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March 25, 2005

Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Comment on SR-NASD-2004-125

Dear Mr. Katz:

Thank you for the opportunity to comment on the NASD's Proposed Rule Change Regarding Procedures for Denying Listing on Nasdaq (SR-NASD-2004-125). In the interest of disclosure, I formerly served as Chief Counsel for Nasdaq's Office of Listing Qualifications Hearings until June of 2004.

On balance I think the proposals are very positive in that they formalize and make transparent many long-standing practices and serve to further enhance the process in a number of areas; however, I am concerned that Nasdaq has apparently determined to begin relinquishing its discretion with respect to the application of, and exceptions to, its listing standards. This seems to be inconsistent with the historical views and practices of the SEC, Nasdaq and the exchanges. As the Commission noted in In the Matter of Tassaway, Inc.,[1] "Nasdaq's rules, like those of the exchanges with respect to delisting, do not lend themselves to mechanical and inflexible administration. This is an area for pragmatic business judgments based on a kaleidoscope variety of factors."

In that regard, I take issue with proposed Rule 4802(b), which would prohibit a Listing Qualifications Panel from granting an exception of longer than 90 calendar days or from granting an extension of a previously issued exception that would extend beyond the 90 day threshold. If, in fact, it is not Nasdaq's intention to foreclose a Panel from extending a previously granted exception beyond 90 days under appropriate circumstances, I would request that Nasdaq specifically make that clear in the rule. While I can certainly appreciate the need to provide issuers and investors with more information relating to the nature and length of exceptions that may be granted by a Listing Panel, I think this can be much more effectively achieved through the adoption of Interpretive Material that sets forth guidelines upon which Panels may rely.[2]

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[1] 45 SEC 706 (1975); SEC Release No. 34-11291.

[2] I am not as concerned by the hard and fast 105 day limit for exceptions granted by the staff in proposed Rule 4803, since failure to satisfy a staff exception will not result in delisting, provided the company appeals the staff delisting determination to a Panel.

I believe that Nasdaq and the Commission should be concerned that the inflexible application of the rules that would result from a hard and fast 90 day limit could very easily lead to inequitable results. As an example, many longer exceptions are based on plans of compliance that require issuers to clear SEC regulatory hurdles, such as the review of a proxy or registration statement. As a result, it is not uncommon for a company's compliance timeline to be altered by an extended period of SEC review and comments. The historical standard for the granting of an exception has been a plan of compliance that is definitive in nature, likely to be completed within a reasonable period of time, and likely to enable the company to sustain long term compliance. It is very easy to imagine a situation where a company has entered into a definitive agreement for a financing or acquisition that will certainly bring it into compliance with Nasdaq's listing standards, but the company is unable to close that transaction within the 90 day period because it must first obtain shareholder approval for the transaction under Nasdaq rules and it has not yet cleared SEC comments on the proxy; or, worse yet, a company has cleared SEC comments and is known to have the necessary votes, but the statutory notice period has not yet expired and the company has therefore not been able to close the transaction, notwithstanding the fact that closure and compliance are a certainty. A more basic example of an inequitable result involves a company with a bid price deficiency that has held a stockholders' meeting, effected a reverse stock split and achieved a bid price in excess of $1 by the 90th day of the exception, but has not yet evidenced compliance with the $1 requirement for the requisite 10 consecutive business days required by Marketplace Rule 4310(c)(8)(D). Under the proposal, such a company would be delisted on the 91st day notwithstanding the fact that it has achieved a $1 bid price.

As a final example, I would point to a company that is delinquent in the filing of its periodic reports due to the fact that its board has launched an investigation into alleged accounting irregularities. Such a hard and fast timeline could discourage companies from doing a broad and thorough investigation and serve to incentivize companies to short-cut the process. Moreover, a large company with significant revenues and global operations should not be held to the same timeline for completing an investigation and obtaining a new audit opinion as a smaller company with limited operations and revenues. One size does not fit all and that is why the Panel process exists. In issuing a decision, a Panel is obligated to weigh the interests of both prospective investors and current investors and the decision's effect on the integrity of The Nasdaq Stock Market. More importantly, Panels are required to assess all of the facts and circumstances associated with the particular issuer and, if appropriate, craft an exception that fits those facts and circumstances.

By way of background, during my Nasdaq tenure more than 4,000 companies came through the hearing process. I concede that few companies ever remained under an exception for longer than 90 days; however, it only takes one inequitable result to make this unnecessary rule a "bad" rule. In fact, the large majority of exceptions then and now are for initial terms of less than 60 or 70 days. As a result, I believe the inclusion of a 90 day cap in the rules with no other guidance or parameters would mislead investors and issuers into believing that Panels routinely grant exceptions of that length, when that is

simply not the case. If, in fact, it is Nasdaq's intention to lengthen the typical term of an exception through this rule filing, then I believe the rule filing should specifically state that intention.

In view of the foregoing, I am not asserting that Nasdaq has simply selected the wrong number of days for a cap on exceptions. Most situations do not merit an exception as long as 90 days, but there are some situations that call for an exception that would exceed 90 days, particularly when the exception involves extensions or milestones. As a result, I am advocating that Nasdaq continue with the facts and circumstances test that it has historically used and that the exchanges continue to use. I strongly believe the goals underlying Nasdaq's rule filing can be more effectively achieved through the adoption of Interpretive Material indicating that, when exceptions are granted, they generally range between 30 and 90 calendar days. Nasdaq could then list the factors that Panels generally consider in determining whether to grant a longer exception, such as whether shareholder approval is required or whether the exception can be structured with meaningful milestones that demonstrate the company's progress toward regaining compliance. In the case of a filing delinquency, a relevant factor for granting a longer exception could be whether the company has provided guidance to the public as to the potential impact of any forthcoming restatement or the company's current financial condition.

The second area of concern relating to Nasdaq's abdication of its discretionary authority involves proposed IM-4803, which states that the Listing Departments shall not grant exceptions to companies seeking to demonstrate compliance with the net income or the total assets and total revenue requirements. To begin with, this raises the question of whether the Panels are foreclosed from granting such exceptions. The new rules are silent on this and I would therefore request that Nasdaq clarify its position as to the Panel's authority to grant such exceptions.

It appears from the proposal that Nasdaq's concern is that a plan for compliance with the net income or total assets and total revenue requirements would be based on future compliance. This is confusing since, by its very nature, an exception is based upon a plan for achieving compliance in the future. As an example, a company requesting an exception to the shareholders' equity requirement will of course not be in compliance at the time it is making such a request. Instead the request will be supported by a plan that contemplates the passage of time during which certain events will occur that enable it to regain compliance. To my knowledge, neither Nasdaq nor the exchanges have previously identified any listing standards as not being subject to the granting of a temporary exception.

As noted above, the historical standard for granting an exception is a plan of compliance that is definitive in nature, likely to be completed within a reasonable period of time, and likely to enable the company to sustain long term compliance.[3] If a company has demonstrated profitability or revenues in excess of the Nasdaq thresholds after the first three quarters of its fiscal year, it is fair to assume that there is a significant likelihood it

[3] I would suggest that this standard also be included in the Interpretive Material addressing the granting of exceptions.

will satisfy the Nasdaq standard upon the conclusion of the fiscal year and the filing of the Form 10-K containing audited financial statements. In the case of revenues, absent a restatement, the chance that it will achieve compliance with the Nasdaq requirement is 100%. Taking this a step further, a company that has completed its fiscal year and believes it will meet the applicable revenue or net income standard based on its unaudited financial statements has an extraordinarily high likelihood of demonstrating compliance upon the completion of the audit and the filing of the Form 10-K (again absent a restatement), both of which are likely to happen within 75-90 days of the end of the fiscal year. Such a company's return to compliance is arguably far more certain than that of a company with a plan of compliance based upon completing a private placement or an acquisition or winding down an investigation into financial irregularities and obtaining a new audit opinion from an independent auditor. Moreover, under proposed IM-4803, Nasdaq would lack the discretion to grant an exception to the net income or revenue requirements even if the company were only a week away from filing the Form 10-K, which would demonstrate compliance.

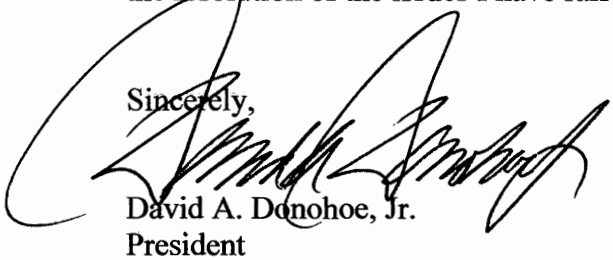
While I concede that the proposed change to the net income and total assets and revenue requirements is a relatively small point, given that few issuers will be impacted, I have made the point to illustrate my concerns that Nasdaq's decision to begin relinquishing its discretion has the potential to result in unanticipated consequences and/or inequitable applications of the rules.

Finally, I would like to seek clarification in two additional areas. First, I would ask that Nasdaq confirm that an issuer developing a new deficiency while under a Panel monitoring period for equity or filing, pursuant to Rule 4806(d), will be entitled to an oral hearing. Second, I would ask that Nasdaq confirm that, under appropriate circumstances, Panels and the Listing Council will continue to have the discretion to relist an issuer under the maintenance requirements, notwithstanding Rule 4802(f).

In sum, with the exceptions noted above, I generally support the proposals set forth in the rule filing and believe they are consistent with Nasdaq's regulatory obligations and with the protection of the investing public. I am concerned, however, that Nasdaq's proposal to begin relinquishing its discretionary authority in the application of its listing standards is the beginning of a journey down a slippery slope that will not serve issuers, investors or Nasdaq well. As Nasdaq repeatedly noted during the development and unveiling of its recent corporate governance reforms, one size does not fit all. Having personally conducted more than 1,500 hearings and having overseen a docket of more than 4,000 companies, I can absolutely say that the view expressed by the Commission in Tassaway is as true today as it was in 1975: "Nasdaq's rules, like those of the exchanges with respect to delisting, do not lend themselves to mechanical and inflexible administration. This is an area for pragmatic business judgments based on a kaleidoscope variety of factors."

Again, thank you for the opportunity to comment on these proposals. I look forward to the resolution of the issues I have raised.

Sincerely,



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