

November 17, 2005

**Via Electronic Mail: rule-comments@sec.gov**

U.S. Securities and Exchange Commission  
Station Place  
100 F Street, N.E.  
Washington, DC 20549-9303

Attention: Jonathan G. Katz, Secretary

**Re: File No. 10-131 — The Nasdaq Stock Market Inc., Notice of Filing of  
Amendment Nos. 4 and 5 to its Application for Registration as a  
National Securities Exchange under Section 6 of the Securities Exchange  
Act of 1934 — Release No. 34-52559 (October 4, 2005)**

Ladies and Gentlemen:

In reviewing the Amendment Nos. 4 and 5 filed by the Nasdaq Stock Market Inc. (“Nasdaq”) to its application for registration as a national securities exchange in the above captioned release (the “Release”), we note the Commission’s request for comment on (i) the extent to which Nasdaq should have access to OATS data and data from the NASD Trade Reporting Facility (the “TRF”) and (ii) the extent to which Nasdaq should be able to use OATS data for non-regulatory purposes.

As an electronic market, the Nasdaq exchange will have all the data it needs to conduct regulatory surveillance of trading activity in its own marketplace. The Nasdaq exchange will not have any authority to regulate trading in its listed securities on other exchanges. It is therefore not necessary as a regulatory matter for Nasdaq to have access to OATS and TRF data regarding orders and executions by Nasdaq members in Nasdaq-listed securities executed away from the Nasdaq Market Center.

If the purpose of the Nasdaq proposal is nevertheless to assert Nasdaq’s regulatory authority over trading of its securities on other exchanges, it is just as improper as the

failed efforts by the New York Stock Exchange (“NYSE”) to regulate trading in NYSE-listed stocks away from NYSE.<sup>1</sup>

We respectfully suggest it also would be improper to permit Nasdaq to use OATS data for non-regulatory purposes. The OATS and TRF data regarding off-exchange trading would confer significant and unique commercial benefits on Nasdaq, benefits that would not help investors. The most significant benefit will be to give Nasdaq an inside and possibly exclusive track to extract additional market-data revenue, in effect, a continuation of the data revenue Nasdaq currently derives from trades reported to ACT. Nasdaq would be able to use those additional revenues to subsidize its entry into other competitive arenas. Among other things, it could use the revenues to provide rebates designed to attract or retain order flow, thereby conferring upon Nasdaq a competitive advantage over other exchanges. Presumably, Nasdaq also will be able to incorporate OATS data into its data products.

To the extent the Nasdaq proposal is a continuation of the sharing of these data and the resultant revenues they generate between the NASD and Nasdaq, it raises yet again the question of the extent to which the NASD and Nasdaq will be truly separate entities. That question bears not only on whether the Nasdaq proposal is appropriate to Nasdaq as an exchange, but also whether the NASD is sufficiently independent of Nasdaq to function as an impartial regulatory body.<sup>2</sup>

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<sup>1</sup> In connection with its consideration of proposed amendments to NYSE Rule 92, the Commission determined that the NYSE should not be allowed to apply its rule to other marketplaces, which the NYSE sought to do to prevent other markets from adopting more liberal trading standards than the NYSE was prepared to allow. See Securities Exchange Act Release No. 44139 (March 30, 2001).

<sup>2</sup> We previously addressed this issue in our letters to the Commission commenting on the NASD’s formation of the Alternative Display Facility. See Bloomberg Tradebook’s letter to the Commission of February 7, 2002 (SEC File No. SR-NASD-2001-90) in which we noted:

Given the Congress’s direction to the Commission in Section 11A of the Exchange Act to use its authority to facilitate the establishment of a national market system, we believe that the Commission was correct in concluding that the NASD should develop an alternative display facility to provide an OTC market as a condition to Nasdaq’s becoming a for-profit exchange. Together with Section 15A(b)(11) of the Exchange Act, Section 11A(c)(1) of the Exchange Act sets forth clear standards the NASD must meet as a self-regulatory organization, including the obligation to ensure equal regulation of all markets. In addition to the clear congressional intent and the express provisions of the statute that speak to the need for the NASD’s independence and impartiality, the NASD is also bound by the Commission’s Order of August 8, 1996 censuring the NASD (the “1996 Order”). To the extent that the NASD and its wholly owned subsidiary, NASD-R, are not independent of the Nasdaq market, the resultant conflict of interest stands in clear violation of the 1996 Order and the related consent decree [citations omitted].

If the Commission were to approve Nasdaq's use of OATS and TRF data for non-regulatory purposes, the logical next step would be for the Commission to grant access to such data for non-regulatory purposes to any other exchanges with UTP privileges — or indeed anyone else who asked for the data for non-regulatory purposes. Conferring such a benefit on the Nasdaq exchange alone would be anti-competitive and would be inconsistent with the congressional policy expressed in Section 11A(a)(1)(c)(ii) of the Securities Exchange Act of 1934 (the "Exchange Act") that it is "in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets . . . to assure fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets."

The Nasdaq proposal, while Nasdaq made little of it in its filing, raises significant issues of public policy and market structure. There has long been considerable debate as to the appropriate use of market-data revenue by SROs, including the extent to which such revenues should be used to fund regulation or attract liquidity through rebates. Those questions are now part of a broader public policy debate regarding the appropriate regulatory functions of SROs. Commission approval of Nasdaq's proposal would effectively foreclose key aspects of that debate without adequate public consideration of the key issues involved.

To fulfill its responsibilities as a national securities exchange, Nasdaq need not have access to order and execution data regarding transactions in Nasdaq-listed securities that take place away from Nasdaq's trading platform. Granting Nasdaq access to OATS and TRF data regarding such orders and transactions and permitting Nasdaq to use those data for non-regulatory purposes would place the Nasdaq stock exchange at an unfair competitive advantage to other exchanges. Indeed, it would give Nasdaq an unfair competitive advantage over any market participant that produces or relies upon market data. The proposal is not necessary or appropriate in furtherance of the purposes of the Act and is inconsistent with the clearly stated policy of Exchange Act Section 11A. Accordingly, the Commission should not approve it

Respectfully submitted,

*Kim Bang* by RDB

cc: The Hon. Christopher Cox, Chairman  
The Hon. Paul S. Atkins, Commissioner  
The Hon. Cynthia A. Glassman, Commissioner  
The Hon. Roel C. Campos, Commissioner  
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