

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-8791; File No. S7-18-06]

RIN 3235-AJ73

Covered Securities Pursuant to Section 18 of the Securities Act of 1933

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is adopting an amendment to a rule under Section 18 of the Securities Act of 1933 (“Securities Act”) to designate securities listed, or authorized for listing, on the Nasdaq Capital Market tier of The NASDAQ Stock Market LLC (“Nasdaq”) as covered securities for purposes of Section 18 of the Securities Act. Covered securities under Section 18 of the Securities Act are exempt from State law registration requirements. The Commission also is making a correction to the rule text to conform it to the language of Section 18 of the Securities Act.

DATES: *Effective Date:* May 24, 2007.

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SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC (“NYSE”), the American Stock Exchange LLC (“Amex”), or the National Market System of The NASDAQ Stock Market LLC (“Nasdaq/NGM”)¹ (collectively, the “Named Markets”), or any national securities exchange designated by the Commission to have substantially similar listing standards to those markets.² More specifically, Section 18(a) of the Securities Act provides that “no law,

¹ As of July 1, 2006, the National Market System of The NASDAQ Stock Market LLC is known as the Nasdaq Global Market. See Securities Exchange Act Release Nos. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) and 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006).

² See National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (October 11, 1996).

rule, regulation, or order, or other administrative action of any State * * * requiring, or with respect to, registration or qualification of securities * * * shall directly or indirectly apply to a security that—(A) is a covered security.”³ Covered securities are defined in Section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are “substantially similar” to the Named Markets.⁴

Pursuant to Section 18(b)(1)(B) of the Securities Act, the Commission adopted Rule 146.⁵ Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards substantially similar to those of the Named Markets and thus securities listed on such exchanges are deemed covered securities.⁶

Nasdaq has petitioned the Commission to amend Rule 146(b) to determine that its listing standards for securities listed on the Nasdaq Capital Market (“NCM”)⁷ are substantially similar to those of the Named Markets and, accordingly, that securities listed pursuant to such listing standards are covered securities for purposes of Section 18(b) of the Securities Act.⁸

On November 22, 2006, the Commission issued a release proposing to amend Rule 146(b) to designate

³ 15 U.S.C. 77r(a).

⁴ 15 U.S.C. 77r(b)(1)(A) and (B). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of Section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

⁵ Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998) (determining that the listing standards of the Chicago Board Options Exchange, Incorporated (“CBOE”), Tier 1 of the Pacific Exchange, Inc. (“PCX”) (now known as NYSE Arca, Inc.), and Tier 1 of the Philadelphia Stock Exchange, Inc. (“Phlx”) were substantially similar to those of the Named Markets and that securities listed pursuant to those standards would be deemed covered securities for purposes of Section 18 of the Securities Act). In 2004, the Commission amended Rule 146(b) to designate options listed on the International Securities Exchange, Inc. (“ISE”) (now known as the International Securities Exchange, LLC) as covered securities for purposes of Section 18(b) of the Securities Act.

⁶ 17 CFR 230.146(b).

⁷ The Nasdaq Capital Market was previously named the Nasdaq SmallCap Market.

⁸ See letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Nancy M. Morris, Secretary, Commission, dated March 1, 2006 (File No. 4-513) (“Nasdaq Petition”).

securities listed on the NCM as covered securities for purposes of Section 18(a) of the Securities Act.⁹ The Commission received seven comment letters, all expressing overall support for the Nasdaq Petition.¹⁰ In connection with its petition, Nasdaq filed a proposed rule change to amend its quantitative listing standards for NCM securities to make its NCM listing standards substantially similar to the Named Markets.¹¹ On April 18, 2007, the Commission approved this proposed rule change.¹²

Based on the approved changes to the NCM listing standards and after careful comparison, the Commission concludes that the listing standards of the NCM are substantially similar to the listing standards of the Named Markets. Accordingly, the Commission today is amending Rule 146(b) to designate securities listed, or authorized for listing, on the NCM as covered securities under Section 18(b)(1) of the Securities Act.¹³ Amending Rule 146(b) to include securities listed, or authorized for listing, on the NCM as covered securities will exempt those securities from state registration

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

¹⁰ See letter to Nancy M. Morris, Secretary, Commission, from Alan M. Parness, Vice Chair, State Regulation of Securities Committee of the American Bar Association Section of Business Law (“ABA Committee”), dated April 3, 2006 (“ABA Committee April 3rd Letter”); letter to Nancy M. Morris, Secretary, Commission, from Patricia D. Struck, The North American Securities Administrators Association (“NASAA”) President and Wisconsin Securities Administrator, dated March 29, 2006 (“NASAA March 29th Letter”); electronic mail to Robert L.D. Colby, Acting Director, Division, Commission, from Randall Schumann, Legal Counsel, Wisconsin DFI-Division of Securities, NASAA Corporation Finance Section Member, dated June 1, 2006; letter to Nancy M. Morris, Secretary, Commission, from Alan M. Parness, Vice Chair, ABA Committee, dated December 20, 2006 (“ABA Committee December 20th Letter”); letter to Nancy M. Morris, Secretary, Commission, from Joseph P. Borg, NASAA President and Director, Alabama Securities Commission, dated December 21, 2006 (“NASAA December 21st Letter”); letter to Nancy M. Morris, Secretary, Commission, from Joseph P. Borg, NASAA President and Director, Alabama Securities Commission, dated December 21, 2006 (“NASAA Supplemental Letter”); and letter to Nancy M. Morris, Secretary, Commission, from Phillip B. Kennedy, Esq., Gaeta & Eveson, P.A., dated December 19, 2006 (“Kennedy Letter”). In addition, the Commission’s Advisory Committee on Smaller Public Companies recommended on April 23, 2006 that the Commission make NCM stocks “covered securities.” SEC Advisory Committee on Smaller Public Companies, Final Report, at 97–100 (2006).

¹¹ See Securities Exchange Act Release Nos. 54378 (August 28, 2006) (“Nasdaq Proposed Rule Change”), 71 FR 52351 (September 5, 2006).

¹² Securities Exchange Act Release No. 55642 (April 18, 2007) (“NCM Listing Standard Amendments”).

¹³ 15 U.S.C. 77r(b)(1).

requirements as set forth under Section 18(a) of the Securities Act.¹⁴

II. Amendment to Rule 146(b) to Include Nasdaq NCM Securities

Under Section 18(b)(1)(B) of the Securities Act,¹⁵ the Commission has the authority to compare the listing standards of a petitioner with those of the NYSE, Amex, or Nasdaq/NGM. The Commission initially compared Nasdaq's listing standards for all NCM securities with only one of the Named Markets. If the listing standards in a particular category did not meet the standards of that market, the Commission compared the petitioner's standards to the other two Named Markets.¹⁶ In addition, the Commission interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the Named Markets.¹⁷ If a petitioner's listing standards are higher than the Named Markets, then the Commission still determined that the petitioner's listing standards are substantially similar to the Named Markets. Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that the listing standards of the petitioner are not substantially similar to those of a Named Market.

The Commission has reviewed the NCM's listing standards, as amended,¹⁸ and, for the reasons discussed below, believes that the standards are substantially similar to those of the Named Markets. Accordingly, the Commission is amending Rule 146(b) to include securities listed, or authorized for listing, on the NCM. Because the Commission believes Nasdaq's qualitative listing standards for NCM securities are identical to the qualitative listing standards for Nasdaq/NGM securities,¹⁹ the discussion below focuses on the NCM quantitative listing standards.

¹⁴ 15 U.S.C. 77r(a).

¹⁵ 15 U.S.C. 77r(b)(1)(A).

¹⁶ This approach is consistent with the approach that the Commission has previously taken. See Securities Act Release Nos. 7422 (June 9, 1997), 62 FR 32705 (June 17, 1997) and 7494 (January 13, 1998), 63 FR 3032 (January 21, 1998).

¹⁷ Securities Act Release No. 7422, *supra* note 16.

¹⁸ See NCM Listing Standard Amendments, *supra*, note 12.

¹⁹ Such qualitative listing standards relate to, among other things, the number of independent directors required, conflicts of interest, composition of the audit committee, executive compensation, shareholder meeting requirements, voting rights, quorum, code of conduct, proxies, shareholder approval of certain corporate actions, and the annual and interim reports requirements. See Nasdaq Rule 4350.

A. Common Stock

As discussed in the Proposing Release, the Commission preliminarily believed that some, but not all, of the requirements in Nasdaq's then-existing quantitative initial listing standards for common stock listing on the NCM were substantially similar to those of Amex's common stock listing standards. The NCM Listing Standard Amendments modify those NCM initial listing standards for common stock to require an issuer to have:

- Shareholder's equity of \$4 million and net income from continuing operations of \$750,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years, and a market value of publicly held shares of \$5 million;
- Shareholder's equity of \$4 million, a market value of listed securities of \$50 million, and a market value of publicly held shares of \$15 million; or
- Shareholder's equity of \$5 million, a two-year operating history, and a market value of publicly held shares of \$15 million.²⁰

In light of these rule changes, the Commission finds the NCM initial listing standards for common stock to be substantially similar to those of Amex.

The Commission finds that the continued listing requirements for common stock listed on the NCM, while not identical, are substantially similar to those of Amex. Amex's delisting criteria are triggered by poor financial condition or operating results of the issuer.²¹ Specifically, Amex will consider delisting an equity issue if: (i) Stockholders' equity is less than \$2 million and such issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years; (ii) stockholders' equity is less than \$4 million and such issuer has sustained losses from continuing operations and/or net losses in three of its four most recent fiscal years; (iii) stockholders' equity is less than \$6 million if such issuer has sustained losses from continuing operations and/or net losses in its five most recent fiscal years; or (iv) the issuer has sustained losses which are so substantial in relation to its overall operations or its existing financial resources, or its financial condition has become so impaired that it appears questionable, in the opinion of the Exchange, as to whether such company

²⁰ See NCM Listing Standard Amendments, *supra*, note 12.

²¹ See generally Sections 1001 through 1006 of the Amex Company Guide.

will be able to continue operations and/or meet its obligations as they mature.²²

Although Nasdaq's NCM does not have the same continued listing requirements, Nasdaq also looks at the financial condition and operating results of the issuer. Specifically, for continued listing, Nasdaq requires an issuer to have shareholder's equity of at least \$2.5 million, market value of listed securities of at least \$35 million, or net income of \$500,000 from continuing operations in the past fiscal year or two out of its three past fiscal years.²³ Further, Nasdaq requires that the listed issue have a minimum bid price for continued listing of \$1 per share.²⁴ In addition, for continued listing, Nasdaq requires an issuer to have a minimum of 500,000 publicly held shares with a market value of at least \$1 million.²⁵

The Commission finds that the maintenance criteria for common stock listed on Amex and on the NCM are substantially similar.²⁶

B. Secondary Classes of Common Stocks

Only Nasdaq has listing standards for the trading of a secondary class of common stock. A secondary class of common stock is a class of common stock of an issuer that has another class of common stock listed on an exchange. The Commission compared the NCM listing standards for secondary classes of common stock and preferred stocks with the listing standards of the Nasdaq/NGM.

As discussed in the Proposing Release, the Commission preliminarily believed that with respect to the number

²² See Section 1003(a) of the Amex Company Guide. Amex also will consider delisting if: (i) An issuer has sold or otherwise disposed of its principal operating assets or has ceased to be an operating company or has discontinued a substantial portion of its operations or business; (ii) if substantial liquidation of the issuer has been made; or (iii) if advice has been received, deemed by the Exchange to be authoritative, that the security is without value, or in the case of a common stock, such stock has been selling for a substantial period of time at a low price. See Section 1003(c) and (f)(v) of the Amex Company Guide.

²³ Nasdaq Rule 4310(c)(2)(B)(i)-(iii).

²⁴ Nasdaq Rule 4310(c)(4). Amex will consider delisting if the price per share is "low." See Amex Rule 1003(f)(v).

²⁵ Nasdaq Rule 4310(c)(7)(A). Amex will consider delisting the common stock of an issuer if the aggregate market value of such publicly held shares is less than \$1 million for more than 90 consecutive days, the number of publicly held shares is less than 200,000 shares, or the number of its public stockholders is less than 300. See Section 1003(b) of the Amex Company Guide.

²⁶ As noted above, the Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets, and differences in language or approach of the listing standards are not dispositive.

of round lot holders,²⁷ bid price,²⁸ and number of publicly held shares²⁹ requirements,³⁰ Nasdaq's initial and continued listing requirements for secondary classes of common stock and preferred stocks listing on the NCM were substantially similar to the listing standards for the Nasdaq/NGM. The Commission did not, however, believe that the initial continued listing requirements for market value of publicly held shares for NCM were substantially similar to Nasdaq/NGM standards.³¹

In the NCM Listing Standard Amendments, Nasdaq increased the NCM listing standards for both preferred and secondary classes of common stock for the market value of publicly held shares to \$3.5 million for initial listing and \$1 million for continued listing.³² Nasdaq also increased its initial and continued NCM listing rules for secondary classes of common stock and preferred stock to require that the common stock or common stock equivalent of the issuer either be listed on Nasdaq or be a covered security as defined in Rule 146(b).³³ In light of these revisions to the NCM's initial and continued listing standards for secondary classes of common stock and preferred stocks, the Commission finds

²⁷ Both Nasdaq NCM and NGM require 100 round lot holders. See NASD Rules 4310(c)(6)(B) and 4420(k)(4). Nasdaq/NGM also requires 100 round lot holders for continued listing. Although the NCM requirements previously did not explicitly require a continuing number of round lot holders, the NCM Listing Standard Amendments clarified that the 100 round lot holders requirement also will apply as a continued listing requirement for the NCM preferred and secondary classes of common stock standards. See NCM Listing Standard Amendments, *supra* note 12.

²⁸ While the NCM bid price requirement for initial listing is \$4 and the Nasdaq/NGM requirement is \$5, the Commission believes that these standards are substantially similar. Both NGM and NCM require a \$1 bid price for continued listing. See Nasdaq Rules 4310(c)(4), 4420(k)(3), and 4450(h)(3).

²⁹ Both Nasdaq NCM and NGM require 200,000 publicly held shares for initial listing, and 100,000 publicly held shares for continued listing. See Nasdaq Rules 4310(c)(7)(B), 4420(k)(1), and 4450(h)(1).

³⁰ The Commission notes that these requirements apply to instances when the common stock or common stock equivalent security of the issuer is listed on Nasdaq/NGM, NCM, Global Select Market ("GSM") (the GSM is a segment of the NGM, see Securities Exchange Act Release Nos. 53799 and 54071, *supra* note 1), or another national securities exchange. If the common stock or common stock equivalent is not listed on one of these markets then the security must meet the common stock listing requirements for the relevant market (either Nasdaq/NGM or NCM). See generally NASD Rules 4310(c)(6)(B) and 4420(k).

³¹ See Proposing Release, *supra* note 9, at notes 43–44 and accompanying text.

³² See NCM Listing Standard Amendments, *supra* note 12.

³³ *Id.*

that the NCM's rules for initial and continued listing for secondary classes of common stock and preferred stock are substantially similar to Nasdaq/NGM's rules.

C. Convertible Debt

The Commission has compared the NCM listing standards for convertible debt to Amex's listing standards for debt.³⁴ In the NCM Listing Standards Amendments, Nasdaq added a debt rating requirement similar to a requirement in Amex's listing standards.³⁵ Specifically, Nasdaq requires that for the initial listing of convertible debt, one of the following conditions must be met: (i) The issuer of the debt security must also have an equity security listed on the Amex, NYSE, or Nasdaq; (ii) an issuer of equity security listed on the Amex, NYSE, or Nasdaq, directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security; (iii) an issuer of equity security listed on the Amex, NYSE, or Nasdaq has guaranteed the debt security; (iv) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or (v) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned an investment grade rating to an immediately senior issue or a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a *pari passu* or junior issue.³⁶ The Listing Standards Amendment also requires that current sale information be available in the United States for the underlying security into which a convertible debt issue is convertible. Accordingly, the Commission finds that the NCM's listing standards for convertible debt are substantially similar to those of Amex.

The Commission also finds that the continued listing requirements for convertible debt securities listed on the NCM are substantially similar to Amex's requirements. The NCM listing standards require that the principal amount outstanding be maintained at \$5 million.³⁷ Amex generally will delist a bond if the aggregate market value or the principal amount of the bond publicly held is less than \$400,000, or if the issuer is not able to meet its obligations

³⁴ See generally Nasdaq Rule 4310(c)(5) and Sections 104 and 1003 of the Amex Company Guide.

³⁵ See NCM Listing Standard Amendments, *supra* note 12.

³⁶ See Nasdaq Rule 4310(c)(5)(B).

³⁷ *Id.*

on the listed debt.³⁸ Although not identical, the Commission believes that both standards are designed to ensure the continued liquidity of the debt security, and thus are substantially similar.

D. Warrants

The Commission compared Nasdaq's NCM listing standards for warrants to the Nasdaq/NGM standards. In the Proposing Release, the Commission stated that it preliminarily believed that the NCM standards were not substantially similar to the Nasdaq/NGM standards. The NCM Listing Standard Amendments, however, increased the required number of warrants that must be outstanding for initial listing on the NCM from 100,000 to 400,000.³⁹ Though not identical, the Commission believes this initial listing requirement is substantially similar to Nasdaq/NGM requirements that there be 450,000 warrants outstanding for initial listing. The NCM Listing Standard Amendments also added a requirement for initial and continued listing that the security underlying the warrant be listed on Nasdaq or be a covered security as described in Section 18(b).⁴⁰ The Commission believes this requirement is substantially similar to the Nasdaq/NGM standard that requires that, for continued listing, the common stock of the issuer must continue to be listed on the Nasdaq/NGM.⁴¹ In light of the changes made by the NCM Listing Standard Amendments, the Commission finds the NCM's listing standards for warrants are substantially similar to those of Nasdaq/NGM.

E. Index Warrants

Index warrants traded on the NCM, must meet the same initial and continuing listing standards as index warrants traded on the Nasdaq/NGM market.⁴² Therefore, the Commission finds that the listing standards for index warrants traded on the NCM are substantially similar to the standards applicable to index warrants traded on the Nasdaq/NGM market.

³⁸ See Section 1003(b)(iv) of the Amex Company Guide. Section 1003(e) of the Amex Company Guide states that convertible bonds will be reviewed when the underlying security is delisted and will be delisted when the underlying security is no longer the subject of real-time reporting in the United States. The Commission does not believe that this is material because although Nasdaq does not have an identical rule, it does have the discretion to delist beyond its standards.

³⁹ See NCM Listing Standard Amendments, *supra* note 12.

⁴⁰ *Id.*

⁴¹ See Nasdaq Rule 4450(d).

⁴² See generally Nasdaq Rule 4310(c)(9)(C).

F. Units

The NCM, Amex, and Nasdaq/NGM all evaluate the initial and continued listing of a unit by looking to its components.⁴³ If all of the components of a unit individually meet the standards for listing, then the unit would meet the standards for listing.⁴⁴ In light of the NCM Listing Standard Amendments, which increase the listing requirements for the different categories of securities discussed above that could make up the components of a unit, the Commission finds that the NCM listing standards for units are substantially similar to both Amex and Nasdaq/NGM listing standards.⁴⁵

III. Other Changes to Rule 146(b)

A. Clarifying Changes in Response to Comments

In response to comments received from the ABA Committee and NASAA, the Commission is making a minor amendment to Rule 146(b) to include securities "authorized for listing" on a market named in Rule 146(b).

NASAA and the ABA Committee expressed concern regarding a discrepancy between the language of Section 18 under the Securities Act and Rule 146(b) thereunder. Section 18 defines covered securities as securities "listed, or authorized for listing" on the Named Markets, or the other exchanges that have listing standards that the Commission has deemed to be substantially similar to the Named Markets. Rule 146(b), however, deems as "covered securities" only securities listed, not those that are "authorized for listing," pursuant to exchange rules that the Commission has found to be substantially similar to the Named Markets. NASAA and the ABA Committee expressed concern that some issuers that are authorized for listing but not yet listed on an exchange identified in Rule 146(b) would not clearly be exempt from state qualification or registration requirements. They recommend that the Commission clarify the language in Rule 146(b) to conform it to the language of Section 18(b)(1)(B) of the Securities Act.⁴⁶ The Commission

believes that this clarifying change to Rule 146(b) is consistent with Congressional intent, as well as the Commission's intent, is appropriate, and addresses the commenters' concerns.⁴⁷

Another commenter expressed concern about a perceived ambiguity in Rule 146(b)(2). Rule 146(b)(2) conditions the designation of securities on the exchanges specified under Rule 146(b)(1) as "covered securities" as long as their listing standards continue to be substantially similar to those of the Named Markets. The commenter believes that it is not clear who makes this determination and recommends that the phrase "as determined by the Commission" should be added to the language of Rule 146(b)(2).⁴⁸ The Commission believes that this change is unnecessary because Section 18 clearly states that "covered securities" are those the Commission determines are substantially similar to the Named Markets. Similarly, Rule 146 specifies that it is the Commission that has found that listed exchanges, or segments thereof, have listing standards substantially similar to those of the Named Markets. The Commission also notes that since this rule has been in effect, the problem described by the commenter has not occurred and does not believe that further amendment to the language of the rule is required at this time.

B. Changes to Exchanges' Names

The Commission is amending Rule 146(b), as proposed, to reflect the following name changes:

- Sections (b)(1) and (b)(2) of Rule 146 use the term "Nasdaq/NMS" to refer to the National Market System of The NASDAQ Stock Market LLC. As noted above, on July 1, 2006, what was the National Market System of The NASDAQ Stock Market LLC became known as the Nasdaq Global Market.⁴⁹ The Commission is making a conforming change to Rule 146(b).
- Rule 146(b)(1)(i) refers to the Pacific Exchange Incorporated. In April 2006, the Pacific Exchange, Incorporated was

renamed NYSE Arca, Inc.⁵⁰ The Commission is making a conforming change to Rule 146(b).

- Rule 146(b)(1)(iv) refers to the International Securities Exchange, Incorporated. In September 2006, the International Securities Exchange, Incorporated was renamed the International Securities Exchange, LLC. The Commission is making a conforming change to Rule 146(b).

- Finally, the Commission is amending paragraph (1)(ii) of Rule 146(b) to reflect the legal name of the Philadelphia Stock Exchange, Inc.⁵¹

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the proposed amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

V. Cost-Benefit Analysis

Congress amended Section 18 of the Securities Act to exempt covered securities from state registration requirements. These securities are listed, or authorized for listing, on the Named Markets or any other national securities exchange determined by the Commission to have substantially similar listing standards to the Named Markets.⁵² Consistent with statutory authority, the Commission has determined that the listing standards for securities listed, or authorized for listing, on the NCM are substantially similar to those of either the Amex or Nasdaq/NGM. Securities listed, or authorized for listing, on the NCM therefore would be covered securities subject only to federal regulation.

By exempting securities listed, or authorized for listing, on the NCM from state law registration requirements, the Commission expects that the listing process for those securities will become easier as one layer of regulation is eliminated. Moreover, the Commission also expects adoption of the rule will reduce the administrative burden the issuers of covered securities face inasmuch as compliance with state blue

⁴³ A unit is a type of security consisting of two or more different types of securities (e.g., a combination of common stocks and warrants). See Securities Exchange Act Release No. 48464 (September 9, 2003), 68 FR 54250 (September 16, 2003).

⁴⁴ See generally Section 101(g) of the Amex Company Guide and Nasdaq Rules 4310(c)(10) and 4420(h)(1)(a)-(c).

⁴⁵ See NCM Listing Standard Amendments, *supra* note 12.

⁴⁶ See ABA Committee April 3rd Letter; ABA Committee December 20th Letter; and NASAA Supplemental Letter, *supra* note 10.

⁴⁷ The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**. The APA's notice and comment requirement does not apply, however, if the agency "for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." Sec. 5. U.S.C. Section 553(b)(3)(B). The Commission finds good cause to include the language "authorized for listing" to the rule because prior notice is unnecessary. The change does not alter the substance of the rule and incorporates language from the statute.

⁴⁸ See Kennedy Letter, *supra* note 10.

⁴⁹ See Securities Exchange Act Release Nos. 53799 and 54071, *supra* note 1.

⁵⁰ See Securities Exchange Act Release No. 53615 (April 7, 2006), 71 FR 19226 (April 13, 2006).

⁵¹ In the Proposing Release, the Nasdaq Global Market and the Nasdaq Capital Market were inadvertently referred to as the Nasdaq National Global Market and the Nasdaq National Capital Market. Those typographical errors are corrected in this adopting release.

⁵² 15 U.S.C. 77r(b)(1)(B).

sky law requirements is preempted.⁵³ The Commission solicited comments concerning the costs and benefits associated with the proposal and received two comments. The commenters believe that the proposed amendments to Rule 146(b) to provide "covered securities" status for securities authorized for listing, or approved for listing on the NCM, should reduce substantial costs for investors, given those securities would be exempted from state law registration requirements.⁵⁴

The Commission also believes that the amendment to Rule 146(b) will permit Nasdaq to compete with other markets whose listed securities are exempt from state law registration requirements for new securities products and listings. This result has the potential to enhance competition and, potentially, liquidity, thus benefiting market participants and the public. The Commission does not believe that there are any significant costs to investors associated with the preemption of state registration requirements for securities listed, or authorized for listing, on the NCM. The Commission notes that there may be some cost to investors through the loss of benefits of state registration and oversight, although the cost is difficult to quantify. Furthermore, the Commission believes that Congress contemplated these costs to the economic benefits of exempting covered securities from state regulation.

VI. Consideration of Promotion of Efficiency, Competition, and Capital Formation

As required under the Securities Act,⁵⁵ the Commission considered the rule's impact on efficiency, competition, and capital formation. National securities exchanges compete for the listing of securities. Thus, the Commission believes that amending Rule 146(b) to designate securities listed, or authorized for listing, on the NCM as covered securities will offer potential benefits for investors because it would facilitate the ability of Nasdaq to compete for listings, which will potentially increase competition and enhance the overall liquidity, and thus the efficiency of the U.S. securities markets. The Commission also believes

that the rule will serve to reduce the cost of raising capital because it will streamline the registration process for issuers listing on the NCM. In addition, the Commission believes that the rule amendment, consistent with Congressional action, is designed to promote efficiency by removing a layer of duplicative regulation. The Commission solicited comments on the amendment's effect on competition, efficiency, and capital formation. Commenters generally believed that this proposal would improve efficiency and facilitate capital formation by eliminating state registration for issuers seeking to list their securities on the NCM.⁵⁶ The Commission also believes that the amendment to Rule 146(b) will permit Nasdaq to compete with other markets whose securities are exempt from state law registration requirements for new securities products and listings. Finally, the amendment to Rule 146(b) will not impair efficiency, competition, and capital formation because it will impose no recordkeeping or compliance burdens, but will provide a limited purpose exemption under the federal securities laws. Thus, the Commission concludes that the amendment to Rule 146(b) would promote efficiency, competition, and capital formation.

VII. Regulatory Flexibility Act Certification

The Commission has certified, pursuant to Section 605(b) of the Regulatory Flexibility Act,⁵⁷ that the amendment to Rule 146 will not have a significant economic impact on a substantial number of small entities. This certification was incorporated into the Proposing Release. The Commission solicited comments as to the nature of any impact on small entities, and generally on whether the amendment to Rule 146(b) could have an effect that has not been considered. No comments were received.

VIII. Statutory Authority

The Commission is amending Rule 146 pursuant to the Securities Act of 1933,⁵⁸ particularly Sections 18(b)(1)(B) and 19(a).⁵⁹

Text of the Rule

List of Subjects in 17 CFR Part 230 Securities.

■ For the reasons set forth in the preamble, Title 17, Chapter II of the *Code of Federal Regulations* is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The general authority citation for part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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■ 2. Section 230.146 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 230.146 Rules under Section 18 of the Act.

* * * * *

(b) * * *

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange ("NYSE"), the American Stock Exchange ("Amex"), or the National Market System of the Nasdaq Stock Market ("Nasdaq/NGM"), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the Philadelphia Stock Exchange, Inc.;
- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on the International Securities Exchange, LLC; and
- (v) The Nasdaq Capital Market.

(2) The designation of securities in paragraphs (b)(1)(i) through (v) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, Amex, or Nasdaq/NGM.

Dated: April 18, 2007.

By the Commission.

Florence E. Harmon,
Deputy Secretary.

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⁵³ Several commenters also expect this outcome. See ABA Committee April 3rd Letter; ABA Committee December 20th Letter; and Kennedy Letter, *supra* note 10.

⁵⁴ See ABA Committee December 20th Letter and Kennedy Letter, *supra* note 10.

⁵⁵ 15 U.S.C. 77b(b).

⁵⁶ See ABA Committee April 3rd Letter; ABA Committee December 20th Letter; and Kennedy Letter, *supra* note 10.

⁵⁷ 5 U.S.C. 605(b).

⁵⁸ 15 U.S.C. 77a *et seq.*

⁵⁹ 15 U.S.C. 77r(b)(1)(B) and 77s(a).