

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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-ISE-2004-38 and should be submitted by February 3, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50984; File No. SR-NASD-2004-177]

Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Fees for Filing Documents Pursuant to NASD Rule 2710 (Corporate Financing Rule—Underwriting Terms and Arrangements)

January 6, 2005.

Pursuant to Section 19(b)(3) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 3, 2004, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items

have been prepared by NASD. NASD has designated the proposed rule change as "establishing or changing a due, fee or other charge" under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon receipt of this filing by 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

NASD is proposing to amend Section 7 of Schedule A to the NASD By-Laws ("Section 7") to adjust fees for filing documents pursuant to NASD Rule 2710 (Corporate Financing Rule—Underwriting Terms and Arrangements). Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

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SCHEDULE A TO NASD BY-LAWS

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Section 7—Fees for Filing Documents Pursuant to the Corporate Financing Rule

(a) There shall be a fee imposed for the filing of initial documents relating to any offering filed with NASD pursuant to the Corporate Financing Rule equal to \$500 plus .01% of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), but shall not exceed [\$30,500] *\$75,500*. The amount of filing fee may be rounded to the nearest dollar.

(b) There shall be an additional fee imposed for the filing of any amendment or other change to the documents initially filed with NASD pursuant to the Corporate Financing Rule equal to .01% of the net increase in the maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement, or any related Rule 462(b) registration statement, or reflected on any Rule 430A prospectus, or included on any other type of offering document. However, the aggregate of all filing fees paid in connection with an SEC registration statement or other type of offering document shall not exceed [\$30,500] *\$75,500*.

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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, NASD 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. NASD 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

According to NASD, the purpose of the proposed rule change is to amend Section 7 to raise the maximum fee that may be charged for the filing of initial documents and amendments pursuant to the Corporate Financing Rule from \$30,500 to \$75,500. NASD's Corporate Financing Department (the "Department") is responsible for reviewing the proposed underwriting terms and arrangements of proposed public offerings of securities for compliance with the requirements of NASD Rule 2710. According to NASD, the purpose of the Department's review is to provide members with, among other things, regulatory guidance as to what constitutes fair and reasonable underwriting terms and arrangements. Pursuant to NASD Rule 2710, the managing underwriter of the offering is required to file certain documentation with the Department for review.

Under Section 7, the current fee for filings pursuant to NASD Rule 2710 is equal to \$500 plus .01 percent of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), but shall not exceed \$30,500. Thus, under Section 7, fees are currently capped with respect to offerings with an aggregate offering price of \$300 million or more.

In 1989, when the current fee structure was adopted, the \$500 minimum fee ensured that at least \$500 would be charged for the smallest offerings.⁵ For larger offerings, a \$30,500

⁵ NASD supplemented the language included in this paragraph to reflect the historical purpose behind the fee structure. Telephone conversation and e-mail correspondence between Shirley Weiss, Associate General Counsel, NASD and Bradley

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(3).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

cap was imposed (.01 percent of the aggregate offering price of \$300 million plus a \$500 minimum flat fee). According to NASD, although the maximum fee was capped, approximately 90 percent of all of the offerings filed with NASD were at or below the cap (approximately 10 percent of the offerings reviewed in 1989 were larger than \$300 million). According to NASD, a recent review of the corporate financing fees shows that the current fee structure is wholly out of date. By 2004, because of the significant increase in the size of public offerings over the intervening 15 years, NASD is only capturing approximately 75 percent of the offerings at or below the cap. Accordingly, NASD is proposing to raise the current cap to place approximately 90 percent of the offerings at or below the cap. The increase is from .01 percent of \$300 million to .01 percent of \$750 million, which would raise the cap from \$30,500 to \$75,000 (\$75,000, plus the \$500 minimum flat fee). NASD believes the proposed increase, which raises only the cap and not the rate imposed for the review of documents by the Department, would be equitably allocated among members underwriting the largest public offerings.

NASD proposes that the fee change will be implemented on January 1, 2005.⁶ NASD plans to conduct an annual review of costs and adjust the corporate financing fee, if necessary, as of January 1 each year after appropriate consultation with the Board and rule filings with the Commission. NASD will announce the implementation date of the proposed rule change in a *Notice to Members* to be published no later than 30 days following Commission notice of

Owens, Attorney, Division of Market Regulation, Commission, dated January 4, 2005.

⁶New filings received and accepted by the Department through its electronic filing system (COBRA) by 12 p.m., Eastern Time, on Thursday, December 30, 2004, will be processed under the current fee structure (\$30,500 maximum fee). New filings that have been rejected will be processed under the current fee structure if corrected, re-submitted, and accepted by the Department by the December 30, 2004 deadline.

COBRADesk will be shut down and unavailable for filings on Thursday, December 30, 2004, at 12 p.m., Eastern Time, to update COBRA and COBRADesk to accept the proposed new filing fee. COBRADesk will again be available to accept filings on Monday, January 3, 2005, at 8 a.m., Eastern Time. COBRA will shut down at 6 p.m., Eastern Time, on Thursday, December 30, 2004, to permit the Department to test the system on Friday, December 31, 2004. The Department expects that COBRA will be accessible on Saturday, January 1, 2005. NASD will notify NASD users of system availability on the NASD Web site beginning on December 1, 2004.

filing of the proposed rule change for immediate effectiveness.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act, which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. NASD believes that the rule change is consistent with Section 15A(b)(5) of the Act in that the proposed fees are reasonable based on the general increase in the size of public offerings and are equitably allocated among members submitting proposed public offerings of securities to the Department for compliance with the requirements of NASD Rule 2710.

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

NASD 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.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(2) of Rule 19b-4 thereunder because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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:

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-NASD-2004-177 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-177. 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 Web site (<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 inspection and copying at the principal office of NASD. 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 the File Number SR-NASD-2004-177 and should be submitted on or before February 3, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

J. Lynn Taylor,

Assistant Secretary.

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⁷ 17 CFR 200.30-3(a)(12).