

## SECURITIES ALERT

### NASDAQ COMPLETES TRANSITION TO NATIONAL SECURITIES EXCHANGE



Following a lengthy application process, NASDAQ became operational as an exchange in NASDAQ-listed securities on August 1, 2006, and plans to become operational as an exchange for other exchange-listed securities on October 1, 2006. Prior to the transition, NASDAQ was technically classified as an automated inter-dealer quotation system, not a national securities exchange. Registrants whose securities trade on NASDAQ will generally not experience any interruptions as a result of this transition. The following discussion provides some background on the transition and its impact on NASDAQ-listed companies.

#### BACKGROUND ON NASDAQ'S TRANSITION TO AN EXCHANGE

In March 2001, in conjunction with a series of private offerings and other transactions designed to divest the National Association of Securities Dealers (NASD) of its ownership of NASDAQ, NASDAQ filed an application to register for national securities exchange status under Section 6 of the Securities Exchange Act of 1934 (the Exchange Act). Pursuant to NASDAQ's application, The NASDAQ Stock Market LLC, a subsidiary of The NASDAQ Stock Market, Inc., will run the new exchange, although the NASD will continue to provide regulatory assistance.

NASDAQ believes its registration as a national securities exchange provides several benefits to issuers, as well as to the exchange, including—

- removing any conflicts of interest between NASDAQ and the NASD because NASDAQ and the NASD are now separate entities
- allowing NASDAQ to compete with foreign exchanges
- streamlining NASDAQ's governance
- no longer being recognized as an "over-the-counter" market
- opening the door to additional financial institution investments in NASDAQ-listed securities
- providing a greater level of prestige.

## IMPACT ON NASDAQ-LISTED COMPANIES

NASDAQ-listed companies should experience few, if any, issues in the transition due to NASDAQ's efforts to coordinate the conversion process with the Securities and Exchange Commission (SEC).

**Transition from Section 12(g) to 12(b) Registration.** Securities currently traded on NASDAQ are registered or were granted an exception from registration under Section 12(g) of the Exchange Act, which requires registration of securities (1) not traded on a national exchange, (2) held by at least 500 shareholders and (3) whose issuer holds more than \$10 million in assets. Now that NASDAQ has commenced operation as a national securities exchange, NASDAQ-listed securities are required to be registered under Section 12(b) of the Exchange Act rather than under Section 12(g).

Changing registration status would normally require each issuer to file with the SEC a Form 8-A to register the securities pursuant to Section 12(b) of the Exchange Act, an expensive and burdensome proposition in light of the number of companies that would have to make the filing. To avoid this burden and smooth the transition, NASDAQ adopted Rule 4130, as approved by the SEC, which allows NASDAQ to file a single application on behalf of all of its registrants, other than those that previously opted out of the global application in favor of filing their own Section 12(b) registration statement.

Issuers that traded on NASDAQ without registration, such as those issuers trading under a Section 12(g) exemption, also escape significant issues in the transition. NASDAQ proposed "grandfathering" these companies with the new exchange, and the SEC has granted a temporary three-year continuation of the exemptions, giving such issuers until August 1, 2009, to register under Section 12(b).

Following the transition to Section 12(b) registration, all NASDAQ-listed companies will have access to several exemptions not previously available to non-exchange-traded securities, including exemptions for specific warrant types under Rule 12a-4 of the Exchange Act, temporary exemptions of substituted or additional securities under Rule 12a-5 and exemptions of stock contained in standardized market baskets under Rule 12a-7.

**Section 16 and Form 144 Filings.** Following the transition, Nasdaq-listed companies must comply with additional filing requirements under Section 16 of the Exchange Act and Rule 144 of the Securities Act of 1933. Section 16 and Form 144 filings are required to be filed with the SEC, and, if the security is traded on a national exchange, with the exchange. Now that NASDAQ has become a national securities exchange, these filings are required to be filed with NASDAQ. However, NASDAQ has received no-action relief from the SEC that allows EDGAR filings of Section 16 reports and Forms 144 to satisfy the filing requirement with NASDAQ. Any such filings not made through the EDGAR system will need to be filed separately with NASDAQ.

**SEC Filing Numbers.** Another potential concern associated with the conversion to a national securities exchange relates to the filing numbers on registrants' SEC filings. In general, filings have different numbers based on whether the securities are traded on an exchange. The SEC has stated that NASDAQ companies will not receive new Exchange Act numbers, and should continue to use their original file numbers (00X-XXXXX). Central Index Key (CIK) numbers for EDGAR filings will also remain the same after the transition.

**Form 10-K Changes.** Before NASDAQ's transition to a national securities exchange, the cover page to Form 10-K filings for NASDAQ-listed companies stated that the company had registered its securities under Section 12(g) of the Exchange Act. Form 10-K filings for NASDAQ-listed companies should now reflect that their securities are registered under Section 12(b) of the Exchange Act and should list "The NASDAQ Stock Market LLC" as the exchange upon which the securities are listed.

**Deregistration Changes.** As part of the transition to a national securities exchange, NASDAQ-listed companies will be confronted with different deregistration requirements. Currently, Rule 12g-4 of the Exchange Act governs deregistration of securities registered under Section 12(g), requiring companies to file a Form 15 to deregister securities under Section 12(g). Now that NASDAQ is an exchange, Rule 12d2-2 will govern the deregistration of securities registered under Section 12(b), requiring NASDAQ or the company to file a Form 25, rather than a Form 15, to deregister its securities under the Exchange Act.

**Miscellaneous Changes.** NASDAQ does not believe that disclosure requirements under the Securities Act and Exchange Act will change following its transition to a national securities exchange. Additionally, NASDAQ does not intend to change either its fees or its listing standards.

## CHANGES IN MARKET TIERS

In conjunction with the transition to a national securities exchange, NASDAQ restructured its market designations effective July 1, 2006. NASDAQ now offers three market tiers for public companies:

- the NASDAQ Global Select Market
- the NASDAQ Global Market
- the NASDAQ Capital Market.

The NASDAQ Global Select Market is intended to be an elite designation with very high listing standards. The NASDAQ Global Market contains listings formerly found in the NASDAQ National Market that do not otherwise meet the criteria for the NASDAQ Global Select Market, and the NASDAQ Capital Market contains listings formerly found in the NASDAQ SmallCap Market.

## CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

Ambika Kuckreja  
 akuckreja@akingump.com  
 1.866.AKIN LAW

Austin	Brussels	Dallas	Dubai	Houston	London	Los Angeles	Moscow
New York	Philadelphia	San Antonio	San Francisco	Silicon Valley	Taipei	Washington, D.C.	