

specialist or other members to interfere with a cross while providing price improvement of only \$.01 to a portion of the cross. This may result in a perception that specialists or Registered Traders will break up a proposed clean cross transaction by trading for their own accounts at a minimally improved price ahead of a public customer on the other side of the cross. This perception could encourage a loss of crossing activity to other markets.

Amex clean cross procedures will continue to preserve auction market principles by providing the possibility of price improvement (because members must follow Amex Rule 151 crossing procedures), and by requiring that members trade with other market interest having time priority at that price before trading with any part of the cross transaction. In addition, the Exchange believes the proposal will enhance competition among markets in the execution of agency crosses.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)<sup>5</sup> of the Act in general and furthers the objectives of Section 6(b)(5)<sup>6</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## 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. 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 Amex. All submissions should refer to file number SR-Amex-2002-89 and should be submitted by January 28, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-269 Filed 1-6-03; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47106; File No. SR-NASD-2002-99]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc., and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Relating to Gross Income Assessments and Personnel Assessments

December 30, 2002.

## I. Introduction

On July 24, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities and Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify its Member Regulation (including Enforcement) pricing structures to: (1) Implement a three-tiered flat rate for the Gross Income Assessment ("GIA") that would be applied to gross FOCUS revenue and would eliminate existing deductions and exclusions; (2) use the Personnel Assessment as a more prominent assessable base to fund Member Regulation activities. On August 21, 2002, the NASD amended the proposal.<sup>3</sup> The proposed rule change, as modified by Amendment No. 1, was published for notice and comment in the **Federal Register** on August 30, 2002.<sup>4</sup>

The Commission received 13 comment letters on the proposed rule change.<sup>5</sup> On November 29, 2002, the

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

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

<sup>3</sup> See August 21, 2002 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division") Commission, and attachments ("Amendment No. 1"). In Amendment No. 1, the NASD provided new proposed rule language that completely replaces and supersedes the original proposed rule language, and made minor technical amendments to the rest of the filing.

<sup>4</sup> See Securities Exchange Act Release No. 46417 (August 23, 2002), 67 FR 55893.

<sup>5</sup> August 19, 2002 letter from Mary Yeager, Assistant Secretary, New York Stock Exchange, Inc. ("NYSE") to Jonathan G. Katz, Secretary, Commission ("NYSE Letter"); September 17, 2002 letter from Lanny A. Schwartz, Philadelphia Stock Exchange, Inc. ("Phlx") to Jonathan G. Katz, Secretary, Commission ("Phlx Letter"); September 18, 2002 letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange ("CBOE") to Jonathan G. Katz, Secretary, Commission ("CBOE Letter"); September 19, 2002 letter from Thomas W. Sexton, Vice President and General Counsel, National Futures Association

Continued

<sup>5</sup> 15 U.S.C. 78(f)(b).

<sup>6</sup> 15 U.S.C. 78(f)(b)(5).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

NASD filed a response to the comment letters and simultaneously amended the proposed rule change.<sup>6</sup> This order approves the proposed rule change as modified as Amendment No. 1. Simultaneously, the Commission provides notice of filing of Amendment No. 2 and grants accelerated approval of Amendment No. 2.

## II. Summary of Comments

The Commission received 13 comment letters on the proposed rule change, all in opposition to the proposal.<sup>7</sup>

("NFA") to Jonathan G. Katz, Secretary, Commission ("NFA Letter"); September 19, 2002 letter from Patrice Blanc, Chairman and Chief Executive Officer, Fimat USA, Inc. ("Fimat") to Jonathan G. Katz, Secretary, Commission ("Fimat Letter"); September 20, 2002 letter from Catherine D. Dixon, Assistant Secretary of the Commission, U.S. Commodity Futures Trading Commission ("CFTC") to Jonathan G. Katz, Secretary, Commission ("CFTC Letter"); September 26, 2002 letter from Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association ("SIA") to Jonathan G. Katz, Secretary, Commission ("SIA Letter"); September 20, 2002 letter from David J. Vitale, President and Chief Executive Officer, Board of Trade of the City of Chicago, Inc., James J. McNulty, President and Chief Executive Officer, Chicago Mercantile Exchange, Inc., and J. Robert Collins, President and Chief Executive Officer, New York Mercantile Exchange, Inc. to Jonathan G. Katz, Secretary, Commission ("Mercantile Letter"); September 23, 2002 letter from Christopher K. Hehmeyer, Co-Chairman, and Carl W. Gilmore, General Counsel, both of Goldenberg, Hehmeyer and Co. ("Goldenberg") to Jonathan G. Katz, Secretary, Commission ("Goldenberg Letter") September 20, 2002 letter from John M. Damgard, President, Futures Industry Association, Inc. ("FIA") to Jonathan G. Katz, Secretary, Commission ("FIA Letter"); September 23, 2002 letter from Brad W. Corey, Chief Financial Officer, Man Financial Inc. ("Man") to Jonathan G. Katz, Secretary, Commission ("Man Letter"); September 26, 2002 letter from Ronald H. Filler, Senior Vice President, Lehman Brothers, Inc. ("Lehman") to Jonathan G. Katz, Secretary, Commission ("Lehman Letter"); September 20, 2002 letter from Thomas O'Brien, Chief Financial Officer, TransMarket Group, L.L.C. ("TransMarket") to Jonathan G. Katz, Secretary, Commission ("TransMarket Letter").

<sup>2</sup> November 27, 2002 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission ("NASD Response Letter") and attachments (collectively, "Amendment No. 2"). In Amendment No. 2, the NASD excluded commodities income from Gross Revenue for purposes of the GIA.

<sup>7</sup> See footnote 5, *supra*. The Commission notes that, in proposing to modify its regulatory pricing structure, the NASD filed the instant proposed rule change in tandem with SR-NASD-2002-98. See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002). SR-NASD-2002-98 was effective upon filing with the Commission. 15 U.S.C. 78s(b)(3)(A)(ii), 17 CFR 240.19b-4(f)(2). Because the NASD's proposed changes to its regulatory pricing structure were split between two separate yet related rule filings, some of the commenters expressed opposition to the restructuring, generally, without raising specific concerns about SR-NASD-2002-99. See NYSE Letter; Phlx Letter; and SIA Letter at 1-2 (absence of the effective rate of the NASD's proposed trading

Many commenters objected to the proposal because they believe the proposed fees are not limited to recovery of costs for services performed by the NASD.<sup>8</sup> For example, commenters expressed disapproval of the NASD's proposed changes to the manner in which it calculates the GIA, stating the new method of calculating the GIA would include revenue from transactions for which there is no regulatory nexus between the transactions and the NASD, including transactions that do not involve securities.<sup>9</sup> Some commenters disapprove of the proposal because they believe the amount of the GIA will have an inverse relationship to the resources that the NASD must expend on firms. In other words, the new method of calculating the GIA allegedly would result in a greater financial impact on firms for which the NASD plays a smaller regulatory role.<sup>10</sup>

Commenters objected to the proposal because they believe the NASD will be charging its members who have dual memberships for regulatory services in relation to transactions in covered securities (as defined in the proposals) that are effected on other markets.<sup>11</sup> Additionally, the commenters expressed concern about the precedent the proposal will set. For example, if the NASD is allowed to assess a fee based on its member's futures business, the

activity fee makes it impossible for SIA member firms to determine the impact of all elements of the NASD's proposed pricing structure). No commenters objected to the Personnel Assessment specifically. Some commenters questioned whether the NASD's proposed restructuring as a whole would be revenue neutral. See *e.g.*, NFA Letter at 1 ("NASD claims that its entire proposal would be revenue neutral, but it does not provide any figures to support that claim.").

<sup>8</sup> See *e.g.*, NYSE Letter; CBOE Letter at 3; NFA Letter at 3-4; Fimat Letter at 1-2; Mercantile Letter at 1; Lehman Letter at 2; Man Letter at 2; TransMarket Letter; FIA Letter at 1 (the proposal " \* \* \* unfairly penalizes member firms that derive a significant portion of their revenue from activities unrelated to their securities business, which are not subject to the oversight of the NASD and with respect to which the NASD provides no regulatory services.") and at 4-5.

<sup>9</sup> See *e.g.*, CFTC Letter at 1; NFA Letter at 1-2 (GIA will collect income via FOCUS reports that is unrelated to securities, such as over-the-counter derivatives, cash commodities, futures, and foreign exchange); Fimat Letter (GIA will have adverse and disproportionate impact on combined broker-dealers/futures commission merchants by allowing the NASD to collect fees on revenue that does not come from securities-related business); Mercantile Letter at 1, 3 (" \* \* \* there is no nexus between the NASD fee and its regulatory responsibilities in the commodity industry."); Goldenberg Letter at 1 (Goldenberg will experience significant increase in its GIA, though "not a single customer \* \* \* would be entitled to utilize any of the regulatory services of the NASD.").

<sup>10</sup> See NFA Letter at 4-5; FIA Letter at 2-3; Man Letter at 3.

<sup>11</sup> See Phlx Letter at 1; Mercantile Letter at 1.

NFA may determine that it is acceptable to assess fees based on its members' securities business.<sup>12</sup>

In its response to the commenters, the NASD focused only on comments made in connection with the instant proposed rule change.<sup>13</sup> The NASD expressed its belief that the proposed changes to the GIA are fair and equitable, because they will "ensure that all NASD members use the same simplified fee structure and will be assessed on the same uniform basis."<sup>14</sup>

With regard to the commenters' concerns that there is no clear nexus between the NASD's proposed fees and the NASD's regulatory services provided, the NASD explained that most of the commenters objected to including commodities in the GIA.<sup>15</sup> By reinstating the exclusion for commodities income, the NASD believes it has addressed the commenters' concerns in this regard. The NASD stated that it believes that the requirement that fees be reasonable and equitably allocated does not require a fee structure "so specific and complex as to tie specific self-regulatory programs and related expenses to specific business lines within a firm[.]" The NASD reiterated the position outlined in the proposal—that total revenues of a broker-dealer member, combined with trading activity of those members and the number of registered persons, serves as an effective measure of what drives the NASD's regulatory costs.<sup>16</sup> Regarding the concern that other markets may institute fees similar to the

<sup>12</sup> Mercantile Letter at 4 ("NFA could also decide to impose fees on dually registered members with respect to their securities-related transactions \* \* \* duplicative fees would be imposed at the expense of members' profit margin, or, alternatively, such fees would merely be passed on by the members to the ultimate customers."). See also Fimat Letter at 2.

<sup>13</sup> NASD Response Letter at 2-3. The Commission notes that the NASD Response Letter speaks of 15 comment letters, because the NASD listed comment letters received on the instant filing and on SR-NASD-2002-98. There are only 13 letters specific to the instant filing, however, and the NASD will address comments relating to SR-NASD-2002-98 at a later time.

<sup>14</sup> *Id.* at 5. The NASD also noted that it removed deductions and exclusions that were used inconsistently by member firms from the GIA equation. *Id.* However, the NASD reinstated the exclusion for commodities income. Noting that some of its member firms conduct securities and commodities business in a single, jointly registered entity, while other members conduct a substantially similar business in separate entities with separate registrations, the NASD determined that "to subject those conducting securities and commodities business in a single jointly registered entity to the increased expense burden (when the commodities income is already assessed under a comparable regulatory scheme) would result in similar entities receiving different treatment." *Id.*

<sup>15</sup> NASD Response Letter at 7.

<sup>16</sup> *Id.* at 8.

NASD's fees, the NASD restates its position that the fees it is proposing "are directly related to the regulatory responsibilities of NASD, are member regulatory fees not market regulatory fees, and are revenue neutral to NASD."<sup>17</sup>

Finally, with regard to the concern that commenters are unable to comment meaningfully on the proposal because of the lack of specifics on the trading activity fee in SR-NASD-2002-98, the NASD states that it has since established and published the trading activity fee rates. Furthermore, the trading activity fee portion of the NASD's proposed fee restructuring proposal is now subject to full notice and comment.<sup>18</sup>

### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letters, and the NASD's response to the comments, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>19</sup> and, in particular, the requirements of section 15A(b)(5) of the Act.<sup>20</sup> Section 15A(b)(5) requires, among other things, that the rules of a national securities association provide 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 association operates or controls. The Commission finds that the three-tiered flat rate for the GIA that the NASD proposes to apply to gross FOCUS revenue and the use of the Personnel Assessment, as described in the instant proposed rule change, is consistent with section 15A(b)(5) of the Act, in that the proposal is reasonably designed to simplify the NASD's fee structure, and to fairly and equitably assess higher fees to those member firms that require a greater portion of NASD regulatory services.

The Commission recognizes the difficulties inherent in restructuring the NASD's regulatory fees, and believes that the NASD has made a good faith effort to do so in a manner that is fair and reasonable. The Commission also notes that the NASD has indicated it will examine the fees periodically, and

will adjust the fees accordingly in an effort to keep the fees at a level that is revenue neutral to the NASD.

While some commenters believe there is no clear nexus between the NASD's proposed fees and the regulatory services the NASD provides, the Commission believes that the NASD had adequately addressed this concern. The Commission believes that both the overall business activity of a firm and the level of transactions a firm handles are reflected in the cost of the NASD's regulatory services. If the fee were based on either measure alone firms whose business is predominantly reflected in one or the other measure would subsidize the operations of other firms. Furthermore, the NASD, as a registered national securities association, has a wide-ranging responsibility for overseeing the just and equitable conduct of its members, as well as its members' financial condition, no matter what activities its members choose to conduct through the broker-dealer. The Commission is satisfied that the NASD's proposed GIA is reasonably tailored to apportion fees based on the regulatory services the NASD provides. Additionally, the Commission agrees that the NASD's decision to reinstate the exclusion for commodities income in the GIA should substantially satisfy the commenters who expressed dissatisfaction with this aspect of the proposal.

With regard to the commenters' concern that approval of the NASD's proposed fee restructuring may set a precedent whereby other markets may institute fees similar to the NASD's fees, the Commission notes that any fee proposal filed with the Commission must meet the statutory standard established in section 15A(b)(5) of the Act.<sup>21</sup> In particular, the Commission will, as it has done in the instant proposed rule change, assess any such proposal to determine whether or not the proposed fees have a sufficient nexus to the regulatory responsibilities of the proposing entity, and are fees based on the regulation of members as opposed to the regulation of markets.

The Commission believes that the NASD has been responsive to the commenters' concerns that more time and information is necessary to evaluate the NASD's tandem proposed rule changes to restructure its regulatory fees. With the filing of SR-NASD-2002-147 and SR-NASD-2002-148, the NASD has provided the public with further opportunity to evaluate its proposed regulatory fee restructuring.

With regard to all other issues raised by the commenters, the Commission is satisfied that the NASD has adequately and accurately addressed the commenters' concerns.

The Commission finds good cause for approving proposed Amendment No. 2 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. The NASD filed Amendment No. 2 in response to comments it received after the publication of the notice of filing of the proposed rule change, to address certain commenters' concerns.<sup>22</sup> Because Amendment No. 2 is responsive to these commenters' concerns, the Commission finds good cause for accelerating approval of the proposed rule change, as amended.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, including whether Amendment No. 2 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 Amendment No. 2 that are filed with the Commission, and all written communications relating to Amendment No. 2 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 number SR-NASD-2002-99 and should be submitted by January 28, 2003.

<sup>22</sup> Certain commenters objected to the NASD's method of calculating the GIA because it would include revenue from transactions for which there is no regulatory nexus between the transactions and the NASD. See footnote 9, *supra*. Although the NASD believes that the GIA structure as proposed constitutes "a reasonable fee that is equitably allocated, and consistent with the Act," the NASD reinstated the exclusion for commodities. NASD Response Letter at 5. According to the NASD, some of its member firms conduct securities and commodities business in a single jointly registered entity, and other members conduct a substantially similar business as separate entities with separate registrations. Reinstating the exclusion for commodities income allows similarly situated entities to receive the same treatment. While the NASD believes that commodities income drives some of the NASD's regulatory costs for jointly registered firms, it reinstated the exclusion for commodities income. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Securities Exchange Act Release No. 46817 (November 12, 2002), 67 FR 69785 (November 19, 2002) (SR-NASD-2002-148).

<sup>19</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78o-3(b)(5).

<sup>21</sup> Exchange rules must comply with section 6(b)(4) of the Act. 15 U.S.C. 78f(b)(4).

## 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.*

[FR Doc. 03-220 Filed 1-6-03; 8:45 am]

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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.