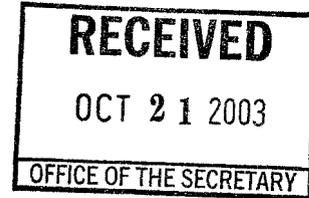


#5



October 20, 2003

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: File No. SR-NASD-2003-128

Dear Mr. Katz:

Pacific Growth Equities, LLC ("PGE") appreciates the opportunity to comment on the amendments to NASD Rules **4623** and 4710 proposed by the Nasdaq Stock Market, Inc. ("Nasdaq"). PGE currently makes markets in approximately 600 Nasdaq National Market ("NNM") securities and consistently ranks among the top investment banks in terms of market making volume in NNM securities. Thus, PGE believes that the Commission will find its comments useful in its consideration of the proposed amendments.

Nasdaq proposes, among other things, to "[1] establish a maximum level of quote/order access fees for Electronic Communications Networks ("ECNs") that elect to participate in Nasdaq's . . . SuperMontage; and [2] eliminate SuperMontage's Price/Time with access fee consideration execution algorithm." Nasdaq believes that the establishment of maximum quote/order access fees for ECNs would eliminate the substantial disparities in access fees currently charged by various ECNs and therefore allow SuperMontage participants who are charged such fees to "reasonably anticipate their trading costs."²

PGE is fully in support of Nasdaq's goal of assisting members in managing their trading costs. However, PGE believes that the proposed amendments are not an appropriate mechanism for achieving this important goal. PGE strongly opposes Nasdaq's proposed amendments for the following reasons:

Nasdaq's Proposed Amendments Would Violate Section 15A of the Securities Exchange Act of 1934

Nasdaq is an electronic quotation and execution system owned and operated by the National Association of Securities Dealers, Inc. ("NASD"). NASD is the only national securities

¹ Securities Exchange Act Release No. 48504 (September 17, 2003), 68 FR 56358 (September 30, 2003) ("Proposing Release").

² *id.*

association registered with the Securities and Exchange Commission (“SEC”) pursuant to Section 15A of the Securities Exchange Act of 1934.³ As a registered national securities association, NASD must, among other things, maintain rules that “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,”⁴ and ensure that those rules “are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. . .”⁵

Nasdaq’s proposal would allow ECNs participating in SuperMontage to charge a maximum quote/order access fee of \$0.003 per share. Non-ECN SuperMontage participants would continue to provide access to their quote/orders free of charge. PGE believes that this segregation of Nasdaq into two classes of participant; those who may charge fees to access their SuperMontage quote/orders and those who may not, is both inequitable and discriminatory and therefore a potential violation of Section 15A.

PGE also believes, contrary to Nasdaq’s representation in the Proposing Release, that the proposed amendments impose a burden on competition by allowing one class of market participant to earn revenues from activities or “services” that other market participants are required to provide free of charge, also a potential violation of Section 15A. Nasdaq should be required, prior to approval of the proposed amendments, to explain why allowing ECNs to charge fees to access their SuperMontage quote/orders while prohibiting non-ECNs from doing so is “necessary or appropriate in furtherance of the purposes”⁶ of Section 15A.

The Legal Status of ECN Access Fees is Unresolved

Since their inception, ECN access fees have been the subject of controversy among Nasdaq market participants and securities regulators alike.⁷ ECNs have been involved in litigation with other Nasdaq market participants’ and regulators’ in an effort to resolve issues associated with access fees. PGE believes, that contrary to the premise of the proposing release, the real issue is

³ 15 U.S.C. 780-3.

⁴ 15 U.S.C. 780-3(b)(5).

⁵ 15 U.S.C. 780-3(b)(6).

⁶ 15 U.S.C. 780-3(b)(7).

⁷ “ECN fees represent [a] . . . knotty market structure issue that will require close attention and creative thinking . . . to resolve.” Testimony of Arthur Levitt, Chairman U.S. Securities and Exchange Commission, Concerning Market Structure Issues Currently Facing the Commission, Before the U.S. Senate Subcommittee on Securities, Committee on Banking Housing and Urban Affairs (Oct. 27, 1999).

⁸ See *All-Tech Investment Group, Inc. vs. Knight Securities, Inc.* (NASD Regulation, Inc. Office of Dispute Resolution, Arbitration No. 98-02132).

⁹ See *Domestic Securities, Inc. v. Securities and Exchange Commission*, No. 02-1308 (D.C. Cir. Jul. 1, 2003), this opinion can be accessed at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200307/02-1308a.pdf>.

Mr. Jonathan G. Katz
United States Securities and Exchange Commission

File No. SR-NASD-2003-128

October 20, 2003

not the disparity of quote/order access fees charged by various ECNs, but the effect such fees have had on the structure and quality of the Nasdaq stock market. The SEC has indicated that it intends to “resolve the underlying issues”¹⁰ surrounding ECN access fees “as they consider broad market reforms.” PGE believes that in light of the SEC’s intention to contend with the issue of ECN access fees, rulemaking action by the Nasdaq at this time, however well intentioned, would only serve to confuse the issue.

Elimination of Price/Time with Access Fee Consideration Execution Algorithm

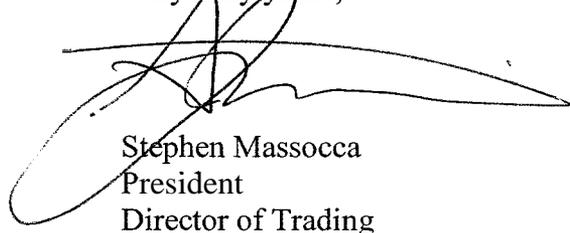
As PGE opposes imposition of a maximum level of quote/order access fees for ECNs that elect to participate in SuperMontage, it also opposes elimination of the Price/Time with access fee consideration execution algorithm. PGE believes that until the market structure and associated legal issues surrounding ECN access fees are resolved, non-ECN market participants must continue to have a choice with regard to incurring such fees.

Conclusion

PGE strongly opposes the amendments to NASD Rules 4623 and 4710 proposed by Nasdaq on the grounds stated in this letter and respectfully requests that the SEC either reject the proposals or request that Nasdaq provide additional information as to why the proposed amendments would comply with its obligations under Section 15A of the Securities Exchange Act of 1934.

PGE reiterates that it is fully in support of Nasdaq’s goal of assisting members in managing their trading costs and believes that the issues noted above can be resolved through discussions between the SEC, NASD and its members. Please do not hesitate to contact the undersigned if you would like to discuss these issues in further detail.

Very truly yours,



Stephen Massocca
President
Director of Trading

¹⁰ Judith Burns, *Court Sides With SEC in ECNS Challenge Of Nasdaq*, Wall St. J., July 2, 2003, quoting Annette Nazareth, Director, SEC Division of Market Regulation.

¹¹ *id.*