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Sent via Electronic Mail (rule-comments@sec.gov)

October 18, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-65319; File No. SR-NASDAQ-2011-073

Dear Ms. Murphy:

Thank you for the opportunity to comment on the recent rule proposal of The NASDAQ Stock Market LLC ("NASDAQ"), which would require companies forming through a reverse merger to meet certain heightened standards to qualify for listing on The NASDAQ Stock Market (File No. SR-NASDAQ-2011-073). Our below comments also touch on the relative merits of the competing rule proposal of the NYSE Amex LLC ("NYSE Amex"), File No. SR-NYSEAmex-2011-55.

By way of background, I previously served as Chief Counsel for the Listing Qualifications Department of NASDAQ, where I was employed from 1995 to 2004. Since leaving NASDAQ in June 2004, I have served as President of Donohoe Advisory Associates LLC, a consulting firm dedicated to advising issuers on a wide range of listing related issues. Over the past seven years we have had hundreds of engagements, including many involving issuers that formed through reverse merger transactions. We regularly assist issuers with listing applications for NASDAQ and NYSE Amex. We also represent issuers in delisting proceedings at both NASDAQ and NYSE Amex. In that regard, we have recently represented a number of reverse merger companies in delisting proceedings that were initiated in response to accounting irregularities.

While we recognize that there has been an increase in the number of reverse merger companies experiencing accounting difficulties, we are also cognizant of the fact that many companies that have gone public through initial public offerings ("IPOs") have also experienced accounting difficulties. In addition, while we do not believe that NASDAQ and NYSE Amex have presented data or a rationale that supports the need for a reverse merger seasoning period,

we do agree that a reasonable seasoning period for reverse merger companies could be beneficial, as it would give the issuer and its officers, directors and employees the opportunity to adjust to life as a public company. Moreover, a seasoning period would provide the issuer's independent registered accounting firm with the opportunity to become more familiar with the issuer (notwithstanding the fact that the auditor would have already completed an audit of the issuer's financial statements for inclusion in the Super Form 8-K that must be filed at the time of the merger).[1] That said, given that reverse mergers have become an acceptable and effective alternative to an IPO over the last decade, particularly since it has become increasingly difficult for companies to attract investment banks willing to complete an IPO for a small cap issuer and given the large upfront cost associated with an IPO, it is important to strike a balance so as not to allow the seasoning period to be unnecessarily long and therefore punitive. In that regard, the NYSE Amex proposal would require issuers to trade in the over-the-counter ("OTC") market for at least one year before being able to initiate the eligibility review with the NYSE Amex Staff. Further, since an issuer must also file an annual report during the seasoning period, the seasoning period has the potential to stretch up to three months beyond one year. Thus, after factoring in the two to three months for completing the eligibility review and application process, an issuer could be required to wait up to 18 months to become listed following the filing of the Super Form 8-K, which document would include audited financial statements.

On the other hand, the proposed NASDAQ seasoning period appears to strike more of a balance, as it would require the issuer to trade in the OTC market for at least six months following the completion of the merger transaction and prior to filing the listing application. However, it should be noted that since the NASDAQ seasoning period also requires the filing of two periodic reports following the completion of the merger transaction, the proposed NASDAQ seasoning period has the potential to stretch to seven, eight or nine months.

In addition to the seasoning requirements, both NYSE Amex and NASDAQ would subject reverse merger companies to heightened stock price requirements. The NYSE Amex proposal would require the issuer to maintain "on both an absolute and an average basis for a *sustained period* a minimum closing stock price equal to the stock price requirement [emphasis supplied]." Such a requirement is problematic in that it completely lacks transparency and allows for uneven application. In contrast, the NASDAQ proposal would require an issuer to maintain "a Bid Price of $4 per share or higher on at least 30 of the 60 trading days immediately preceding the filing of the initial listing application." While preferable to the NYSE Amex proposal, it too is problematic in that the proposal is silent as to price requirements over the two to three month period during which the listing application is under review. Moreover, the proposal makes no

[1] Following a merger between a shell company and an operating company, within four business days, the issuer must file a Super Form 8-K, which includes the same type of information that would be required in registering a class of securities under the Securities Exchange Act of 1934. *See* SEC Release Nos. 33-8587 and 34-52038.

allowance for an issuer to effect a reverse stock split just prior to listing so as to satisfy the price requirement. Such action is commonplace for OTC companies seeking to list on NASDAQ or NYSE Amex, as OTC companies often trade at lower price levels than listed issuers. Keep in mind that it is also commonplace for companies completing IPOs to implement stock splits in conjunction with an offering so as to price the security in a manner that is most attractive to potential investors. While certainly the reverse merger issuer could implement the reverse stock split earlier, it is more desirable to effect the reverse stock split in close proximity to the event of listing, as the announcement that a listing is imminent will often provide support for the post-split stock price. This is important, given that reverse stock splits are generally viewed by investors as unfavorable events and thus issuers generally prefer to effect reverse splits in conjunction with offsetting favorable corporate developments.

Finally, the NYSE Amex proposal includes an exemption from the seasoning requirements for reverse merger companies listing in connection with a firm commitment, underwritten public offering where the proceeds to the company are at least $40 million. Importantly, the NASDAQ proposal does not include a similar underwritten public offering exemption, although the initial NASDAQ reverse merger rule filing, which was filed in April and subsequently withdrawn, File No. SR-NASDAQ-2011-056, did include an exemption "if the Company lists in connection with a firm commitment, underwritten public offering." It is our view that such a public offering exemption is critical, as the only differences between a reverse merger and an IPO are that the reverse merger issuer may not have filed a registration statement with the SEC (although, as noted above, the issuer is required to provide the same information in the Super Form 8-K that would be required in connection with the filing of a registration statement), and the issuer may not have undergone the scrutiny associated with the underwriting process. Therefore, once an issuer has completed an underwritten public offering, it is on a level playing field with an issuer listing pursuant to an IPO. In that regard, the NYSE Amex proposal seems to imply that the public offering exemption is only available if the issuer is listing in connection with the offering. We submit that once the issuer has completed a firm commitment, underwritten public offering it should no longer be subject to the heightened reverse merger requirements, without regard to whether the offering occurs before the listing application is filed or at the time of listing.

While we applaud NYSE Amex for including the public offering exemption in its proposal, we strongly disagree with the $40 million offering threshold. This seems only to prejudice smaller issuers and underwriters and NYSE Amex has not provided a rationale for establishing this threshold. This begs the question, is an issuer listing in conjunction with a $5 million IPO more qualified to list and more deserving of an exemption to the heightened reverse merger requirements than a reverse merger company that has completed a $20 million underwritten financing, or one that has completed a $39 million underwritten offering? We

believe that NASDAQ got it right in their initial rule filing when they chose not to quantify the size of the underwritten offering and we strongly urge both NASDAQ and NYSE Amex to include an exemption for reverse merger companies that have completed a firm commitment, underwritten public offering without regard to size. In support, we note that the due diligence associated with an underwritten, public offering and the underwriter's fiduciary and legal obligations will not change based on the relative size of the offering.

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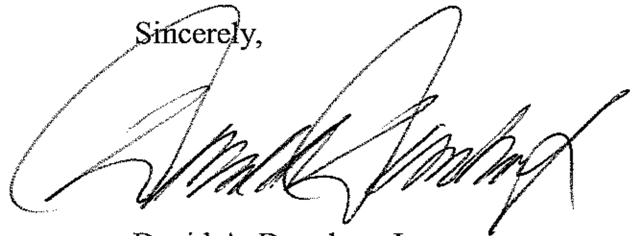
We thank you for the opportunity to comment on the NASDAQ and NYSE Amex proposals and for your consideration of our comments. Please do not hesitate to contact me at ddonohoe@donohoeadvisory.com or (240) 403-4180 should you have any questions.

Sincerely,



David A. Donohoe, Jr.