

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

Jonathan G. Katz,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48236; File No. SR-NASD-2003-105]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. To Implement a Six-Month Pilot Program Establishing Fees for Written Interpretations of Nasdaq Listing Rules

July 28, 2003.

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 July 3, 2003, 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.<sup>3</sup> 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 the Substance of the Proposed Rule Change

Nasdaq proposes to implement a pilot program that establishes fees for written interpretations of Nasdaq listing rules. The text of the proposed rule change is below. Proposed new language is in *italics*.

\* \* \* \* \*

#### 4500. Issuer Listing Fees

##### 4550. Written Interpretations of Nasdaq Listing Rules

(a) *An issuer listed on The Nasdaq SmallCap Market or The Nasdaq National Market may request from Nasdaq a written interpretation of the*

*Rules contained in the 4000 through 4500 Series. In connection with such a request, the issuer must submit to The Nasdaq Stock Market, Inc. a non-refundable fee of \$2,000. A response to such a request generally will be provided within four weeks from the date Nasdaq receives all information necessary to respond to the request.*

(b) *Notwithstanding paragraph (a), an issuer may request a written interpretation of the Rules contained in the 4000 through 4500 Series by a specific date that is less than four weeks, but at least one week, after the date Nasdaq receives all information necessary to respond to the request. In connection with such a request for an expedited response, the issuer must submit to The Nasdaq Stock Market, Inc. a non-refundable fee of \$10,000.*

(c) *An applicant to The Nasdaq Stock Market that has submitted the applicable entry fee under Rule 4510 or Rule 4520 will not also be required to submit a fee in connection with a request for a written interpretation involving the applicant's initial inclusion on Nasdaq. In addition, an issuer is not required to submit a fee in connection with a request for an exception from the Nasdaq shareholder approval rules pursuant to Rule 4350(i)(2).*

(d) *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 written interpretation fee prescribed herein.*

#### 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

The purpose of the proposed rule change is to institute a six-month pilot program that establishes a fee for written interpretations of Nasdaq listing rules. Nasdaq proposes that this rule change become effective on October 1, 2003 or upon Commission approval,

whichever date is later. Nasdaq will monitor the effect of this rule change on the listing rules interpretative process during this period. Prior to the completion of the pilot, Nasdaq will evaluate the impact of this rule and report its findings to the Commission, and thereafter, determine the appropriate course of action.

Currently, issuers may contact Nasdaq to request an interpretation regarding the application of Nasdaq's listing rules to a particular set of facts. For example, an issuer negotiating a private placement might want to ensure that the proposed transaction does not require shareholder approval under Nasdaq's rules. Alternatively, an issuer seeking to add a new director to its board of directors may inquire as to the impact of a prior relationship with that individual on the person's independence under Nasdaq rules.

Issuers can request formal interpretative guidance of Nasdaq's listing rules by submitting a letter that identifies the issuer and provides all relevant facts and circumstances surrounding the question. Staff of Nasdaq's Listing Qualifications Department will prepare a response letter, which the Nasdaq Office of General Counsel reviews prior to issuance. Written interpretations are binding on Nasdaq unless the issuer has made a material misstatement or omission, there is a subsequent change in the facts or circumstances that the issuer described in its letter, or there is a subsequent change in Nasdaq's listing requirements.<sup>4</sup> Since written interpretations are based on the specific facts and circumstances presented by an issuer, an issuer may not rely on a written interpretation that has been provided to another issuer. However, to provide transparency regarding our rules and policies, Nasdaq publishes anonymous summaries of these interpretative letters on its Web site, at <http://www.nasdaq.com/about/StaffInterLetters.stm>.

Nasdaq currently provides written interpretations at no cost to issuers. In recent years, however, there has been an increase in the complexity of transactions for which issuers have sought interpretations. As a result, Nasdaq staff now spends an increasing amount of time on routine interpretation letters, with some interpretations

<sup>4</sup> Nasdaq also provides oral guidance regarding its listing rules. Issuers will often request such guidance on a "no names" basis, while they still are structuring a transaction or analyzing the impact of a proposed change. Since oral guidance may not be based on a complete review of all relevant facts and circumstances, it is not binding on Nasdaq.

<sup>5</sup> 17 CFR 200.30-3(a)(1).

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

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

<sup>3</sup> The Commission revised text in the description of the proposed rule change to clarify certain terms of the pilot, and added a reference to its proposed start date, with the consent of Nasdaq. See e-mails from John Nachmann, Senior Attorney, Nasdaq, to Andrew Shipe, Special Counsel, and Leah Mesfin, Attorney, Division of Market Regulation, Commission, dated July 21 and July 22, 2003.