

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52430; File No. SR-NASD-2004-162)

September 14, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto to Establish Fee and Notice Requirements for Substitution Listing Events and to provide Additional Transparency for Changes Requiring a Record-keeping Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 26, 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 May 11, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.³ On August 18, 2005, Nasdaq filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposal, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 superseded and replaced the filing in its entirety. In Amendment No. 1, Nasdaq clarified that securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities are exempt from the proposed Substitution Listing Event notice and fee requirements. Amendment No. 1 also corrected typographical errors and clarified certain other non-material terms related to the scope of the proposed Substitution Listing Event fee and notice requirements.

⁴ Amendment No. 2 superseded and replaced the amended filing in its entirety. In Amendment No. 2, Nasdaq clarified that securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities are exempt from only the proposed Substitution Listing Event fee requirement and, therefore, would be subject to the proposed notice requirement. Amendment No. 2 also made certain conforming changes and representations regarding the collection and dissemination of substitution listing event information and the proposed rules impact on Nasdaq’s regulatory functions.

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

Nasdaq proposes to amend NASD Rules 4200(a), 4310, 4320, 4510, and 4520 to establish fee and notice requirements for substitution listing events for all Nasdaq issuers, except the proposed fee will not apply to issuers whose securities are listed on a national securities exchange and subsequently listed on Nasdaq but not designated by Nasdaq as Nasdaq national market system securities. Nasdaq also proposes amendments to provide more transparency regarding certain changes subject to the record-keeping fee. Nasdaq would implement the proposed rule change, as amended, as soon as practicable following Commission approval.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in [brackets].⁵

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4200. DEFINITIONS

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1)—(36) No change.

(37) “Substitution Listing Event” means a reverse stock split, re-incorporation or a change in the issuer’s place of organization, the formation of a holding company that replaces a listed company, reclassification or exchange of an issuer’s listed shares for another security, the listing of a new class of securities in substitution for a previously-listed class of securities, or any technical change whereby the shareholders of the original company receive a share-for-share interest in the new company without any change in their equity position or rights.

(38) “Transaction costs” means costs incurred in connection with a limited partnership rollup transaction, including printing and mailing the proxy, prospectus or other documents; legal fees not related to the solicitation of votes or tenders; financial advisory fees; investment banking fees; appraisal fees; accounting fees; independent committee expenses; travel expenses; and all other fees related to the preparatory work of the transaction, but not including costs that would

⁵ Nasdaq represents that changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasd.com. Nasdaq also represents that there are no pending rule filings that would affect this proposed rule change.

have otherwise been incurred by the subject limited partnerships in the ordinary course of business or solicitation expenses.

[(38)](39) "Underwriting Activity Report" is a report provided by the Market Regulation Department in connection with a distribution of securities subject to SEC Rule 101 pursuant to Rule 2710(b)(11) and includes forms that are submitted by members to comply with their notification obligations under Rules 4614, 4619, and 4623.

(b) No Change.

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4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a) — (b) No change

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1) — (19) No change.

(20) The issuer shall notify Nasdaq promptly in writing of any change in the general character or nature of its businesses and any change in the address of its principal executive offices. The issuer also shall file on a form designated by Nasdaq notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

(21) – (29) No change.

(30) The issuer shall notify Nasdaq of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by Nasdaq. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify Nasdaq as soon as practicable after such event has been implemented by filing the appropriate form as designated by Nasdaq. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities.

(d) No change.

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4320. Qualification Requirements for Non-Canadian Foreign Securities and American Depository Receipts

To qualify for inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depository Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(a) — (d) No change.

(e) In addition to the requirements contained in paragraphs (a), (b) or (c), and (d), the security shall satisfy the criteria set out in this subsection for inclusion in Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued inclusion on Nasdaq.

(1) — (17) No change.

(18) The issuer shall notify Nasdaq promptly in writing of any change in the general character or nature of its businesses and any change in the address of its principal executive offices. The issuer also shall file on a form designated by Nasdaq notification of any corporate name change, or other change requiring payment of a record-keeping fee, no later than 10 days after the change.

(19) — (25) No change.

(26) The issuer shall notify Nasdaq of a Substitution Listing Event (other than a re-incorporation or a change to an issuer's place of organization) no later than 15 calendar days prior to the implementation of such event by filing the appropriate form as designated by Nasdaq. For a re-incorporation or change to an issuer's place of organization, an issuer shall notify Nasdaq as soon as practicable after such event has been implemented by filing the appropriate form as designated by Nasdaq. Issuers shall also pay the appropriate fee associated with Substitution Listing Events. The Substitution Listing Event fee shall not apply to securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities.

(f) No change

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4510. The Nasdaq National Market

(a) – (d) No change.

(e) **Record-Keeping Fee**

An issuer that makes a change such as a change to its name, the par value or title of its security, or its symbol shall pay a fee of \$2,500 to The Nasdaq Stock Market, Inc. and submit the appropriate form as designated by Nasdaq.

(f) Substitution Listing Fee

An issuer that implements a Substitution Listing Event shall pay a fee of \$7,500 to The Nasdaq Stock Market, Inc. and submit the appropriate form as designated by Nasdaq. Notwithstanding the foregoing, this substitution listing fee shall not apply to securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities.

4520. The Nasdaq SmallCap Market

(a) – (c) No change.

(d) Record-Keeping Fee

An issuer that makes a change such as a change to its name, the par value or title of its security, or its symbol shall pay a fee of \$2,500 to The Nasdaq Stock Market, Inc. and submit the appropriate form as designated by Nasdaq.

(e) Substitution Listing Fee

An issuer that implements a Substitution Listing Event shall pay a fee of \$7,500 to The Nasdaq Stock Market, Inc. and submit the appropriate form as designated by Nasdaq. Notwithstanding the foregoing, this substitution listing fee shall not apply to securities that are listed on a national securities exchange and not designated by Nasdaq as Nasdaq national market system securities.

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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, as amended, and discussed any comments it received on the proposal. 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

The purpose of this rule filing is to amend NASD Rules 4200(a), 4310, 4320, 4510, and 4520 to establish a fee for substitution listing events and a corresponding notice requirement. Substitution listing events include the implementation of a reverse stock split, an issuer's re-incorporation or a change in the issuer's place of organization (including a change in the issuer's state of incorporation), the reclassification or exchange of an issuer's listed shares for another security, formation of a holding company that replaces a listed company, the listing of a new class of securities in substitution for a previously listed class of securities, or any technical change where the shareholders of the original company receive a share-for-share interest in the new company without a change in their equity position or rights.

When Nasdaq learns about a substitution listing event for a Nasdaq-listed company, Nasdaq must implement technical changes to its trading, market data, and internal monitoring systems. Nasdaq disseminates certain substitution listing event information about Nasdaq-listed companies to other markets and market participants through a subscription service.⁶ Nasdaq-listed issuers that are designated by Nasdaq pursuant to NASD Rule 4400 Series as Nasdaq national market system securities ("Nasdaq designated securities") are contacted directly by Nasdaq to verify the details of the substitution listing events. Under the NASD Rule 4400 Series, the securities of certain Nasdaq-listed issuers that are also listed on a national securities

⁶ Nasdaq provides advance notification of certain substitution listing events, such as reverse stock splits, to member firms, market data vendors, service bureaus, and other subscribers of its daily list service. Notification of the substitution listing event information on Nasdaq's daily list service is subsequently provided to users of Nasdaq's systems through a fifth letter identifier, such as a "D," that is temporarily added to an issuer's trading symbol. Re-incorporations or changes to the place of organization are recorded in Nasdaq's internal database, but are not disseminated to market participants.

exchange are not designated by Nasdaq as Nasdaq national market system securities (“Nasdaq non-designated securities”).⁷ Nasdaq does not contact the issuers of Nasdaq non-designated securities directly to verify the details of substitution listing events. Instead, for Nasdaq non-designated securities, Nasdaq receives electronic reports from the national securities exchange that designated the securities as national market system securities⁸ under that market’s national market system plan. Nasdaq uses these reports to make the necessary changes to its systems.

Nasdaq has dedicated specific resources to manage the process for collecting, verifying, and implementing the changes related to substitution listing events of Nasdaq-listed securities so that such changes are accurately and promptly reflected in its trading, market data, and internal monitoring systems. To support these activities, Nasdaq proposes to establish a fee of \$7,500 per event for issuers of Nasdaq designated securities. Since the costs associated with managing the substitution listing events for Nasdaq non-designated securities is reduced through Nasdaq’s use of consolidated reports from other markets, the proposed rule would waive the substitution listing event fee for these particular issuers.⁹ Waiving these fees also would eliminate the

⁷ NASD IM-4400 provides that Nasdaq shall not exercise its authority under the NASD Rule 4400 Series separately to designate the securities that are listed on a national securities exchange and subsequently permitted to list on the Nasdaq National Market as Nasdaq national market system securities within the meaning of Section 11A of the Act, 15 U.S.C. 78k-1, or the rules thereunder.

⁸ For example, Nasdaq uses electronic reports from the New York Stock Exchange (“NYSE”) to verify the details of the substitution listing events for NYSE-listed securities that are subsequently also listed on Nasdaq but are still designated by the NYSE as national market system securities pursuant to the NYSE’s national market system plan. The consolidated reports from the NYSE contain information regarding reverse stock splits, the substitution of a previously listed class of securities for another class, the creation of a holding company, and the reincorporation or change to the place of organization of an issuer.

⁹ Although the proposed rule would waive the substitution-listing event fee for these Nasdaq issuers, Nasdaq represents that the lack of such fees from these issuers would not impair Nasdaq’s ability to fulfill its regulatory responsibilities and enforce its rules. Furthermore, although Nasdaq relies on consolidated reports in managing the substitution

possibility that these issuers would be charged twice for the same substitution listing event since, as discussed below, other markets charge their listed companies a fee for substitution listing events.

Under the proposed rule change, issuers of both Nasdaq designated and Nasdaq non-designated securities would be required to notify Nasdaq about a substitution listing event no later than 15 days prior to the implementation of the event, in order to provide Nasdaq with sufficient time to implement the technical changes into its systems. For a re-incorporation or a change to an issuer's place of organization, however, Nasdaq proposes to require issuers to notify Nasdaq as soon as practicable after the event has been implemented since these substitution listing events may be contingent on shareholder approval and would not require immediate changes to Nasdaq's systems.

Other markets also assess a fee for substitution listing events. For example, both the NYSE and the American Stock Exchange ("Amex") charge a fee for substitution listing events. The NYSE charges a "Reduced Initial Fee" of \$15,000 for substitution events.¹⁰ Under the NYSE's rules, the \$15,000 fee applies only if the change in the company's status is technical in nature and the shareholders of the original company receive a share-for-share interest in the new company without any change in their equity position or rights. If the substitution event does not comply with these requirements, the full initial listing fees would apply. Amex charges \$5,000 for each substitution listing event.¹¹ For Amex issuers, a substitution listing fee applies in cases

listing events process for these Nasdaq issuers, Nasdaq represents that its rules must be "designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and promote orderly produces for collecting, distributing, and publishing quotations" pursuant to Section 15A(b)(11) of the Act, 15 U.S.C. 78o-3(b)(11).

¹⁰ See NYSE Listed Company Manual Section 902.02.

¹¹ See AMEX Company Guide Sections 142 and 305.

where, after the original listing, a change is made by charter amendment or otherwise by which shares listed on Amex are reclassified, or changed into or exchanged for another security, either with or without a change in par value. Amex also charges a substitution listing fee whenever a company implements a reverse stock split, re-incorporates, lists a new class of securities in substitution of a previously-listed class of securities, or otherwise engages in a transaction which would require the company to file a new Form 8-A with the Commission in regard to the previously listed security.

The proposed rule change also would make minor amendments to NASD Rules 4310(c)(20), 4320(e)(18), 4510(e), and 4520(d) to clarify that Nasdaq-listed companies that are subject to a record-keeping fee must submit the appropriate form to Nasdaq within 10 days after the change. This proposed change simply reflects the current practice of issuers.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,¹² in general, and with Section 15A(b)(5) of the Act,¹³ in particular, in that the proposed rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls. The proposed rule change is reasonable because the fee is competitive with similar fees charged by other markets. The proposed rule is also equitable because it will apply to all similarly situated Nasdaq issuers on an equal basis. The exemption from the proposed fee requirement for issuers of Nasdaq non-designated securities is equitable and reasonable because it recognizes the reduced costs for managing substitution listing events

¹² 15 U.S.C. 78o-3.

¹³ 15 U.S.C. 78o-3(b)(5).

for such issuers. The exemption is also consistent with the provisions of Section 15A of the Act¹⁴ in that it promotes competition among exchange markets.

The proposed clarifications to NASD Rules 4310(c)(20), 4320(e)(18), 4510(e), and 4520(d) regarding the requisite form to be submitted in connection with payment for a record-keeping fee is consistent with Section 15A of the Act,¹⁵ in general, and furthers the objectives of Section 15A(b)(6) of the Act,¹⁶ in particular in that it is designed to foster cooperation and coordination with persons engaged in regulating and processing information with respect to, and facilitating transactions in securities, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that the proposed rule change would benefit issuers and issuers' counsel by providing additional transparency with respect to the process by which issuers request changes covered by the record-keeping fee.

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

¹⁴ 15 U.S.C. 78o-3.

¹⁵ Id.

¹⁶ 15 U.S.C. 78o-3(b)(6).

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which NASD 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. Please include File Number SR-NASD-2004-162 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2004-162. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of 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-2004-162 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.¹⁷

Jonathan G. Katz
Secretary

¹⁷ 17 CFR 200.30-3(a)(12).