

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52712; File No. SR-NASD-2004-162)

November 1, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto to Establish Fee and Notice Requirements for Substitution Listing Events and Other Corporate Changes

I. Introduction

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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish fee and notice requirements for substitution listing events and to provide additional transparency for corporate changes requiring a record-keeping fee. Nasdaq amended the proposal on May 11, 2005³ and August 18, 2005.⁴ The proposed rule change, as amended, was published for notice and comment in the Federal Register on September 22, 2005.⁵ The Commission did not receive comments on the proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposal

Nasdaq proposes to amend NASD Rules 4200(a), 4310, 4320, 4510, and 4520 to establish fee and notice requirements for each “substitution listing event.” The term “substitution listing event” would include: (1) the implementation of a reverse stock split; (2) an issuer’s re-incorporation or a change in the issuer’s place of organization (including a change in

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³ Amendment No. 1 superseded and replaced the filing in its entirety.

⁴ Amendment No. 2 superseded and replaced the amended filing in its entirety.

⁵ See Securities Exchange Act Release No. 52430 (September 14, 2005), 70 FR 55643.

the issuer's state of incorporation); (3) formation of a holding company that replaces a listed company; (4) the reclassification or exchange of an issuer's listed shares for another security; (5) the listing of a new class of securities in substitution for a previously listed class of securities; and (6) any technical change whereby 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.

Nasdaq-listed securities may be divided into two groups: (1) Nasdaq-listed securities that Nasdaq designates as Nasdaq national market system securities, pursuant to NASD Rule 4400 Series ("Nasdaq designated securities"); and (2) all securities that are listed on a national securities exchange and subsequently listed on Nasdaq but not designated by Nasdaq as Nasdaq national market system securities ("Nasdaq non-designated securities").⁶ For Nasdaq designated securities, the proposed notice requirement and fee would apply. For Nasdaq non-designated securities, only the proposed notice requirement, and not the proposed fee, would apply.

Nasdaq has stated that, when it learns about a substitution listing event for a Nasdaq-listed security, it must implement technical changes to its trading, market data, and internal monitoring systems. In addition, Nasdaq would disseminate certain substitution listing event information about the issuer of a Nasdaq-listed security to other markets and market participants through a subscription service.⁷ For a substitution listing event relating to a Nasdaq designated

⁶ If a security is originally listed on an exchange and designated by the exchange as a national market system security under the exchange's national market system plan, Nasdaq would not exercise its authority to later designate the security as a national market system security under its own national market system plan. This arrangement creates uniformity across all markets with respect to a dually listed security's ticker symbol, trading halt declarations, trade reporting, and status under the trade-through provisions of the Intermarket Trading System Plan. See NASD IM-4400.

⁷ Nasdaq has stated that it 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

security, Nasdaq would directly contact the issuer to verify the details of the event. For a substitution listing event relating to a Nasdaq non-designated security, however, Nasdaq would not contact the issuer directly to verify the details of the event; instead, Nasdaq would receive an electronic consolidated report from the national securities exchange that has designated the security as a national market system security under that market's national market system plan. The exchange would disseminate information on the substitution listing event for that security. Nasdaq would use this electronic consolidated report to make the necessary changes to its systems.⁸

Nasdaq has represented that it has dedicated specific resources to manage the process for collecting and verifying information for substitution listing events and for implementing the related changes for its issuers 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 substitution listing event for issuers of Nasdaq designated securities. Nasdaq has stated that, since the costs associated with managing the information for substitution listing events for issuers of Nasdaq non-designated securities are reduced through Nasdaq's use of electronic consolidated reports from other markets, it would

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.

⁸ For example, Nasdaq stated that it 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.

waive the substitution listing event fee for these issuers.⁹ Waiving these fees also would eliminate the possibility that these issuers would be charged twice for the same substitution listing event, since other markets charge these issuers a fee for substitution listing events. For example, both NYSE and the American Stock Exchange LLC (“Amex”) charge a fee for substitution listing events. NYSE charges a “Reduced Initial Fee” of \$15,000 for a substitution listing event¹⁰ and Amex charges \$5,000 for a substitution listing event.¹¹

Under the amended proposal, issuers of both Nasdaq designated securities 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 substitution listing event so that Nasdaq would have 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 would require an issuer to notify Nasdaq as soon as practicable after the event has been implemented, since such

⁹ Nasdaq has represented 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 listing events process for these issuers, Nasdaq has represented 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. 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.

¹¹ See Amex Company Guide Sections 142 and 305. For Amex issuers, a substitution listing fee applies in cases 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.

an event may be contingent on shareholder approval and would not require immediate changes to Nasdaq's systems.

Finally, the proposal would require an issuer to notify Nasdaq of a corporate action that would require the payment of a record-keeping fee. Specifically, Nasdaq proposes to amend NASD Rules 4310(c)(20), 4320(e)(18), 4510(e), and 4520(d) to clarify that an issuer of a Nasdaq-listed security that is subject to a record-keeping fee must submit the appropriate form to Nasdaq within ten days after a change that requires payment of a record-keeping fee. Nasdaq has represented that this proposed change reflects the current practice of Nasdaq issuers.

III. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations applicable to a national securities association.¹²

The Commission believes that the proposed notice requirement for a substitution listing event is consistent with Section 15A(b)(6) of the Act,¹³ which requires that the rules of a national securities association be designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. Nasdaq is requiring all of its issuers to provide notice of substitution listing events for the purposes of maintaining up-to-date corporate information and disseminating accurate information about its

¹² The Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78o-3(b)(6).

listed securities. This requirement should better enable Nasdaq to perform its essential monitoring functions and enhance the flow of accurate market data.

In addition, the Commission believes that the fee for a substitution listing event is consistent with Section 15A(b)(5) of the Act,¹⁴ which requires that the rules of a national securities association 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 the association operates or controls. The fee is designed to offset the costs associated with collecting and verifying information related to substitution listing events and for implementing requisite systems changes. The Commission believes that it is reasonable for a listing market to assess fees on its issuers that will enable the listing market to make necessary systems changes and to carry out its regulatory responsibilities. With respect to the fee waiver for issuers of Nasdaq non-designated securities, the Commission notes that it has previously approved a waiver of fees based on a security's dually listed status.¹⁵ Nasdaq has represented that its costs for processing substitution listing events of Nasdaq non-designated securities are significantly reduced on account of Nasdaq's reliance on electronic consolidated reports received from the listing market for such securities. On this basis, the Commission believes that the proposed fee for Nasdaq designated securities and the proposed fee waiver for substitution listing event fee for Nasdaq non-designated securities are a reasonable allocation of fees among issuers.

¹⁴ 15 U.S.C. 78o-3(b)(5).

¹⁵ See Securities Exchange Act Release No. 51005 (January 10, 2005), 70 FR 2917 (January 18, 2005) (approving, among other things, the waiver of entry fees, application fees, and additional shares listing fees for securities that are originally listed on a national securities exchange but later dually listed on Nasdaq).

Finally, the Commission believes that codifying a requirement for an issuer to notify Nasdaq of the payment of a corporate record-keeping fee is reasonable and consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NASD-2004-162), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Jonathan G. Katz
Secretary

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).