

**AMERICAN BAR ASSOCIATION  
SECTION OF BUSINESS LAW  
STATE REGULATION OF SECURITIES COMMITTEE  
321 NORTH CLARK STREET  
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April 3, 2006

Nancy M. Morris, Esq.  
Secretary  
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E-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

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. 4-513

Dear Ms. Morris:

The State Regulation of Securities Committee (the "Committee") of the Section of Business Law (the "Section") of the American Bar Association (the "ABA") appreciates the opportunity to comment on the February 28, 2006 petition (the "Petition") by The Nasdaq Stock Market, Inc. ("Nasdaq"), requesting that the Securities and Exchange Commission (the "SEC") amend Rule 146(b) under the Securities Act of 1933, as amended (the "Securities Act"), to designate securities listed on the Nasdaq Capital Market ("NCM") as "covered securities" for purposes of Section 18(b)(1)(B) of the Securities Act.

The Committee is comprised of over 350 ABA members, a part of whose practice (in many cases, a principal or substantial part) involves the regulation of securities by state authorities (so-called "Blue Sky" law). The Committee includes attorneys in private practice, in corporate law departments, and in governmental agencies. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of the members of the Committee who reviewed and commented on this letter in draft form. The views expressed herein have not, however, been approved by the House of Delegates or Board of Governors of the ABA, and should not be construed as representing policy of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

We strongly support the Petition to amend Rule 146(b) to designate securities listed on the NCM as "covered securities" for purposes of Section 18(b)(1)(B) of the Securities Act. At

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present, absent the availability of other exemptions under idiosyncratic statutes, rules, or administrative orders, an offering registered pursuant to Section 6 of the Securities Act of securities listed on the NCM, or securities on par with, or senior to, such listed securities, would potentially also be subject to securities registration, notice, or other filings under the securities (so-called "Blue Sky") laws of all 50 states (other than Hawaii, which has a unique self-executing exemption for all offerings registered with the SEC under the Securities Act), the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands (each, a "State," and collectively, the "States"). Such filings entail substantial filing fees, related legal fees and other costs and expenses, as well as significant time to obtain clearances from all relevant State regulators. Further, because a number of States (including certain major market States) enforce so-called "merit review" standards as part of the securities registration review process (irrespective of full disclosure of all material information in accordance with the Securities Act), the imposition of such standards may also result in either material changes in the terms and conditions of the offering (including the structure of the offering and the operations and capital structure of the issuer) as a condition of clearance, or the withdrawal of the filing altogether from those States where such standards cannot be satisfied (thereby resulting in the inability of the securities in question to be offered and sold to the general public in or from those States). In many cases, even when offerings subject to merit review by State securities regulators are ultimately cleared, the merit review process may cause significant delays, and timing strategies designed to take advantage of windows of market opportunity in the securities markets may be compromised, to the overall detriment of the capital formation process for the affected issuers. Thus, absent their designation as "covered securities," offerings of NCM-listed securities and securities on par with or senior to such securities are presently subject to oftentimes burdensome regulation (and we note that the costs of this dual regulatory scheme are ultimately borne by investors).

Assuming the accuracy of Nasdaq's representations in the Petition and in Exhibits A and B thereto, Nasdaq has adopted and rigorously enforces initial and continued listing standards for NCM issuers substantially similar to, and in certain instances more stringent than, those imposed by the other markets whose listed securities are now designated as "covered securities" pursuant to Section 18(b)(1) of the Securities Act and Rule 146(b) thereunder. Accordingly, we believe that amending Rule 146(b) to designate NCM-listed securities as "covered securities" will be consistent with the SEC's mandate under Section 11A of the Securities Exchange Act of 1934, as amended, to assure fair competition among the exchanges, and will reduce the substantial costs of dual Federal and State regulation of offerings of such securities by preempting registration or other qualification filings for such securities under State Blue Sky laws. Moreover, the approval of the Petition would be consistent with the goals of the National Securities Markets Improvement Act of 1996, where Congress, through the preemption provided by Section 18(b)(1) of the Securities Act, recognized that securities

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offerings in respect of issuers of substantial size and means which meet the quantitative and qualitative listing requirements of the national securities exchanges designated in that provision, as well as exchanges with comparable listing requirements, are offerings which are “national” in scope and best subject to uniform Federal regulation.

As regards the preemption of the securities registration requirements of State Blue Sky laws, as reflected at page 8 of the Petition at footnote 42, the Board of Directors of the North American Securities Administrators Association (“NASAA”), the umbrella organization of State securities regulators, has determined not to oppose the Petition. Given that NASAA, which historically has been a zealous defender of State authority over securities offerings, is not opposing the Petition, it is submitted that such action lends great credence to the Petition.

Finally, although not specifically requested in the Petition, we recommend that the SEC amend Rule 146(b)(1), for the sake of clarity, to provide “covered securities” status not only to securities actually listed on the NCM and the other exchanges designated in Rule 146(b)(1), but also to securities which are “authorized for listing” on the NCM and the other exchanges. This would conform the Rule to the language of Section 18(b)(1)(B) of the Securities Act, and thereby resolve a theoretical issue as regards the need to effect Blue Sky registration filings in order to offer securities which have been authorized for listing on the NCM or one of the other exchanges designated in the Rule, pending their actual listing upon notice of issuance. We believe this technical revision will place the NCM and the other exchanges designated in Rule 146(b) on par with the exchanges specifically designated in Section 18(b)(1), as contemplated by Congress.

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We appreciate any consideration given by the SEC to the foregoing comments, and would be happy to discuss these comments further with the SEC staff, should that be necessary or desirable.

Respectfully submitted,

STATE REGULATION OF SECURITIES COMMITTEE

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