



DIVISION OF  
MARKET REGULATION

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

December 29, 2006

Ms. Ann Vlcek  
Vice President and Associate General Counsel  
The Securities Industry and Financial Markets Association  
1425 K Street, NW  
Washington, DC 20005-3500

RE: Request for Temporary No-Action Relief from Exchange Act Rules 17a-3, 17a-25, and 17a-5 Relative to NASDAQ's Commencement of Operation as an Exchange.

Dear Ms. Vlcek:

This letter is written in response to your letter, dated December 29, 2006, in which the Securities Industry and Financial Markets Association (or "SIFMA") requests both an extension of the No Action relief granted by the staff of the Division of Market Regulation (the "Division") on July 31, 2006, as well as certain additional relief as described below, regarding the NASDAQ Stock Market LLC's ("NASDAQ") operation as a national securities exchange.

**I. Background**

On July 31, 2006, the staff of the Division confirmed to the Securities Industry Association (now SIFMA) by letter that it would not recommend to the Commission enforcement action under Rules 17a-3 or 17a-25 of the Securities Exchange Act of 1934 ("Exchange Act") if a broker-dealer reflects 1) NASDAQ as an over-the-counter ("OTC") market instead of an exchange market, 2) NASDAQ securities as OTC securities instead of exchange-listed securities, and/or 3) a broker-dealer as a member of NASD rather than as a member of NASDAQ (or vice versa) on required books and records and securities transaction information submitted to the Commission.<sup>1</sup> This relief was extended with respect to NASDAQ UTP Plan securities,<sup>2</sup> and is due to expire on December 31, 2006.

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<sup>1</sup> See Securities Industry Association, 2006 SEC No-Act. LEXIS 582 (Jul. 31, 2006). Hereinafter, "securities transaction information submitted to the Commission" may also be referred to as "transaction reports."

<sup>2</sup> Transactions are reported pursuant to two national market system plans: Nasdaq-listed securities are reported to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (referred to either as "UTP Plan securities" or "NASDAQ-listed securities"); securities listed on other national securities exchanges (i.e., the New York Stock Exchange and the American Stock Exchange) are reported to the Consolidated Transaction Association Plan (referred to as "CTA Plan securities" or "non-NASDAQ-listed securities").

At the time the relief was requested, NASDAQ believed that it would become a national securities exchange for trading both UTP Plan and CTA Plan securities and would have completed the integration of its systems to its Single Book execution system platform for both UTP Plan and CTA Plan securities prior to December 31, 2006. However, NASDAQ has since run into some obstacles to meeting that target.

At this point NASDAQ is operating as an exchange market for NASDAQ-listed securities and it has integrated its systems to its Single Book execution system platform for those securities. However, NASDAQ is not presently operating as an exchange market for non-NASDAQ-listed securities and it has not integrated its systems to its Single Book execution system platform for non-NASDAQ-listed securities. NASDAQ presently believes that it will begin operating as an exchange market for non-NASDAQ-listed securities and will integrate its systems to its Single Book execution system platform for those securities on the same day.

## **II. Requested Relief**

### **1. Extension of Prior Relief for NASDAQ-listed Securities**

SIFMA believes that some broker-dealers may not have planned to be able to distinguish between NASDAQ-listed securities and non-NASDAQ-listed securities after December 31, 2006 because they were relying on all NASDAQ trades being exchange-listed after that date and, therefore, they may need additional time to make programming changes.

Consequently, SIFMA is requesting that the staff of the Division of Market Regulation extend the relief it granted to broker-dealers last July 31, 2006 relating to NASDAQ-listed securities from December 31, 2006 to sixty days following the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

### **2. Request for Relief Regarding Non-NASDAQ-listed Securities**

#### *A. Broker-dealers that have Already Programmed Systems Changes*

Some broker-dealers have already updated their systems so that, after December 31, 2006, their required books and records and transaction reports will reflect, for transactions in non-NASDAQ-listed securities 1) NASDAQ as an exchange market instead of an OTC market, and 2) the transaction as having occurred on an exchange market rather than an OTC market, and/or 3) a broker-dealer as a member of the NASDAQ rather than as a member of the NASD. As a result of NASDAQ's delay, these broker-dealers' required books and records and transaction reports will be incorrect until the NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and

completes the integration of its systems to its Single Book execution system platform for those securities.

Consequently, SIFMA is requesting that the staff of the Division confirm that the Division will not recommend to the Commission enforcement action under Exchange Act Rules 17a-3 and 17a-25 against a broker-dealer that reflects, for transactions in non-NASDAQ-listed securities 1) NASDAQ as an exchange market instead of an OTC market, and/or 2) the transaction as having occurred on an exchange market rather than an OTC market, and/or 3) a broker-dealer as a member of the NASDAQ rather than as a member of the NASD on its required records and transaction reports from January 1, 2007 until the date the NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

*B. Anticipatory Relief for Broker-dealers to Make Systems Changes*

SIFMA wants to ensure that broker-dealers have sufficient time both to make and to test system changes necessary to provide for the operation of NASDAQ as an exchange market for non-NASDAQ-listed securities and to allow for a smooth integration of NASDAQ's systems to its Single Book execution system platform for those securities.

Consequently, SIFMA is requesting that the staff of the Division confirm that the Division will not recommend to the Commission enforcement action under Exchange Act Rules 17a-3 and 17a-25 against a broker-dealer that reflects, for transactions in non-NASDAQ-listed securities, 1) NASDAQ as an OTC market instead of an exchange market, 2) the transaction as having occurred on an OTC market rather than an exchange market, and/or 3) a broker-dealer as a member of NASD rather than as a member of NASDAQ on required books and records and securities transaction information submitted to the Commission from the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities until sixty days thereafter.

**3. Request for Relief from Exchange Act 17a-5**

Due to the above-described systems complications, some broker-dealers may incorrectly classify securities commission revenues generated by transactions in NASDAQ-listed and non-NASDAQ-listed securities in the Statement of Income (Loss) section on FOCUS Reports submitted to the broker-dealers' designated examining authorities in accordance with Exchange Act Rule 17a-5.<sup>3</sup>

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<sup>3</sup> 17 CFR 240.17a-5.

Consequently, SIFMA is requesting that the staff of the Division confirm that the Division will not recommend to the Commission enforcement action under Exchange Act Rule 17a-5 before the sixtieth day following the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities if a broker-dealer mis-allocates securities commission revenues generated by transactions in NASDAQ-listed and non-NASDAQ-listed securities on FOCUS reports submitted to the broker-dealer's designated examining authority.

### **III. Response**

Based on your representations and the facts presented, the Division will not recommend to the Commission enforcement action under Exchange Act Rule 17a-3 if a broker-dealer reflects on books and records required under Exchange Act Rule 17a-3;

- a) for transactions in NASDAQ-listed securities, 1) NASDAQ as an OTC market instead of an exchange market, 2) NASDAQ securities as OTC securities instead of exchange-listed securities, and/or 3) a broker-dealer as a member of NASD rather than as a member of NASDAQ (or vice versa) until the sixtieth day following the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities;
- b) for transactions in non-NASDAQ-listed securities by a broker-dealer that has programmed the appropriate systems changes, 1) NASDAQ as an exchange market instead of an OTC market, and/or 2) the transaction as having occurred on an exchange market rather than an OTC market, and/or 3) a broker-dealer as a member of the NASDAQ rather than as a member of the NASD until the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities; and
- c) for transactions in non-NASDAQ-listed securities by a broker-dealer that has not programmed the appropriate systems changes, 1) NASDAQ as an OTC market instead of an exchange market, 2) the transaction as having occurred on an OTC market rather than an exchange market, and/or 3) a broker-dealer as a member of NASD rather than as a member of NASDAQ from the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities until sixty days thereafter.

Broker-dealers either should maintain sufficient additional records to identify that a given transaction was effected on an exchange market or an OTC market, that the security is an exchange-listed security or an OTC security, and/or that the broker-dealer is either a

member of NASDAQ or NASD, or may rely on the NASDAQ to access and obtain this information until the end of the no-action relief period.<sup>4</sup>

In addition, the Division will not recommend to the Commission enforcement action under Exchange Act Rule 17a-25 if a broker-dealer reflects in securities transaction information submitted to the Commission pursuant to Exchange Act Rule 17a-25;

- a) for transactions in NASDAQ-listed securities, NASDAQ as an OTC market instead of an exchange market and NASDAQ securities as OTC securities instead of exchange-listed securities until the sixtieth day following the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities;
- b) for transactions in non-NASDAQ-listed securities by a broker-dealer that has programmed the appropriate systems changes, NASDAQ as an exchange market instead of an OTC market, and/or the transaction as having occurred on an exchange market rather than an OTC market until the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities; and
- c) for transactions in non-NASDAQ-listed securities by a broker-dealer that has not programmed the appropriate systems changes, NASDAQ as an OTC market instead of an exchange market, and/or the transaction as having occurred on an OTC market rather than an exchange market from the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities until sixty days thereafter.

Finally, the Division will not recommend to the Commission enforcement action under Exchange Act Rule 17a-5 if a broker-dealer incorrectly classifies securities commission revenues generated by transactions in NASDAQ-listed and non-NASDAQ-listed securities on FOCUS reports submitted to the broker-dealer's designated examining authority until the sixtieth day following the date NASDAQ begins operating as an exchange for non-NASDAQ-listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

This position concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of statutory or regulatory provisions of the federal securities laws. Moreover, this position is based on the facts you have presented

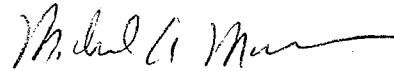
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<sup>4</sup> Letter from Mary Revell, Associate Vice President, The NASDAQ Stock Market, to Michael A. Macchiaroli, Associate Director, Division of Market Regulation, SEC (August 4, 2006), telephone conversation on November 15, 2006, and Letter from Mary Revell, Associate Vice President, The NASDAQ Stock Market, to Michael A. Macchiaroli, Associate Director, Division of Market Regulation, SEC (December 29, 2006).

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and the representations you have made, and any different facts or conditions may require a different response. This position is subject to modification or revocation if at any time the Commission or the Division determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. The Division expresses no view with respect to any other questions that the proposed activities may raise, including the applicability of other federal or state laws or self-regulatory organization rules to those activities.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Macchiaroli", with a long horizontal flourish extending to the right.

Michael A. Macchiaroli  
Associate Director



December 29, 2006

Michael A. Macchiaroli  
Associate Director  
Division of Market Regulation  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Request for Temporary No-Action Relief from Exchange Act Rules 17a-3, 17a-25, and 17a-5 Relative to NASDAQ's Commencement of Operation as an Exchange

Dear Mr. Macchiaroli,

The NASDAQ Exchange Working Group of the Securities Industry and Financial Markets Association<sup>1</sup> ("SIFMA"), formerly the Securities Industry Association or SIA, appreciates the Securities and Exchange Commission ("SEC" or "Commission") Division of Market Regulation ("Division") staff's grant of no-action relief to broker-dealers until December 31, 2006 in connection with the commencement of NASDAQ's operation as a national securities exchange for NASDAQ-listed securities and concerning certain books and records requirements under Rule 17a-3 of the Securities Exchange Act of 1934 ("Exchange Act") and certain securities transaction information required to be submitted to the Commission pursuant to Rule 17a-25 of the Exchange Act.<sup>2</sup>

Because of the unanticipated delay in NASDAQ's completion of its systems integration for securities listed on other national securities exchanges and reported to the

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> Letter from Michael A. Macchiaroli, Associate Director, SEC Division of Market Regulation, to Ann Vicek, Vice President and Associate General Counsel, SIA (July 31, 2006) ("No-Action Letter"), which is available at <http://www.sec.gov/divisions/marketreg/mr-noaction/sia073106.pdf> along with SIA's Letter requesting this relief from Ann Vicek to Michael Macchiaroli, dated July 28, 2006 ("SIA Letter").

Consolidated Tape Association Plan ("non-NASDAQ listed securities") and consequent delay in becoming operational as a national securities exchange for trading those securities,<sup>3</sup> we are requesting (1) an extension of the Division's previously-granted no-action relief regarding transactions in NASDAQ-listed securities; (2) similar no-action relief for broker-dealers regarding transactions in non-NASDAQ listed securities; and (3) no-action relief for certain broker-dealers who may be ready to implement systems changes to accommodate NASDAQ's operating as a national securities exchange in non-NASDAQ listed securities before NASDAQ commences doing so. We request that the relief in the first instance be extended from December 31, 2006 until a date that is sixty days after the date NASDAQ begins operation as an exchange for non-NASDAQ listed securities and completes the integration of its systems to its Single Book execution system platform for those securities. In the second instance, we request that the relief begin on the date NASDAQ begins operating as an exchange for non-NASDAQ listed securities and completes the integration of its systems to its Single Book execution system platform for those securities and extend until a date sixty days thereafter. In the third instance, we request that the relief begin on January 1, 2007 and extend until the date NASDAQ begins operation as an exchange for non-NASDAQ listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

Finally, we request no-action relief from Exchange Act Rule 17a-5 for broker-dealers that misallocate certain securities commission revenues on their FOCUS reports (as described below) until sixty days after the date NASDAQ begins operation as an exchange for non-NASDAQ listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

#### **I. Request for Extension of Previously-Granted No-Action Relief Regarding NASDAQ-Listed Securities**

In light of the delay in NASDAQ's completion of its systems integration for non-NASDAQ listed securities and consequent delay in becoming operational as a national securities exchange for trading those securities beyond December 31, 2006, we hereby request that the Division's previously-granted no-action relief regarding NASDAQ-listed securities be extended until a date that is sixty days after the date NASDAQ begins operation as an exchange for non-NASDAQ listed securities and completes the integration of its systems to its Single Book execution system platform for those securities.

Because firms were relying on all NASDAQ trades being exchange-listed trades by December 31, 2006, they may not have planned to be able to distinguish between NASDAQ-listed securities and non-NASDAQ listed securities after that date. Therefore, these firms may need additional time to make programming changes.

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<sup>3</sup> Letter from Mary Revell, Associate Vice President, The NASDAQ Stock Market, to Michael A. Macchiaroli, Associate Director, Division of Market Regulation, SEC (December 29, 2006) ("NASDAQ December 2006 Letter").

