

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63732; File No. SR-NASDAQ-2011-007)

January 19, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Impose a Quarterly Maximum on the Listing of Additional Shares Fees Payable by Closed-End Funds

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 January 6, 2011, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II, which Items have been prepared by Nasdaq. 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

Nasdaq proposes to impose a quarterly maximum on the listing of additional shares fees payable by Closed-End Funds. Nasdaq will implement the proposed rule change immediately.

The text of the proposed rule change is below. Proposed new language is in italics.

**5910. The NASDAQ Global Market**

(a) No change.

**(b) Additional Shares**

(1) – (5) No change.

(6) The maximum fee charged to an issuer that is a Closed-End Fund in any quarter is \$25,000 per Company.

(c) – (f) No change.

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

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

## 5920. The Nasdaq Capital Market

(a) No change.

### (b) Additional Shares

(1) – (5) No change.

(6) The maximum fee charged to an issuer that is a Closed-End Fund in any quarter is \$25,000 per Company.

(c) – (e) No change.

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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, 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

Nasdaq currently assesses a fee for listing additional shares of an already listed class in the amount of \$5,000 or \$0.01 per additional share, whichever is higher, up to an annual maximum of \$65,000 per listed company.<sup>3</sup> There is no fee assessed for issuances of less than

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<sup>3</sup> See Nasdaq Listing Rule 5910(b), applicable to Nasdaq Global and Global Select Market companies and Nasdaq Listing Rule 5920(b), applicable to Nasdaq Capital Market companies.

50,000 shares per quarter.<sup>4</sup> This fee applies to both operating companies and closed-end companies (“Closed-End Funds”).

A Closed-End Fund is a type of company regulated under the Investment Company Act of 1940.<sup>5</sup> Generally, a Closed-End Fund sells a fixed number of shares and invests the proceeds in investments chosen by its investment adviser to achieve the funds stated investment objectives. Shareholders have an interest in the fund’s investments, but generally cannot redeem shares from the fund. Instead, the Closed-End Fund’s shares are listed and trade at a value which may be greater or less than the fund’s assets. Unlike operating companies, a Closed-End Fund is not taxed on its income so long as it generates at least 90% of its income from permissible sources, including dividends on and gains from the sale of stock or securities, and distributes that income to its shareholders.<sup>6</sup> As a consequence, a Closed-End Fund generally distributes all of its income annually and does not have access to retained earnings for new investment opportunities. A Closed-End Fund, therefore, frequently needs to issue additional shares to raise new capital in order to fund such opportunities. This is in contrast to operating companies, which generally have access to retained earnings to acquire new assets, and as a consequence are not limited to issuing shares.

Given the unique nature of Closed-End Funds, Nasdaq believes it is appropriate to provide them relief from the fee for listing additional shares in the form of a \$25,000 quarterly limit. The quarterly maximum will reduce the likelihood of reaching the existing \$65,000 annual limit and eliminate the possibility of reaching the annual maximum with a single capital raise or in a single quarter. Nasdaq previously had a fee schedule for listing additional shares that, like

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<sup>4</sup> Id.

<sup>5</sup> 15 U.S.C. 80a-5.

<sup>6</sup> 26 U.S.C. 851 – 856.

the proposed amended rule, included both an annual and quarterly fee cap, but was applicable to operating companies and Closed-End Funds alike.<sup>7</sup> As such, and for the reasons discussed above, we believe it is appropriate to adopt a quarterly maximum on the listing of additional shares fees payable by closed-end funds in addition to the current annual maximum.

While Nasdaq believes the proposed quarterly cap is appropriate, Nasdaq continues to believe that it is also appropriate to charge Closed-End Funds a listing of additional shares fee. In that regard, Nasdaq notes that it must review share issuances by Closed-End Funds for compliance with the shareholder approval rules. In addition, other markets also charge fees for the listing of additional Closed-End Fund shares, separate from operating companies.<sup>8</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Sections 6(b)(4) and (b)(5) of the Act,<sup>10</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. Nasdaq is instituting a quarterly maximum on the listing of additional shares fees applicable to Closed-End Funds based on their unique characteristics and their need to issue shares as a primary means by which they may expand their businesses. As such, Nasdaq believes that Closed-End Funds are differently impacted than operating companies by the current listing of additional shares fees,

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<sup>7</sup> Securities Exchange Act Release No. 48631 (October 15, 2003), 68 FR 60426 (October 22, 2003) (SR-NASD-2003-127) (eliminating the quarterly fee cap for listing additional shares while retaining the annual fee cap).

<sup>8</sup> The New York Stock Exchange assesses a Closed-End Fund listing of additional securities fee. See NYSE Listed Company Manual Sections 902.03 and 902.04.

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (b)(5).

and believes that the proposed quarterly fee cap will serve to lessen the adverse impact of the current fees. In light of these considerations, Nasdaq believes that the proposed rule change will promote a more equitable allocation of listing fees by reducing the impact of listing of additional share fees on a class of issuers that must issue shares as a primary means by which to expand their business, and, accordingly, consistent with Section 6(b)(5) of the Act<sup>11</sup> will not unfairly discriminate between issuers.

Nasdaq also believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act<sup>12</sup> because 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. As noted above, Nasdaq is implementing the quarterly fee cap because it believes that Closed-End Funds are differently impacted than operating companies by the current listing of additional shares fees. The proposed quarterly fee cap will serve to lessen the adverse impact of the current fee, and, as noted above, does not unfairly discriminate between issuers. As such, Nasdaq believes that the proposed rule change promotes just and equitable principles of trade.

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, as amended.

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<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> Id.

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<sup>13</sup> and paragraph (f)(2) of Rule 19b-4 thereunder,<sup>14</sup> because it establishes a due, fee, or other charge imposed by Nasdaq.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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. 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-007 on the subject line.

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(2).

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549–1090.

All submissions should refer to File Number SR-NASDAQ-2011-007. 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 website (<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 website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 No. SR-NASDAQ-2011-007 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Elizabeth M. Murphy  
Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).