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

**Re: Petition to Allow The Nasdaq Capital Market to Adopt Initial Listing Price Requirements Identical to NYSE Amex**

Dear Ms. Murphy:

By this petition, The Nasdaq Stock Market LLC (“Nasdaq”) requests that the Securities and Exchange Commission (the “Commission”) grant an exemption to Rule 3a51-1(a)(2)(i)(C) (the “Rule”), promulgated under the Securities Exchange Act of 1934<sup>1</sup> (the “Act”) to permit the Nasdaq Capital Market to adopt identical initial listing standards related to price as NYSE Amex LLC (“NYSE Amex”). The Rule generally requires that a national securities exchange have a \$4 minimum price for initial listing of common stock as a prerequisite to avoid having securities treated as “penny stocks,” as defined in Rule 3a51-1.<sup>2</sup> Simply put, the requested exemption is necessary because, under the Commission’s rules, Nasdaq is subject to this requirement, whereas its competitor, NYSE Amex, is not. NYSE Amex instead is able to rely upon a grandfathering provision in Rule 3a51-1 to avoid having a \$4 initial listing price requirement. Thus, while the Capital Market and NYSE Amex share comparable regulatory treatment, including an exemption from state registration requirements and the Commission’s Penny Stock Rules,<sup>3</sup> and compete to list many of the same companies, the Capital Market is precluded from adopting the same listing standards as NYSE Amex. The Commission must act to eliminate this unfair burden on competition.

Alternatively, if the Commission is unwilling to allow Nasdaq to adopt an identical price requirement as NYSE Amex, Nasdaq hereby petitions for the Commission to modify Rule 3a51-1(a)(1)<sup>4</sup> to eliminate the grandfather provision that allows NYSE Amex to maintain this unfair competitive advantage.

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<sup>1</sup> 17 CFR 240.3a51-1(a)(2)(i)(C).

<sup>2</sup> 17 CFR 240.3a51-1.

<sup>3</sup> Exchange Act Rule 15g-1 to 15g-100, 17 CFR 240.15g-1 to 15g-100.

<sup>4</sup> 17 CFR 240.3a51-1(a)(1).

## **Background**

When Congress adopted the Penny Stock Reform Act of 1990<sup>5</sup> it found that “[i]nvestors in the penny stock market suffer from a serious lack of adequate information concerning price and volume of penny stock transactions, the nature of this market, and the specific securities in which they are investing.”<sup>6</sup> Therefore, Congress directed the Commission to adopt rules requiring broker-dealers to provide customers with certain trade and market information prior to effecting a transaction in a penny stock for their customers. The Commission adopted the Penny Stock Rules and Rule 3a51-1, defining the term “penny stock,” in 1992, pursuant to that directive. As originally adopted, Rule 3a51-1 excluded securities listed on Nasdaq from the definition of a penny stock.<sup>7</sup>

The Commission adopted changes in 2005 to update Rule 3a51-1 to require that reported securities listed on a national securities exchange also must meet one of two new alternatives to be excluded from the definition of a penny stock. First, the exchange could satisfy a grandfather provision if it had been continuously registered since April 20, 1992 and had maintained quantitative listing standards that are substantially similar to, or stricter than, those in place on that exchange on January 8, 2004.<sup>8</sup> To our knowledge, NYSE Amex is the only current beneficiary of this grandfather provision<sup>9</sup> and, as a result, the NYSE Amex initial listing price requirement is either \$2 or \$3. In sharp contrast, any other exchange must satisfy the second alternative for listed securities to be excluded from the definition of a penny stock, and, as a result, must have a higher minimum initial listing price of \$4.<sup>10</sup>

Nasdaq submitted a comment during the rulemaking process that led to the 2005 changes expressing concern about the codification of this anti-competitive advantage in the Commission’s rules.<sup>11</sup> In response, the Commission stated that “in the event that an exchange ... decided to lower any particular listing standards below the standards established in this rule, it

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<sup>5</sup> Pub. L. 101-429, 104 Stat. 931 (1990).

<sup>6</sup> *Id.* at Section 502(6).

<sup>7</sup> Former Rule 3a51-1(a) excluded reported securities, including securities listed on what was then the Nasdaq National Market (now the Nasdaq Global and Global Select Markets). Securities listed on what was then the Nasdaq SmallCap Market (now the Nasdaq Capital Market) were excluded under former Rule 3a51-1(f) until 2001, when the Commission approved a transaction reporting plan for SmallCap Market securities, making them reported securities excluded by former Rule 3a51-1(a).

<sup>8</sup> Rule 3a51-1(a)(1), 17 CFR 240.3a51-1(a)(1).

<sup>9</sup> The New York Stock Exchange was previously covered by this exception but the Commission found that it “would no longer be included in the ‘grandfather’ exception” after adopting listing standards for special purpose acquisition companies. Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 27597 at note 30 (May 13, 2008) (approving SR-NYSE-2008-17).

<sup>10</sup> Rule 3a51-1(a)(2), 17 CFR 240.3a51-1(a)(2). The second alternative requires that exchanges establish certain fixed, minimum initial listing requirements, including the requirement that the company’s common stock have a minimum price of \$4 per share.

<sup>11</sup> March 18, 2004, letter from Edward S. Knight, Nasdaq, to Jonathan G. Katz, Commission, available at: <http://www.sec.gov/rules/proposed/s70204/s70704-5.pdf>.

could request an exemption from the Commission...” under Exchange Act Rule 15g-1<sup>12</sup> and Section 36 of the Act.<sup>13</sup> It is on that basis that this Petition is submitted.

While the Commission did not discuss the factors it would consider in deciding whether to grant an exemption, in the proposing release for these changes the Commission discussed Congress’ concerns which led to its adoption of the original Penny Stock Rules.<sup>14</sup> The Commission stated that it believed that requiring that reported securities satisfy additional requirements to be excluded from the definition of penny stock “would create a more meaningful distinction between securities that should be subject to the penny stock rules and those of more substantially capitalized issuers.”<sup>15</sup> The Commission also described the companies it believed posed the most danger to unsophisticated investors as “companies that are minimally capitalized and that do not possess the attributes of companies with general market followings such as, for example, substantial tangible assets, an operating history, a defined business plan, net income, and genuine public interest as demonstrated by a large number of public shareholders that are not affiliated with the company or a significant market value for the company’s listed shares.”<sup>16</sup>

After the Commission adopted the most recent amendments to the Penny Stock Rules, Nasdaq increased a number of the listing requirements for the Capital Market.<sup>17</sup> These changes resulted in the Commission finding that the listing standards for common stock on the Capital Market were “at least as comprehensive as,” or higher than, those of NYSE Amex and, therefore, designating securities listed on the Capital Market as “covered securities,” which are exempt from state regulation under Section 18 of the Securities Act of 1933.<sup>18</sup>

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<sup>12</sup> 17 CFR 240.15g-1(f) (permitting an exemption from the Penny Stock Rules for any “transaction or class of transactions or persons or class of persons that, upon prior written request or upon its own motion, the Commission conditionally or unconditionally exempts by order as consistent with the public interest and the protection of investors.”).

<sup>13</sup> 15 U.S.C. 78mm (granting the Commission general exemptive authority “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”). Securities Exchange Act Release No. 51983, 70 FR 40614 at 40616 (July 13, 2005) (footnotes omitted).

<sup>14</sup> Securities Exchange Act Release No. 49037, 69 FR 2531 (January 16, 2004).

<sup>15</sup> *Id.* at 2535.

<sup>16</sup> *Id.* at note 37.

<sup>17</sup> In particular, Nasdaq modified the listing standards to require a minimum of \$4 million in stockholders’ equity in all cases. In addition, Nasdaq modified the stockholders’ equity listing alternative to require a two year operating history, instead of the one year history previously required, and the market value of listed securities and equity listing alternatives to require \$15 million in market value of publicly held shares, instead of the \$5 million previously required. Securities Exchange Act Release No. 55642 (April 18, 2007), 72 FR 20395 (April 24, 2007) (approving SR-NASDAQ-2006-032).

<sup>18</sup> 15 U.S.C. 77r(b). Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 at 20411 (April 24, 2007). The Commission concluded that the initial listing standards for common stock on the Capital Market were substantially similar to those of the American Stock Exchange (now NYSE Amex). The Commission stated that it interpreted the “substantially similar” standard to require listing standards at least as comprehensive as those of the market to which it was comparing.

## Discussion

Nasdaq requests an exemption from the Rule to permit a modification to Nasdaq Rule 5505 such that companies could list on the Capital Market under the Equity Standard and Net Income Standard with a minimum \$3 price and under the Market Value of Listed Securities standard with a minimum \$2 price, instead of the \$4 minimum price now required under each standard. In this manner, the Capital Market would have the same price requirement as the comparable NYSE Amex standards. All other requirements for listing on the Capital Market meet or exceed the requirements for listing on Amex.<sup>19</sup> This exemption and the proposed rule change would eliminate the existing conflict in the Commission's rules, whereby securities could list at a \$2 or \$3 price on NYSE Amex and not be considered penny stocks, but could not list at the same price on Nasdaq because Nasdaq cannot adopt comparable standards without violating the Penny Stock Rules. As such, the proposed exemption would eliminate an unfair burden on competition without adversely impacting investor protection.

## Investor Protection

In approving the NYSE Amex listing rules that permit listing at \$2 and \$3, the Commission was required by the Act to conclude that those rules were designed to protect investors and the public interest. That conclusion should be no different with respect to Nasdaq's proposal to adopt identical requirements, particularly given that all other requirements for listing on the Capital Market are the same or higher as those of NYSE Amex, as shown in Attachment A. In addition, the requirements for market value of public float under the income standard and stockholders' equity under the equity standard are higher for listing on the Capital Market than on NYSE Amex. Moreover, given that the Capital Market has, and will continue to have, a \$1 continued listing price requirement whereas NYSE Amex has no continued listing price requirement, Nasdaq's proposal may provide better protection to investors and the public interest. As of May 21, 2010, approximately 80 securities on NYSE Amex (15%) were trading below \$1. The Commission encouraged NYSE Amex to adopt a minimum price requirement for continued listing more than four years ago, but NYSE Amex has taken no action to do so.<sup>20</sup>

The existing NYSE Amex rule permitting listing at \$2 or \$3, and the Commission's treatment of these securities as not being penny stocks, is supportable because the difference in price between a company trading at \$2 or \$3 per share and a similar company trading at \$4 may reflect nothing more than the number of shares outstanding at each company and is not necessarily indicative of the quality of the company. This too supports allowing the Capital Market to list companies on a comparable basis. Prohibiting listing on Nasdaq does not serve to protect investors and Nasdaq believes that investors would be at least as well protected by having these companies listed on the Capital Market, where they would be subject to oversight by

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<sup>19</sup> See Attachment A, containing a table comparing those standards. See also Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

<sup>20</sup> Exchange Act Release No. 53050 (January 3, 2006), 71 FR 1580 at 1581 (note 11) (January 10, 2006) (approving SR-AMEX-2005-114).

Nasdaq's regulatory staff, including trading reviews conducted by FINRA.<sup>21</sup> There is simply no statutory or rules basis to allow a company to list on NYSE Amex and receive an exemption from the Penny Stock Rules while denying the very same company the opportunity to achieve these beneficial results through listing on the Capital Market.

Application of Nasdaq's remaining listing requirements directly address the concerns raised by Congress and the Commission in regulating penny stocks and will help assure that minimally capitalized companies with limited market following are not listed under the revised listing standards. Nasdaq's listing requirements, other than price, provide protections to investors to assure that a company that qualifies at the proposed new price is sufficiently liquid to warrant an exchange listing and meets quantitative and qualitative attributes demonstrating that they have sufficient assets, an operating history, a defined business plan, net income (where applicable), and genuine public interest.

Further, Nasdaq staff has no discretion to waive the application of these initial listing requirements. In addition, Nasdaq has broad discretionary authority, set forth in the Listing Rule 5100 Series, to deny listing to securities that otherwise meets the listing requirements in order to protect investors and the public interest. Nasdaq has used this discretion to deny initial listing to companies associated with individuals with a history of regulatory misconduct, the very type of situation which led to the adoption of the Penny Stock Rules. To support the use of its discretionary authority, Nasdaq has formed a specialized team, Listing Investigations, whose principal function is to scrutinize disclosures and financial reports and investigate conduct that raises public interest concerns. This team is regularly involved in reviewing companies that apply for listing. To our knowledge, no other marketplace has dedicated resources to proactively conducting such reviews.

Nasdaq's listing standards are also supported by a rigorous, transparent rules enforcement program, which would not change under the proposal. Underlying this enforcement program is state-of-the-art, proprietary technology that collects company information, financial statements and market data for all Nasdaq-listed issues and compares this data to Nasdaq's listing standards on a daily basis. This system allows Nasdaq staff to efficiently prioritize and review more than 50,000 filings annually, including 35,000 Forms 8-K.

The Commission has concluded that companies that satisfy the NYSE Amex listing standards, including price, are not penny stocks. Given the foregoing, there is no reason to draw a different conclusion about these same companies if they were to be allowed to list instead on the Nasdaq Capital Market. Therefore, Nasdaq believes there are no investor protection concerns that should preclude this request for an exemption to permit the Capital Market to adopt initial listing price requirements identical to those of NYSE Amex.

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<sup>21</sup> In fact, Nasdaq notes that NYSE Euronext has announced that they plan to follow a similar approach to market regulation and contract with FINRA to provide market surveillance and enforcement functions for NYSE Amex and other NYSE Euronext U.S. equity and option markets. See May 4, 2010 press release "FINRA to Perform NYSE Regulation's Market Oversight Functions" available at <http://www.nyse.com/press/1272880693677.html>.

### Effect on Competition

Section 11A of the Act requires that there be fair competition among exchange markets to further the public interest and protection of investors. The existing situation, whereby NYSE Amex is permitted to have listing standards that no other market can, is an unfair burden on competition in violation of Section 11A. There are companies eligible to list on NYSE Amex that are precluded from listing on the Capital Market. In addition, there are companies already listed on NYSE Amex that are precluded from transferring to the Capital Market solely based on their failure to have a \$4 price. As a result, Nasdaq cannot compete with NYSE Amex for these listings, and companies and their investors are denied the benefits of competition. Since 2008, NYSE Amex listed 29 companies, for which no other market could compete. Based on discussions over time with different companies, we also understand that some companies that ultimately would have qualified for a Capital Market listing did not even bother to apply because their price (or expected price in the case of an IPO) was near \$4 and they were uncertain if they would ultimately be able to qualify for a Nasdaq listing. At the same time, Nasdaq believes that if it could list companies trading at \$2 or \$3, additional companies presently listed on NYSE Amex would apply to transfer their listings to the Capital Market. In that regard we note that since January 1, 2008, 68 companies listed on NYSE Amex transferred their listing to Nasdaq, including 23 switching to the Capital Market, whereas in this same period, notwithstanding the lower price requirement on NYSE Amex, only two companies transferred their listing from Nasdaq to NYSE Amex.

The rules adopted by the Commission maintain a situation in which NYSE Amex has been granted an unconstrained monopoly with respect to the listing of securities under \$4. This burden on competition is exacerbated by the recent acquisition of the former American Stock Exchange by NYSE Euronext. Now rebranded with the "NYSE" name, NYSE Amex is supported by NYSE's marketing and, among other things, NYSE Amex securities trade on the same floor as NYSE-listed stocks. There is therefore no reason to perpetuate the NYSE Amex grandfather unless it is also extended to the Capital Market.

Given the foregoing, Nasdaq believes the Commission's statutory mandate to ensure fair competition among exchanges requires that it grant the requested exemption to permit the Capital Market to adopt initial listing price requirements identical to those of NYSE Amex.

### Conclusion

Allowing Nasdaq to adopt identical listing standards for the Capital Market as NYSE Amex will not encourage any potential penny stock-type abuses or the types of concerns raised by Congress and the Commission. Given the equivalent treatment of the two exchanges under the federal securities laws, allowing more companies to list on Nasdaq will only further the Commission's investor protection and fair competition mandates. No legal or policy justification exists to continue to support the existing competitive disparity between NYSE Amex and the

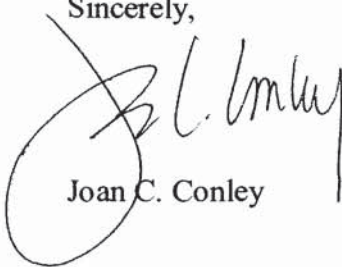
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Capital Market. The logic in favor of reversing this position is compelling. Accordingly, we urge the Commission to exercise its authority under Section 36 and Rule 15g-1 to grant an exemption to the Rule to permit the proposed listing standards.

Were the Commission on the other hand to reject this request, it would only serve to exacerbate an unfair existing competitive disparity among marketplaces, which would be contrary to the Act. Accordingly, in the event the Commission is unwilling to grant the requested exemption, we hereby respectfully petition in the alternative that the Commission institute rulemaking proceedings to modify Rule 3a51-1(a)(1) to eliminate the grandfather provision and establish competitive parity between the Capital Market and NYSE Amex by requiring NYSE Amex to adopt a \$4 initial listing, and a \$1 continued listing, price requirement.

If you have any questions, or if we can provide any additional information, please contact Arnold Golub at (301) 978-8075.

Sincerely,



Joan C. Conley

Attachment

cc: The Hon. Mary L. Schapiro, Chairman  
The Hon. Kathleen L. Casey, Commissioner  
The Hon. Elisse B. Walter, Commissioner  
The Hon. Luis A. Aguilar, Commissioner  
The Hon. Troy A. Paredes, Commissioner  
Robert W. Cook, Director, Division of Trading and Markets  
James A. Brigagliano, Deputy Director, Division of Trading and Markets  
David Shillman, Associate Director, Division of Trading and Markets

### Attachment A

#### Comparison of NYSE Amex and NASDAQ Capital Market Listing Standards

NYSE Amex					NASDAQ Capital Market			
	Standard 1	Standard 2	Standard 3	Standard 4 <sup>1</sup>		Net Income Standard	Equity Standard	MVLS Standard
Pre-tax income	\$750,000	N/A	N/A	N/A	Net income from continuing operations	\$750,000	N/A	N/A
Market capitalization	N/A	N/A	\$50 million	\$75 million (or Total Assets and Total Revenues of \$75 million each)	Market value of listed securities	N/A	N/A	\$50 million
Market value of public float	\$3 million	\$15 million	\$15 million	\$20 million	Market value of public float	\$5 million	\$15 million	\$15 million
Operating history	N/A	2 years	N/A	N/A	Operating history	N/A	2 years	N/A
Stockholders' equity	\$4 million	\$4 million	\$4 million	N/A	Stockholders' equity	\$4 million	\$5 million	\$4 million
Distribution <sup>2</sup>	500,000 Publicly Held Shares and 800 Public Shareholders or 1,000,000 Publicly Held Shares and 400 Public Shareholders or 500,000 Publicly Held Shares and 400 Public Shareholders and 2,000 shares Daily Trading Volume				Distribution <sup>2</sup>	1,000,000 Publicly Held Shares and 300 Round Lot Shareholders		
Minimum price	\$3	\$3	\$2	\$3	Minimum price	\$4	\$4	\$4

<sup>1</sup> No comparable Nasdaq Capital Market requirement.

<sup>2</sup> The Commission has concluded that the Capital Market distribution requirement is substantially equivalent to NYSE Amex's requirement after considering the markets' differences in the required number of publicly held shares and the number of public or round lot shareholders. See Securities Act Release No. 8754, 71 FR 67762 at note 20 (November 22, 2006); Securities Act Release No. 8791, 72 FR 20410 (April 24, 2007).