

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52997; File No. SR-NASD-2005-143)

December 22, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Allow Nasdaq Capital Market Issuers That Transfer Their Listing to the Nasdaq National Market to Apply the Amount of the Capital Market Entry Fee Toward the Entry Fee Payable for Listing on the National Market, and to Make Other Clarifying Changes

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 December 1, 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 Nasdaq. Nasdaq filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ As required by Rule 19b-4(f)(6)(iii), 17 CFR 240.19b-4(f)(6)(iii), the Nasdaq submitted written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing.

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

Nasdaq proposes to add new language to NASD Rules 4510(a) and 4520(a) to allow Nasdaq Capital Market issuers that transfer their listing to the Nasdaq National Market to apply the amount of the Capital Market entry fee previously paid to the entry fee payable for listing on the National Market, and to make other clarifying changes. The text of the proposed rule change is below. Proposed additions are in *italics*.

4510. The Nasdaq National Market

(a) Entry Fee

(1) – (8) No change.

(9) An issuer that transfers its listing from The Nasdaq Capital Market to The Nasdaq National Market shall pay the entry fee described in this Rule 4510(a) less the entry fee that was previously paid by the issuer to Nasdaq in connection with listing on The Nasdaq Capital Market. Such issuer is not required to pay the application fee described in Rule 4510(a) in connection with the application to transfer listing.

(10) An issuer that submits an application for listing on The Nasdaq Capital Market, but prior to listing revises its application to seek listing on The Nasdaq National Market, is not required to pay the application fee described in Rule 4510(a) in connection with the revised application.

(b) – (e) No change.

4520. The Nasdaq Capital Market

(a) Entry Fee

(1) – (7) No change.

(8) An issuer that submits an application for listing on The Nasdaq National Market, but prior to listing revises its application to seek listing on The Nasdaq Capital Market, is not required to pay the application fee described in Rule 4520(a) in connection with the revised application.

(b) – (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 proposal. 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

The purpose of the proposed rule change is to permit existing Nasdaq issuers that seek to transfer their listing from the Nasdaq Capital Market to the Nasdaq National Market to apply the amount of the Capital Market entry fee previously paid to the entry fee payable for listing on the National Market. Currently, issuers listing a class of securities on the Nasdaq Capital Market pay an entry fee based on total shares outstanding that ranges from \$25,000 to \$50,000.⁶ Under

⁶ NASD Rule 4520(a)(1). This fee includes a \$5,000 non-refundable application fee that is submitted with the issuer’s initial listing application. The remainder of the entry fee is assessed on the date of entry on the Capital Market.

the existing rules, an issuer that later applies to “phase up” its listing from the Capital Market to the National Market is required to pay the applicable entry fee for new issuers listing on the National Market, which currently ranges from \$100,000 to \$150,000.⁷

Under the proposed rule change, a Capital Market issuer that applies to “phase up” its listing would pay the applicable National Market entry fee less the amount of the entry fee that it paid to list on the Capital Market. Because the issuer previously paid a non-refundable application fee when applying to list on the Capital Market, the issuer would not be required to pay an additional application fee in connection with the transfer to the National Market. For example, an issuer that paid an entry fee of \$50,000 (of which \$5,000 was a non-refundable application fee) upon inclusion of a class of securities in the Capital Market would receive a \$45,000 credit toward the applicable National Market entry fee upon phase up and the application fee would be waived.

Nasdaq believes that the reduction in fees resulting from the entry fee credit is justified by the corresponding reduction in time and effort needed to review a phase up application. Nasdaq’s experience has shown that the review process for phase up applications generally is less time-consuming for the staff than the review required for issuers that list on the National Market after an initial public offering or through other means. Furthermore, the proposed rule change creates an incentive for issuers that list on the Capital Market to transfer to the National Market rather than seek a listing elsewhere, thereby promoting competition between Nasdaq and exchange markets.

⁷ NASD Rule 4510(a)(1). This fee includes a \$5,000 non-refundable application fee that is submitted with the issuer’s initial listing application. The remainder of the entry fee is assessed on the date of entry on the National Market. Under Rule 4510(a)(3), Closed-End Funds pay an entry fee of \$5,000 per class of securities (of which \$1,000 is a non-refundable application fee).

Nasdaq also proposes to clarify that an issuer that applies for listing on one tier of Nasdaq, but prior to listing decides to apply to list instead on the other tier, is not required to pay an additional application fee in connection with its revised application. For example, an issuer that submits an application for inclusion of a class of securities in the Nasdaq National Market is required to pay a \$5,000 nonrefundable application fee that is submitted with the issuer's application. If prior to listing the issuer decides to apply to list on the Nasdaq Capital Market instead, the issuer would not be required to pay an additional \$5,000 application fee in connection with its revised application.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁸ in general, and with Sections 15A(b)(5)⁹ and 15A(b)(6)¹⁰ of the Act, 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 Nasdaq operates or controls, and is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system. Nasdaq believes the proposed rule change provides for an equitable allocation of reasonable fees because, although Capital Market issuers that transfer their listing to the National Market would continue to pay an entry fee for each class of securities listed, such fee would be reduced in recognition that these issuers already paid an entry fee upon listing on the Capital Market, and that there is a corresponding reduction in the time and effort necessary to process listing applications of such

⁸ 15 U.S.C. 78q-3.

⁹ 15 U.S.C. 78q-3(b)(5).

¹⁰ 15 U.S.C. 78q-3(b)(6).

companies. In addition, the proposed rule change should enhance competition among markets by allowing issuers to better evaluate the benefits of maintaining a listing 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

Nasdaq has neither solicited nor received comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and Nasdaq provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five days prior to the filing date,¹¹ the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

¹¹ See footnote 5, *supra*.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

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-2005-143 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2005-143. 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 the 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-2005-143 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

Jonathan G. Katz
Secretary

¹⁴ 17 CFR 200.30-3(a)(12).