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April 23, 2007

BY E-MAIL TO: rule-comments@sec.gov

Nancy M. Morris
Secretary
United States Securities and Exchange Commission
Station Place, 100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. SR-NASDAQ-2007-025

Dear Ms. Morris:

We write to ask the Commission to exercise its authority under Section 19(b)(3)(C) of the Securities Exchange Act of 1934, as amended (the "Exchange Act")¹, to summarily abrogate the proposed rule change that the NASDAQ Stock Market, LLC ("Nasdaq") filed on March 21, 2007.² Nasdaq asserts that it filed the proposed rule change for the purpose of providing "notice that it will trade the securities of Delta Financial Corporation ("DFC") using the three-character symbol 'DFC.'"³ The common stock of Delta Financial Corporation, which previously had been listed on the American Stock Exchange LLC (the "Amex") under the symbol "DFC," became listed on Nasdaq effective March 22, 2007 and has been trading there since.

Section 19(b)(2) of the Exchange Act requires the Commission to approve a proposed rule change, or to institute disapproval proceedings, after it has published the rule change in the Federal Register and given interested persons an opportunity to comment.⁴ Section 19(b)(3) provides a narrow exception to the rule that the Commission may approve changes to the rules of a self-regulatory organization ("SRO") only after offering interested parties an opportunity to comment. However, the DFC Filing fails to satisfy the section 19(b)(3) requirements for submission of a rule change outside of the traditional notice-and-comment process. For that reason alone, the Commission should abrogate it.

¹ 15 U.S.C. § 78s(b)(3)(C).

² Release No. 34-55519; File No. SR-NASDAQ-2007-025 (the "DFC Filing").

³ DFC Filing at 3.

⁴ 15 U.S.C. § 78s(b)(2).

In submitting the DFC Filing for immediate effectiveness under Section 19(b)(3), Nasdaq relies upon Rule 19b-4(f)(5). That rule permits immediate effectiveness only of a rule that effects

a change in an existing order-entry or trading system of a self-regulatory organization that: (i) [d]oes not significantly affect the protection of investors or the public interest; (ii) [d]oes not impose any significant burden on competition; and (iii) [d]oes not have the effect of limiting the access to or availability of the system.⁵

Nasdaq's reliance on Rule 19b-4(5) is entirely misplaced and abuses the Commission's rule approval process. By filing its proposed rule change for immediate effectiveness, Nasdaq attempted to avoid public scrutiny and Commission evaluation of its first use of a three-character symbol in its history and to advance its not-so-hidden agenda of blurring the significant distinctions between it and NYSE LLC ("NYSE"). Nasdaq should not be permitted to circumvent the requirement of public notice and comment applicable to virtually any substantive SRO rule change by relying on the fact that changes to its systems may have been required to render it capable of supporting stocks identified by symbols of three or fewer characters. Under Nasdaq's distortion of Rule 19(b)-4(5), an SRO would be able to gain immediate effectiveness for major market changes on the simple ground that order-entry or trading systems were changed to implement them.

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On March 29, 2007, Nasdaq filed with the Commission a second proposed rule change that would allow *any* company with a three-character symbol that transfers its securities to Nasdaq from "another domestic market" to continue to use that symbol when it transfers its listing to Nasdaq.⁶ Nasdaq abandoned the disingenuous characterization it had given the DFC Filing as a mere change to an existing order-entry or trading system and filed the broader proposed rule change "regular way" under Section 19(b)(1)⁷. Accordingly, that proposed rule change can become effective only after public notice, opportunity for comment, and evaluation and approval by the Commission.

Deleted: This filing, SR-Nasdaq-2007-031, will be referred to hereinafter as

Section 19(b)(3)(C) of the Exchange Act empowers the Commission, at any time within 60 days of the date of filing of a proposed rule change by an SRO, to summarily abrogate an SRO rule change that has taken effect upon filing, and require that the proposed rule change be re-filed and reviewed in accordance with § 19(b)(2), if it appears that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of

⁵ 17 C.F.R. 240.19b-4(f)(5).

⁶ Release No. 34-55563; File No. SR-NASDAQ-2007-031 (the "General Portability Filing").

⁷ 5 U.S.C. 78s(b)(1).

the purpose of the Act.⁸ As will be demonstrated below, abrogation of Nasdaq's proposed rule change is necessary and appropriate for all three reasons.

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The Division of Market Regulation's Request that the Markets Address the Allocation of Ticker Symbols Through a National Market System Plan

Nasdaq has abused the narrow exception to the general rule that requires proposed substantive SRO rule changes to be subject to public notice and comment. That exception is intended to permit an SRO to declare certain uncontroversial rule changes immediately effective, not to provide an SRO with a means to accelerate the effectiveness of significant rule changes that impact other markets. In addition, Nasdaq has flouted the expressed desire of Commission staff that "the practice of markets that compete to list new products acting jointly to allocate symbols should be done pursuant to a national market system plan."⁹

In the more than two years since the Division of Market Regulation's request, the securities exchanges, with the participation of Commission staff, have worked diligently to develop such a plan. Between April and December 2005, NYSE, ISE and Nasdaq circulated several draft plans.

By letter dated February 10, 2006, NYSE advised Market Regulation of its belief that a new national market system plan, including the proposed plan then under development, was not the appropriate means of addressing symbol supply problems caused by the proliferation of options. In NYSE's opinion, the current draft of the plan proposed unnecessary changes to a symbol reservation plan that had functioned effectively for decades.¹⁰ NYSE explained:

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...there is no valid reason for, or benefit to be derived from, the creation of a plan that materially alters the long recognized practice whereby NYSE and the regionals use 3 character symbols but NASDAQ uses symbols of 4 or more characters. Over the many years that this practice has been maintained in the marketplace, investors have developed a clear and unambiguous understanding as to the listed venue of a security based upon the number of characters in its symbol. We firmly believe that issuers as well as investors like and value the notion of differentiation with the NASDAQ provided by this historical distinction between types of symbols. Altering this time-tested practice now will result only in investor confusion and unwarranted stress on the supply of symbols.¹¹

⁸ 15 U.S.C. § 78s(b)(3)(C).

⁹ See Letter from Annette L. Nazareth, Director, Division of Market Regulation, to John A. Thain, Chief Executive Officer, New York Stock Exchange, Inc., dated February 7, 2005.

¹⁰ See letter from Catherine R. Kinney, President and Co-Chief Operating Officer of NYSE, to Robert L. Colby, Acting Director, Division of Market Regulation, dated February 10, 2006 ("NYSE February 2006 letter").

¹¹ NYSE February 2006 letter at 1

NYSE then proposed an alternative approach to Nasdaq's expressed desire to utilize the already limited supply of three-character symbols. First, NYSE and other markets that historically had used three-character symbols were engaged in a review of their existing reservations. NYSE already had released 700 symbols and anticipated releases by other exchanges that would significantly increase the limited supply of symbols. Second, NYSE had initiated meetings with Amex, ISE, the Chicago Board Options Exchange, Inc. ("CBOE"), and the Securities Industry Association to forge agreement among the options exchanges and their members to implement explicit strikes, thereby further alleviating the pressure on the existing supply of three-character symbols.

Despite NYSE's belief that a national market system plan was unnecessary to address symbol allocation, it continued to participate in discussions with other SROs directed at formulating such a plan. In November 2006, NYSE was able to report to the Division of Market Regulation that NYSE, Amex and CBOE had together removed 1,000 symbols from reserved status, thereby making them available to other markets that might need additional symbols. In addition, the options exchanges were engaged in developing a new symbology construct that would free up an estimated 3,000 additional symbols in 2009.¹² NYSE reiterated that Nasdaq's desire to gain the right to use symbols of three or fewer characters exacerbated existing supply problems without justification. While there are slightly more than 18,000 possible combinations of three or fewer characters, there are more than 12 million possible combinations using four or five characters, as Nasdaq historically has.

In early October 2006, NYSE circulated a revised plan to the other markets for comment. ISE offered further revisions and recirculated a revised draft a few days later. In November 2006, Nasdaq circulated its own version of a plan. In December 2006, the markets agreed to review the two proposals – the NYSE/ISE proposal and the Nasdaq proposal – and reconvene in February 2007 to select a plan to file with the SEC.

After both proposals failed to garner the support of a majority of the exchanges, Nasdaq abandoned collaboration in favor of unilateral action to appropriate symbols of three or fewer characters by announcing in March 2007 that Delta Financial Corporation would continue to use the three-character symbol that had identified its securities on Amex when it transferred to Nasdaq. Nasdaq then attempted to legitimize its unilateral action by submitting the DFC Filing on March 21, 2007, one day prior to the effective date of the Company's listing on Nasdaq. Nasdaq attempted to justify its disregard for the Division of Market Regulation's insistence that symbol reservation be addressed through a national market system plan by stating: "While this filing relates to the transfer of this issuer [Delta Financial Corp.], Nasdaq remains committed to working with the Commission and other markets to establish an equitable and transparent symbol assignment plan."¹³

¹² See letter from Catherine R. Kinney to Erik R. Sirri, Director, Division of Market Regulation, dated November 20, 2006 ("NYSE November 2006 letter").

¹³ DFC Filing at 6.

On March 22, 2007, NYSE, Amex, and NYSE Arca, Inc. filed with the Commission a national market system plan intended to be the exclusive means of allocating and using symbols of one, two or three characters. The plan (the “NYSE Symbology Plan”) provides that any other SRO that maintains a market for the listing and trading of securities, in accordance with Commission-approved rules, which are identified by one, two or three-character symbols and are eligible securities for Network A or Network B (as those terms are defined in the CTA Plan) may join the NYSE Symbology Plan. On or about March 21, 2007, Nasdaq, joined by the NASD, the National Stock Exchange, Inc., and the Philadelphia Exchange (“PHLX”), filed a proposed national market system plan regarding the selection and reservation of ticker symbols (the “Nasdaq Symbology Plan”). On April 5, 2007, the Commission announced that it would publish both proposed plans for public comment.

Despite its filing the Nasdaq Symbology Plan, Nasdaq continued to advance its agenda of utilizing three-character symbols prior to approval of a national market system plan by submitting the General Portability Filing on March 29, 2007. This second proposed rule change would permit *any* company that uses a three-character symbol to continue to use that symbol upon its transfer to Nasdaq, despite the fact that, in the past, companies that transferred their listings to Nasdaq were identified, post-transfer, by symbols of four or five characters.

The Commission should summarily abrogate the DFC Filing in order to permit the important issues it presents, including symbol portability, to be resolved only after thorough Commission review of the national market system plans that have been or may be filed. In its announcement regarding the NYSE Symbology Plan and the Nasdaq Symbology Plan, the Commission stated that, after publishing the plans and the General Portability Filing, it “will resolve the conflicts over the allocation of stock symbols as fairly and expeditiously as possible.”¹⁴

Abrogation Is Necessary in the Public Interest, for the Protection of Investors, and to Further the Purposes of the Exchange Act

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As stated above, § 19(b)(3)(C) of the Exchange Act empowers the Commission summarily to abrogate the change in an SRO rule made effective upon filing pursuant to § 19(b)(3) at any time within 60 days of its filing and require it to be refiled “if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.”¹⁵ All three grounds militate in favor of abrogation of Nasdaq’s proposed rule change permitting Delta Financial Corporation to continue to use a three-character symbol after its transfer to Nasdaq in late March 2007. First, abrogation of the proposed rule is necessary and appropriate for the protection of investors. As a result of long practice, investors identify securities with symbols of three or fewer characters as listed on NYSE and securities with symbols of four or five characters as listed on Nasdaq. Since

¹⁴ Release No. 2007-63.

¹⁵ 15 U.S.C. §19(b)(3)(C).

its founding 36 years ago, Nasdaq has used only four or five character symbols to identify the securities that it lists. Indeed, Nasdaq has done so for the express purpose of distinguishing itself from other exchanges, such as NYSE, which has used symbols of three or fewer characters exclusively since the invention of the ticker tape machine in 1867.

As a result, investors, other participants in the securities markets, and the general public have been able to distinguish securities listed on Nasdaq from securities listed on NYSE by the number of characters in their ticker symbol. This is a clear distinction that both investors and securities issuers have found valuable. Investors need only look at a security's ticker symbol to know whether it is listed on the Nasdaq or another exchange. As demonstrated below, the distinction in symbology alerts investors to significant qualitative and quantitative distinctions between the two national markets, the NYSE and Nasdaq. For example:

Comment [W1]: Now that Nasdaq is an exchange, that distinction is not relevant

- NYSE has the highest market capitalization in the world. According to the World Federation of Exchanges, as of February 28, 2007, the domestic market capitalization of the NYSE was \$15.9 trillion, compared to \$3.9 trillion for Nasdaq.
- Historically, companies have viewed their ability to satisfy NYSE's high listing standards as a significant step in their growth. The median market value of companies listed on the NYSE is \$2.5 billion compared with a median market value of \$253 million for companies listed on Nasdaq. More than a quarter of Nasdaq-listed companies have a market value of less than \$100 million.
- Median revenues and profits of NYSE-listed companies are, respectively, \$483 million and \$30 million, compared to median revenues and profits of \$100 million and \$1.4 million for Nasdaq-listed companies.
- NYSE-listed companies dominate market indices that serve as benchmarks of economic performance. Twenty-eight of the 30 stocks that comprise the Dow Jones Industrial Average and 423 of the stocks included in the S&P 500 are listed on the NYSE and are identified by symbols of three or fewer characters.
- The median offering size of IPOs on the NYSE is \$279 million, compared to a median offering size of \$92.5 million for Nasdaq IPOs.

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In addition, investment in companies listed on Nasdaq tends to involve greater risk for investors than investment in companies listed on NYSE. For example,

- The average implied volatility for Nasdaq stocks with options (43.6%) was more than 50% higher than that of NYSE stocks with options (28.5%) in 2006.
- From 2000 to 2006, Nasdaq delisted 1,305 companies for non-compliance with continued listing standards; NYSE delisted only 283 companies for non-compliance with continued listing standards.

- Today, Nasdaq lists the securities of 3,175 companies, down from 5,000 in 2000. In contrast, NYSE has 2,713 companies listed today; it had 2,862 companies listed in 2000.

Companies that have attained an NYSE listing have met the highest financial and corporate governance standards. They correctly view their symbols as a sign of distinction. For many of these companies, listing on NYSE is a goal to which they aspired. When they were able to meet NYSE's stringent listing standards and chose to list on NYSE, they took pride in the fact that their symbol readily communicated that association. Their listing on NYSE contributes to their ability to raise capital, and they resist blurring the distinction between markets, as their recent letters to the Commission attest. Several companies have communicated to NYSE directly that they oppose elimination of the distinction between Nasdaq and NYSE symbologies and believe that doing so diminishes the value of their NYSE listing. Approximately 150 companies moved from Nasdaq to the NYSE during the last five years. All changed their symbols to signal the corporate achievement listing on the NYSE represented.

In the General Portability Filing, Nasdaq urges that companies should choose a listing venue on the basis of objective differences between markets, not merely symbols. NYSE agrees and, for that reason, opposes Nasdaq's attempt to dilute the strength of NYSE's brand by appropriating three-character symbols.

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Section 11A of the Exchange Act explicitly recognizes that assuring fair competition among markets and the availability of information with respect to quotations for, and transactions in securities to brokers, dealers and investors are "in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets."¹⁶ As demonstrated above, the symbology currently in use, under which symbols of three or fewer characters designate only Network A and Network B-eligible Securities, provide investors and others with valuable information and avoid unfair competition. NYSE will suffer competitive disadvantage if Nasdaq is permitted to use three-character symbols. In addition, pressure on the limited supply of three-character symbols will be increased for no valid reason. In contrast, Nasdaq will suffer no prejudice if it is required to continue using symbols of four or five characters, as it has for more than three decades.

For the last two years, the exchanges have collaborated to develop a plan that fairly deals with the reservation and allocation of ticker symbols. NYSE continues to believe that a national market system plan is not required and that the system currently in use, accompanied by the proposed new symbology for options that will go into effect in the future, adequately address the issues caused by the proliferation of new products. Nevertheless, it has acquiesced to Market Regulation's expressed wish and, with Amex and NYSE Arca, has filed the NYSE Symbology Plan. Nasdaq, with NASD, the National Stock Exchange, Inc., and PHLX, has now filed the

16. 15 U.S.C. §§ 78k-1(a)(1)(C)(iii) & (D).

Nasdaq Symbology Plan. The Commission has committed to fairly and promptly resolve the differences between the plans.

NYSE respectfully submits that the piecemeal approach to resolving the important issues raised by Nasdaq's DFC Filing and General Portability Filing is contrary to the directives of Commission Staff. In addition, it abuses the rule-filing process and is inimical to the protection of investors and the purposes of the Exchange Act. NYSE therefore urges the Commission exercise its authority under Rule 19(b)(3)(C) to abrogate the DFC Rule Filing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mary Yeager", with a long horizontal flourish extending to the right.

Mary Yeager

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Annette L. Nazareth
Commissioner Kathleen L. Casey
Erik Sirri, SEC Director, Division of Market Regulation
Robert L.D. Colby, SEC Deputy Director, Division of Market Regulation