SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44374; File No. SR–NASD–2001–17]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. To Revise the Fees Associated With Appeals of Nasdaq Listing Determinations

May 31, 2001.

On March 13, 2001, 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'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to revise the fees associated with appeals of Nasdaq Listing Determinations. The proposed rule change was noticed in the **Federal Register** on April 11, 2001.[3] No comments were received on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposal

Determinations by the Listing Qualifications Department or the Listing Investigations Department to limit or prohibit the initial or continued listing of an issuer's securities may be appealed by the issuer to the Listing Qualifications Panel (the ''Panel'') and thereafter to the Nasdaq Listing and Hearing Review Council (the ''Listing Council''). Nasdaq has proposed to revise the current fee schedules for issuer requests for the review of listing determinations to both the Panel and the Listing Council to cover the costs associated with the review.

Currently, the fee for an appeal to the Panel based on a written submission from the issuer is $1,400, and the fee for an oral hearing before the Panel is $2,300. In addition, the fee for an appeal to the Listing Council is $1,400.[4] Nasdaq has proposed to change the fee for an appeal to the Panel based on a written submission from the issuer to $4,000, and the fee for an oral hearing before the Panel to $5,000. In addition, Nasdaq has proposed to change the fee for an appeal to the Listing Council to $4,000.

The fees associated with appeals to the Panel were last revised in 1996.[5] Nasdaq asserts that since that time, there has been an increase in the various costs associated with the review process. Nasdaq asserts in particular that, in 1999, it expanded the review process in part in response to the Commission's findings, which required changes in the process of reviews and an increase in the amount of time spent by Nasdaq staff members dedicated to the review process.[6] Further, Nasdaq has identified other expenses related to the review process that are not covered by the current hearing fees.[7]

The proposed fee for an appeal to the Panel includes all costs of the Office of Listing Qualifications Hearings attributable to the processing of hearing requests and the associated expenses of the Panel.[8] In addition, the proposed fee for an appeal to the panel includes a large portion of the expenses associated with the Office of Appeals and Review,[9] and the Listing Council. The proposed fee for an appeal to the Listing Council under Marketplace Rule 4840(b) will cover the remainder of the expenses of the Office of Appeals and Review and the Listing Council, as well as the Office of General Counsel's time directly related to the appeals process.[10]

II. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(5) [11] and Section 15A(b)(6) [12] of the Act. The Commission believes that the proposed rule change is consistent with Section 15A(b)(5) because it helps to provide for the equitable allocation of reasonable dues, fees, and other charges among issuers using Nasdaq, by proposing fees for the review process that are revenue neutral and reflect the costs incurred by Nasdaq to process issuer requests. The Commission also believes that the proposed rule change is consistent with Section 15A(b)(6), which requires that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices as well as to protect investors and the public interest. In particular, the Commission believes that the proposed fees will help Nasdaq to ensure that only qualified issuers are allowed to list or remain listed on Nasdaq.

III. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–NASD–2001–17) is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–14430 Filed 6–7–01; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

[License No. 02/02–5377]

Elk Associates Funding Corporation; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Elk Associates Funding Corporation, 747 Third Avenue, New York, New York 10017, a Federal Licensee under the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 44153 (April 5, 2001), 66 FR 44153 (April 11, 2001) (SR–NASD–01–17).

[4] Pursuant to Marketplace Rule 4840(d), appeals to the Listing Council are based only on the written record unless the Listing Council exercises its discretion to hold an oral hearing. There is no additional fee for an oral hearing before the Listing Council.

[5] *See* Securities Exchange Act Release No. 37088 (April 9, 1996), 61 FR 16662 (April 16, 1996). In 1999, a $1,400 fee for appeals to the Listing Council was established, which matched the fee for appeals to the Panel based only on the written record. *See* Securities Exchange Act Release No. 41367 (May 4, 1999), 64 FR 25942 (May 13, 1999).

[6] *See* Securities Exchange Act Release No. 41367 (May 4, 1999), 64 FR 25942 (May 13, 1999).

[7] Nasdaq has represented that the other expenses relating to the review process that are not covered by the current hearing fees include the following: overhead, including telephones, supplies, depreciation and occupancy, computer system support, listing qualifications retention analyst and manager review, and a stipend for Panel and Listing Council members. Telephone conversation between John D. Nachmann, Senior Attorney, Office of General Counsel, Nasdaq, and Lisa Jones, Attorney, Division of Market Regulation, Commission (March 30, 2001).

[8] The additional variable fee allocated to issuers who request oral hearings before the panel is designed to recover the additional costs associated with such hearings; specifically, travel expenses for members of the Panel and court reporter time to maintain a transcript of these hearings.

[9] On March 22, 2001, Nasdaq filed a proposed rule change, SR–NASD–2001–02, with the Commission pursuant to Section 19(b)(3)(A) of the Act, and subparagraph (f) of Rule 19b–4 thereunder, that transfers certain responsibilities from the Nasdaq Office of General Counsel regarding the review process to the Office of Appeals and Review, a new unit in the Nasdaq's Listing Qualifications Department. The Office of Appeals and Review will receive requests for review from issuers and will keep records of proceedings.

[10] The fees proposed in this proposed rule change are designed to recover only the direct costs associated with the review process and do not include various indirect overhead costs that have been identified by Nasdaq as Senior Management, Finance, Human Resources, Administrative Services, Legal (excluding unrelated litigation and international expenses), Economic Research, Nas Tech and Strategic Development.

[11] 15 U.S.C. 78*o*–3(b)(5).

[12] 15 U.S.C. 78*o*–3(b)(6).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).