

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50740; File No. SR-NASD-2004-140)

November 29, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Eliminate Entry and Application Fees for Exchange-Listed Issuers Transferring Listings to Nasdaq

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 20, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On November 12, 2004, Nasdaq amended the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to eliminate the entry and application fees imposed upon issuers listed on a national securities exchange that transfer their listing to Nasdaq. Nasdaq will make the proposed rule change effective retroactively for any issuer listing on Nasdaq on or after September 20, 2004 (the date Nasdaq originally filed this proposal with the Commission). Accordingly, an issuer that switches its listing to Nasdaq between

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Amendment No. 1 replaced and superseded the original filing in its entirety.

September 20, 2004 and such date as Commission approval of the filing may occur would receive a refund of the entry and application fee paid.

The text of the proposed rule change is below. Proposed new language is in italics.<sup>4</sup>

**4510. The Nasdaq National Market**

(a) Entry Fee

(1) – (5) No change.

(6) The fees described in this Rule 4510(a) shall not be applicable to any issuer that is listed on a national securities exchange and that transfers its listing to the Nasdaq National Market.

(b) – (e) No change.

**4520. The Nasdaq SmallCap Market**

(a) Entry Fee

(1) – (5) No change.

(6) The fees described in this Rule 4520(a) shall not be applicable to any issuer that is listed on a national securities exchange and that transfers its listing to the Nasdaq SmallCap Market.

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<sup>4</sup> Changes are marked to the rule text that appears in the electronic NASD Manual found at <http://www.nasd.com>. No pending rule filings would affect the portions of these rules amended herein.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to eliminate the entry and application fees under NASD Rules 4510(a) and 4520(a) for any company listed on a national securities exchange (an "exchange") that transfers its listing to the Nasdaq National Market or The Nasdaq SmallCap Market (i.e., the issuer becomes listed on Nasdaq and ceases to be listed on an exchange). Nasdaq believes that the elimination of such fees is justified on several grounds. An issuer that already paid initial listing fees to an exchange when it became a publicly traded company is reluctant to pay a second initial listing fee to another listing venue, even if it concludes that Nasdaq offers the issuer and its investors superior services and market quality. With the benefit of statistics mandated by Rule 11Ac1-5 under the Act,<sup>5</sup> an issuer seeking the better market may compare the execution speed and quality on its current venue with speed and quality of comparable stocks trading on Nasdaq and conclude that a change in listing would be beneficial. Nevertheless, the benefits of the switch must currently be weighed against the cost of initial inclusion,

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<sup>5</sup> 17 CFR 240.11Ac1-5.

which ranges from \$25,000 to \$150,000, depending on the issuer's market tier and the number of shares outstanding. Since the expected benefits of the switch would be diffused among the issuers' investors and realized over time, but the initial listing fees must be paid by the issuer immediately, Nasdaq is concerned that issuers that stand to benefit may nevertheless opt to forgo a switch. As such, Nasdaq believes that assessing the initial fees against issuers that have already paid fees to list on another market imposes a burden on the competition between exchange markets and markets other than exchange markets, a competition that Nasdaq believes is one of the central goals of the national market system.<sup>6</sup>

Nasdaq's concern as to the undue burden on competition imposed by a duplicative initial listing fee is especially acute in the case of New York Stock Exchange ("NYSE") listed companies, whose opportunities to effect a switch have, until recently, been constrained by NYSE Rule 500.<sup>7</sup> Nasdaq had long advocated the repeal of NYSE Rule 500, in favor of a competitive environment in which significant barriers to listing transfers do not exist and listed companies can move quickly and easily to the market that best suits their needs. In January 2004, Nasdaq announced a program to allow NYSE companies to take advantage of the repeal of NYSE Rule 500 by adding a second listing on Nasdaq and thereby undertake a focused comparison of the services and market quality offered by each listing venue. To date, seven companies have taken advantage of this program. The explicit goal of this program has always been to encourage the eventual switch of companies that dual list, once they have experienced first-hand the

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<sup>6</sup> See 15 U.S.C. 78k-1.

<sup>7</sup> See Securities Exchange Act Release No. 48720 (October 30, 2003), 68 FR 62645 (November 5, 2003) (SR-NYSE-2003-23).

benefits of their Nasdaq listing.<sup>8</sup> For that reason, Nasdaq adopted a one-year waiver of entry, annual, and listing of additional shares fees for NYSE companies that dual list, and a waiver of entry fees (the same fees that are the subject of this proposed rule change) for any issuer that switches its listing between January 12, 2004 and December 31, 2004.<sup>9</sup> Without a waiver for switches, companies that have dual listed would nevertheless be forced to weigh the benefits of a Nasdaq listing against the requirement to pay a duplicative entry fee. In effect, NYSE Rule 500 would have been replaced with a burden on listing transfers imposed by Nasdaq itself. To avoid such an incongruous result, Nasdaq believes that the temporary fee waiver for switches adopted earlier this year should be made permanent.

Nasdaq also believes that the proposed rule change is justified from the standpoint of Nasdaq's experience with regard to the time and effort required to review applications of issuers that are already listed on an exchange. Although companies that switch their listings are reviewed for compliance with Nasdaq listing standards in the same manner as any other company applying for listing on Nasdaq, Nasdaq believes that the average application of a switching issuer is less likely to involve time-consuming regulatory issues than the average application from a company conducting an initial public offering

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<sup>8</sup> It is Nasdaq's expectation that a comparison of the performance of issuers in the dual listing program may also prove instructive to other NYSE issuers and issuers listed on other markets, but that full scale entry fees may impede such issuers from switching.

<sup>9</sup> Securities Exchange Act Release No. 49286 (February 19, 2004), 69 FR 8999 (February 26, 2004) (SR-NASD-2004-04). Nasdaq notes that in SR-NASD-2004-04, it indicated that a dually listed company that transfers to Nasdaq after December 31, 2004 would pay "the entry fee or a portion thereof." As indicated in this filing, however, Nasdaq has now concluded that the imposition of a duplicative entry fee is inequitable to switching issuers and places an undue burden on competition.

or a company that is applying to Nasdaq after being delisted by another market. This is, in part, due to the ongoing scheme of regulation to which such issuers have been subject. Moreover, because such companies are already familiar with the standards of conduct imposed upon public companies by listing markets, their applications are generally presented with a high degree of completeness and accuracy. Finally, and most significant, because such companies already satisfy the listing standards of another self-regulatory organization, there is a higher likelihood that they also comply with Nasdaq's listing standards. Thus, although Nasdaq always conducts a full and independent review of each issuer's compliance, and will continue to do so with respect to issuers switching from exchanges, Nasdaq believes the probability that a switching issuer will be found not in compliance and therefore denied access to a Nasdaq listing is low. As a result, Nasdaq believes the probability that Nasdaq staff will be required to devote the time and effort required to establish a sufficient record to support a decision to deny listing and to defend such a decision against appeal under the NASD Rule 4800 Series is also low. By contrast, when an applicant is denied a listing, Nasdaq receives only a \$5,000 application fee (and possibly hearing fees under the NASD Rule 4800 Series), but must frequently devote resources to defending its decision.

Nasdaq understands that the effect of this proposed rule change will be to impose a lower level of listing fees on switching issuers than on some other issuers.<sup>10</sup> In light of the fact that Nasdaq will collect the same level of annual fees and listing of additional shares fees from such issuers, however, Nasdaq believes that the difference does not

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<sup>10</sup> See Securities Exchange Act Release No. 50741 (November 29, 2004) (SR-NASD-2004-142), which established fees for companies with a dual listing on the New York Stock Exchange and Nasdaq.

constitute an inequitable allocation of fees. Notably, Nasdaq's fee schedule and the fee schedules of other self-regulatory organizations assess varying levels of fees on issuers based on reasoned assessments of the issuers' varying circumstances. For example, both entry fees and annual fees are assessed on a sliding scale that uses total shares outstanding and the issuer's market tier (i.e., Nasdaq National Market or SmallCap Market) as a corollary to the complexity of reviewing each issuer's compliance with listing standards and each issuer's ability to pay. Inevitably, the use of such a scale means that different issuers pay different amounts for their listing on Nasdaq. Similarly, issuers listed on Nasdaq are not subjected to entry fees under NASD Rules 4510(a) and 4520(a) for listing an additional security if they have already paid the maximum entry fee, and annual fees for listing of American Depositary Receipts on the Nasdaq National Market are significantly lower than annual fees for listing of common stock, in recognition of the issuer's payment of listing fees to a foreign market. In light of a switching issuer's prior payment to another market and the generally lower burdens associated with reviewing a switching issuer's eligibility, Nasdaq believes that eliminating initial fees for switching issuers is entirely consistent with an equitable allocation of listing fees. Finally, Nasdaq notes that it does not expect the financial impact of this proposed rule change to be material, either in terms of increased levels of annual fees from switching issuers or in terms of diminished entry fees. Quite simply, even with the proposed rule change in place, Nasdaq understands that a change in listing venue is a major step for an issuer, and therefore Nasdaq does not expect that the number of switching issuers in a given time frame will be sufficient to have a material effect on financial resources. Accordingly, the proposed rule change will not impact Nasdaq's

resource commitment to its regulatory oversight of the listing process or its regulatory programs.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>11</sup> in general, and with Sections 15A(b)(5) and 15A(b)(6) of the Act,<sup>12</sup> in particular, in that it is designed to provide an equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. As described above, Nasdaq believes the elimination of entry fees for exchange-listed companies switching to Nasdaq is equitable and reasonable because requiring these companies to pay such fees would impose costs that are duplicative of fees that they have already paid to another market, and is also justified from the standpoint of Nasdaq's experience with regard to the time and effort generally required to process applications of such companies. In addition, Nasdaq believes this change will enable exchange-listed companies to determine more easily the benefits of switching to Nasdaq, thereby eliminating a burden on competition among markets in accordance with the provisions of Section 11A(a)(1)(C)(ii) of the Act.<sup>13</sup>

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<sup>11</sup> 15 U.S.C. 78o-3.

<sup>12</sup> 15 U.S.C. 78o-3(b)(5) and (6).

<sup>13</sup> 15 U.S.C. 78k-1(a)(1)(C)(ii).



B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, Nasdaq believes that the proposed rule change will enhance competition by allowing issuers that are listed on an exchange to move their listing to Nasdaq without being required to pay a fee that is duplicative of fees already paid to an exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-140 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-140. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available

publicly. All submissions should refer to File Number SR-NASD-2004-140 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).