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

February 10, 2012

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

Re: Release No. 34-66159; File No. SR-NASDAQ-2012-002

Dear Ms. Murphy:

Thank you for the opportunity to comment on the recent rule proposal of The NASDAQ Stock Market LLC ("NASDAQ"), which would provide an alternative to the $4 per share bid price requirement for issuers seeking to list on The NASDAQ Capital Market (the "Capital Market"), provided they would not fall under the definition of a "penny stock," as set forth in Exchange Act Rule 3a51-1(g).

By way of background, I served as Chief Counsel for the Listing Qualifications Department of NASDAQ, where I was employed from 1995 to 2004. Since leaving NASDAQ in June of 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 nearly eight years, we have had hundreds of engagements, many of which involved issuers seeking to list on The NASDAQ Stock Market, the NYSE Amex and the New York Stock Exchange.

While the large majority of the initial listing requirements for the Capital Market and the NYSE Amex are generally comparable, there is a significant disparity between the price requirements for initial listing in that the Capital Market requirement is $4 per share under all three of its listing alternatives and the NYSE Amex requires only $3 per share under three of its four listing alternatives and $2 per share under the fourth listing alternative.[1]

[1] Interestingly, under all three Capital Market listing alternatives an issuer must demonstrate at least $4 million in stockholders' equity; however, the NYSE Amex offers one listing alternative with no stockholders' equity requirement.

As a firm that regularly advises boards of directors and management teams on exchange listing alternatives, we can emphatically state that for companies trading between $2 and $4 per share, the main reason given for opting to list on the NYSE Amex instead of the Capital Market is almost universally the difference in initial listing price requirements between the two exchanges.[2] Moreover, often companies trading in the $4 or $5 range elect to seek listing on the NYSE Amex instead of the Capital Market in order to guard against the potential for a temporary decrease in the stock price to below $4 per share.[3]

Given this disparity, it defies logic that the Commission could refuse to level the playing field between the two exchanges, as would be consistent with the mandate set forth in Section 11A of the Exchange Act, based solely on the objection that the Commission is prevented from doing so by changes it made to the Penny Stock Rules in 2005. Instead, the discussion should be focused on what changes must be made to the Penny Stock Rules to facilitate the carrying out of the mandate that the Commission ensure fair competition among the exchanges. Apart from the visibility associated with being listed on an exchange and the superior trading environment, listed issuers enjoy a number of very significant regulatory benefits. In that regard, they receive a Blue Sky exemption in all 50 states, they are exempt from the Penny Stock Rules, they are marginable and they are S-3 eligible. With that being the case, we fail to understand why the Commission would allow the NYSE Amex to prospect for new listings by offering these benefits to issuers with a $2 and $3 stock price, yet foreclose NASDAQ from doing the same.

In its desperation to seek the elimination of the price disparity, NASDAQ has proposed to the Commission that it would publish a separate list of issuers that were approved under the new $2 or $3 standard that then fell below the quantitative requirements set forth in the Penny Stock Rules. This is unwieldy and certain to be less than fully transparent. Moreover, this would continue to allow the NYSE Amex to maintain a competitive advantage over NASDAQ, as it is certain that they would argue to issuers that by choosing NASDAQ they risk being deemed "penny stocks" in the future and that if they select the NYSE Amex there is no such risk. Again, the proper solution is not to contort the NASDAQ listing program, but rather is to amend the

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[2] While it must be acknowledged that the Amex brand has been greatly improved since the Amex was acquired by the NYSE several years ago, and certainly the technology and trading improvements made by the NYSE have been well received, it remains the case that the deciding factor in selecting an exchange for companies in the $2-$4 price range continues to be, in most cases, the difference in the price requirements.

[3] There is an argument that an issuer desiring to list on the Capital Market rather than the NYSE Amex is always free to effect a reverse stock split to qualify; however, this ignores the fact that the reverse stock split process can be costly, time consuming and in most states requires shareholder approval. Further, given the negative connotation of a reverse stock split and the fact that investors generally dislike reverse stock splits, this argument misses the mark.

Penny Stock Rules so as to eliminate this regulatory inequality. The Penny Stock Rules were initially adopted to address problems with issuers trading in an unregulated and non-transparent over-the-counter environment. The NASDAQ Stock Market is one of the most transparent markets in the world and is highly regulated both from a trading perspective and a listing qualification perspective. It makes no sense to apply the Penny Stock Rules to any issuer listed on any of the three NASDAQ tiers.

Based on the foregoing, we urge the Commission to initiate a process to amend the Penny Stock Rules, as required, and to then approve the NASDAQ proposal to establish listing alternatives with a $2 and $3 price requirement.

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We thank you for the opportunity to comment on the NASDAQ proposal 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.