

November 23, 2012

Respond to Washington, DC office

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**VIA EMAIL**

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Re: File Number SR-NASDAQ-2012-090

Dear Ms. Murphy:

We previously submitted comments in this matter dated August 22, 2012 and referred to in the SEC Order Instituting Proceedings as the "Thompson Letter." That letter was submitted on behalf of plaintiffs who have brought class actions against NASDAQ for negligence in the Facebook IPO, in order to recover losses they sustained from the system failures that permeated that IPO process on the NASDAQ Stock Exchange. At present there are nine such class actions that have been transferred to a multidistrict litigation in the United States District Court for the Southern District of New York. The plaintiffs are retail investors, not the NASDAQ member firms to whom the proposed accommodation proposal is directed. As such, the proposal does not provide a means for these retail investors to be made whole. This was and remains the principal focus of our concern.

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As noted in our prior comments,<sup>1</sup> we urge the Commission not to do or say anything in this proceeding that

1. Would, directly or by implication, in anyway jeopardize the ability of the retail investors to recover their losses in the courts; or
2. Would prejudice, directly or by implication, any of the important factual and legal issues of the retail investor litigation, including NASDAQ's claims of immunity,<sup>2</sup> the causes and effects of the Exchange's system failures, the market prices of Facebook stock that would have prevailed in a properly functioning IPO market (the so-called "benchmark price"), the types and categories of losses that should or should not be recognized as compensable, or the myriad of other unsupported factual or legal assumptions put forth by NASDAQ in the request for rulemaking.

Since the filing of our prior comments, very little additional, pertinent information has been made public. We are aware only of news reports that NASDAQ commissioned a study by IBM of the Exchange system failures, but no substantive details of that study have been made publicly available. In our prior comments we noted that much of NASDAQ's proposal was premised on self-serving assumptions as to what happened during the IPO – when the problems started, how long they lasted, what impact they had on the market prices, when market participants should have been able to take steps to mitigate losses, and others.<sup>3</sup> We observed that if NASDAQ is proposing the Commission make any findings as to these assumptions, it must be required to disclose fully their underlying factual bases, so that the assumptions

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<sup>1</sup> We do not repeat our prior comments here but request that they be incorporated into the record in full, as if fully set forth herein.

<sup>2</sup> We note that NASDAQ agrees the Commission need not address the immunity issues. Order at 14.

<sup>3</sup> The NASDAQ assumptions are discussed in greater detail in our prior submission. See Thompson Letter at 11-20.



can be tested and scrutinized by the Commission and by interested parties. To our knowledge, NASDAQ has not released any information concerning the bases of the assumptions or any further explanations concerning them. In this sense, all commenters and interested parties are flying blind.

We note that in the Order the Commission has requested “written data, views, and arguments” from commenters. However, it is not possible for us to provide any additional data or argument with respect to NASDAQ’s numerous factual assumptions without access to the underlying data, methodologies and support. Accordingly, the Commission cannot effectively adjudicate NASDAQ’s many assumptions, and we strongly encourage the Commission not to make findings as to any of them. On the other hand, NASDAQ’s claim that the proposal is just, equitable, fair, non-discriminatory and in the public interest, seems to rise or fall, at least in measurable part, on the validity of NASDAQ’s underlying assumptions. Thus, it is unclear how the Commission could properly rule upon whether the proposal satisfies Section 6(b)(5) of the Act without a thorough testing of the underlying bases of the NASDAQ assumptions in an adversary proceeding.

We submit that the dilemma of attempting to decide, on pure policy and legal grounds, issues that are ineluctably intertwined with myriad and complex fact questions, without access to the underlying facts, is symptomatic of an overriding concern that we have had from the outset and that other commenters have also pointed out – the NASDAQ proposal is simply not a proper subject for a rulemaking at all. Indeed, we agree with the comments in the Citi Letter, that the type of loss sustained in the Facebook IPO is not the result of an ordinary system failure and therefore not within the ambit of Rule 4626. Thus, resolution of fact questions would seem required even to decide the threshold question of the scope applicability of the rule in the first instance.



In reality, the proposed “rule” amendment would not result in a rule of general and future applicability. It rather is an attempt to garner the Commission’s blessing for a settlement offer from NASDAQ to its member firms as a means of resolving potential litigation over what is clearly a particularized dispute among a discrete and identifiable number of private parties, namely NASDAQ and its member firms. NASDAQ’s attempt to couch a private dispute as a proposed rulemaking, and to tie around it a ribbon of a Commission approval, seems both unnecessary and fraught with potential mischief.

For these reasons, and those stated in our prior comments, we submit the proposed rule does not promote fair and equitable principles of trade, does not protect investors and the public interest and is not designed to prevent unfair discrimination between customers, issuers, brokers, or dealers. It does not meet the criteria of Section 6(b)(5) of the Act, and it should be denied.

Respectfully submitted,

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On behalf of Plaintiffs in

*Goldberg, et al. v. NASDAQ OMX Group, Inc., et al.*  
No. 12-cv-4054 (S.D.N.Y.)

*McGinty v. NASDAQ OMX Group, Inc., et al.*  
No. 12-cv-5549 (S.D.N.Y.)

*Alfonso, et al. v. The NASDAQ Stock Market LLC, et al.*  
No. 12-cv-4201(S.D.N.Y.)

*Steinman v. NASDAQ OMX Group, Inc., et al.*  
No. 12-cv-4600 (S.D.N.Y.)

*Eagan v. NASDAQOMX Group, Inc., et al.*  
No. 12-cv-6882 (S.D.N.Y.)