

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50741; File No. SR-NASD-2004-142)

November 29, 2004

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Establish Fees for Companies with a Dual Listing on the New York Stock Exchange and 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 September 28, 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 November 12, 2004, Nasdaq amended the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to adopt a fee schedule for issuers that are dually listed on the New York Stock Exchange (the “NYSE”) and Nasdaq. Should the Commission approve the proposed rule change, Nasdaq will implement the proposed rule change immediately.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 replaced and superseded the original filing in its entirety.

The text of the proposed rule change is below. Proposed new language is in italics.⁴

4510. The Nasdaq National Market

(a) Entry Fee

(1) – (5) No change.

(6) Reserved.

(7) The fees described in this Rule 4510(a) shall not be applicable to an 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.

(b) Additional Shares

(1) – (4) No change.

(5) The fees described in this Rule 4510(b) shall not be applicable to an 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

⁴ Changes are marked to the rule text that appears in the electronic NASD Manual found at www.nasd.com. Nasdaq notes, however, that it has recently submitted SR-NASD-2004-140 (September 20, 2004), a proposed rule change that would adopt Rules 4510(a)(6) and 4520(a)(6). Accordingly, those provisions have been marked as “Reserved” in the rule text. See Securities Exchange Act Release No. 50740, November 29, 2004

Nasdaq, and (ii) that maintains such listing and designation after it lists such securities on Nasdaq.

(c) Annual Fee--Domestic and Foreign Issues

(1) – (4) No change.

(5) 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) – (e) No change.

4520. The Nasdaq SmallCap Market

(a) Entry Fee

(1) – (5) No change.

(6) Reserved.

(7) The fees described in this Rule 4520(a) shall not be applicable to an 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.

(b) Additional Shares

(1) – (4) No change.

(5) The fees described in this Rule 4520(b) shall not be applicable to an 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.

(c) Annual Fee

(1) – (4) No change.

(5) 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.

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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

During 2004, following the repeal of the NYSE's Rule 500,⁵ Nasdaq established a dual listing program for securities listed on the NYSE. Nasdaq had long advocated the repeal of NYSE Rule 500, in favor of a competitive environment in which significant barriers to listing transfers do not exist and listed companies can move quickly and easily to the market that best suits their needs. In recognition of the fact that a change in listing venue is a major step for any issuer, however, Nasdaq's dual listing program is designed to allow issuers to undertake a focused comparison of the services and market quality offered by Nasdaq and the NYSE. The explicit goal of the program, however, is to encourage the eventual switch of companies that dual list.

To facilitate the program, Nasdaq filed with the Commission on January 12, 2004 an interpretation of its rules (NASD IM-4500-3) that waived, for a one-year period, the entry fees, annual fees, and listing of additional shares fees due under Nasdaq rules for any NYSE issuer that dually listed on Nasdaq, or switched to Nasdaq, between January

⁵ See Securities Exchange Act Release No. 48720 (October 30, 2003), 68 FR 62645 (November 5, 2003) (SR-NYSE-2003-23).

12, 2004 and December 31, 2004.⁶ With the instant proposed rule change, Nasdaq now proposes to establish a fee schedule for those NYSE issuers that remain dually listed after that one-year period, and for NYSE issuers that dually list after December 31, 2004.

Nasdaq proposes to apply this schedule to any issuer that adds a dual listing on Nasdaq while remaining listed on the NYSE.

Under the proposed fee schedule, the issuer of a dually listed security would not be subject to entry and application fees, which otherwise would range from \$25,000 to \$50,000 on The Nasdaq SmallCap Market and from \$100,000 to \$150,000 on the Nasdaq National Market. These issuers also would not be subject to the fee for listing additional shares, which is otherwise \$2,500 or \$0.01 per additional share, whichever is higher, up to an annual maximum of \$45,000 per issuer.⁷ Finally, a dually listed issuer would not pay an annual fee until the end of its first year on Nasdaq, at which time the annual fee would be \$15,000.⁸ Nasdaq believes that without a remission of these fees, companies that may be interested in comparing Nasdaq and the NYSE through a dual listing would nevertheless be forced to weigh the potential benefits against a requirement to duplicate the fees that they have paid and continue to pay to the NYSE. Nasdaq believes that in

⁶ Securities Exchange Act Release No. 49286 (February 19, 2004), 69 FR 8999 (February 26, 2004) (SR-NASD-2004-04).

⁷ Issuances of up to 49,999 additional shares per quarter are not subject to the Additional Shares fee.

⁸ On August 25, 2004, Nasdaq proposed to modify the annual fee for issuers listed on the Nasdaq Stock Market. See Securities Exchange Act Release No. 50577 (October 21, 2004), 69 FR 62926 (October 28, 2004) (SR-NASD-2004-128). Under this proposal, annual fees for SmallCap Market issuers would range from \$17,500 to \$21,000 and annual fees for National Market issuers would range from \$24,500 to \$75,000. Nasdaq has proposed that these revised fees be effective January 1, 2005 for issuers currently listed on The Nasdaq Stock Market.

effect, NYSE Rule 500 would have been replaced with a burden on a Nasdaq listing imposed by Nasdaq itself. Nasdaq believes that by promoting a comparison of markets through dual listing, a waiver of these fees will enhance fair competition between exchange markets and markets other than exchange markets, consistent with Section 11A(a)(1)(C)(ii) of the Act,⁹ to the benefit of the investing public.

Nasdaq also believes that the proposed remission of the entry fee is justified from the standpoint of Nasdaq's experience with regard to the time and effort required to review applications of issuers that are already listed on an exchange. Although companies that dually list are reviewed for compliance with Nasdaq listing standards in the same manner as any other company applying for listing on Nasdaq, Nasdaq believes that the average application of a dually listing issuer is less likely to involve time-consuming regulatory issues than the average application from a company conducting an initial public offering or transferring from the over-the-counter market. This is, in part, due to the ongoing scheme of regulation to which such issuers have been subject. Moreover, because such companies are already familiar with the standards of conduct imposed upon public companies by listing markets, their applications are generally presented with a high degree of completeness and accuracy. Finally, and most significant, because such companies already satisfy the listing standards of the NYSE, there is a very high likelihood that they also comply with Nasdaq's listing standards. Thus, although Nasdaq always conducts a full and independent review of each issuer's compliance, and will continue to do so with respect to issuers that dually list, the probability that an issuer seeking to dually list will be found not in compliance and

⁹ 15 U.S.C. 78k-1(a)(1)(C)(ii).

therefore denied access to a Nasdaq listing is low. As a result, the probability that Nasdaq staff will be required to devote time and effort to establish a sufficient record to support a decision to deny listing and to defend such a denial against appeal under the Rule 4800 Series is also low. By contrast, when an applicant is denied a listing, Nasdaq receives only a \$5,000 application fee, but must frequently devote significant resources to defending its decision.

The proposed fee schedule would require an issuer of dually listed securities to pay an annual listing fee of \$15,000, instead of the annual fee otherwise due. In the case of an issuer that was eligible for a waiver under NASD IM-4500-3, this annual fee will be assessed on the anniversary of the issuer's Nasdaq listing. In the case of subsequent issuers that add a dual listing, the fee will be assessed on the anniversary of the issuer's listing on Nasdaq. Accordingly, issuers that opt to dual list will have a one-year period to assess the benefits of the dual listing before the fee is assessed.

Although, as noted above, the goal of the dual-listing program is to encourage switches to Nasdaq after one year, some issuers may feel that they need more than one year to evaluate the two markets, or that they benefit from maintaining a dual listing that encourages ongoing competition between Nasdaq and the NYSE. In that case, Nasdaq believes it would be inequitable to charge dually listed issuers the full annual fee or the fee for listing additional shares, as they are also paying these fees to the NYSE. Nevertheless, Nasdaq believes that in such circumstances, the collection of a reduced annual fee is warranted to support the ongoing cost of issuer services, including regulatory oversight, and to fund future product and service investments.

Nasdaq believes that imposing lower fees on dually listed issuers is equitable in light of the issuers' ongoing payment of fees to the NYSE and the ongoing role of the NYSE as the primary market for such issuers. Nasdaq's fee schedule and the fee schedules of other self-regulatory organizations assess varying levels of fees on issuers based on reasoned assessments of the issuers' varying circumstances.¹⁰ For example, both entry fees and annual fees are assessed on a sliding scale that uses total shares outstanding and the issuer's market tier (*i.e.*, Nasdaq National Market or SmallCap Market) as a corollary to the complexity of reviewing each issuer's compliance with listing standards and each issuer's ability to pay. Inevitably, the use of such a scale means that different issuers pay different amounts for their listing on Nasdaq. Similarly, non-U.S. issuers listing American Depositary Receipts ("ADRs") on Nasdaq are subject to a lower annual fee than domestic issuers due, in part, to the fact that Nasdaq is typically a secondary market for these issuers' securities. Nasdaq believes that the lower fees for ADRs are directly analogous to the proposed lower fees for dually listed companies. Moreover, Nasdaq notes that certain functions required to oversee companies that are solely listed on Nasdaq are not necessary with respect to dually listed issuers. Specifically, Nasdaq's Market Watch group, which ordinarily reviews news releases for material news and makes determinations as to whether to halt trading pending news dissemination, defers to the NYSE on those matters regarding dually listed issuers. In addition, notifications for dividends and stock splits, or changes to the underlying

¹⁰ Nasdaq notes that the Commission has previously approved reduced fees for securities that are dually listed on the Pacific Exchange, finding that "reduced fees are appropriate and reasonable because the costs incident to maintaining exclusive issues are greater than costs incident to maintaining dually listed issues." See Securities Exchange Act Release No. 40395 (September 3, 1998), 63 FR 48774 (September 11, 1998) (SR-PCX-98-32).

security or symbol, are not required to be provided to Nasdaq as they would be in the case of issuers that are not dually listed. Finally, Nasdaq believes issuers that become dually listed voluntarily undertake a second set of regulations and therefore demonstrate their commitment to regulatory excellence. Although Nasdaq subjects dually listed companies to the same degree of regulatory scrutiny applicable to solely listed issuers, Nasdaq expects that companies of this type will raise fewer regulatory issues and therefore will require less staff time on an ongoing basis.

It should also be noted that the trading of dually listed stocks remains subject to the restrictions of the Intermarket Trading System plan. Moreover, dually listed issuers are not eligible for inclusion in indices maintained by Nasdaq, and their stock is therefore not held by index products and funds based upon such indices.

Nasdaq does not expect the financial impact of this proposed rule change to be material, either in terms of increased levels of annual fees from dually listed companies that eventually switch to Nasdaq or in terms of diminished entry or annual fees of companies that maintain a dual listing. Quite simply, even with the proposed rule change in place, Nasdaq understands that a change in listing venue, either through a switch or a dual listing, is a major step for an issuer, and therefore Nasdaq does not expect that the number of dually listed issuers in a given time frame will be sufficient to have a material effect on financial resources. Accordingly, the proposed rule change will not impact Nasdaq's resource commitment to its regulatory oversight of the listing process or its regulatory programs.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹¹ in general, and with Sections 15A(b)(5) and 15A(b)(6) of the Act,¹² in particular, in that it is designed to provide an 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. As discussed above, Nasdaq believes that this proposal is an equitable allocation of reasonable fees because dually listed companies would pay annual fees, but such fees would be reduced in recognition of the fact that the issuer is also paying listing fees to another market and that certain services offered by Nasdaq would be duplicative of services already received from the other market. In addition, as noted above, Nasdaq believes that the proposed rule change is consistent with the provisions of Section 11A(a)(1)(C)(ii) of the Act¹³ in that it is designed to promote fair competition between exchange markets and markets other than exchange markets.

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 the NYSE to add a listing on

¹¹ 15 U.S.C. 78o-3.

¹² 15 U.S.C. 78o-3(b)(5) and (6).

¹³ 15 U.S.C. 78k-1(a)(1)(C)(ii).

Nasdaq without being required to pay fees that are duplicative of fees already paid to the NYSE.

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 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, 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-2004-142 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-2004-142. 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 Section, 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-2004-142 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.¹⁴

Margaret H. McFarland
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).