

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50838; File No. SR-NASD-2004-128)

December 10, 2004

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

I. Introduction

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”), 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 modify the annual fee for domestic and foreign issuers (other than American Depositary Receipts) listed on the Nasdaq National Market and for all issuers listed on The Nasdaq SmallCap Market. The proposed rule change was published for notice and comment in the Federal Register on October 28, 2004.³ The Commission received no comments in response to the proposal as published in the Federal Register. The Nasdaq Office of General Counsel, however, received one comment letter before the proposal was published for comment.⁴ This order approves the proposed rule change as filed.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 50577 (Oct. 21, 2004), 69 FR 62926 (Oct. 28, 2004). Footnote number 3 of the release incorrectly identified Mr. Golub; his correct information is: Arnold Golub, Office of General Counsel, Nasdaq.

⁴ See letter from Dorrance W. Lamb, Chief Financial Officer, Performance Technologies, Inc., to Nasdaq Office of General Counsel, dated October 20, 2004.

II. Summary of Comments

The Nasdaq's Office of General Counsel received one letter in response to an email it sent to listed issuers, before the proposal was published in the Federal Register, notifying listed issuers of the planned rule filing and the potential fee increase.⁵ The commenter did not file a comment on the proposal with the Commission; however, the Nasdaq forwarded the letter to the Commission and the Commission placed the letter in the public file. The commenter opposed the proposed increase in the annual fee and expressed concern over the fee for the listing of additional shares. In particular, the commenter opined that the fee charged for listing additional shares unfairly burdens listed issuers who reissue treasury shares as a result of stock option exercises and, accordingly, can result in total fees consistent with, or more than, the fees charged to listed issuers with a higher range of total shares outstanding.

III. The Nasdaq's Response to the Comment

The Nasdaq acknowledged the commenter's concerns, but explained that the Nasdaq does not charge the fee for listing additional shares in connection with the reissuance of treasury shares.⁶ Further, the Nasdaq affirmed that the proposed fee schedule does not, by its terms, preference any class of listed issuers, but rather applies equally to all similarly situated listed issuers.⁷ The Nasdaq also noted that issuers falling into a higher total shares outstanding category similarly would be subject to the fee for listing additional shares, which fee would be

⁵ See id. The proposal was published in the Federal Register on October 28, 2004, eight days after the date of Performance Technologies, Inc.'s letter to Nasdaq.

⁶ Telephone conference between Arnold Golub, Office of General Counsel, Nasdaq, and Richard Holley, Attorney, Division of Market Regulation, Commission, on December 3, 2004.

⁷ See id.

proportionate to their total shares outstanding.⁸ The Commission believes that the Nasdaq's response to the commenter's concerns is reasonable.

IV. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,⁹ and, in particular, the requirements of Section 15A(b)(5) of the Act.¹⁰ The Commission believes that the proposed rule change will result in the equitable allocation of annual fees among listed issuers. The Commission notes that the Nasdaq plans to use the proposed fee increase to support its ongoing costs of issuer services and to fund future product and service investments.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-NASD-2004-128) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland
Deputy Secretary

⁸ See id.

⁹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o-3(b)(5).

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).