

## V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-NASD-2002-99), as amended by Amendment No. 1, be, and it hereby is, approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>24</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47111; File No. SR-NASD-2002-183]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Amending Nasdaq's Rules Pertaining to Certain Issuer Entry Fees

December 31, 2002.

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 December 26, 2002, 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 December 30, 2002, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On December 31, 2002 Nasdaq filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is

publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change, as amended, on an accelerated basis.

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

Nasdaq is proposing to amend its rules regarding non-refundable application fees, listing fees for rights, and SmallCap entry and annual listing fees. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

\* \* \* \* \*

4510. The Nasdaq National Market

(a) Entry Fee

(1) [When a] A domestic issuer, or foreign issuer raising capital in conjunction with its Nasdaq listing, *that* submits an application for inclusion of any class of its securities (*not otherwise identified in this Rule 4500 series*) in The Nasdaq National Market, [it] shall pay to The Nasdaq Stock Market, Inc. a fee calculated on total shares outstanding, [which includes a one-time company listing fee of \$5,000 (\$1,000 of which is a non-refundable processing fee),] according to the following schedule[:]. *This fee will be assessed on the date of entry in The Nasdaq National Market, except for \$5,000 which represents a non-refundable, application fee, and which must be submitted with the issuer's application.*

Up to 30 million shares—\$100,000.

30+ to 50 million shares—\$125,000.

Over 50 million shares—\$150,000.

(2) [When a] A foreign issuer not raising capital in conjunction with its Nasdaq listing, including American Depositary Receipts (ADRs), *that* submits an application for inclusion of any class of its securities (*not otherwise identified in this Rule 4500 series*) in The Nasdaq National Market, [it] shall pay to The Nasdaq Stock Market, Inc. a fee calculated on total shares outstanding, [which includes a one-time company listing fee of \$5,000 (\$1,000 of which is a non-refundable processing fee),] according to the following schedule[:]. *This fee will be assessed on the date of entry in The Nasdaq National Market, except for \$5,000, which represents a non-refundable, application fee, and which must be submitted with the issuer's application.*

Up to 3 million shares—\$50,000.

3+ to 5 million shares—\$75,000.

5+ to 30 million shares—\$100,000.

30+ to 50 million shares—\$125,000.

Over 50 million shares—\$150,000.

(3) No change

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

([4]5) 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.

([5]6) If the application is withdrawn or is not approved, the entry fee (less the non-refundable *application* [processing] fee) shall be refunded.

(b)-(d) No change

4520. The Nasdaq SmallCap Market

(a) Entry Fee

(1) [When a] An issuer *that* submits an application for inclusion of any class of its securities (*not otherwise identified in this Rule 4500 series*) [, other than convertible debentures,] in The Nasdaq SmallCap Market, [it] shall pay to The Nasdaq Stock Market, Inc. a fee calculated on total shares outstanding, [which includes a one-time company listing fee of \$5,000 (\$1,000 of which is a non-refundable processing fee),] according to the following schedule[:]. *This fee will be assessed on the date of entry in The Nasdaq SmallCap Market, except for a non-refundable, application fee of \$5,000, which must be submitted with the issuer's application.*

Up to [1 million shares—\$9,500.

1+ to] 5 million shares—\$[19,000] 25,000.

5+ to 10 million shares—\$[30,875] 35,000.

10+ to 15 million shares—\$[40,375] 45,000.

Over 15 million shares—\$[47,500] 50,000.

(2) [When a] An issuer *that* submits an application for inclusion of any class of convertible debentures in The Nasdaq SmallCap Market, [it] shall pay to The Nasdaq Stock Market, Inc. a [one-time, company] *non-refundable application* [listing] fee of \$5,000 [(which shall include a \$1,000 non-refundable processing fee)] and a fee of \$1,000 or \$50 per million dollars face amount of debentures outstanding, whichever is higher.

(3) 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) 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

<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission ("Amendment No. 1"). In Amendment No. 1, Nasdaq requests that the Commission finds good cause to approve the proposed rule change on an accelerated basis pursuant to Section 19(b)(2) of the Act. 15 U.S.C. 78s(b)(2).

<sup>4</sup> See letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated December 30, 2002 ("Amendment No. 2"). Amendment No. 2 makes technical changes to the proposed rule text.

filed with the issuer's appropriate regulatory authority.

(5) *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.* [If the application is withdrawn or is not approved, the entry fee (less the non-refundable application [processing] fee) shall be refunded.]

(b) No change

(c) Annual Fee

(1) The issuer of a class of securities that is a domestic or foreign issue, including American Depositary Receipts (ADRs), listed in The Nasdaq SmallCap Market shall pay to The Nasdaq Stock Market, Inc. an annual fee to be computed as follows:

(A) \$[8,000] 15,000 for the first issue if it has total shares outstanding of up to 10 million shares; or

(B) \$16,000 for the first issue if it has total shares outstanding of 10 million or more shares; plus

(C) \$2,000 for each additional issue.

(D) *For companies with more than one issue, the first issue is the company's common stock or common stock equivalent with the highest total shares outstanding. For companies with no common stock or common stock equivalent, the first issue is the issue with the highest total shares outstanding.*

(2)-(4) No change

\* \* \* \* \*

## 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 III 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 amend Nasdaq rules regarding non-refundable application fees, listing fees for rights, and SmallCap entry and annual listing fees. Nasdaq proposes that these changes be effective as of January 1, 2003. Nasdaq

also proposes that the proposed fees be applied to all issuers listed as of that date, and all new listings entering Nasdaq on or after that date. Pursuant to NASD Rule 4520 ("The Nasdaq SmallCap Market"), SmallCap entry fees would increase from a range of \$9,500 to \$47,000, to a range of \$25,000 to \$50,000, depending on the total shares outstanding in the issue. Nasdaq SmallCap annual fees would increase from \$8,000 for the first issue, to a range from \$15,000 to \$16,000, depending on the total shares outstanding in the issue. Nasdaq is undertaking this increase to cover costs associated with the operation of the SmallCap market. In particular, Nasdaq has continued to invest in market services and initiatives such as the launch of SuperMontages<sup>SM</sup>, the NASDAQ Market Intelligence Desk<sup>SM</sup>, and enhancements to NASDAQ.com. At the same time, Nasdaq's costs to provide regulatory oversight, client coverage and other professional services have continued to increase.

Nasdaq also proposes to: (1) Provide transparency to the entry fee for rights; (2) change the date of the assessment of entry fees from the date of application to the date of listing; and (3) increase the non-refundable portion of the listing fee from \$1,000 to \$5,000 for both the Nasdaq National Market and the Nasdaq SmallCap Market.<sup>5</sup>

With respect to the entry fee for rights, Nasdaq rules do not currently distinguish between rights and regular equities. As such, applications for the inclusion of any class of rights are subject to the same entry fees as those for regular equities. Nasdaq has traditionally waived all but \$1,000 of the entry fees for rights because Nasdaq believes that it would be inequitable to charge the same entry fees for rights and regular equities, as rights are short-term in nature and usually expire in 30 to 60 days. Therefore, Nasdaq is proposing to codify a separate non-refundable entry fee of \$1,000 for the inclusion of any class of rights to provide transparency to this policy.

Nasdaq is also proposing to revise the assessment date for entry fees from the date that an issuer submits a listing application to the date that an issuer is listed. Currently, Nasdaq currently assesses entry fees based on the date that an issuer submits its application. Because an issuer is billed for entry fees at the time that it is listed, however, Nasdaq staff must review the fee schedule that was in effect at the time that the issuer submitted its listing application in order to determine the

appropriate entry fees that are due. Nasdaq believes that revising the assessment date for entry fees to the date that an issuer is listed will make it much easier for Nasdaq staff, as well as issuers, to determine the proper fees for the listing of a class of securities; as the fees will be determined by the fee schedule in effect at the time of billing.

Lastly, Nasdaq proposes to increase the non-refundable portion of the listing fee from \$1,000 to \$5,000. Currently, when an issuer submits an application for inclusion on Nasdaq, it must pay a one-time fee of \$5,000, which includes a \$1,000 non-refundable processing fee. Nasdaq is proposing to increase the non-refundable processing fee from \$1,000 to \$5,000 in order to cover the costs associated with processing an application. Because the cost of processing a listing application is approximately \$5,000, Nasdaq is unable to cover its costs in those situations where an issuer withdraws its application or is denied listing. In conjunction with this change, Nasdaq also proposes to change the term "listing fee" to "application fee."

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act<sup>6</sup> in general, and with sections 15A(b)(5)<sup>7</sup> and 15A(b)(6)<sup>8</sup> of the Act in particular. Nasdaq believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act in that it provides for the equitable allocation of reasonable dues, fees, and other charges among issuers using the Nasdaq system. Nasdaq believes that the proposed rule change is consistent with section 15A(b)(6) of the Act in that it is designed to prevent fraudulent and manipulative acts and practices as well as to protect investors and the public interest by providing greater transparency to Nasdaq's rules for issuers, their counsel, and investors.

#### 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.

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(5).

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>5</sup> See NASD Rules 4510 and 4520, respectively.

*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. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2002-183 and should be submitted by January 28, 2003.

### IV. Commission's Finding and Order Granting Accelerated Approval of a Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of section 15A of the Act<sup>9</sup> and the rules and regulations thereunder applicable to a national securities association. Specifically, the Commission finds that the proposed rule change, as amended, is consistent with section 15A(b)(5) of the Act,<sup>10</sup> in that the proposal provides for an equitable allocation of reasonable dues, fees, and other charges among issuers using Nasdaq's facility and/or systems. As represented by Nasdaq, the Commission notes that the proposed fee increase in Nasdaq SmallCap entry and annual fees reflect the additional costs associated with operating Nasdaq SmallCap market, including various regulatory and client services provided to issuers. Namely, Nasdaq represented that it has continued to invest in market services and market quality improvements such as SuperMontage, the Nasdaq Market Intelligence Desk,

and enhancements to NASDAQ.com. Furthermore, as represented by Nasdaq, the increase of a non-refundable application fee from \$1,000 to \$5,000 covers the processing of an issuer application for entry, especially in those instances where an issuer has withdrawn its application or has been denied listing.

The Commission also finds that the proposed rule change consistent with section 15A(b)(6) of the Act<sup>11</sup> because the proposed rules promote just and equitable principles of trade, and protect investors and the public interest. In particular, the Commission notes that Nasdaq should provide greater transparency to issuers by codifying its regular practice of charging a \$1,000 fee for the inclusion of any class of rights. Finally, Nasdaq has represented that it would assess appropriate entry fees based on the fee schedule in effect at the time of listing, rather than the application date.

Nasdaq seeks to implement that proposed fees on January 1, 2003. In order to facilitate the implementation of the new fee schedule and ease administration of the fees, Nasdaq has requested that the Commission find good cause to approve the proposed rule change, as amended, before the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission finds good cause to approve the proposed rule change, as amended, prior to the thirtieth day after publication in the **Federal Register**. The Commission believes that granting accelerated approval to the amended proposal will allow Nasdaq to implement the new fees by January 1, 2003 and will provide issuers with notice and an opportunity to budget for additional costs.

### V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-NASD-2002-183) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47112; File No. SR-NASD-2002-182]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Extending Existing Pilot Program for the Regulatory Fee and Trading Activity Fee

December 31, 2002.

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 December 26, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 NASD. The Association filed the proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 NASD proposes to extend the pilot program for the Trading Activity Fee ("TAF") through March 1, 2003. The TAF structure as originally proposed in SR-NASD-2002-98<sup>5</sup> (and modified in SR-NASD-2002-147<sup>6</sup>) is set to expire on December 31, 2002. Upon expiration of SR-NASD-2002-98, the member regulatory pricing structure was to revert to Section 8 of Schedule A of the By-Laws as amended. However, the NASD has determined not to revert to the previous pricing structure, but rather to extend the TAF pilot program, to maintain the status quo and to allow the Commission more time to review issues presented by the TAF proposed rule change.<sup>7</sup> The NASD proposes no substantive changes to the existing pilot

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002).

<sup>6</sup> Securities Exchange Act Release No. 46818 (November 12, 2002), 67 FR 69782 (November 19, 2002).

<sup>7</sup> In addition, many NASD member firms have already made programming changes to pay in conformity with the TAF structure that was effective on October 1, 2002.

<sup>9</sup> 15 U.S.C. 78o-3.

<sup>10</sup> 15 U.S.C. 78o-3(b)(5).