

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78175; File No. SR-NASDAQ-2016-088)

June 28, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Reduce the Fees for Certain Real Estate Investment Trusts Listed on 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 June 14, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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

The Exchange proposes to reduce the fees for certain Real Estate Investment Trusts (“REITs”) listed on Nasdaq.

The text of the proposed rule change is set forth below. Proposed new language is underlined; deleted text is in brackets.

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IM-5910-1. All-Inclusive Annual Listing Fee

(a) - (c) No change.

(d) The All-Inclusive Annual Listing Fee will be calculated on total shares outstanding according to the following schedules:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(1) All domestic and foreign Companies listing equity securities, except as described below:

Up to 10 million shares \$45,000

10+ to 50 million shares \$55,000

50+ to 75 million shares \$75,000

75+ to 100 million shares \$100,000

100+ to 125 million shares \$125,000

125+ to 150 million shares \$135,000

Over 150 million shares \$155,000

Real Estate Investment Trusts (REITs) are subject to the same fee schedule as other equity securities. For the purpose of determining the total shares outstanding, shares outstanding of all members in a REIT Family listed on the Nasdaq Global Market may be aggregated. The maximum annual fee applicable to such a REIT Family shall not exceed \$155,000. For purposes of this rule, a "REIT Family" means three or more REITs that are provided management services by the same entity or by entities under common control.

(2) – (3) No change.

(e) No change.

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IM-5920-1. All-Inclusive Annual Listing Fee

(a) - (c) No change.

(d) The All-Inclusive Annual Listing Fee will be calculated on total shares outstanding according to the following schedules:

(1) All domestic and foreign Companies listing equity securities, except as described below:

Up to 10 million shares \$42,000

10+ to 50 million shares \$55,000

Over 50 million shares \$75,000

Real Estate Investment Trusts (REITs) are subject to the same fee schedule as other equity securities. For the purpose of determining the total shares outstanding, shares outstanding of all members in a REIT Family listed on the Nasdaq Capital Market may be aggregated. The maximum annual fee applicable to such a REIT Family shall not exceed \$75,000. For purposes of this rule, a "REIT Family" means three or more REITs that are provided management services by the same entity or by entities under common control.

(2) - (3) No change.

(e) 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, the Exchange 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. The Exchange 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 proposes to allow three or more REITs that are provided management services by the same entity or by entities under common control (a “REIT Family”) to aggregate the shares outstanding of such REITs for the purpose of determining the annual fee payable to Nasdaq, thus lowering the fees paid by the REIT Family.³

Some publicly traded REITs have their operations externally managed by another entity pursuant to a management agreement. In such cases, the REIT itself does not have any employees. Rather, the external manager is entirely responsible for managing and staffing the operations of the company, in return for management fees. In a limited number of cases, a single entity or affiliated entities externally manage three or more REITs, thus forming a REIT Family.

As an incentive for all of the REITs in such a group to list on Nasdaq, Nasdaq proposes to allow three or more REITs under common management to aggregate the shares outstanding of such REITs for the purpose of determining the annual fee payable to Nasdaq.⁴ Nasdaq believes

³ REITs currently pay the same annual fees that apply to other equity securities.

⁴ For example, three REITs in a REIT Family, each having 55 million total shares outstanding, listed on the Nasdaq Global Market, would be charged \$75,000 each under

that this will be attractive to management companies that externally manage multiple REITs as it will reduce the REITs' expenses and, therefore, increase the REITs' earnings available to shareholders.

Nasdaq already allows the sponsor of a family of closed-end funds to aggregate the funds' shares outstanding in a similar manner.⁵ REITs are similar to closed-end funds in that they receive special tax treatment if they distribute most of their income each year. As a result, like closed-end funds, REITs are judged by investors, in large part, based upon the yield that they provide and REITs are therefore extremely fee sensitive.

The Exchange expects that the proposed fee change will incentivize external managers to encourage the boards of their managed REITs to avail themselves of the potential reduction in the annual fee and that it will therefore motivate eligible REITs to remain listed on Nasdaq or to transfer their listing to the Nasdaq.

The proposed REIT fee structure would apply to both the Nasdaq Global Market and the Nasdaq Capital Market.⁶ REITs listed on the Nasdaq Global Market that are part of a REIT Family will be permitted to aggregate the shares outstanding of such REITs for the purpose of determining the annual fee, and such aggregated shares outstanding will be subject to the same fee schedule as a single REIT listed on the Nasdaq Global Market.

Similarly, REITs listed on the Nasdaq Capital Market that are part of a REIT Family will be permitted to aggregate the shares outstanding of such REITs for the purpose of determining

the current All-Inclusive Annual Listing Fee schedule for a total of \$225,000. Under the proposed rule such REITs would be charged \$155,000 in total, as one entity with 165 million total shares outstanding.

⁵ See Securities Exchange Act Release No. 52277 (August 17, 2005), 70 FR 49347 (August 23, 2005) (SR-NASD-2005-96).

⁶ Listing Rule 5910 provides that fee schedules for the Nasdaq Global Select Market are the same as fee schedules for the Nasdaq Global Market.

the annual fee, and such aggregated shares outstanding will be subject to the same fee schedule as a single REIT listed on the Nasdaq Capital Market.

The proposed amendment will affect only the All-Inclusive Annual Listing Fee schedule. In 2014, Nasdaq adopted a new All-Inclusive Annual Listing Fee schedule and this new fee structure currently applies to all newly listing companies and will become operative for all listed companies in 2018.⁷ On June 10, 2016, Nasdaq filed a proposed rule change with the Commission to allow currently listed companies that are not on the All-Inclusive Annual Listing Fee schedule to opt-in for 2017.⁸ This will allow any currently listed REIT Family that would like to take advantage of this fee change to do so for their next annual fee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a preliminary matter, Nasdaq competes for listings with other national securities exchanges and companies can easily choose to list on, or transfer to, those alternative venues. As a result, the fees Nasdaq can charge listed companies are constrained by the fees charged by

⁷ Securities Exchange Act Release No. 73647 (November 19, 2014), 79 FR 70232 (November 25, 2014) (SR-NASDAQ-2014-87).

⁸ SR-NASDAQ-2016-085.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

its competitors and Nasdaq cannot charge prices in a manner that would be unreasonable, inequitable, or unfairly discriminatory.

Nasdaq believes that the proposed fee change allowing a REIT Family to aggregate shares, and pay a lower fee, is reasonable and not unfairly discriminatory because there is a reasonable justification for charging a REIT Family different fees from those charged to other issuers of equity securities.

In particular, REITs are similar to closed-end funds in that they receive special tax treatment if they distribute most of their income each year. As a result, like closed-end funds, REITs are judged by investors, in large part, based upon the yield that they provide and are therefore extremely fee sensitive. For these reasons, it is not unfairly discriminatory to afford a REIT Family a similar fee benefit as afforded to a family of closed-end funds, even if such treatment differs from the treatment of operating companies.

In addition, Nasdaq notes that a substantial portion of the regulatory cost it incurs in connection with the continued listing of an issuer relates to the review by Nasdaq staff of the issuer's compliance with Nasdaq's corporate governance requirements. Because the REITs in a REIT Family are provided management services by the same entity or by entities under common control, established rapport between REIT managers and Nasdaq staff allows Nasdaq to more efficiently monitor all members of a REIT Family.

Nasdaq believes that allowing aggregation of shares outstanding for three or more REITs, rather than two or more REITs, managed by the same entity or entities under common control is not unfairly discriminatory. First, the benefits to Nasdaq described above are more pronounced when there are three or more REITs in the family. In addition, if aggregation is allowed for two REITs, it would lead to additional loss of revenue to Nasdaq. Finally, the proposed fee change is

a competitive response to the discount allowed by NYSE, which is also available only to families of three or more REITs.¹¹

Nasdaq also notes that no other company will be required to pay higher fees as a result of the proposed amendments. Therefore, Nasdaq believes that allowing a REIT Family to aggregate the shares outstanding of all REITs that are part of the REIT Family is reasonable and not inequitable or unfairly discriminatory.

Finally, Nasdaq believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act¹² in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market system, and in general to protect investors and the public interest.

Specifically, the amount of revenue forgone by allowing REIT Families to aggregate shares outstanding when calculating fees is not substantial, and the reduced fees may result in more REITs listing on Nasdaq, thereby increasing the resources available for Nasdaq's listing compliance program, which helps to assure that listing standards are properly enforced and investors are protected.

¹¹ In 2007, the New York Stock Exchange ("NYSE") adopted a rule that provides for a discount in annual fees for three or more REITs sharing a common external manager. Securities Exchange Act Release No. 57061 (December 28, 2007), 73 FR 0902 (January 4, 2008) (SR-NYSE-2007-113). In an order approving the NYSE's discount the Commission found that "it is reasonable for the Exchange to balance its need to remain competitive, while at the same time ensuring adequate revenue to meet its regulatory responsibilities." The Commission further found that the NYSE's proposed discount "does not constitute an inequitable allocation of reasonable dues, fees, and other charges, does not permit unfair discrimination between issuers, and is generally consistent with the Act." See Securities Exchange Act Release No. 57291 (February 7, 2008), 73 FR 8387 (February 13, 2008) (approving SR-NYSE-2007-113).

¹² 15 U.S.C. 78f(b)(5).

Consequently, Nasdaq believes that the potential loss of revenue from the aggregation of shares outstanding in a REIT Family, as proposed, will not hinder its ability to fulfill its regulatory responsibilities.

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. The market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to set their fees.¹³ For these reasons, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵

¹³ See footnote 11 above.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intention to file the proposed rule change at least five business days prior to the date of filing of the proposed rule

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days from the date of filing. However, Rule 19b-4(f)(6)(iii)¹⁶ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that REITs have an incentive to list on the Exchange sooner, which additional time the Exchange states will help to prevent potential disruptions to listing REITs that are part of a REIT Family and thereby enhance competition. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest for the same reasons stated by the Exchange.¹⁷ The Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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:

change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁶ 17 CFR 240.19b-4(f)(6)(iii).

¹⁷ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-NASDAQ-2016-088 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2016-088. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. 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-NASDAQ-2016-088 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Robert W. Errett
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).