several commentators have noted the need for increased competition, particularly among distributors of news releases. In that regard, two providers currently distribute approximately 85% to 90% of press releases for public companies listed on U.S. exchanges.⁵
 - As discussed above, ample justification for Nasdaq's fee increases would exist even if these services were not provided.
- Nothing in Nasdaq's proposal presents a conflict of interest.
 - Competitors have also alleged in their comments that it would be a conflict of interest for Nasdaq to provide companies with news dissemination services. This is simply not true.
 - Nasdaq's rules support the rules of the Commission by requiring companies to disclose material news.
 - Nasdaq rules do not define how such news should be disclosed, much less require the use of any particular service provider. Instead, Nasdaq rules defer to the Commission's rules, specifically Regulation FD, to determine the proper method of such disclosure.
 - Any change to these rules, such as requiring companies to use a Nasdaq-owned provider, would require Commission approval.
 - Nasdaq's regulatory role in news dissemination is to analyze whether it is necessary to halt an issuer's stock to allow dissemination of the news to the market. The issuer's choice of news dissemination service plays no role in this regulatory function.

⁵ Based on Nasdaq's analysis of press releases sourced from the Comtex News Network data feed for the 90 days ending on October 23, 2006.