

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51511; File No. SR-NASD-2005-044)

April 8, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to NASD Rules 4510(a) and 4520(a) to Clarify Rule Language Regarding Entry and Application Fees for Issuers Listed on a National Securities Exchange That Transfer Their Listing to Nasdaq

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 April 4, 2005, 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. Nasdaq filed this proposal pursuant to Section 19(b)(3)(A)(i)³ of the Act and Rule 19b-4(f)(1) thereunder as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule,⁴ which renders the proposal effective upon filing with the Commission. 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 Substance of the Proposed Rule Change

Nasdaq is amending NASD Rules 4510(a) and 4520(a) to clarify rule language regarding entry and application fees for issuers listed on a national securities exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

that transfer their listing to Nasdaq. The text of the proposed rule change is below.

Proposed new language is in italics; proposed deletions are in brackets.⁵

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] with respect to any securities that (i) are listed on a national securities exchange but not listed on Nasdaq, or (ii) are listed on the New York Stock Exchange and Nasdaq, if the issuer of such securities [and that] transfers [its] their listing exclusively to the Nasdaq National Market.

(7) No change.

(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] with respect to any securities that (i) are listed on a national securities exchange but not listed on Nasdaq, or (ii) are listed on the New York Stock Exchange and Nasdaq, if the issuer of such securities [and that] transfers [its] their listing exclusively to the Nasdaq SmallCap Market.

(7) No change.

⁵ Changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasd.com. No pending rule filings would affect the portions of these rules amended herein.

(b) No change.

(c) Annual Fee

(1) – (4) No change.

(5) Total shares outstanding means the aggregate of all classes of equity securities included in The Nasdaq SmallCap Market as shown in the issuer's most recent periodic report required to be filed with the issuer's appropriate regulatory authority or in more recent information held by Nasdaq. In the case of foreign issuers, total shares outstanding shall include only those shares issued and outstanding in the United States.

[(5)] (6) In lieu of the fees described in Rule 4510(c)(1), the annual fee shall be \$15,000 for each issuer (i) whose securities are listed on the New York Stock Exchange and designated as national market securities pursuant to the plan governing New York Stock Exchange securities at the time such securities are approved for listing on Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq. Such annual fee shall be assessed on the first anniversary of the issuer's listing on Nasdaq.

(d) No change.

* * * * *

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 its proposal and discussed any comments it received regarding 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

In January 2005, the Commission approved a proposed rule change by Nasdaq to eliminate the entry and application fees under NASD Rules 4510(a) and 4520(a) for companies listed on a national securities exchange (an “exchange”) that transfer their listing to the Nasdaq National Market or the Nasdaq SmallCap Market.⁶ Nasdaq has determined that the text of NASD Rules 4510(a)(6) and 4520(a)(6) (the “Transfer Rules”) may be ambiguous when applied to issuers transferring between the Nasdaq SmallCap Market and the Nasdaq National Market, and is submitting this proposed rule change to ensure that the rule text more clearly reflects Nasdaq’s interpretation of the Transfer Rules.

The intent of the Transfer Rules was to remove disincentives for issuers whose primary listing is on a national securities exchange to drop their exchange listing and switch to Nasdaq, thereby promoting competition between Nasdaq and exchange markets. Thus, an issuer whose securities are listed exclusively on an exchange, or whose securities are dually listed on the New York Stock Exchange and Nasdaq,⁷ would pay no entry fee if the issuer dropped its exchange listing and moved exclusively to Nasdaq.

⁶ Securities Exchange Act Release No. 51004 (January 10, 2005), 70 FR 2917 (January 18, 2005) (SR-NASD-2004-140).

⁷ See NASD Rule 4400 and IM-4400. As provided in IM-440, transactions in such dually listed securities are reported under the Consolidated Tape Association plan, rather than the Nasdaq UTP Plan.

As originally filed, however, the Transfer Rules arguably could be read to offer a fee waiver to issuers that “phase up” from the Nasdaq SmallCap Market to the Nasdaq National Market (or “phase down” from the National Market to the SmallCap Market) if such issuers happen to have a secondary listing on an exchange that they relinquish at the time of their transfer. Accordingly, Nasdaq is amending the Transfer Rules to make it clear that they do not apply in such circumstances.⁸

In addition to the fact that the Transfer Rules were never intended to apply to phase up or phase down scenarios, it should be noted that the policy rationale for the Transfer Rules does not apply with equal force to such scenarios. An issuer with a SmallCap Market or National Market listing whose trades are reported under the Nasdaq UTP Plan is already a Nasdaq-listed company in all respects, and therefore it cannot be argued that fees or any other factor are inhibiting the issuer from becoming listed on Nasdaq. Many SmallCap companies that obtain a primary listing on Nasdaq at the time of their initial public offerings also list on a national securities exchange because the exchange listing provides an exemption from “blue-sky laws” that is not available from a listing on the SmallCap Market alone. When such a company becomes eligible for a phase up to the National Market, it may decide that its exchange listing is superfluous, since a National Market listing confers the same blue-sky exemption as an exchange listing, but Nasdaq does not see a competitive justification for encouraging such an issuer to drop its exchange listing at that time. In fact, these issuers are already familiar with the benefits of the Nasdaq marketplace and, therefore, interpreting the rule in this manner would result in Nasdaq offering a financial incentive focused solely on whether a

⁸ The proposed rule change also corrects a typographical error in NASD Rule 4520(c).

Nasdaq-listed issuer also pays listing fees to a competitor. Similarly, although issuers phasing down from the National Market to the SmallCap Market may be less likely to have exchange listings at the time of their phase down than issuers that are phasing up, Nasdaq sees no competitive justification for encouraging such issuers to drop their exchange listing, particularly since the listing will provide them the benefit of a blue-sky exemption when they move to the SmallCap market. Finally, Nasdaq is concerned that a broad application of the Transfer Rules to phase up situations could be “gamed” by issuers who may find it financially advantageous to obtain, and then relinquish, an exchange listing in conjunction with a planned phase up application.

Nasdaq has not observed any difference in the time and effort needed to review a phase up or phase down application for an issuer that has a secondary listing on an exchange as compared to an issuer that has no such secondary listing. Accordingly, there does not appear to be a cost justification, let alone a competitive justification, for waiving entry fees solely for those phase-up issuers that happen to have an exchange listing that they drop at the time of the phase up. Similarly, applications of issuers that are phasing down to the SmallCap Market are likely to involve more time and effort on the part of Nasdaq staff than issuers that join the SmallCap Market after an initial public offering, since phase downs are often the result of a current or incipient failure to meet the requirements of the Nasdaq National Market. Finally, Nasdaq notes that the financial impact of a broad waiver for phase up and phase down scenarios could be far more significant than the financial impact of the narrower application of the Transfer Rules intended by Nasdaq.

Nasdaq recognizes, however, that some issuers submitting applications for phase up or phase down since September 20, 2004, the effective date of the Transfer Rules, may have concluded that the Transfer Rules would apply to them in the event that they drop their exchange listings. Although application of the Transfer Rules to such issuers is contrary to the intent underlying the rules, Nasdaq recognizes the ambiguity of the rules as originally drafted, and will therefore waive entry fees for any issuer (i) listed on Nasdaq and on an exchange, (ii) that has had an application for a phase up or phase down pending at any time between September 17, 2004, and the effective date of this proposed rule change, and (iii) that initiates a process to delist from the exchange on which it is listed within five days after the date on which such phase up or phase down application is approved. The clarification adopted by this proposed rule change will apply to all issuers submitting applications after April 4, 2005, the effective date of the rule change.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁹ in general, and with Sections 15A(b)(5) and 15A(b)(6) of the Act,¹⁰ in particular, in that it is designed to provide an equitable allocation of reasonable dues, fees, and 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. The proposed rule change will ensure that issuers moving from one tier of the Nasdaq market to another do not pay disparate entry fees merely because they relinquish a pre-existing exchange listing.

⁹ 15 U.S.C. 78o-3.

¹⁰ 15 U.S.C. 78o-3(b)(5) and (6).

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act¹¹ and Rule 19b-4(f)(1) thereunder,¹² in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization.

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.

¹¹ 15 U.S.C. 78s(b)(3)(A)(i).

¹² 17 CFR 240.19b-4(f)(1).

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. 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-2005-044 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-2005-044. 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 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-2005-044 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.¹³

Margaret H. McFarland
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).