EDWARD KNIGHT
EXECUTIVE VICE PRESIDENT

NASDAQ®

THE NASDAQ STOCK MARKET
9600 BLACKWELL ROAD
ROCKVILLE, MARYLAND 20850
P 301.978.8480 F 301.978.8471
edward.knight@nasdaq.com

January 16, 2007

Via Facsimile and Overnight Mail

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: **SR-NASDAQ-2006-040**

Dear Ms. Morris:

The NASDAQ Stock Market LLC ("Nasdaq") appreciates this opportunity to respond to the comments submitted on the above captioned proposed rule change.[1] This proposal generated a number of comments, and we are grateful for the many positive comments submitted by listed companies, their representatives, and other interested persons. The Commission's statutory mandate concerning fees, as set forth in section 6(b)(4) of the Securities Exchange Act of 1934,[2] is to ensure that the rules of an exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." Further, section 6(b)(8) of the Act[3] provides that the rules of an exchange cannot "impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Act. As described below, Nasdaq's proposed fees, which are at or below (and in some cases well below) previously approved fees for the New York Stock Exchange (NYSE), NYSE Arca, and the American Stock Exchange (Amex) meet these requirements

---

1 This response is limited to Nasdaq's proposal to increase annual fees. No adverse comments were received on other proposals contained in SR-NASDAQ-2006-40 relating to entry fees for the Nasdaq Capital Market, listing of additional shares fees, and fees for issuers seeking written interpretations of Nasdaq's listing rules. In addition, no adverse comments were received on Nasdaq's proposal to eliminate the entry fee for most companies transferring between the Nasdaq Capital Market and the Nasdaq Global Market and to include certain fee waivers in Nasdaq's rules.

2 15 U.S.C. 78f(b)(4)

3 15 U.S.C. 78f(b)(8)

Notwithstanding the many favorable comments from listed companies on Nasdaq's history of innovation, and our plans to provide additional value to listed companies, other listed companies, as well as several companies that Nasdaq competes with in businesses that are not regulated by the Commission, have raised questions about Nasdaq's plan to offer listed companies a sample of certain investor communication services. Nasdaq has determined to modify the proposal to remove the proposed service that converts the annual report and proxy material into a dynamic online document for use by current and potential shareholders, the four audio webcasts, the four press releases, the four Form 8-K (or 6-K) filings and the customized report to help analyze exposure to securities litigation as a part of the listing package.[4] These services will not be offered in connection with a Nasdaq listing and do not serve as a justification for the proposed fee increase.[5] Therefore, Nasdaq believes it is not necessary to address the merits of the comments objecting to Nasdaq providing these services.

Even without these services, the proposed fees are reasonable. While the proposal represents a fee increase for most listed companies, and some companies have commented that the proposed increase is excessive,[6] Nasdaq believes that this increase is appropriate in light of the substantial resources Nasdaq dedicates to its regulatory programs ensuring that they are world-class, including the Nasdaq Listing Qualifications and MarketWatch Departments; the initiatives Nasdaq has undertaken to increase issuer visibility, including through use of the MarketSite and international conferences and the re-branding of the Nasdaq SmallCap Market as the Nasdaq Capital Market; the enhancements Nasdaq has made to its trading platform, which increase liquidity and improve price discovery, thereby lowering trading costs for listed companies' shareholders[7]; and the enhancements made to Nasdaq Online and the Market Intelligence Desk. In addition, the proposed increase in annual fees for companies listed on the Capital Market, while a greater percentage increase than the increase for Global and Global Select Market companies, is also appropriate. While these companies share in all of the benefits described above, the fees for companies listed on the Capital Market remain lower than those of companies listed on the Global and Global Select Markets. Further, there are additional benefits to Capital Market companies that do not apply to companies listed on the Global and Global Markets. For example, Nasdaq has proposed to eliminate the entry fee for Capital Market companies to transfer to the Global or Global Select Market.[8] In addition, in response to a Nasdaq petition, the Commission has proposed to treat securities listed on the Capital Market as "covered securities" under Section 18 of the Securities Act of 1933.[9] If approved, this will result in

---

4 See Amendment No. 3 to SR-NASDAQ-2006-40, filed January 16, 2007.

5 Nasdaq still intends to offer these services to Nasdaq-listed companies and companies listed on other U.S. securities exchanges that complete a registration process and meet with a Nasdaq representative, as a free sample to encourage them to try these services. Of course no company is required to use these free samples.

6 See, e.g., comments of Don T. Seaquist (November 27, 2006), Don D. Jennings, Kentucky First Federal Bancorp (November 28, 2006), and Adam Yan, eFuture Information Tech Inc. (December 15, 2006).

7 Nasdaq has spent approximately $1 billion to complete the Instinet transaction, primarily for its trading technology, and is in the final stages of launching its "Single Book" platform based on that technology.

8 See, e.g., comments of Efstathios D. Gourdomichalis, FreeSeas, Inc. (December 12, 2006) and Jose Ignacio Del Barrio, Telvent GIT, S.A. (December 13, 2006).

9 Securities Act Release No. 8754 (November 16, 2006), 71 FR 67762 (November 22, 2006).

a substantial new benefit to companies listed on the Capital Market, easing their ability to raise capital. Finally, given that Nasdaq's proposed annual listing fees are generally below those of other markets,[10] Nasdaq believes that its fees are, *per se*, reasonable.[11] As such, Nasdaq believes the annual fee proposal, as amended, meets the reasonableness requirement of section 6(b)(4).

Nasdaq's proposed fees will also be equitably allocated. No commenter has alleged that Nasdaq's fees would not be equitably allocated "among its members and issuers and other persons using our facilities" and the Commission has previously approved fee structures that allocate listing fees by shares outstanding, as is proposed for the Global Market.[12] The only comments concerning the equitable allocation of Nasdaq's proposed fees related to Nasdaq providing services, which some companies might choose not to use.[13] As noted above, Nasdaq has amended the filing to eliminate these proposed services as a part of a Nasdaq listing and is no longer relying on the provision of these services as justification for the proposed change. Accordingly, it is not necessary to address those comments.

Finally, Nasdaq's proposed fees will not present any burden on competition. Again, the only comments concerning the burden on competition related to Nasdaq providing press releases, Edgar filings, and webcasts, which Nasdaq is no longer relying on as a justification for the proposed change.[14]

Some commenters have also questioned whether Nasdaq's providing news dissemination services raises a conflict of interest.[15] Again, Nasdaq has amended the filing to remove those services as a part of the listing and as a justification for the proposed fee changes. Nonetheless, it is important to note that Nasdaq's rules on the dissemination of material information permit such dissemination in any Regulation FD

---

10 The proposed $27,500 Capital Market annual fee compares to fees of $30,000 - $85,000 on NYSE Arca and from $16,500 - $34,000 on the American Stock Exchange. The proposed annual fees for the Nasdaq Global and Global Select Markets range from $30,000 to $95,000, compared to fees on the NYSE that range from $38,000 to $500,000. For any amount of shares outstanding, Nasdaq's fees would be less than those of the NYSE, and Nasdaq's fees would be more than $400,000 less for some Global and Global Select Market companies.

11 See also comments of Deirdre Skolfield (November 28, 2006) and Betsy Atkins (December 6, 2006).

12 The current Nasdaq annual fees are allocated based on shares outstanding, as are the fees of the NYSE, NYSE Arca and the American Stock Exchange. See, e.g., Section 902.03 of the NYSE Listed Company Manual; Section 141 of the Amex Company Guide. The proposed annual fee will be the same for all companies listed on the Capital Market.

13 See, e.g., comments of Pickard and Dijinis LLP on behalf of Thomson Financial LLC (December 11, 2006) and David B. Armon, PR Newswire (October 13, 2006 and November 3, 2006).

14 While it is not necessary to address these comments given the change to the rule proposal, we do note that a number of commenters expressed the need for additional competition among providers of the Services. See, e.g., comments of Andrew A. Sauter, Avigen, Inc. (December 12, 2006), Lilian Vassilatos, Eclipsys Corp. (December 11, 2006), Brad Burke, Rice Alliance for Technology and Entrepreneurship (December 10, 2006), Michael Walsh, Investor Relations Associates (December 7, 2006) and E.E. Wang (November 29, 2006).

15 Comments of Dominic Jones, IRWebReport.com (December 12, 2006) and Michael Nowlan, MarketWire (November 15, 2006).

compliant manner.[16] Nasdaq's regulatory role in these situations is to determine whether it is necessary to halt an issuer's stock to allow dissemination of the news to the market. The issuer's choice of news dissemination service plays no role in this regulatory function – the decision to halt is based on the substance of the news itself and not on the manner of distribution. Moreover, when Nasdaq does act to help its issuers by identifying methods of distributing press releases, Nasdaq lists several providers of those services that claim to satisfy the broad, non-exclusionary distribution requirements of Regulation FD.[17]

If the SEC staff has any questions concerning this submission, please feel free to contact me at (301) 978-8480 or Arnold Golub at (301) 978-8075.

Very truly yours,

Edward S. Knight

Edward S. Knight
Executive Vice President and General Counsel

---

16 Nasdaq Rules 4310(c)(16) and 4320(e)(14) and IM-4120-1.

17 See Nasdaq Regulatory Requirements at page 30, attached as Exhibit F to the December 11, 2006 comment of Holmes, Roberts & Owen LLP, submitted on behalf of Business Wire. Nasdaq also plans to add disclosure to this information indicating that it is not necessary to use PrimeNewswire to satisfy Nasdaq's requirements.