

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49512; File No. SR-NASD-2004-054)

March 31, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Make Permanent the Current Pilot Program for the Imposition of a Fee for Written Interpretations of Nasdaq Listing Rules

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 March 25, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to make permanent NASD Rule 4550, which provides for the imposition of fees for written interpretations of Nasdaq listing rules. The text of the proposed rule change is below, which is identical to the text proposed in the pilot.³

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4500. ISSUER LISTING FEES

4550. Written Interpretations of Nasdaq Listing Rules

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities and Exchange Act Release No. 48450 (September 4, 2003), 68 FR 53770 (September 12, 2003).

(a) An issuer listed on The Nasdaq SmallCap Market or The Nasdaq National Market may request from Nasdaq a written interpretation of the Rules contained in the 4000 through 4500 Series. In connection with such a request, the issuer must submit to The Nasdaq Stock Market, Inc. a non-refundable fee of \$2,000. A response to such a request generally will be provided within four weeks from the date Nasdaq receives all information necessary to respond to the request.

(b) Notwithstanding paragraph (a), an issuer may request a written interpretation of the Rules contained in the 4000 through 4500 Series by a specific date that is less than four weeks, but at least one week, after the date Nasdaq receives all information necessary to respond to the request. In connection with such a request for an expedited response, the issuer must submit to The Nasdaq Stock Market, Inc. a non-refundable fee of \$10,000.

(c) An applicant to The Nasdaq Stock Market that has submitted the applicable entry fee under Rule 4510 or Rule 4520 will not also be required to submit a fee in connection with a request for a written interpretation involving the applicant's initial inclusion on Nasdaq. In addition, an issuer is not required to submit a fee in connection with a request for an exception from the Nasdaq shareholder approval rules pursuant to Rule 4350(i)(2).

(d) The Board of Directors of The Nasdaq Stock Market, Inc. or its designee may, in its discretion, defer or waive all or any part of the written interpretation fee prescribed herein.

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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 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

NASD Rule 4550, which was approved by the Commission on September 4, 2003,⁴ established a six-month pilot program under which Nasdaq charges fees for written interpretations regarding the application of the listing rules set forth in the NASD Rule 4200, 4300 and 4400 Series. The pilot went into effect October 1, 2003, and is scheduled to expire on April 1, 2004. Based on a review of the pilot to date, Nasdaq proposes adopting this fee on a permanent basis.

Under NASD Rule 4550, an issuer considering a specific action or transaction can request an interpretation from Nasdaq's Listing Qualifications staff, and in return, staff will prepare a responsive letter to the issuer as to how the rules apply to the proposed action or transaction. The Office of General Counsel reviews interpretations prior to issuance. This service is provided for a non-refundable fee of \$2,000, and the process generally takes four weeks. Alternatively, an issuer may elect to pay a non-refundable fee of \$10,000 to receive an expedited response, which will be provided by a specific date that is less than four weeks but at least one week after the date staff receives all information necessary to respond to the request. No fee is charged in connection with requests involving a company's initial listing application on

⁴ Securities and Exchange Act Release No. 48450, 68 FR 53770 (September 12, 2003).

Nasdaq or in cases where the fee would present economic hardship, such as requests for a financial viability exception to Nasdaq's shareholder approval rules.⁵

Prior to issuing a final written interpretation, Nasdaq will advise the company of the result of staff's analysis and the proposed interpretation. If the interpretation is going to be adverse, the company is given the opportunity to amend or withdraw their request for a written interpretation.

In the rule filing establishing the pilot program, Nasdaq stated that it would evaluate the impact of the pilot program and report its findings to the Commission. Nasdaq did so by letters dated March 4, 2004⁶ and March 17, 2004.⁷

Significantly, no comments were received during the comment period for the rule filing establishing the pilot program. As noted in the above-referenced reports, since the program has been in effect, staff has received no complaints from issuers in connection with the fees. In fact, while the rule provides Nasdaq with discretion to waive the fee, no requests for a fee waiver have been made to date. Several issuers and their representatives have expressed unsolicited approval for the expedited process, as it provides a means for issuers to be certain of their compliance with Nasdaq's corporate governance rules, in particular the shareholder approval and voting rights rules, in cases where a transaction must be closed imminently.

⁵ Telephone call between Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, and Leah Mesfin, Attorney, Division of Market Regulation, Commission on March 31, 2004.

⁶ See letter from Mary Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated March 4, 2004.

⁷ See letter from Mary Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated March 17, 2004.

An additional public benefit to the program is that staff prepares anonymous summaries of correspondence, as well as frequently asked questions based on requests received from issuers, including those withdrawn before a written response is issued. These summaries and questions are posted on the Nasdaq Legal and Compliance website so that the general public, practitioners, and other issuers can better understand how Nasdaq applies its rules and policies. In this way, the overall need to request such interpretations is minimized, thus reducing burdens on issuers and staff alike.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁸ in general and with Section 15A(b)(5) of the Act,⁹ in particular, in that the proposal provides for the 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. Specifically, the proposed fees will be imposed equally on all listed issuers that request written interpretations of Nasdaq's listing rules and will relieve issuers not availing themselves of this process from subsidizing its cost.

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.

⁸ 15 U.S.C. 78q-3.

⁹ 15 U.S.C. 78q-3(b)(5).

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. We also note that, during the comment period for the rule filing establishing the pilot program (SR-NASD-2003-105), no comments were received.

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b-4¹¹ thereunder in that it effects a change that does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change 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.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay and permit the proposed rule change to become operative on April 1, 2004. The Commission believes that waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹¹ 17 CFR 240.19b-4(f)(6).

interest. The Commission notes that the proposal is making the current pilot program permanent, and not making any other modifications to it. In addition, the Commission notes that it did not receive any comment letters in response to the original pilot and has not received any comments during the pilot period. Because the pilot is scheduled to expire on April 1, 2004, acceleration of the operative date will allow the imposition of the fees for written interpretations of Nasdaq's listing rules to continue on an uninterrupted basis.¹²

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2004-054. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 will also be available for inspection and copying at the principal

¹² For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

office of Nasdaq. All submissions should refer to file number SR-NASD-2004-054 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

J. Lynn Taylor
Assistant Secretary

¹³ 17 CFR 200.30-3(a)(12).