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Via email to rule-comments@sec.gov

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

Re: File No. SR-NASDAQ-2007-031

Dear Ms. Morris:

We write on behalf of New York Stock Exchange LLC ("NYSE") to comment on the proposed rule change that the Nasdaq Stock Market, LLC ("Nasdaq") filed with the Commission on March 29, 2007.[1] In the General Portability Filing, Nasdaq proposes to allow any company with a three-character symbol that transfers its securities to Nasdaq "from another domestic market" to continue using the three-character symbol that identified its securities on the market where they previously were listed.

As will be demonstrated below, the Commission should not approve the General Portability Filing because: (1) it is inconsistent with the request of Commission staff that the exchanges address the process of reserving, selecting and allocating securities symbols through development of a national market system plan; (2) it will deprive investors of valuable information regarding securities and will cause confusion; and (3) it incorrectly presumes that a listed company has some proprietary right to a symbol assigned to its securities by the original listing venue.

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[1] Securities Exchange Act Release No. 34-55563; File No. SR-NASDAQ-2007-031 (the "General Portability Filing").

Nasdaq's Prior Rule Filing Regarding Ticker Symbols

Prior to submitting the General Portability Filing, Nasdaq filed a related proposed rule change[2] for the purported purpose of providing notice that it would use the three-character symbol "DFC" to trade the securities of Delta Financial Corporation ("Delta Financial") after Delta Financial transferred to Nasdaq from the American Stock Exchange LLC ("Amex"). Delta Financial began to trade on Nasdaq on March 22, 2007, one day after Nasdaq submitted the DFC Filing, and has traded there since.

Nasdaq designated the rule change proposed in the DFC Filing effective upon filing on the purported ground that it fell within the exception provided by Rule 19b-4(f)(5) under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"). However, 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.[3]

For the reasons set forth in NYSE's April 23, 2007 comment letter regarding the DFC Filing[4], to which the Commission is respectfully referred, Nasdaq's proposed rule change does not satisfy the criteria for the limited exception provided by Rule 19b-4(f)(5). Far from implementing a noncontroversial system change, Nasdaq's DFC Filing raises substantial issues relating to investor protection, fair competition, and the maintenance of fair and orderly markets, issues that cannot be decided unilaterally by a single market declaring a rule immediately effective. Nasdaq essentially conceded the inappropriateness of the DFC Filing by submitting the General Portability Filing "regular way," *i.e.*, subject to public notice, opportunity for comment, and Commission evaluation prior to approval. NYSE has asked the Commission to exercise its authority under Section 19(b)(3)(C) of the Exchange Act summarily to abrogate the DFC Filing because such action is necessary and appropriate in the public interest, for the protection of investors, and in furtherance of the purposes of the Act.

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2 *See* Securities Exchange Act Release No. 34-55519; File No. SR-NASDAQ-2007-025 (the "DFC Filing").

3 17 C.F.R. 240.19b-4(f)(5).

4 *See* Letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, United States Securities and Exchange Commission, dated April 23, 2007 (File No. SR-NASDAQ-2007-025).

Symbol Portability Should Be Addressed in the Context of the National Market System Plans That Have Been, or May Be, Filed with the Commission, Not in the Context of the General Portability Filing

As the Commission well knows, for more than two years the securities exchanges, with the participation of Commission staff, have been working collaboratively to develop a national market system symbology plan. The exchanges commenced such discussions in March 2005, following the request by staff of the Division of Market Regulation that they do so in order to develop a plan that "should, at a minimum, establish a common, objective, and transparent process" of "reserving, selecting, and allocating securities symbols."[5] To date, two such plans have been filed: one by NYSE, NYSE Arca LLC, and Amex (the "NYSE Symbology Plan") and a second by Nasdaq, NASD,[6] the National Stock Exchange, Inc., and the Philadelphia Stock Exchange, Inc. ("PHLX") (the "Nasdaq Symbology Plan"). We understand that additional plans may be filed in the future. On April 5, 2007, the Commission announced that it would publish the NYSE Symbology Plan and the Nasdaq Symbology Plan for public comment.[7]

Both the NYSE Symbology Plan and the Nasdaq Symbology Plan address the portability of symbols within the context of unified proposals that also address, among other things, the administration of the plans, the symbol reservation system, and financial matters, including the allocation of development costs. However, the plans differ significantly with respect to the use of symbols of three or fewer characters. The NYSE Symbology Plan is "intended to be the exclusive means of allocating and using symbols of 1, 2 or 3 characters" and is intended to provide that, in the case of equity securities, such symbols may be used only for securities reflected on "Network A" or "Network B," as those terms are defined in the CTA Plan. Nasdaq-listed securities would not be able to use symbols of three or fewer characters. This would preserve the right of NYSE to continue to use symbols of three or fewer characters, as it has done since the invention of the ticker tape machine in 1867, without the dilution of its brand and investor confusion that will result if Nasdaq is permitted to also use such symbols.

The efforts of the exchanges to develop a new symbology plan were spurred by the limited supply of three-character symbols available to the exchanges that historically used them. Permitting Nasdaq to use three-character symbols exacerbates, rather than alleviates, existing supply problems. As NYSE explained in its April 23 comment letter regarding the DFC Filing, there are more than 12 million possible symbol combinations

5 *See* Letter from Annette L. Nazareth, Director, Division of Market Regulation, to John A. Thain, Chief Executive Officer, NYSE, dated February 7, 2005.

6 As NASD is not a national securities exchange, it lacks the interest in a national market symbology plan the exchanges possess.

7 SEC Press Release No. 2007-063 (April 5, 2007) ("Release No. 2007-063").

that use four or five characters, as Nasdaq historically has done. In contrast, there are slightly more than 18,000 possible combinations of three or fewer characters available to NYSE and the exchanges that historically have used such symbols. To the extent there is a symbol shortage, it will be solved by the new options symbology that is planned for 2009. The General Portability Filing is nothing more than a transparent attempt to jump-start Nasdaq's program to appropriate to itself the use of three-character symbols in isolation, rather than in the context of a national market system symbology plan. Its motive for doing so is similarly transparent--to blur the distinctions between Nasdaq and the NYSE.

Nasdaq states in both of its rule filings that it remains committed to working with the Commission and other markets to establish an equitable and transparent symbol allocation plan. If that is, in fact, the case, Nasdaq should withdraw both the DFC Filing and the General Portability Filing and permit the Commission to evaluate symbol portability in the context of its review and evaluation of the national market system plans that have been, or may be, submitted to it. In light of the fact that two national market system plans have been submitted already and that the Commission has stated that it "will resolve the conflicts over the allocation of symbols as fairly and expeditiously as possible"[8] after the plans are published, there is no valid reason for determining whether Nasdaq should be permitted to utilize three-character symbols in isolation.

Abandoning the Distinctive Symbologies That Readily Distinguish Securities Listed on Nasdaq from Those Listed on NYSE Is Contrary to the Interests of Investors and of Listed Companies

The crucial overarching issue that the General Portability Filing ignores is whether it is in the interest of investors, securities issuers, and the public at large to abandon key features of a Symbol Reservation Plan under which the exchanges have effectively operated for more than 30 years and that has provided investors with a clear and simple means of identifying where a stock trades.

Customer Confusion

Without any factual support for its statement, Nasdaq asserts that permitting any company with a three-character symbol to continue using that symbol when it transfers to Nasdaq "will promote competition among exchanges and reduce investor confusion."[9] The evidence actually supports the opposite conclusion.

Investors have long associated symbols of three or fewer characters with the NYSE, Amex, and regional exchanges. After the International Securities Exchange, Inc.

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8 Release No. 2007-063.

9 Securities Exchange Act Release No. 34-55563 at 3.

("ISE") was established in or about 2000, it sought, and was granted the right to participate in the Symbol Reservation Plan that has operated to allocate and reserve symbols among the various stock exchanges for more than 30 years.

Over the last seven years, NYSE and Nasdaq have established themselves as the two leading national markets for the listing of equities. For example, of 1,238 new equity issues that have come to market in the past seven years, 1,166 (*i.e.*, 94%) of them have listed on either NYSE or Nasdaq. During the entire course of its history, Nasdaq has utilized a separate, distinctive symbology that utilizes only symbols of four or five characters to identify its securities. Nasdaq's assertion that permitting a company currently identified by a three-character symbol to keep that symbol if and when it transfers to Nasdaq disregards the fact that investors, securities professionals, and the general public use the number of characters in a symbol as shorthand for where a security lists. It is that association between symbol and market that Nasdaq wants to blur. After 35 years of not using them, Nasdaq's request for permission to employ three-charcter symbols is a transparent attempt to gain an unfair competitive advantage by using the same symbology that long has been associated with NYSE.

<u>Dilution of the Value of the NYSE Brand</u>

The distinctiveness of the symbology used by Nasdaq and that used by the NYSE alerts investors to significant qualitative and quantitative distinctions between the two markets. For example:

- 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.

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 had to delist 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.

Historically, companies have viewed their ability to satisfy NYSE's high listing standards as a significant step in their growth. Companies that have attained listing on the NYSE 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 the 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 communicated that association. Their listing on the NYSE contributes to the ability of these companies to raise capital, and they resist blurring the distinction between markets, as their recent letters to the Commission regarding symbology attest.[10] 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.

Industry commentators have recognized this identification/branding function, and its significance to the investing public. For example, Matt Krantz of *USA Today* writes that Nasdaq's use of one, two and three character symbols "removes one of the clearest demarcation lines between Nasdaq and NYSE. Until now, a Nasdaq stock had at least four letters in its symbol….While the change may seem mundane, it's significant because it: . . . [i]ntroduces some confusion. Investors could recognize Nasdaq stocks instantly by their four-letter symbols. That goes away now."[11] Similarly, Gaston Ceron of the *Wall*

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[10] NYSE will provide copies of such letters it has received upon request by the Commission.

[11] Matt Krantz, *Nasdaq Hopes To Attract New Listings As Easy As 1-2-3*, USA TODAY at 1B (Mar. 13, 2007).

Street Journal writes, "If symbols with three or fewer letters become widely used on Nasdaq, it would blur yet another dividing line between exchanges."[12]

Permitting Companies that Transfer to Nasdaq to Continue Automatically To Use Three-Character Symbols Does Not Promote Fair Competition and Disregards the Prior Market's Valuable Right in the Symbol

Nasdaq argues that "as issuers face the important choice of where to list their equities, the symbol an issuer currently uses should not factor prominently in the listing decision process" and that issuers should evaluate competing listing venues on the basis of objective criteria.[13] It further argues that a company's symbol should not act as an "anchor" that tethers a company to its original listing venue.

NYSE agrees that issuers should make the crucial decision of where to list their securities on the basis of the objective differences between markets. However, Nasdaq's proposed rule change is not conducive to their doing so. The symbologies currently in use distinguish between Nasdaq and NYSE. To permit Nasdaq to utilize the three-character symbology that has long identified NYSE-listed companies would blur the distinction between markets and, in fact, commoditizes them. Moreover, it is inconsistent with the principles of true competition, basic considerations of equity, and preservation of settled expectations that are hallmarks of the Exchange Act.[14]

In the vast majority of cases, a company's transfer from NYSE to Nasdaq is not voluntary. Rather, it is the result of the company's inability to satisfy NYSE's continued listing standards. This fact underscores the confusion that is likely to result if a company that falls below NYSE's continued listing standards is permitted to retain its symbol when it transfers to Nasdaq.

Nasdaq offers no evidence to support its assertion that companies remain on a particular exchange in order to retain the symbols that identify their securities on that exchange. Historically, many companies that initially did not meet NYSE's stringent listing criteria chose to list on Nasdaq and transferred to NYSE when their growth made it possible to do so, at which time they adopted a new symbol of three or fewer characters that signaled their corporate achievement. All of the approximately 150 companies that have moved from Nasdaq to NYSE during the last five years have changed their symbols to signal the corporate achievement listing on the NYSE represents. Plainly, these issuers believe the value of listing on the NYSE is of far greater value than their retention of the

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12 Gaston F. Ceron, *In the ABCs of the NYSE, Macy's Snags the 'M'*, WALL ST. J. at C3 (Mar. 29, 2007).

13 General Portability Filing at 3.

14 15 U.S.C. § 78k-1(a)(1)(C)(ii).

symbol that previously identified their securities. Indeed, Delta Financial made clear that it intended to transfer from Amex to Nasdaq in order to gain recognition in the investment community, and would have done so regardless of whether it could keep the "DFC" symbol.[15]

In addition, the assertion that a company listed on one exchange has the right to transfer that symbol when it transfers its listing to another exchange wrongly presupposes that a company has some proprietary right in the stock symbol assigned to it by the original listing venue. This is contrary to governing case law. A stock symbol is used in a non-trademark manner that does not conflict with trademark rights. An exchange assigns a stock symbol to a listed company as a short-hand, unequivocal means of identifying that company's securities for the purpose of allowing member firms to place buy and sell orders for the company's stock and for the dissemination of pricing information regarding such securities transactions to the investment community. *See Exxon Corp. v. XOIL Energy Resources, Inc.,* 552 F. Supp. 1008, 1015 (S.D.N.Y. 1981).

In *XOIL Energy Resources, Inc.*, "XON," the stock symbol assigned by the NYSE to identify Exxon's securities, was held not to be a protectable trademark. *Id*. at 1017. Exxon had sought to enjoin the defendants from using the stock symbols "XOIL" and "XPLR" to identify their respective securities on the grounds that these designations were likely to be confused with the "XON" symbol. Exxon alleged trademark rights in "XON" as it identified the stocks and securities sold, sponsored by and originating with Exxon. *Id*. at 1017. The Court rejected this argument on the grounds that the "XON" symbol was not "owned by, used to sell products by, or even created by [Exxon]." *Id*. at 1016; *see also Central Parking Corp. v. Park One Inc.*, No. Civ. A. 97-2638, 1997 WL 655925, at *1 (E.D. La. Oct. 20, 1997) (holding that the ticker symbol "PK" was not entitled to protection as a service mark).

The recognition that a listed company has rights in its stock symbol also is detrimental from a regulatory perspective, as it would promote a secondary market in which one listed company could sell its stock symbol to another company that wanted to be listed under that symbol. This would inevitably lead to confusion in the investment community. For over a century, NYSE has assigned, taken away, and reassigned ticker symbols to listed companies. Its power to do so freely is of paramount importance to its role of conducting a fair and equitable market for the trading of securities. In light of its duty to protect investors, NYSE consistently has taken the position that its listed companies have no rights in their stock symbols and has, when necessary, intervened to prevent the private sale of symbols.

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[15] Gaston F. Ceron, *Moving the Market – Nasdaq's Symbolic Shift: A Three-Letter Ticker --- Delta Financial To Remain 'DFC' In Move From Amex*, WALL ST. J. at C3 (Mar. 13, 2007).

Nasdaq argues that, as it is now a national securities exchange, as opposed to a national securities association, it should be permitted to participate in the use of three-character symbols. In support of this proposition, Nasdaq cites the fact that companies that have transferred their listings among Amex, NYSE and NYSE Arca have been permitted to keep their symbols of three or fewer characters and that companies that transfer to Nasdaq should be permitted to do so as well. The fact that Nasdaq is an exchange is essentially irrelevant for this purpose. The transfers Nasdaq cites were from one market that identifies its securities by three-character symbols to another market that does so. Nasdaq seeks an unwarranted change that would permit a company that transfers to Nasdaq, which exclusively has identified its securities by symbols of four or five characters, to continue to use a symbology long identified with the NYSE and other markets whose securities are "Network A" or "Network B" "Eligible Securities," as those terms are defined in the CTA Plan. NYSE and these other markets have not used symbols as "anchors." To the contrary, the Symbol Reservation Plan that has governed their dealings for more than 30 years permits markets to cooperate and trade symbols among themselves.[16] The NYSE Symbology Plan would permit this cooperation to continue, rather than replacing it with a rule that causes a symbol to move automatically with a company that transfers its listing.

<u>Automatic Symbol Portability Is Not a Necessary Consequence of the Enhanced Redundancy Nasdaq Claims</u>

Nasdaq finally argues that the changes it has made to its systems to accommodate trading in securities that are identified by symbols of three or fewer characters "will enhance the strength of U.S. capital markets" by purportedly enabling all Nasdaq systems to support all NYSE- and Amex-listed securities over its various platforms.[17] As the Commission well knows, NYSE and the other markets have made significant investments and changes to their technology, as have their member organizations, to enhance redundancy and resiliency after the experience of September 11th. Any enhanced redundancy that flows from Nasdaq's system changes is a benefit that is not linked to permitting Nasdaq to use three-character symbols to identify its securities, in deviation

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16 An example of such cooperation is the manner in which ISE's request for its current symbol "ISE" at the time of its 2005 initial public offering on the NYSE was handled under the existing Symbol Reservation Plan. Although the symbol had been reserved by the PHLX, PHLX agreed to comply with NYSE's request that it relinquish its reservation in exchange for another three-character symbol. ISE began to trade on NYSE under the symbol "ISE" on March 9, 2005.

17 General Portability Filing at 5.

from its long-established practice of identifying them by symbols of four or five characters.[18]

Conclusion

In light of the above facts, NYSE urges the Commission to disapprove the General Portability Filing. As demonstrated above, the important issue of portability of symbols should not be addressed in the narrow context of Nasdaq's proposed rule change but in the broader context of the Commission's consideration of national market system symbology plans that have been, and may be, filed. The Commission has publicly announced its commitment to resolve the issues presented by the NYSE Symbology Plan and the Nasdaq Symbology Plan as fairly and expeditiously as possible. To rush to judgment on Nasdaq's rule filing can only operate to the detriment of the public and the protection of investors.

Very truly yours,

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

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[18] Nasdaq represents in the March 29, 2007 General Portability Filing that "there have been no trading problems reported to Nasdaq as a result of trading that security [Delta Financial Corporation] on Nasdaq with a three-character symbol." Securities Exchange Act Release No. 34-55563 at 2. Aside from the fact that Delta Financial Corporation had been trading on Nasdaq under the three-character symbol "DFC" for a single week at the time of the filing, that extremely limited experience sheds no light on what may occur if Nasdaq is permitted to use three-character symbols more generally.