

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50577; File No. SR-NASD-2004-128)

October 21, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Modify the Annual Fee for Certain Issuers Listed on The Nasdaq Stock Market, Inc.

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 August 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” or “SEC”) 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 amend NASD Rules 4510(c) and 4520(c) to modify the annual fee for domestic and foreign issuers (other than American Depositary Receipts (“ADRs”)) listed on the Nasdaq National Market and for all issuers listed on The Nasdaq SmallCap Market. Nasdaq will implement the proposed rule change on January 1, 2005, for issuers listed on Nasdaq as of the date of approval of this rule filing, and upon approval for all new listings after the date of approval of this rule filing. In addition, Nasdaq proposes to adopt new IM-4520-1 to clarify that no fees are due from issuers described in Rule 4320(c).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.³

* * * * *

4510. The Nasdaq National Market

(a) – (b) No change.

(c) Annual Fee – Domestic and Foreign Issues

(1) The issuer of each class of securities, other than an ADR, that is a domestic or foreign issue listed in The Nasdaq National Market shall pay to The Nasdaq Stock Market, Inc. an annual fee calculated on total shares outstanding according to the following schedule:

Up to 10 million shares	[\$21,225] <u>\$24,500</u>
10+ to 25 million shares	[\$26,500] <u>\$30,500</u>
25+ to 50 million shares	[\$29,820] <u>\$34,500</u>
50+ to 75 million shares	[\$39,150] <u>\$44,500</u>
75+ to 100 million shares	[\$51,750] <u>\$61,750</u>
Over 100 million shares	[\$60,000] <u>\$75,000</u>

(2) – (4) No change.

(d) – (e) No change.

* * * * *

4520. The Nasdaq SmallCap Market

³ Changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasdaq.com, which was current as of the date of this filing. No pending rule filings would affect Rule 4510(c) and 4520(c). Telephone conversation between Arnold Golub, Office of General Counsel, Amex, and Richard Holley, Attorney, Division of Market Regulation, Commission, dated October 14, 2004.

(a) – (b) No change.

(c) Annual Fee

(1) The issuer of [a] each class of securities that is a domestic or foreign issue, including American Depositary Receipts (ADRs), listed in The Nasdaq SmallCap Market shall pay to The Nasdaq Stock Market, Inc. an annual fee [to be computed as follows:] calculated on total shares outstanding according to the following schedule:

Up to 10 million shares \$17,500

Over 10 million shares \$21,000

[(A) 15,000 for the first issue if it has total shares outstanding of up to 10 million shares; or

(B) \$16,000 for the first issue if it has total shares outstanding of 10 million or more shares; plus

(C) \$2,000 for each additional issue.

(D) For companies with more than one issue, the first issue is the company's common stock or common stock equivalent with the highest total shares outstanding. For companies with no common stock or common stock equivalent, the first issue is the issue with the highest total shares outstanding.]

(2) – (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.

(d) No change.

* * * * *

IM - 4520 – 1. Foreign Exempt Securities

Rules 4520(b)(4) and 4520(c)(3) provide Nasdaq with the discretion to waive all or part of the additional share and annual listing fees otherwise due. Pursuant to that authority, Nasdaq has determined to waive any additional share or annual fee that otherwise would be due from any issuer described in Rule 4320(c).

* * * * *

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 modify the annual fees for domestic and foreign issuers (other than ADRs) listed on the Nasdaq National Market and for all issuers listed on The Nasdaq SmallCap Market. Pursuant to the rule change, annual fees on the Nasdaq

National Market would increase from a minimum of \$21,225 and a maximum of \$60,000 to a minimum of \$24,500 and a maximum of \$75,000. Annual fees on The Nasdaq SmallCap Market would increase from a minimum of \$15,000 and a maximum of \$16,000 to a minimum of \$17,500 and a maximum of \$21,000. In addition, Nasdaq is proposing to eliminate the separate \$2,000 charge to SmallCap Market issuers that list additional classes of stock. Instead of this separate charge, Nasdaq will aggregate shares outstanding for all issues of stock in determining the annual fee, as is currently done on the Nasdaq National Market.

These fee increases are necessary to support the ongoing cost of issuer services and to fund future product and service investments. Nasdaq annual fees were last increased in 2001 for National Market issuers and in 2003 for SmallCap Market issuers. The services added since the prior increase include enhancements to the trading systems such as the Closing Cross, a centralized order facility that brings together the buy and sell interest in specific NASDAQ stocks and executes all shares for each stock at a single price, and continued improvements to Nasdaq Online, the Market Intelligence Desk, the Nasdaq Corporate Services Network, and NASDAQ.com. In addition, the cost of monitoring issuers for ongoing compliance with Nasdaq's listing standards has increased, in part as a result of Nasdaq's enhanced corporate governance requirements, which were approved in November 2003.

The new annual fee schedule would be effective January 1, 2005 for all issuers listed on The Nasdaq Stock Market at the time of approval of this rule filing. For newly listing issuers, the new annual fee schedule would be effective once approved.

In addition, Nasdaq is proposing to adopt new Interpretive Material that clarifies that issuers exempt from registration with the Commission pursuant to SEC Rule 12g3-2(b), which are eligible to be quoted on Nasdaq pursuant to Rule 4320(c), are exempt from annual fees and additional share fees. These companies are not listed on Nasdaq at their own initiative, and have not signed an application or listing agreement. As such, Nasdaq believes it would be inequitable to assess fees against this small group of uniquely situated issuers.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁴ in general, and with Section 15A(b)(5) of the Act,⁵ in particular, in that it is designed to provide an equitable allocation of reasonable fees and charges among issuers listed on Nasdaq.

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.

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 by Nasdaq.

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

⁴ 15 U.S.C. 78o-3.

⁵ 15 U.S.C. 78o-3(b)(5).

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 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-2004-128 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-2004-128. 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, 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-2004-128 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.⁶

J. Lynn Taylor
Assistant Secretary

⁶ 17 CFR 200.30-3(a)(12).