



THE NASDAQ STOCK MARKET
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ROCKVILLE, MARYLAND 20850

July 24, 2007

Via E-mail and Overnight Mail

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Attention: Paul Dudek
Chief, Office of International Corporate Finance

Re: Request for No-Action Letter on Behalf of Nasdaq Members -
Registration of PORTAL Securities under Section 12(g) of the Securities
Exchange Act of 1934

Dear Mr. Dudek:

The Nasdaq Stock Market LLC (“Nasdaq”) respectfully requests that you advise that the staff of the Division of Corporation Finance (“Division”), pursuant to the authority delegated to it by the Securities and Exchange Commission (“SEC” or “Commission”), will not recommend that the SEC take enforcement action against any Nasdaq member that may trade certain equity securities not registered pursuant to Section 12(g)¹ of the Securities Exchange Act of 1934 (“Exchange Act”).² This request is made in connection with Nasdaq’s filing with the SEC of a rule change to amend The PORTAL[®] Market (“PORTAL” or “PORTAL Market”) rules to (i) establish qualification requirements for brokers and dealers that are Nasdaq members and qualified institutional buyers (“QIBs”) under Rule 144A(a)(1)³ who wish to access the PORTAL Market and (ii) implement quotation, trade negotiation and trade reporting functions in the PORTAL Market with respect to PORTAL-designated securities.⁴ As more fully discussed below,

¹ 15 U.S.C. 78l(g).

² 15 U.S.C. 78a *et seq.*

³ 17 CFR 230.144A(a)(1).

⁴ SEC Release No. 34-55669 (Apr. 25, 2007); 72 F.R. 23874 (May 1, 2007); SR-NASDAQ-2006-065 (the “PORTAL rule filing”).

Nasdaq is requesting that foreign private issuers of PORTAL-designated equity securities be permitted to rely on the exemption provided by Rule 12g3-2(b) from the registration requirements of Section 12(g) on the basis that PORTAL is not an “automated inter-dealer quotation system.”

I. Background

The PORTAL Market: Nasdaq currently operates the PORTAL Market for the sole purpose of qualifying⁵ restricted securities⁶ as eligible for resale pursuant to SEC Rule 144A⁷ under the Securities Act of 1933 (“Securities Act”).⁸ Rule 144A provides an exemption from registration under Section 5 of the Securities Act⁹ for resales of privately placed securities to investors that meet the eligibility requirements of being a “QIB” under Rule 144A(a)(1), *i.e.*, institutional investors that in the aggregate own or invest on a discretionary basis at least \$100 million in securities and certain broker/dealers that in the aggregate own or invest on a discretionary basis at least \$10 million in securities. PORTAL designation is required for all Rule 144A security issues, except investment grade rated debt,¹⁰ in order for the security to receive a CUSIP identification number from Standard and Poor’s and be eligible for the deposit, book-entry delivery, and other services of The Depository Trust Company (“DTC”).¹¹ An issuer of an investment grade rated debt issue can apply directly to DTC for book-entry services under DTC rules and need not also qualify as a PORTAL-designated security.

Pursuant to NASD Rule 6700 Series, trade reports in all PORTAL-designated equity securities are required to be submitted to the NASD’s OTC Trade Reporting Facility (“OTC Reporting Facility”),¹² and trade reports in most PORTAL-designated debt securities are required to be submitted to the Trade Reporting and Compliance Engine or “TRACE.”¹³

Nasdaq Rule Filing: As previously stated, Nasdaq has filed the PORTAL rule filing with the Commission for the purpose of adopting amendments to the PORTAL rules that will (i) establish qualification requirements for brokers and dealers that are

⁵ See, PORTAL Rules 6521 – 6525.

⁶ See, definition of “restricted security” in SEC Rule 144(a)(3). 17 CFR 230.144(a)(3).

⁷ 17 CFR 230.144A

⁸ 17 U.S.C. 77a *et seq.*

⁹ 17 U.S.C. 77e.

¹⁰ Investment grade rated debt is a debt security rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories.

¹¹ SEC Release No. 34-33327 (Dec. 13, 1993); 58 F.R. 67878 (Dec. 22, 1993)..

¹² See, NASD Rule 6600 Series.

¹³ See, NASD Rule 6200 Series.

Nasdaq members and QIBs that wish to access PORTAL and (ii) implement quotation, trade negotiation and trade reporting functions in the PORTAL Market with respect to PORTAL-designated securities. Most of the proposed amendments were previously approved by the Commission with respect to an earlier attempt by the NASD to establish PORTAL as a closed trading system for Rule 144A securities.¹⁴ The proposed rule change would, again, create a closed trading system for purposes of Rule 144A with respect to approved PORTAL securities, qualified broker/dealers and QIBs.

Nasdaq will continue to qualify restricted securities, as defined in SEC Rule 144(a)(3),¹⁵ and securities that are restricted pursuant to contract or through the terms of the security for designation as PORTAL securities based on compliance with, among other things, the security eligibility and information disclosure requirements for the resale of a security under Rule 144A(d)(3) and Rule 144A(d)(4), respectively.¹⁶ With respect to the information disclosure requirements of Rule 144A(d)(4), an issuer of a PORTAL-designated security must be subject to reporting under Sections 13 or 15(d) of the Exchange Act, a foreign private issuer that is exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, a foreign government eligible to register securities under Schedule B of the Securities Act, or include disclosure in the private placement memorandum that the issuer agrees to provide to a holder of a Rule 144A security and a prospective purchaser designated by the holder reasonably current information about the issuer's business and financial statements as required by SEC Rule 144A(d)(4)(ii).

As a matter of practice, PORTAL designation is limited to those Rule 144A securities that are initially sold to QIBs by a broker/dealer acting as initial placement agent or initial purchaser.¹⁷ Moreover, Nasdaq will continue to have authority to suspend or terminate the designation of a PORTAL security if Nasdaq determines that the security is not in compliance with PORTAL rules, a holder or prospective purchaser that

¹⁴ SEC Release No. 34-27956 (Apr. 27, 1990); 55 F.R. 18781 (May 4, 1990). The functions of the PORTAL Market approved by the SEC for the quotation, trading and reporting of PORTAL securities did not develop as anticipated due to a cumbersome technology for access to the PORTAL system and resistance to trade reporting in Rule 144A debt and equity securities. Subsequently, these functions were eliminated. *See*, SEC Release No. 34-44042 (Mar. 6, 2001); 66 F.R. 14969 (Mar. 14, 2001).

¹⁵ 17 CFR 230.144(a)(3).

¹⁶ 17 CFR 230.144A(d)(3) and (d)(4). *See*, PORTAL Rule 6522; PORTAL rule filing, proposed PORTAL Rule 6502(b).

¹⁷ PORTAL Rule 6522(a)(4) requires that a PORTAL security be assigned a CUSIP number that is different than the identification number assigned to any unrestricted securities of the same class. As a matter of practice by PORTAL and Standard & Poor's, the CUSIP number assigned to securities that are initially sold to QIBs pursuant to Rule 144A is different than the CUSIP numbers assigned to those securities that are part of the same offering that are sold to accredited investors pursuant to SEC Regulation D and to non-U.S. investors under SEC Regulation S. Thus, PORTAL-designation is limited to those securities that have been sold to QIBs. Nasdaq is proposing to amend this provision, renumbered Rule 6502(b)(1)(D) to reflect this policy.

requested information pursuant to Rule 144A(d)(4)¹⁸ did not receive the information, any application or other document relative to such securities submitted to Nasdaq contained an untrue statement of material fact or omitted to state a material fact necessary to make the statements therein not misleading, or failure to withdraw designation of such securities would for any reason be detrimental to the interests and welfare of Nasdaq, Nasdaq members or investors.¹⁹

Nasdaq members that meet the PORTAL qualification requirements will be designated as PORTAL Dealers and PORTAL Brokers.²⁰ QIBs that meet the PORTAL qualification requirements will be designated as PORTAL Qualified Investors.²¹ The purpose of distinguishing between Nasdaq members that qualify as “PORTAL Dealers” and “PORTAL Brokers” is to identify in PORTAL those Nasdaq members that qualify as a QIB under Rule 144A to purchase Rule 144A securities on a principal basis.

PORTAL Dealers and Brokers will be permitted to post anonymous one-or two-sided indicative quotations in PORTAL securities in PORTAL that will be seen by other PORTAL Dealers and Brokers and by PORTAL Qualified Investors, negotiate anonymously and execute trades in PORTAL securities, and submit trade reports in reportable PORTAL-negotiated trades through PORTAL for forwarding to TRACE and the OTC Reporting Facility. Nasdaq also intends to provide the ability to forward PORTAL trades to an appropriate subsidiary of the Depository Trust & Clearing Corporation for settlement.²² In comparison, PORTAL Qualified Investors will be solely authorized to view quotations by PORTAL Dealers and PORTAL Brokers, and confirm transactions where a PORTAL Qualified Investor uses a PORTAL Dealer or Broker to execute a trade in PORTAL. All trade report information for trades that are executed in PORTAL will be disseminated in PORTAL to PORTAL Brokers, Dealers and Qualified investors, but such trade report information will not be disseminated outside of PORTAL.²³

To qualify as a PORTAL Broker, a Nasdaq member will be required by PORTAL rules to execute a subscriber agreement with PORTAL, be a member of Nasdaq, be qualified to do business as a general securities firm, and agree to comply with the PORTAL rules.²⁴ Pursuant to Rule 144A(a)(1)(iii), a dealer registered under Section 15 of the Exchange Act is authorized to act as an agent for a QIB on a non-discretionary

¹⁸ 17 CFR 230.144A(d)(4).

¹⁹ See, PORTAL Rule 6523; PORTAL rule filing, proposed PORTAL Rule 6502(c).

²⁰ See, PORTAL rule filing, proposed PORTAL Rule 6505.

²¹ See, PORTAL rule filing, proposed PORTAL Rule 6506.

²² See, PORTAL rule filing, proposed PORTAL Rules 6508 - 6510.

²³ See, PORTAL rule filing, proposed PORTAL Rule 6511.

²⁴ See, PORTAL rule filing, proposed PORTAL Rule 6505(b).

basis pursuant to Rule 144A or to act in a riskless principal capacity on behalf of a QIB. To qualify as a PORTAL Dealer, a Nasdaq member will be required by PORTAL rules to meet these same requirements and also to demonstrate to the satisfaction of Nasdaq that it is eligible to purchase securities under the financial criteria of SEC Rule 144A(a)(1)(ii).²⁵ Under Rule 144A(a)(1)(ii), a dealer so registered will qualify as a QIB if the dealer in the aggregate owns and invests on a discretionary basis at least \$10 million of securities of issuers that are not affiliated with the dealer and may act for its own account or the accounts of other QIBs.

In order for an investor to access PORTAL quotation, trade report and participant information, the investor will be required by PORTAL rules to execute a subscriber agreement with PORTAL, agree to comply with the PORTAL rules, and demonstrate to the satisfaction of Nasdaq that it is a QIB under Rule 144A(a)(1).²⁶ In addition, in order to comply with the requirement of Rule 144A(d)(2) that the seller of Rule 144A securities take reasonable steps to ensure that the purchaser is aware that the seller may rely on Rule 144A, the subscriber agreement will include an undertaking that the PORTAL Qualified Investor is aware that it may purchase a PORTAL security from another qualified investor who may rely on an exemption from the provisions of Section 5 of the Securities Act.

Nasdaq proposes to reconfirm the qualifications of PORTAL Dealers and PORTAL Qualified Investors annually. Nasdaq proposes to require that PORTAL Dealers annually submit the dealer's Audited Financial Statements filed with the SEC pursuant to Rule 17a-5(d) under the Exchange Act in order to qualify under Rule 144A(a)(1)(ii). In the case of non-broker/dealers that are PORTAL Qualified Investors, an investor shall annually demonstrate to the satisfaction of Nasdaq that the investor is a QIB under Rule 144A(a)(1).²⁷

The proposed PORTAL rules provide authority to Nasdaq to suspend or terminate the registration of any PORTAL Dealer, PORTAL Broker or PORTAL Qualified Investor if (among other things) any application or other document submitted to Nasdaq contains an untrue statement of material fact or omits to state a material fact necessary to make the statements therein not misleading, it fails to comply with any requirement of the PORTAL rules, or it fails to file any documents or to pay any fee as may be required by Nasdaq.²⁸

²⁵ See, PORTAL rule filing, proposed PORTAL Rule 6505(a).

²⁶ See, PORTAL rule filing, proposed PORTAL Rule 6506(a).

²⁷ See, PORTAL rule filing, proposed PORTAL Rule 6506(b).

²⁸ See, PORTAL rule filing, proposed PORTAL Rules 6505(c) and 6506(b).

NASD currently provides and would continue to provide surveillance of trade reports in PORTAL securities that are submitted through TRACE and the OTC Reporting Facility.

Exchange Act Registration: Section 12(a) of the Exchange Act²⁹ provides in relevant part that it “shall be unlawful for any member, broker or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange.” This registration requirement applies, therefore, to both debt and equity securities that are listed on a national securities exchange. Section 12(b)³⁰ of the Exchange Act dictates how the registration referred to in Section 12(a) must be accomplished. Debt securities that are not listed on a national securities exchange may be traded by brokers and dealers without such securities being registered under the Exchange Act, as the SEC’s Exchange Act registration requirements for unlisted securities do not apply to debt securities.³¹ In comparison, issues of equity securities that are not listed on a national securities exchange securities must be registered under Section 12(g)(1)³² the Exchange Act if the issuer’s total assets exceed \$10 million and the issue is held by at least 500 recordholders. If an issue of unlisted equity securities does not meet the threshold registration requirement of Section 12(g)(1), brokers and dealers may trade such securities without the securities being registered under the Exchange Act.

For a foreign private issuer with an issue of unlisted equity securities that meets the registration standards of Section 12(g)(1) based on worldwide recordholders, SEC Rule 12g3-2(a)³³ provides an exemption from registration if the class of equity securities has fewer than 300 recordholders resident in the U.S. on the last day of its most recently completed fiscal year. If the issue of securities of a foreign private issuer is held by more than 300 recordholders resident in the U.S.,³⁴ Rule 12g3-2(b)³⁵ provides a further exemption from registration if the securities are not traded on an “automated inter-dealer quotation system” and the issuer furnishes to the Commission or publishes on its Internet

²⁹ 15 U.S.C. 78l(a).

³⁰ 15 U.S.C. 78l(b).

³¹ When Congress amended the Exchange Act in 1964 to add Section 12(g), it extended the registration requirement to specified equity securities that are not exchange-traded. No comparable provision was provided for debt securities that are not exchange-traded.

³² 15 U.S.C. 78l(g)(1).

³³ 17 CFR 240.12g3-2(a).

³⁴ The method of calculation of recordholders under Rule 12g3-2 requires looking through the record ownership of brokers, dealers, banks or other nominees on a worldwide basis and counting the number of customers resident in the U.S. for which the securities are held. 17 CFR 240.12g3-2(a)(1) and (2).

³⁵ 17 CFR 240.12g3-2(b)(1) and (f)(1).

Web site or through an electronic information delivery system copies of the information required to be made public under the laws of its country of domicile.³⁶

On January 13, 2006, the SEC approved the registration of Nasdaq as a national securities exchange under Section 6 of the Exchange Act.³⁷ Nasdaq operates the PORTAL Market as a market that is separate from the Nasdaq stock exchange. In a separate letter, Nasdaq has requested that the SEC grant relief pursuant to Section 36 of the Exchange Act to provide an exemption from Section 12(a) of the Exchange Act to permit Nasdaq members and brokers and dealers to trade PORTAL-designated debt and equity securities that are not registered under Section 12(b) of the Exchange Act.

Prior SEC Division of Corporation Finance Determination: In connection with the SEC's consideration of the NASD's original proposal of the PORTAL Rules, the NASD requested relief from certain provisions of Section 12(g) of the Exchange Act. Specifically, the NASD requested that PORTAL Qualified Investors in domestic and foreign equity securities not be counted as recordholders for purposes of determining whether registration is required under Section 12(g) of the Exchange Act and that the Commission take the position that foreign private issuers with a class of equity securities trading on PORTAL could rely on the exemption provided by Rule 12g3-2(b) from the registration requirements of Section 12(g).

In the SEC's approval order for the original PORTAL Rules and in a separate letter to the NASD,³⁸ the Division of Corporation Finance ("Division") stated that it was of the view that PORTAL Qualified Investors should be counted in determining whether the issuer must register an issue of equity securities under Section 12(g). The Division further stated that while foreign private issuers that reach the recordholder and asset thresholds of Section 12(g)(1) would be entitled to rely on the exemption in Rule 12g3-2(b), domestic issuers with a class of equity securities held of record by 500 or more persons would be required to register under Section 12(g) and become subject to the reporting requirements of Sections 13, 14, and 16 under the Exchange Act.

As set forth above, the exemption provided by SEC Rule 12g3-2(b) is not available to a foreign private issuer whose securities are traded on an "automated inter-

³⁶ A foreign private issuer that formerly was a reporting company and has filed a Form 15F with the SEC pursuant to SEC Rule 12h-6 to deregister a class of equity securities because the average daily trading volume of the securities in the US has been no more than 5% of the trading volume worldwide during a recent 12-month period, can also rely on this exemption by publishing the required information on its Internet Website or through an electronic information delivery system. 17 CFR 240.12g3-2(b)(1) and (e)(1).

³⁷ SEC Release No. 34-53128 (Jan. 13, 2006); 71 F.R. 3550 (Jan. 23, 2006).

³⁸ See, SEC Release No. 34-27956 (Apr. 27, 1990); 55 F.R. 18781 (May 4, 1990), at 18789 and footnote 78 citing letter from Mary E.T. Beach, Associate Director, Division of Corporation Finance, SEC, to Frank V. Wilson, Executive Vice President and General Counsel, NASD, dated January 16, 1990.

dealer quotation system.” The Division stated that it would not recommend that the Commission take enforcement action if a foreign private issuer did not register its PORTAL-traded securities under Section 12(g), if such issuer would be entitled to rely on the exemption provided by Rule 12g3-2(b) except for the fact that its securities are quoted in the PORTAL Market, so long as such issuer complies with the requirements of the Rule 12g3-2(b) exemption. The Division further stated that that for purposes of all rules, regulations, forms and schedules under the Securities Act and the Exchange Act, the PORTAL Market would not be considered an “automated inter-dealer quotation system” or an “electronic inter-dealer quotation system.”³⁹

II. Request for No-Action

Nasdaq respectfully requests that the staff of the Division advise, pursuant to the authority delegated to it by the SEC, that it will not recommend that the SEC take any enforcement action against any Nasdaq member that may trade PORTAL-designated equity securities of foreign private issuers that are not registered under Section 12(g) of the Exchange Act in reliance on the exemption provided by Rule 12g3-2(b) from the registration requirements of Section 12(g) because PORTAL is not considered an “automated inter-dealer quotation system.”

We also request that the Division determine that for purposes of all rules, regulations, forms and schedules under the Securities Act and Exchange Act, the PORTAL Market will not be considered an “automated inter-dealer quotation system” or an “electronic inter-dealer quotation system.”

III. Discussion

PORTAL Is Not An “Automated Inter-Dealer Quotation System” Nor An “Electronic Inter-Dealer Quotation System”: Nasdaq believes that the PORTAL Market is not an “automated inter-dealer quotation system” or an “electronic inter-dealer quotation system.” The term “electronic inter-dealer quotation system” in SEC rules is used to solely reference The Nasdaq Stock Market LLC.⁴⁰ The SEC has clarified that neither the OTC Bulletin Board (“OTCBB”) operated by the NASD nor the market operated by the Pink Sheets LLC (“Pink Sheets”) are deemed to be automated inter-dealer quotation systems.⁴¹ Since the OTCBB and the Pink Sheets are electronic systems that provide publicly-available voluntary quotations in unlisted securities, Nasdaq believes that it would be appropriate for the SEC to provide similar relief to the PORTAL Market since PORTAL is limited to Rule 144A-eligible securities and access to PORTAL

³⁹ See, SEC Release No. 34-27956 (Apr. 27, 1990); 55 F.R. 18781 (May 4, 1990), footnote 79, at 18789.

⁴⁰ See, Rule 144(e)(2). See, SEC Release No. 34-15251 (Oct. 20, 1978), footnote 60 and SEC Release No. 34-25546 (Apr. 4, 1988), footnote 28.

⁴¹ See, SEC Release No. 33-6862 (Apr. 23, 1990); 55 F.R. 17933 (Apr. 30, 1990), footnote 22.

quotations will be limited to PORTAL Qualified Investors that meet the criteria of being a QIB under Rule 144A. Nasdaq also believes that the SEC should rely on the precedent of the position that the Division took in 1990 that PORTAL is not an “automated inter-dealer quotation system” or an “electronic inter-dealer quotation system” for purposes of all rules, regulations, forms and schedules under the Securities Act and Exchange Act, as there is nothing in Nasdaq’s PORTAL rule filing to reestablish the PORTAL Market that provides a basis for concluding that PORTAL should be treated as an “automated inter-dealer quotation system” or an “electronic inter-dealer quotation system.”

Foreign Private Issuers Should Be Permitted to Rely on the Rule 12g3-2(b) Exemption From Registration: Moreover, we believe that PORTAL-designation of an issue of equity securities of a foreign private issuer that is exempt from registration under Section 12(g) in reliance on Rule 12g3-2(b), should not require the registration of the issuer’s securities both because PORTAL is not an “automated inter-dealer quotation system” and because, under Rule 144A(d)(4), the SEC specifically allowed foreign private issuers to provide to potential investors in Rule 144A-eligible securities the information that the issuer is required to furnish to the SEC pursuant to the requirements of Rule 12g3-2(b). Since the security eligibility provisions of the PORTAL Rules require that PORTAL-designated securities meet the information delivery requirements of Rule 144A(d)(4), Nasdaq staff will confirm the accuracy of an issuer’s claim of reliance on SEC Rule 12g3-2(b).⁴² Therefore, we believe that the SEC should continue to take the position taken by the Division in 1990, which was that foreign private issuers of PORTAL-designated equity securities that reach the recordholder and asset thresholds of Section 12(g)(1) of the Exchange Act will be permitted to rely on the exemption in Rule 12g3-2(b) from registration under the Exchange Act.

Impact of Requested No-Action Relief: Nasdaq believes that Rule 144A and the proposed PORTAL Market provide an important strategic opportunity for foreign private issuers with a non-U.S. trading market to access the U.S. institutional market without registration under the Securities Act⁴³ and that U.S. institutional investors should have a choice as to whether to access foreign securities in the U.S. or non-U.S. markets. Nasdaq believes that the requested no-action relief will facilitate U.S. private placements of PORTAL-eligible securities by foreign private issuers without undermining the Exchange Act protections afforded PORTAL Qualified Investors.⁴⁴

⁴² One possible method for checking the issuer’s claim of reliance on SEC Rule 12g3-2(b) is by confirming that the issuer is included on the SEC’s most recent published list of foreign issuers that claimed exemptions from the registration provisions of Section 12(g) of the Exchange Act. See SEC Release No. 34-51893 (June 21, 2005).

⁴³ The SEC stated in adopting Rule 144A that it would monitor the evolution of the Rule 144A market including, among other things, “the extent of foreign issuer participation in the private market” SEC Release No. 33-6862 (Apr. 23, 1990); 55 F.R. 17933 (Apr. 30, 1990), at 17934.

⁴⁴ The SEC stated in the release proposing Rule 144A that “The Rule may have significant implications for offerings by foreign issuers. Foreign issuers who previously may have foregone

PORTAL Qualified Investors Are Sophisticated Investors: In adopting Rule 144A in 1990, the Commission relied on the numerical qualification standards for QIBs to in order to limit participation in the Rule 144A market to investors with the financial sophistication and resources to make investment decisions in Rule 144A-eligible restricted securities without the disclosure protections of registration under the Securities Act.⁴⁵ Nasdaq proposes in its PORTAL rule filing to limit non-broker/dealer investor access to the PORTAL Market to only PORTAL Qualified Investors that meet the Rule 144A criteria for QIBs.⁴⁶ Nasdaq will have authority to suspend or terminate the registration of any PORTAL Qualified Investor if, among other things, it fails to comply with PORTAL rules. Nasdaq proposes to update the qualifications of PORTAL Qualified Investors annually. PORTAL Qualified Investors of such size, *i.e.*, at least \$100 million portfolio under management, will employ professional management experienced in managing investment portfolios. Accordingly, Nasdaq believes that the non-broker/dealer institutional investors that participate in the PORTAL Market as a PORTAL Qualified Investor do not need the protections afforded by either Securities Act or Exchange Act registration as such investors will be in a position to independently request and evaluate information regarding an issuer of a PORTAL security in order to make an investment decision.

PORTAL Securities Must Meet The Investment Criteria of QIBs: As stated above, PORTAL designation as a matter of practice is limited to those PORTAL-designated securities that are initially sold to QIBs by a broker/dealer acting as initial placement agent or initial purchaser. Under these circumstances PORTAL securities are and will continue to issued by the companies that meet the investment qualification criteria of such QIBs. Therefore, Nasdaq believes that PORTAL Qualified Investors that purchase PORTAL-designated securities do not require the protections provided by Exchange Act registration of securities that meet the investment criteria of QIBs.

raising capital in the United States due to the compliance costs and liability exposure associated with registered public offerings, and the costs of financing inherent in placing restricted securities, may find private placements in the United States a more viable capital-raising option as a result of the combined effect of proposed Rule 144A and proposed Regulation S. Greater participation by foreign issuers in the U.S. capital market also would have the benefit of reducing the costs borne by U.S. institutional investors that wish to invest in foreign securities and are compelled at present to go overseas to obtain such securities. Moreover, U.S. intermediaries who may have lost business to foreign competitors simply because such securities may be available only offshore may be afforded more opportunities to participate in the internationalization of investment strategies. SEC Release No. 33-6806 (Oct. 2, 1988); 53 F.R. 44016 (Nov. 1, 1988), at 44022.

⁴⁵ SEC Release No. 33-6862 (Apr. 23, 1990); 55 F.R. 17933 (Apr. 30, 1990).

⁴⁶ A Nasdaq member that proposes to be designated as a "PORTAL Dealer" in the PORTAL Market will also be required to meet the standards for being a QIB under Rule 144A, with respect to that part of the standards that apply to a dealer registered under Section 15 of the Exchange Act acting for its own account or for the accounts of other QIBs. *See* Rule 144A(a)(1)(ii).

IV. Conclusion

Nasdaq believes that the requested no-action relief for PORTAL equity securities is consistent with the Commission's stated policy that price transparency in the U.S. capital markets is fundamental to promoting the fairness and efficiency of such markets.⁴⁷ The SEC stated that the adoption of Rule 144A was "the first step toward achieving a more liquid and efficient institutional resale market for unregistered securities."⁴⁸ Building upon the availability of trade report information for most PORTAL securities, Nasdaq is proposing to reestablish an updated version of the closed PORTAL Market for quotation and trading in Rule 144A-eligible securities for the purpose of facilitating price discovery and maximizing market transparency. Nasdaq hopes, thereby, to finally realize the SEC's vision of a "liquid and efficient institutional resale market for unregistered securities."⁴⁹

Nasdaq further believes that the requested no-action relief is consistent with the provisions of Section 6(b)(5) of the Act, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In particular, the proposal can be expected to enhance the efficiency and transparency of trading in restricted securities that are eligible for resale under Rule 144A and draws an appropriate balance between the needs of PORTAL Qualified Investors for relevant information in order to make an investment decision, the protections available under the Exchange Act and the objectives of the SEC to create a more liquid and efficient institutional resale market for unregistered securities. The requested no-action relief also reflects that the framework of the regulatory structure created by the SEC when it adopted Rule 144A in that the Exchange Act disclosure obligations of foreign private issuers of Rule 144A securities were deemed to be satisfied by compliance with SEC Rule 12g3-2(b).

* * *

⁴⁷ See, Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce Concerning Transparency in the United States Debt Market and Mutual Fund Fees and Expenses (September 29, 1998).

⁴⁸ SEC Release No. 33-6862 (Apr. 23, 1990); 55 F.R. 17933 (Apr. 30, 1990), at 17934.

⁴⁹ In 1990, the SEC concluded that the PORTAL Market would improve the efficiency and effectiveness of the secondary placement market in unregistered securities in the interest of investors. SEC Release No. 34-27956 (Apr. 27, 1990); 55 F.R. 18781 (May 4, 1990), at 18787.

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If you require any additional information or clarification regarding this submission,
please contact me at (301) 978-8483.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Moran', with a long horizontal flourish extending to the right.

Thomas P. Moran
Associate General Counsel