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VIA Electronic mail (rule-comments@sec.gov)

December 9, 2008

Florence E. Harmon  
Acting Secretary  
United States Securities and Exchange Commission  
Station Place  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File No. SR-NASDAQ-2008-085**

Dear Ms. Harmon:

Thank you for the opportunity to comment on rule filing SR-NASDAQ-2008-085 in which The Nasdaq Stock Market (“Nasdaq”) proposes to modify the procedures by which it adjudicates listed companies that are late in filing a required periodic report with the United States Securities and Exchange Commission (the “SEC”).

In the spirit of disclosure, FTI Consulting, Inc. (“FTI”) has an interest in this proposal for several reasons. FTI’s clients include many domestic issuers and foreign private issuers that are listed on Nasdaq.<sup>1</sup> The services FTI provides to these clients include advice concerning maintaining and achieving compliance with Nasdaq’s listing requirements, forensic accounting, technical accounting and strategic communications, among others. FTI also advises many institutional investors, both large and small, who rely on access to current and accurate financial statements and related disclosures to make informed investment decisions. Some of these clients have an interest in the outcome of self-regulatory organization (“SRO”) proceedings, including Nasdaq listed companies that do not satisfy Nasdaq’s filing requirement.

Also, among FTI’s 2,600 plus professionals are a former attorney who served as counsel to the Nasdaq Listing Qualifications Panel (the “Panel”), a former attorney who served as counsel to the Nasdaq Listing and Hearing Review Council (the “Listing Council”) and, previous to that, as Associate Director of Nasdaq’s SmallCap Market<sup>SM</sup>, now known as The Nasdaq Capital Market<sup>SM</sup>, and a former Panel member.

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<sup>1</sup> The views expressed in this letter are those of the author and are not necessarily representative of FTI.

FTI's concerns with SR-NASDAQ-2008-085 are three-fold. First, Nasdaq has failed to clearly explain and support its reasons for a change in the process by which it adjudicates late filers. Second, Nasdaq has failed to explain how displacing decision making authority from independent bodies in favor of the Nasdaq staff is consistent with investor protection and how it adequately insulates Nasdaq listed companies from potential bias and conflicts of interest. Third, it is unclear how Nasdaq's proposed automatic 60-day grace period enhances investor protections. As such, FTI encourages the SEC to reject this proposal.

### ***Regulatory Frame of Reference***

Nasdaq's filing requirement is a logical outflow of the mandates of the Securities Exchange Act of 1934 (the "Exchange Act"). This requirement is arguably Nasdaq's most important listing standard from an investor protection standpoint. Through the enforcement of its filing requirement, Nasdaq is the first line of defense in protecting investors who rely upon access to current and accurate financial statements and related disclosures to make informed investment decisions. Without question, the threat of a prompt delisting for violating Nasdaq's listing requirement gets the attention of a senior management team and board of directors, and provides meaningful impetus for companies to avoid this offense if at all possible.

Historically, the SEC and Nasdaq have looked to a case entitled In the Matter of Tassaway, Inc.<sup>2</sup> ("Tassaway") as the leading case in this area of law and regulation.<sup>3</sup> Tassaway stands for, among other things, the proposition that "[t]hrough exclusion from [Nasdaq] may hurt existing investors, primary emphasis must be placed on the interests of prospective future investors. The latter group is entitled to assume that the securities in the system meet the system's standards. Hence the presence in Nasdaq of non-complying securities could have a serious deceptive effect."<sup>4</sup> The principles set forth in Tassaway have historically been used by Nasdaq as the foundation for training new appointees to the Panel and Listing Council and have guided many Panel and Listing Council decisions over at least the past 10 years.<sup>5</sup>

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<sup>2</sup> 45 SEC 706 (1975); SEC Release No. 34-11291.

<sup>3</sup> Tassaway identifies itself as a case of first impression regarding the enforcement of Nasdaq listing standards. Since this decision was issued in 1975, Tassaway has been frequently cited in litigation involving Nasdaq listing matters as the guiding case law. See Outsource International, Inc., Securities Exchange Act Rel. No. 44944 (October 17, 2001); Ryan-Murphy, Inc., Securities Exchange Act Rel. No. 38999 (September 2, 1997); Gunther International Ltd., Securities Exchange Act Rel. No. 37073 (April 5, 1996); DHB Capital Group, Inc., Securities Exchange Act Rel. No. 37069 (April 5, 1996); KLH Engineering Group, Inc., Securities Exchange Act Rel. No. 36422 (October 26, 1995); Biorelease Corporation, Securities Exchange Act Rel. No. 35575 (April 6, 1995).

<sup>4</sup> *Ibid.* at 709.

<sup>5</sup> The Nasdaq Board of Directors appoints independent individuals from the business and academic communities to the Panel and the Listing Council. There are very specific rule-based procedures, including, but not limited to, recusals for conflicts of interest or situations that present the appearance of a conflict of interest involving Panel and Listing Council members. Nasdaq went to great lengths in SR-NASD-2004-125 (February 28, 2005) "to adopt rules that follow the NASD model to increase the separation and objectivity of Adjudicators at each level of a proceeding." In fact, then proposed NASD Rule 4816 provided that Adjudicators and Nasdaq staff members were required to recuse themselves from matters as to which they had

It is unclear how “prospective future investors” will be better protected under the proposed rule than they were under Nasdaq’s historic process whereby delinquent filers were adjudicated by independent Panel and Listing Council members. SR-NASDAQ-2008-085 cites several reasons for the rule change, including “recent changes in the regulatory environment [that] have made it increasingly difficult for companies to prepare, obtain auditor review, and file their periodic reports on time”, “the formal process required to investigate the underlying issues causing the delay”, and Nasdaq’s view that the “receipt of a delisting letter immediately upon being late in filing is disruptive to the Company and can be misleading to shareholders and prospective investors.” No additional detail, support or data was provided to substantiate these general opinions. Nasdaq also did not explain its rationale for providing a *de facto* 60-day grace period before the issuer will even be required to make any statement to Nasdaq regarding the issue(s) underlying the late filing.<sup>6</sup>

### *Nasdaq’s Reversal in Posture*

Edward S. Knight, Executive Vice President and General Counsel of Nasdaq, argued in his December 7, 2005 comment letter regarding SR-NYSE-2005-75:<sup>7</sup>

NASDAQ feels the information contained in these reports [Forms 10-K and 10-Q] is critical, both to existing investors and to prospective investors, and provide the fundamental framework with which an investor evaluates a company and a marketplace determines compliance with continued listing requirements. **In sharp contrast to the extended time the NYSE allows delinquent filers to trade, NASDAQ begins delisting proceedings immediately when an issuer is late with a required annual or quarterly report.... While a NASDAQ-listed issuer may receive a short exception to remain listed, such exceptions come from independent hearing panels [emphasis added] and cannot exceed 90 days from the date of the panel’s decision. [Footnote omitted.]** Allowing such a company to continue to trade for an extended period ignores the emphasis that the Commission has stated should be placed on prospective investors, who have the right to assume that a listed security meets the listing requirements, [Footnote omitted] and who are ‘peculiarly in need of the sort of protection which is afforded by delisting’. [Footnote omitted.] Of course every marketplace need not have the same rules. Nonetheless, NASDAQ believes that the availability and integrity of financial statements is an issue that cuts across all markets and raises

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a conflict of interest or bias, or if circumstances otherwise existed where their fairness might reasonably be questioned. See SEC Release No. 34-51268; File No. SR-NASD-2004-125.

<sup>6</sup> We are aware that, as a result of an inspection by the SEC’s Office of Compliance and Inspection in the 2000-2001 time period and related recommendations, Nasdaq began expediting Panel hearings for late filers, as it was determined that a violation of Nasdaq’s filing requirement warranted more prompt regulatory attention than other types of violations. This resulted in Panel hearings within 21 to 35 days from the missed filing due date versus 30 to 45 days for other deficient companies. At some undeterminable later point, this practice was disbanded.

<sup>7</sup> SR-NYSE-2005-75 proposed amendments to NYSE Rule 802.01E that would allow the NYSE to forebear from commencing suspension and delisting proceedings despite the listed company’s failure to file the annual report within one year because, in the NYSE’s view, the delisting would be contrary to the national interest and the interests of public investors.

fundamental issues of investor protection and therefore we urge the SEC not to allow the NYSE to weaken its rule as proposed.

Similarly, in its own rule filing (SR-NASD-2004-125 (February 28, 2005)) in connection with modifying procedures for denying listing on Nasdaq, Nasdaq made clear that “the [Nasdaq] staff’s authority [to grant an extension] **would not extend to qualitative listing standards that are considered fundamental to an investor’s participation in the company or to Nasdaq’s relationship with the company.**” [Emphasis added]. This rule filing specifically references Nasdaq’s filing requirement as one of the “qualitative listing standards” for which the Nasdaq staff’s authority did not extend.<sup>8</sup>

In a September 2006 speech, Robert Greifeld, Nasdaq’s Chief Executive Officer, stated that: “We’ve been to the SEC and said either have the NYSE come to our standards or we’ll have to roll ours to theirs, which many believe is the wrong thing because certainly the cornerstone of making investment in a public company is their financial reporting.”<sup>9</sup>

Is Nasdaq’s claimed competitive disadvantage to the NYSE in this area now sufficient rationale to reverse its position and do “the wrong thing”? FTI believes that it is Nasdaq’s historic process for adjudicating late filers that is most consistent with the principles of the Exchange Act.

We are concerned that this move could compromise the importance placed by U.S. listed companies on providing investors (both institutional and individual alike) with timely and accurate financial statements in an era where the SEC has required many issuers to file periodic reports on an earlier basis than previous SEC rules permitted. This proposal, in effect, creates an uneven playing field between the many issuers that are diligent and strive to ensure that investors are provided with current and accurate financial statements and those issuers that do not.

### *A Move Away from Independence*

Given the importance of current and accurate financial information and related disclosures to investors, to our knowledge, the Nasdaq staff has historically had no discretion to provide listed companies with any extension to the filing requirement. The role of the Nasdaq staff in connection with late periodic public filings was limited solely to identification of the delinquency and notification to the violator, akin to a street cop. This was no accident.

Once the Nasdaq staff provided the delinquent company with notice of the late filing, the presiding independent Panel members were responsible for determining whether the issuer had presented a definitive plan with a high probability of being executed within a reasonable period of time. The strength of this process was that independent individuals were vested with making decisions on behalf of Nasdaq on whether or not an exception to the rule was

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<sup>8</sup> See SEC Release No. 34-51268, File No. SR-NASD-2004-125. Fn. 8.

<sup>9</sup> The Boston Globe, September 13, 2006.

warranted. This removed any opportunity for Nasdaq staff bias or taint from business considerations.

At the Panel hearing, representatives of an issuer's choosing (typically senior management and the chairman of the audit committee) have the opportunity to provide an explanation of what transpired, to explain why the issue is not likely to recur, and to present a plan to regain compliance. Importantly, Panel members typically ask, and company representatives must respond to, questions regarding the underlying facts and circumstances, or any other item of interest in the record. This meeting is valuable to the Panel members to help understand the underlying issues and to assess the acumen, character and approach being taken by those responsible for solving the issue(s) and filing the report. The meeting is equally valuable to the issuer as it provides a fair opportunity to explain what has happened and what is being done in response.

Panel members were also responsible for determining whether the issuer has provided as much information as possible to the investing public to make an informed investment decision in the absence of a periodic report. Carrying out these responsibilities in a wholly-independent manner is what distinguished Nasdaq's historic process of adjudicating filing delinquencies versus that of the NYSE.

In the past 15 years, FTI is not aware of a single instance in which the Panel process was called into question by the SEC or a federal court. So, notwithstanding Nasdaq's specified reasons, what has changed that warrants such a significant change in the way Nasdaq enforces its filing requirement? Could it be that Nasdaq is now a for-profit, publicly traded entity? Could Nasdaq be relaxing its regulatory duties in an effort to exercise greater business control over what rigors it is willing to put its late-filer clients through?

It is clear that Nasdaq derives a material amount of its revenue from listings.<sup>10</sup> Nasdaq disclosed in Nasdaq's Annual Report on Form 10-K for the fiscal year ended December 31, 2007 ("December 31, 2007 Form 10-K"), "While the reduction in initial listings or the loss of one or more large issuers could decrease our listing revenues, it could cause an even more significant decrease in revenues from the quoting, reporting and trading of those issuers' securities."<sup>11</sup> Consequently, embedded within Nasdaq's business model is an incentive to retain as many issuers on its marketplace for as long a period as possible.

It is here where Nasdaq's fiduciary duty to its shareholders potentially lies in conflict with its duty to discharge its regulatory obligations as an SRO. This concern is clearly disclosed in Nasdaq's December 31, 2007 Form 10-K: "The SEC staff has expressed concern about potential conflicts of interest of 'for-profit' markets performing the regulatory functions of a self-regulatory organization."<sup>12</sup> Nasdaq's historic process of relying upon independent Panel and Listing Council members to make listing decisions regarding late filers adequately addressed this concern. By vesting early authority with the Nasdaq staff,

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<sup>10</sup> Nasdaq's December 31, 2007 Form 10-K, pgs. 45-50.

<sup>11</sup> *Ibid* at 22.

<sup>12</sup> *Id.* at 25.

delaying the authority of the Panel and displacing the authority of the Listing Council, clearly such concerns are now well founded. As such, we believe that the SEC must reconcile these concerns before approving this proposed rule.

By removing or postponing decision-making authority from independent bodies, the strength of Nasdaq's adjudication process has been materially weakened and is not even equal to that of the NYSE where the reporting lines of these types of decision makers are deliberately separate from the business professionals. The NYSE's process for adjudicating late filers includes a process led by the NYSE's Listed Company Compliance division staff, which reports up a chain of command through the Chief Executive Officer, NYSE Regulation, Inc., an individual outside of the NYSE's business function.<sup>13</sup> That individual reports directly to the NYSE Regulation, Inc. Board of Directors, avoiding any pressures or appearance of influence by the NYSE's business functions. By housing its listing compliance monitoring and adjudication function in its regulatory arm, NYSE listing decisions are not tainted by, at a minimum, the appearance of self-dealing that can occur when the profit generating part of the organization has the ability to exert control directly or indirectly (e.g. budgetary considerations) on its regulatory function. In contrast, we understand that Nasdaq's Listing Qualifications department reports to the Office of the General Counsel, which in turn reports to Nasdaq's Chief Executive Officer. We are not suggesting that Mr. Greifeld has or will exercise inappropriate influence. We merely point out a significant structural flaw in the process.

Because the authority to deny or limit access to the market has always been vested in independent Panels in the past, Nasdaq's profit-generating part of the organization had limited ability to exert pressure on the regulatory side. This will no longer be the case if SR-NASDAQ-2008-085 is approved. Under this proposal, consider the opportunity for biased decision making if one of its most prized listed companies (measured by market capitalization and trading volume) was embroiled in management fraud that resulted in a prolonged and significant restatement, which, when compared to similar cases for smaller issuers, would not otherwise warrant an extension of time from the Nasdaq staff.

### ***Nasdaq Staff Discretion Versus Panel Discretion***

The expansion of Nasdaq staff's authority under this proposal would be unprecedented. To our knowledge, nowhere else in the Nasdaq rules, either currently or historically, has the Nasdaq staff been given the authority to provide up to a 180-day exception for a violation of any Nasdaq rule that is not mechanical in nature (e.g. an automatic extension to cure a quantitative deficiency, such as the \$1.00 bid price requirement).

This expansion of Nasdaq staff's authority at the expense of the independent bodies is problematic from several perspectives. First, under the proposed rule, the Nasdaq staff may grant an issuer an exception from the filing requirement of up to 180 days from the date the filing was due before any independent body reviews the underlying facts and circumstances.

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<sup>13</sup> See <http://www.nyse.com/regulation.nyse/1045516499685.html>.

Previously, it was the responsibility of the Panel members to serve as a check on the actions of the Nasdaq staff. Under the proposed rule, there is no check on Nasdaq staff's ability to grant an issuer an extension for up to 180 days, nor any review of any aspect of such decisions, unless a company appeals to the Panel. Under the prior process, every Panel decision was reviewed by the Listing Council. By providing the Nasdaq staff with this authority, which as recent as February 28, 2005 Nasdaq itself acknowledged was not advisable,<sup>14</sup> FTI is concerned that investor protections are being removed while diligent corporate governance is not being rewarded.

Second, the new adjudication process opens the door to the influence of Nasdaq staff bias as a result of prior Nasdaq staff interactions with an issuer and/or from conducting an investigation into the activities of the issuer. Take, for example, a situation in which there are prior interactions between the issuer and the Nasdaq staff in connection with a late periodic report. More specifically, during a routine review of an SEC report, the Nasdaq staff reads about a series of transactions that the analyst believes requires further investigation. The assigned analyst conducts an inquiry with the cooperation of the subject issuer. Ultimately, the subject company determines that a restatement is required and, as a result, an SEC periodic report becomes late.

Under these circumstances, the Nasdaq staff has properly done its job to investigate a disclosure item. However, by doing its job, whether in this type of specific example or in carrying out its general monitoring functions, the Nasdaq staff must form an opinion of the issuer and its representatives, which creates a bias, whether negative or positive. If that bias is negative and the Nasdaq staff determines to deny an extension request, we recognize that the company still has the opportunity to request a hearing with a Panel, which *may* stay a delisting. However, this company may have identical facts to another Nasdaq listed company and, but for the prior investigation and interaction with the Nasdaq staff, it may have received a favorable decision from the Nasdaq staff. It is this fact pattern, or many variations thereof, which in Nasdaq's words would be "misleading to shareholders and prospective investors" to say nothing of the injustice to the issuer. In effect, under SR-NASDAQ-2008-085, the Nasdaq staff will act as cop, judge and jury for up to the first 180 days after the late filing – a result that does not benefit listed companies or investors. This is why the prompt involvement of objective, independent decision makers is vital to the process.

### ***Automatic 60-Day Extension***

An issuer disclosing that it will be unable to meet its periodic reporting obligations constitutes a "red flag" to investors and regulators alike. In these situations, SROs are often the first line of defense for investors and properly exercise their regulatory duties by promptly stepping in, investigating the underlying facts and circumstances, and monitoring the situation more closely. NASDAQ-2008-085 proposes to do just the opposite. There is nothing in the proposal that would require Nasdaq to immediately investigate the causes of

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<sup>14</sup> See SEC Release No. 34-51268; SR-NASD-2004-125.

the late filing. In fact, for the right issuer, there could be business reasons and implicit pressures for the Nasdaq staff not to investigate, leading to the likelihood that the details of a material, negative corporate event that prevents the filing of a periodic report may not be disclosed to Nasdaq for an additional two months.

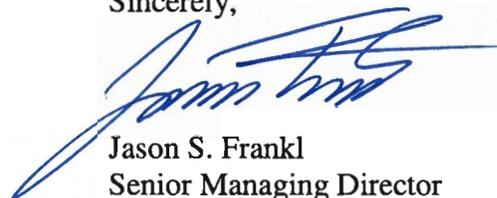
To reduce or eliminate the automatic 60-day grace period included in the proposed rule, the Nasdaq staff would need to raise grounds for delisting based upon a “public interest concern,” as permitted by Nasdaq Marketplace Rule 4300, which has rarely occurred historically. When investors are working with the disadvantage of not having access to current financial statements, particularly in this difficult economic environment where the propensity for accounting shenanigans and other conduct detrimental to accurate financial reporting are more likely to occur, Nasdaq’s proposed 60-day reprieve is inconsistent with investor protections.

***Request***

We urge the SEC to reject Nasdaq’s application of rule filing SR-NASDAQ-2008-085 and to require Nasdaq to follow its historic rules. We do not disagree with Nasdaq’s perception of an uneven playing field when comparing Nasdaq’s adjudication of late filers to that of the NYSE; however, the remedy should not be to allow Nasdaq to lower its regulatory bar.

Thank you for the opportunity to comment on this proposal. We look forward to the resolution of the matters raised within.

Sincerely,



Jason S. Frankl  
Senior Managing Director