

Changes in Store for Companies Listed on the Nasdaq

The Nasdaq started life as a computer-based system that allowed broker-dealers to more easily share trading information for over-the-counter stocks. Soon, however, the Nasdaq will become a national securities exchange now that its application has been approved by the SEC. The historical "nonexchange" status of Nasdaq meant that companies with securities quoted on the Nasdaq registered with the SEC under Section 12(g) of the '34 Act rather than under Section 12(b) since their stock was not listed on a national securities exchange. With the change in status of the Nasdaq, companies are wondering if they need to change their SEC registration status and how to go about it.

The Nasdaq has proposed that it would transition the registration of the securities of its 3,200 companies from Section 12(g) to Section 12(b) without

each company having to file a new Form 8-A to do this. Each company would have a 10-day window to "opt out" of this process, but there is no reason to do this. No word yet exists on how and if '34 Act filing numbers for each Nasdaq company would change. It is not clear whether the SEC will assign new '34 Act filing numbers to Nasdaq companies. In the past, these companies received filing numbers that began with a "0," while exchange-listed companies received a filing number that began with a "1." Listed companies will also need to change their status from a 12(g) registrant to a 12(b) registrant on next year's Form 10-K.

Nasdaq has also unveiled plans to create another market tier in addition to its current Nasdaq Capital Market (the former Nasdaq Small Cap Market) and Nasdaq National Market. The proposed "Global Select Market" will begin on July 1

Adopting Compliance Programs for Governmental Affairs Activities

All businesses are affected by the actions of the federal, state and local governments and, as a result, most businesses need or want to interact with government officials from time to time. Whether you are a large corporation with lobbyists and government affairs employees or a small company with more modest resources, your interaction with government officials is subject to a variety of laws and regulations. In general, these laws and regulations are designed to control:

- contributions to candidates for political office;
- conferring gifts, meals, entertainment or other benefits on government officials; and
- how those who communicate with government officials must disclose those communications.

Failure to strictly follow the laws in

these areas can result in some strict criminal and civil penalties. In addition, companies that sell goods and services to the government risk losing existing government contracts and being barred from future contracts. Enforcement of these laws is becoming an increasing priority at both the state and federal levels. As a result, it is important that all businesses have a compliance program that addresses their government affairs activities. Among other things, the existence of a compliance program is a factor that federal prosecutors look favorably upon when deciding whether or not to prosecute or the penalties they seek to impose. While there is no "one size fits all" compliance program, there are certain key elements that should be incorporated into any effective program. These include establishing standards to prevent, and procedures to detect, wrongful activity and providing an

IN THIS ISSUE:

- **Changes in Store for Companies Listed on the Nasdaq.....1**
- **Adopting Compliance Programs for Governmental Affairs Activities.....1**
- **Illinois Case May Expand Liability of Parent Corporations.....2**
- **Bundling Arrangements Return: High Court Drops Antitrust Rule.....2**

with more than 1,000 of Nasdaq's largest companies. Details of the listing standards have not been released, but they are purported to be "the highest listing standards in the world" according to Nasdaq press releases. At the same time, the Nasdaq National Market will be renamed the "NASDAQ Global Market." The Nasdaq Capital Market will retain its current name.



Whether you work for a large corporation with lobbyists or a small company with more modest resources, your interaction with government officials is subject to a variety of laws and regulations.

Illinois Case May Expand Liability of Parent Corporations

One of the principal reasons for incorporating a business is to insulate the owners of the business from liability. Corporations also do this by forming separate subsidiary corporations. In general, a corporation is not liable for the debts and obligations of its subsidiaries unless there is a substantial disregard of the separate corporate existence of the subsidiary by the parent corporation. A recent case in Illinois held that a parent corporation may be liable for liabilities of its subsidiary even if the corporate form of the subsidiary had been respected where the parent corporation was "directly participating" in the subsidiaries business. The case, *Forsythe v. Clark USA, Inc.*, involved a wrongful death action brought on behalf of an employee of a subsidiary of the defendant corporation who was killed in a fire at the subsidiary's plant. The plaintiff alleged that cost-cutting measures at the plant led to conditions that resulted in the deadly fire. The plaintiff further alleged that the parent corporation was directly responsible for creating the conditions

that led to the fire because it imposed a business strategy of capital spending cutbacks on the subsidiary. The plaintiff produced evidence that (i) the parent corporation demanded that the subsidiary position itself in its market as the low-cost alternative, (ii) the parent corporation took action to decrease the subsidiary's capital spending, (iii) the parent corporation's board had prepared and approved the subsidiary's budget, (iv) the parent's and subsidiary's boards meet simultaneously, and (v) the same person acted as CEO for both the parent and the subsidiary.

The Illinois Appellate Court noted that in order to "pierce the corporate veil" and impose liability on a parent corporation, it was usually necessary to show that the legal separateness of a subsidiary corporation has been broadly disregarded by the parent through failure to observe corporate formalities, commingling of records or accounts, inadequate capitalization of the subsidiary and similar failures. Although this did not appear to be the case in the current

situation, the Court went on to note an exception to this general rule which imposes liability on a parent corporation if the alleged wrong of the subsidiary can be traced to the parent corporation's direct participation in the management of the subsidiary. The Appellate Court found that the plaintiff's case against the parent corporation could not be dismissed until a trial was held to determine if the parent corporation's actions constituted sufficient participation to impose liability under this theory.

While the final determination of this case has not been reached, the holding of the Appellate Court does point out that merely respecting the corporate separateness of a subsidiary may not be enough to prevent the imposition of liability on a parent corporation if it exercises domination over a subsidiary's decision making and those decisions can be directly linked to an action of the subsidiary which causes injury or otherwise imposes liability on the subsidiary.

Bundling Arrangements Return: High Court Drops Antitrust Rule

Bundling arrangements, such as those requiring the purchase of replacement ink cartridges from the manufacturer of a printer, have long raised antitrust issues that have made them difficult to enforce. These arrangements have new life, however, as a result of the U.S. Supreme Court's recent ruling in *Illinois Tool Works Inc. v. Independent Ink Inc.* ("ITW") that threw out a procedural rule that made it difficult for manufacturers of patented or copyrighted products to defend tying arrangements involving their products.

For more than four decades, the U.S. Supreme Court had repeatedly held that a patent or copyright created a presumption of market power that prevented the maker of a patented or copyrighted product from requiring its purchasers to buy another product without violating the Sherman Act. The Court's recent ruling does away with this

presumption of market power. In its opinion, the Court noted its earlier opinions consistently assumed that tying arrangements served no purpose beyond the suppression of competition, but in recent years it had repeatedly rejected this negative view of tying.

As a result of *ITW*, bundling arrangements involving intellectual property will be subject to the same rules as other products. By removing the presumption of market power, manufacturers of products incorporating patented or copyrighted concepts should have more latitude to create bundling arrangements for their products.

Whether the *ITW* case will result in a rush to new bundling arrangements is unclear. However, as patent owners continue to seek ways to commercialize their products, it is likely that the arrangements will become more common.

Kutak Rock is a national law firm with 16 offices located throughout the United States. Our practice areas include:

- **Corporate Governance**
- **Banking Law**
- **SEC Reporting and Compliance**
- **Employment/Employee Benefits Law**
- **Stock Offerings**

**Please visit our website
www.KutakRock.com**

To learn more, contact:

**Steve Amen 402.231.8721
Steven.Amen@KutakRock.com**

**Jeremy Johnson 202.828.2463
Jeremy.Johnson@KutakRock.com**