AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW
STATE REGULATION OF SECURITIES COMMITTEE
321 NORTH CLARK STREET
CHICAGO, ILLINOIS 60610

December 20, 2006

Nancy M. Morris, Esq.
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, D.C. 20549-9393

E-mail address: rule-comments@sec.gov

Re: File No. S7-18-06

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 Securities and Exchange Commission (the "SEC") Release No. 33-8754 (the "Release"), relating to a proposed amendment of 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" pursuant to Securities Act § 18(b)(1)(B).

The Committee is comprised of over 390 ABA members, a part of whose practice (in many cases, a principal or substantial part) involves the regulation of securities by state authorities under statutes (so-called "Blue Sky" laws) which have been enacted by the 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands (each, a "State" and collectively, the "States"). The Committee includes attorneys in private practice, in corporate law departments, and in governmental agencies. This letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those 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.

As set forth in the text accompanying footnote 68 of the Release, by letter dated April 3, 2006 (the "April 3 Letter"), the Committee previously expressed its support for the rulemaking petition (File No. 4-513) filed by The Nasdaq Stock Market, Inc. ("Nasdaq"), which ultimately led to the Release, and thus we strongly endorse the proposed amendment of Rule 146(b) to

designate securities listed on the NCM as "covered securities" for purposes of Securities Act § 18(b)(1)(B).

However, we note that the Release does not address our recommendation in the April 3 Letter that the SEC amend Rule 146(b)(1), for the sake of clarity and conformity to Securities Act § 18(b)(1), to extend "covered securities" status not only to securities actually listed on the NCM and the other exchanges designated in Rule 146(b)(1) (collectively, the "Rule Exchanges"), but also to securities which are "authorized for listing" on the Rule Exchanges. While Securities Act § 18(b)(1)(A) provides that securities "listed, or authorized for listing" on the New York, American, and Nasdaq Global Market exchanges (collectively, the "Statutory Exchanges") are "covered securities," and Securities Act § 18(b)(1)(B) contains similar language as regards the SEC's authority to designate Rule Exchanges, Rule 146(b)(1) includes only securities actually listed on the Rule Exchanges, but not those only authorized for listing. As explained below, this discrepancy between the statute and Rule 146(b) creates a void whereby initial public offerings of securities which have been authorized for listing on one of the Rule Exchanges may not be offered without a registration filing, or compliance with an available exemption, under most Blue Sky laws, pending the consummation of their actual listing, while securities authorized for listing on one of the Statutory Exchanges may be offered in all States without need for filings, in reliance on the preemptive effect of Securities Act § 18. [This discrepancy only affects initial public offerings, because once listed on a Rule Exchange, the listed securities, as well as securities equal in seniority or senior to such securities, are "covered securities" under Securities Act § 18(b)(1)(C).]

In reviewing the language of Securities Act § 18(b)(1)(A) and (B), we believe that Congress intended that there be a "level playing field" between securities listed on the Statutory Exchanges and those listed on the Rule Exchanges, particularly given that Section 18(b)(1)(B) requires that the Rule Exchanges have "listing standards that the Commission determines by rule . . . are substantially similar to the listing standards applicable to securities described in subparagraph (A)." In reviewing the Release, as well as prior SEC releases proposing and adopting amendments adding the other Rule Exchanges to Rule 146(b), we see no indication that the SEC deliberately distinguished between securities listed, and those just authorized for listing, and therefore consciously concluded that the Rule should only include the former, and not the latter (see Release Nos. 33-7422, 33-7494, 33-8404, and 33-8442). Rather, we believe this omission is a mere oversight, and considering that securities authorized for listing have met the particular Rule Exchange's listing standards, and have been approved for listing upon notice of issuance, there should be no distinction between those securities.

To address a possible concern that there may be instances where an issuer has obtained authorization to list its securities on a Rule Exchange, yet never proceeded to actually list

them, we have been advised by Nasdaq that, since January 1, 2002, there have been 38 NCM (previously Nasdaq SmallCap) listing applications for initial public offerings approved by Nasdaq. Of those 38, 29 ultimately traded on the NCM, while 9 were withdrawn. Of the 9 withdrawn applications, 5 offerings failed for various reasons (and in 4 of those cases the registration statements were withdrawn from the SEC), 2 offerings were listed on the American Stock Exchange (thereby gaining "covered securities" status), and the remaining 2 offerings were ultimately traded on the OTC Bulletin Board, when they failed to meet certain listing conditions as of the date of SEC effectiveness.

We believe the foregoing statistics from Nasdaq support our belief that once securities have been authorized for listing on a Rule Exchange, unless the offering fails altogether, so that no securities are actually sold, it is extremely rare for the offering to proceed without finalizing such listing on that Rule Exchange or a listing on another Statutory or Rule Exchange. Of course, as is the case even with an initial public offering authorized for listing on a Statutory Exchange under Securities Act § 18(b)(1)(A), should the offering ultimately be rejected for listing (*e.g.*, because the offering was reduced in size below the requisite minimum "float"), so that it is not listed on either a Statutory or Rule Exchange, it is understood that the preemptive effect of Securities Act § 18 over Blue Sky laws no longer applies, and the issuer would either have to consummate sales in reliance on other State exemptions, or file registration applications in the relevant jurisdictions. Although in rare instances an offering may proceed without finalizing a listing for securities authorized for listing on a Rule Exchange, that scenario could occur equally with respect to a Statutory Exchange, and thus we suggest that the treatment of Rule Exchanges should not be different.

Noting Part VI of the Release concerning the cost and benefits of the rulemaking, we believe that by omitting securities which have been authorized for listing on the Rule Exchanges, the SEC is imposing potentially significant costs on initial public offerings of such securities. Contrary to the statements in the Release, not all Blue Sky law requirements will actually be preempted until those securities are actually listed upon consummation of the offering, and therefore Rule 146(b) will not permit the NCM, nor does it permit the current Rule Exchanges, to compete fairly with the Statutory Exchanges. As regards the impact of the discrepancy on an issuer's ability to offer its securities in compliance with the registration requirements of the various Blue Sky laws, we note that Section 402(b)(12) of the Uniform Securities Act (1956) provides an exemption from registration for:

> any offer (but not a sale) of a security for which registration statements have been filed under both this act and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act.

In reviewing the Blue Sky laws, we note that exemptions (by law or rule) identical or substantially similar to the foregoing provision are in effect in all States, other than: (1) California, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Missouri, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, the U.S. Virgin Islands, and Vermont, where exemptions permit offers, but not sales, of securities pending registration under the Securities Act, but without need for a State filing [other than California, Georgia, Hawaii, Louisiana, New York, and Pennsylvania, all of these States have enacted an exemption premised on Section 202(16) of the new Uniform Securities Act (2002)]; and (2) New Jersey, where there is no relevant exemption for offers of securities pending registration under the Securities Act.

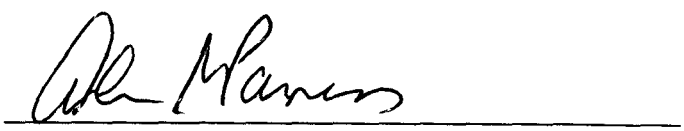
Thus, absent the availability of another exemption under the applicable Blue Sky law (*e.g.*, restricting all offers to certain institutional investors), an issuer with a pending Securities Act registration for an initial public offering whose securities have been authorized for listing on a Rule Exchange would be required to file a registration application, or effect an exemption notice filing, in order to distribute preliminary prospectuses or otherwise offer such securities in 38 of the 54 States. Even if such filings were effected for the minimum amount of securities possible under the relevant Blue Sky law, and were withdrawn once the securities were actually listed on the Rule Exchange and thereby qualified as "covered securities," the issuer would still have been obligated to remit thousands of dollars in Blue Sky filing fees (most of which would be nonrefundable), in addition to thousands of dollars in legal fees and the other costs of effecting such Blue Sky filings and preparing a "Blue Sky Survey." (A Blue Sky Survey is typically a detailed memorandum prepared for a particular offering and addressed to the underwriter(s), setting forth: (i) where the offering is exempt from State filings; (ii) where State filings are being made (and when and if they are cleared by each State); (iii) where State filings are not being made; and (iv) so-called "institutional investor" exemptions from registration under the various Blue Sky laws, which exemptions are not necessarily uniform, even in those States adopting a version of the Uniform Securities Act.) All of such fees and costs would, of course, be ultimately payable by the investing public as costs of the offering, and we believe this is contrary to Congress' intent in amending Securities Act § 18 to preempt Blue Sky laws with regard to "covered securities."

In sum, we believe that the simple technical revision of inserting ", or authorized for listing" following "securities listed" in Rule 146(b)(1) will: (1) correct what we believe was an inadvertent oversight by the SEC in adopting Rule 146(b)(1) in the first instance; (2) place the NCM and the other Rule Exchanges on a "level playing field" with the Statutory Exchanges; and (3) satisfy the intent of Congress, by substantially reducing the costs of initial public offerings of such securities.

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

By: 

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