

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁵

Jonathan G. Katz,
Secretary.

[FR Doc. 03-19665 Filed 8-1-03; 8:45 am]

BILLING CODE 8010-01-U

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"),¹ and Rule 19b-4 thereunder,² 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.³ 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*.

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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.⁴ 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

⁴ 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.

⁵ 17 CFR 200.30-3(a)(1).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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.

requiring as much as 20 staff hours to complete.

In order to address, in part, the costs associated with the written interpretation process, Nasdaq is proposing to adopt a \$2,000 fee for interpretation letters. Nasdaq will generally respond to such requests in the order received, and responses require approximately four weeks from the date that Nasdaq receives all information necessary to respond to the request. However, Nasdaq recognizes that, due to business exigencies or other reasons, an issuer may require an interpretation letter in a shorter period of time. In such situations, an issuer can request that an interpretation letter be processed 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. Nasdaq will make all reasonable efforts to meet the date specified by the issuer. Nasdaq is proposing to adopt a \$10,000 fee for interpretation letters processed on an expedited basis.

Nasdaq will not assess fees for requests submitted by issuers with regard to initial listing on Nasdaq, because reviews of these matters are considered to be part of the processing of an issuer's application and a separate application fee is already charged in these situations. In addition, issuers will not be required to submit a fee in connection with requests for an exception from the Nasdaq shareholder approval rules pursuant to Rule 4350(i)(2), since requests for such exceptions involve issuers whose financial viability is in jeopardy. Lastly, in order to address other exceptional situations where the payment of a fee for an interpretation letter would be inequitable under the circumstances, Nasdaq is proposing to provide the Nasdaq Board of Directors or its designee the discretion to defer or waive all or any part of the written interpretation fee. Such discretion will not be used in generally applicable or frequently-replicated situations, but only in circumstances that are truly unique.⁵

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁶ in general and with Section 15A(b)(5) of the Act,⁷ in particular, in that the proposal 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 the NASD operates or controls. Specifically, the proposed fees will be imposed equally on all listed issuers that request written interpretations of Nasdaq's listing rules and will relieve issuers not availing themselves of this process from subsidizing its cost.

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.

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

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 self-regulatory organization 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 NASD. All submissions should refer to file number SR-NASD-2003-105 should be submitted by August 25, 2003.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-19666 Filed 8-1-03; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48240; File No. SR-Amex-2003-67]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC To Extend the Suspension of Transaction Charges for Certain iShares Funds

July 28, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 30, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to extend until July 31, 2003 the suspension of Exchange transaction charges for specialist, Registered Trader, and broker-dealer orders for the iShares Lehman 1-3 year Treasury Bond Fund and the iShares Lehman 7-10 year Treasury Bond Fund. Proposed new language is *italicized*; proposed deletions are in [brackets].

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⁵ See letter from Annette L. Nazareth, Director, Division of Market Regulation, Commission, to T. Grant Callery, Executive Vice President and General Counsel, NASD (March 27, 2003).

⁶ 15 U.S.C. 78o-3.

⁷ 15 U.S.C. 78o-3(b)(5).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.