

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52515; File No. SR-NASD-2005-106)

September 27, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Regarding Fees for Closed-End Funds Listing on The Nasdaq SmallCap Market

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 31, 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 the 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 Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rules 4510 and 4520. The text of the proposed rule change is below. Proposed new language is *italicized*; proposed deletions are in [brackets].

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4510. The Nasdaq National Market

(a) - (c) No change

(d) Annual Fee – American Depositary Receipts (ADRs) and Closed-End Funds

(1) – (3) No change

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

(4) For the purpose of determining the total shares outstanding, fund sponsors may aggregate shares outstanding of all Closed-End Funds in the same fund family listed in The Nasdaq National Market or The Nasdaq SmallCap Market, as shown in the issuer's most recent periodic reports required to be filed with the appropriate regulatory authority or in more recent information held by Nasdaq. The maximum annual fee applicable to a fund family shall not exceed \$75,000. For purposes of this rule, a "fund family" is defined as two or more Closed-End Funds that have a common investment adviser or have investment advisers who are "affiliated persons" as defined in Section 2(a)(3) of the Investment Company Act of 1940, as amended.

(5) – (6) No change

(e) No change

#### 4520. The Nasdaq SmallCap Market

(a) Entry Fee

(1) – (2) No change.

(3) A closed-end management investment company registered under the Investment Company Act of 1940, as amended (a "Closed-End Fund"), that submits an application for inclusion of securities in The Nasdaq SmallCap Market shall pay to the Nasdaq Stock Market, Inc. an entry fee of \$5,000 (of which \$1,000 represents a non-refundable, application fee).

[(3)4] The Board of Directors of The Nasdaq Stock Market, Inc. or its designee may, in its discretion, defer or waive all or any part of the entry fee prescribed herein.

[(4)5] Total shares outstanding means the aggregate of all classes of equity securities to be included in The Nasdaq SmallCap Market as shown in the issuer's most recent periodic report or in more recent information held by Nasdaq or, in the case of new issues, as shown in the offering circular, required to be filed with the issuer's appropriate regulatory authority.

([5]6) An issuer that submits an application for inclusion of any class of rights in The Nasdaq SmallCap Market, shall pay, at the time of its application, a non-refundable application fee to The Nasdaq Stock Market of \$1,000.

([6]7) The fees described in this Rule 4520(a) shall not be applicable 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 transfers their listing exclusively to the Nasdaq SmallCap Market.

([7]8) 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) No change.

(c) Annual Fee

(1) - (2) No change.

(3) Notwithstanding paragraph (1), a Closed-End Fund listed on The Nasdaq SmallCap Market shall pay to The Nasdaq Stock Market, Inc. an annual fee calculated based on total shares outstanding according to the following schedule:

<u>Up to 5 million shares</u>	<u>\$15,000</u>
<u>5+ to 10 million shares</u>	<u>\$17,500</u>
<u>10+ to 25 million shares</u>	<u>\$20,000</u>
<u>25+ to 50 million shares</u>	<u>\$22,500</u>
<u>50+ to 100 million shares</u>	<u>\$30,000</u>

<u>100+ to 250 million shares</u>	<u>\$50,000</u>
<u>Over 250 million shares</u>	<u>\$75,000</u>

([3]4) The Board of Directors of The Nasdaq Stock Market, Inc. or its designee may, in its discretion, defer or waive all or any part of the annual fee prescribed herein.

([4]5) If a class of securities is removed from The Nasdaq SmallCap Market, that portion of the annual fees for such class of securities attributable to the months following the date of removal shall not be refunded, except such portion shall be applied to Nasdaq National Market fees for that calendar year.

([5]6) 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.

(7) Notwithstanding paragraph (6), for the purpose of determining the total shares outstanding, fund sponsors may aggregate shares outstanding of all Closed-End Funds in the same fund family listed in The Nasdaq National Market and The Nasdaq SmallCap Market, as shown in the issuer's most recent periodic reports required to be filed with the appropriate regulatory authority or in more recent information held by Nasdaq. The maximum annual fee applicable to a fund family shall not exceed \$75,000. For purposes of this rule, a "fund family" is defined as two or more Closed-End Funds that have a common investment adviser or have investment advisers who are "affiliated persons" as defined in Section 2(a)(3) of the Investment Company Act of 1940, as amended.

[(6)8] 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

Currently, Closed-End Funds listing on The Nasdaq SmallCap Market (“SmallCap Market”) are required to pay entry and annual fees according to the applicable fee schedules set forth in NASD Rule 4520.<sup>3</sup> These entry fees range from \$25,000 to \$50,000 and the annual fees from \$17,500 to \$21,000.

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<sup>3</sup> Closed-End Funds are evaluated for listing on the SmallCap Market under the general initial listing criteria contained in NASD Rules 4310 and 4320.

Pursuant to the rule change, the entry fee for listing a Closed-End Fund on the SmallCap Market will decrease to \$5,000 (of which \$1,000 is a non-refundable application fee) per fund. Annual fees will be based on the total number of shares outstanding, with a minimum fee of \$15,000 and a maximum fee of \$75,000. For the purposes of determining the annual fee, fund sponsors will be permitted to aggregate the shares outstanding of all Closed-End Funds listed on either The Nasdaq National Market (“National Market”) or the SmallCap Market that are part of the same fund family. As a result, the annual fee may not exceed \$75,000 per fund family. For the purposes of this rule, a “fund family” is defined as two or more Closed-End Funds that share a common investment adviser or investment advisers who are “affiliated persons” as defined in Section 2(a)(3) of the Investment Company Act of 1940, as amended.

Nasdaq believes there are several reasons to adopt new fees applicable to Closed-End Funds listing on the SmallCap Market. First, the new annual fee schedule would accommodate the needs of fund sponsors more effectively than the current fee schedule because sponsors often choose to issue and list multiple funds in the same family. Currently, each fund that is listed on The SmallCap Market is assessed a separate annual fee. Under the proposed rules, fund families would be permitted to aggregate shares outstanding of listed funds to determine the annual fee, subject to an annual cap of \$75,000 per fund family.

Second, under the proposed rule change, funds listed on the SmallCap Market would be subject to a schedule of annual fees identical to that of funds listed on the National Market.<sup>4</sup> Because fund families would be permitted to aggregate shares outstanding across markets for the

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<sup>4</sup> Nasdaq recently adopted new listing fees for Closed-End Funds listing on the National Market. See Securities Exchange Act Release No. 52277 (August 17, 2005), 70 FR 49347 (August 23, 2005) (SR-NASD-2005-096).

purposes of calculating the annual fee, Nasdaq believes that matching fee schedules would minimize problems that could arise if fund families listing funds on both the National Market and SmallCap Market were subject to conflicting fee schedules. Although an individual fund listing on the SmallCap Market with over 25 million total shares outstanding would be subject to an increase in annual fees under the proposed rules, Nasdaq believes the benefits of substantially lower entry fees and the ability of fund families to aggregate shares across markets outweigh the burden to funds of the limited fee increase.

Finally, in many cases where multiple funds are listed, the new fee schedule would lower fees payable by Closed-End Funds, thereby benefiting the fund investors that ultimately pay those expenses by reducing the costs associated with listing fund shares. In addition, Nasdaq believes that establishing lower fees for fund families would permit Nasdaq to compete more effectively for listings with other markets.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>5</sup> in general, and with Section 15A(b)(5) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable fees, dues, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The proposed change to the entry and annual fees will apply equally to all Closed-End Funds listing on The Nasdaq SmallCap Market. Furthermore, Nasdaq believes that the proposed fees are reasonable and fall within the range of fees charged by other markets.

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<sup>5</sup> 15 U.S.C. 78q-3.

<sup>6</sup> 15 U.S.C. 78q-3(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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 NYSE 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-106 on the subject line.



Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-106. 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 Nasdaq.

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 publicly available. All submissions should refer to File Number SR-NASD-2005-106 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.<sup>7</sup>

Jonathan G. Katz  
Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).