

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of its application, a non-refundable application fee to The Nasdaq Stock Market of \$1,000.* [If the application is withdrawn or is not approved, the entry fee (less the non-refundable application [processing] fee) shall be refunded.]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.