OES MarketGroup

February 23, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release Number 34-59275; File Number SR-NASDAQ-2008-104
Proposed NASDAQ Rule Change to Adopt a Modified Sponsored Access Rule

Dear Ms. Murphy:

Order Execution Services Holdings, Inc. ("OES"), on behalf of its subsidiary OES Brokerage Services, LLC, appreciates the opportunity to provide comments on SR-NASDAQ-2008-104. OES Brokerage Services, LLC is a member of The NASDAQ Stock Market LLC ("Nasdaq") and provides many types of broker-dealer services including those defined in this rule filing as Direct Market Access, Direct Sponsored Access, and Third Party Sponsored Access.

OES is concerned with a number of aspects of this proposed modification of the Nasdaq's Sponsored Access Rule.

We would like to briefly offer our comments on the following:

(1) The modified Sponsored Access Rule seems unnecessary and duplicates regulatory responsibilities of the Nasdaq member's Designated Examining Authority;

(2) The application of specific risk management requirements onto only various forms of sponsored access appears to be contrary to the Access Rule requirements of Regulation NMS that cover the fair and non-discriminatory access to protected quotations displayed by NMS trading centers requirements; and,

(3) In the event this Sponsored Access Rule continues to be considered for approval, the definitions of Sponsored Access contained in the modified Nasdaq rule, and thus in similar rules that we assume other SROs will subsequently file, should include the "Fee Riders" practice wherein both members and non-members use an aggregator firm's MPID or mnemonic on their orders entered into a specific trading center solely in order to gain the benefit of volume fee or credit benefits

744 Broad Street 23rd Floor Newark, New Jersey 07102
p 973.286.8770 f 973.242.0171 tradeoes.com

> achieved on an overall volume basis by the aggregator firm's activity at the trading center.

Modified Rule Seems Unnecessary and Creates Duplicative Regulatory Structure

The practice of member brokerage firms providing sponsored access was developed to satisfy the needs of various market participants for flexibility, innovation, efficiency, lowered costs, and to enhance competition between marketplaces. Sponsored access has been in place for many years and it appears to have worked well under existing exchange requirements for sponsoring members to employ methods to adequately fulfill their regulatory, financial and risk management obligations. OES is unaware of any allegations of abuse or previous specific disciplinary action taken by an SRO or the Commission against abuses by a broker-dealer in its sponsored access activities that would illustrate the unacceptable risks involved in existing practices, and therefore require extensive modification of sponsored access rules. OES agrees with a previous comment submitted[1] that Nasdaq (or the Commission) should offer an explanation that supports the need for, or that clarifies the basis for the imposition of the additional risk management requirements.

OES believes that the proposed rule modification creates duplicative regulatory oversight between the SRO and the member firm's DEA. We agree with the statement included in a previous comment letter[2]:

> "While Nasdaq obviously maintains regulatory oversight of its member firms as it relates to the member firm's trading activity on the Exchange, that oversight does not generally extend to non exchange regulatory responsibilities of its member firms. In contrast this oversight does extend to the member firm's DEAs. Nasdaq elected not to serve as a DEA, but preferred instead to relegate this responsibility to other Self Regulatory Organizations that maintain DEA status. These DEAs, which bear this responsibility, have rules, in conjunction with existing securities laws that adequately and effectively address a much broader scope of requirements, in light of the totality of a member firm's business operations, which cover, amongst other tings what financial information or books and records are needed from clients."

Proposed Rule Modifications Seem Inconsistent with Access Rule of Reg NMS

Regulation NMS includes the "Access Rule" (Rule 610) which intended to enhance the initiative's objective to modernize and strengthen the regulatory structure of the U.S. equity markets. The Access Rule requires fair and non-discriminatory access to

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[1] See Comment Letter from Harvey Cloyd, Chief Executive Officer, Electronic Transaction Clearing, Inc. – February 5, 2009

[2] See Comment Letter from Harvey Cloyd, Chief Executive Officer, Electronic Transaction Clearing, Inc. – February 5, 2009

quotations displayed by trading centers in the National Market System. The rule prohibits trading centers from imposing unfairly discriminatory terms that inhibit any person from obtaining efficient access through a member or subscriber.

In its proposed rule, Nasdaq has singled-out sponsored access arrangements for needing to uniquely comply with compliance requirements that include contractual provisions, financial controls and regulatory controls. In addition, Nasdaq, with apparent agreement by the Commission, broadly redefines Sponsored Access to include Direct Market Access business arrangements. OES asserts that Nasdaq's members accept responsibility for orders and trades under any arrangement where the member is the broker of record on the trades. As the broker of record the member is obligated to employ methods to adequately monitor its activity, apply various risk management rules, and perform various other surveillance activities it deems necessary to ensure it fulfills its regulatory, financial and risk obligations. However, to have member firms that provide various forms of sponsored access to be singled-out with an obligation to perform additional new systemic processes that intend to prevent and ensure an error-free order entry and execution environment without uniform similar requirements for all other forms of access to Nasdaq clearly is discriminatory.

The unique access requirements will require the sponsoring member to accept a financial and technology resource burden that all other members are not required by specific rule to carry, and as a consequence in addition to the increased regulatory burden imposed on the sponsoring firm it also has higher financial barriers to accept in order to gain access to Nasdaq.

This proposed rule modification is inconsistent with Regulation NMS' Access Rule because:

(1) It establishes unfair discriminatory terms through provisions of a rule that creates unique compliance obligations that are not required of other members for access to Nasdaq's protected quotations; and,

(2) As a result of the additional costs and resources required to perform the unique compliance obligations and preventative measures for sponsoring members it creates a financial and resource burden for accessing the trading center by sponsoring members that other members are not required by rule to have to carry.

Fee Riders Need to be Included in Definition of Sponsored Participants

In the event the Commission determines that it is appropriate to move forward with the proposed Sponsored Access Rule submitted by Nasdaq, then OES requests that the rule's forms of sponsored access be amended to add another arrangement.

The proposed modified Sponsored Access Rule by Nasdaq defines three forms of sponsored access:

(a) Direct Market Access
(b) Direct Sponsored Access
(c) Third Party Sponsored Access

OES asserts that there should be a clearly defined fourth form of the "Fee Riders" practice wherein both members and non-members use an aggregator firm's MPID or exchange mnemonic on their orders entered into a specific trading center solely in order to gain the benefit of volume fee or credit benefits achieved on an overall basis by the aggregator firm's activity at the trading center.

The Fee Rider usually uses direct connectivity to Nasdaq or through a third party or service bureau. In some cases they may also gain access through a direct market access arrangement. Fee Riders are unique in that they will include Nasdaq members that are willing to be sponsored by the aggregator firm even though they are members and have their own direct connectivity or third party connectivity in order to benefit by the financial aspects of the aggregator's ability to achieve various fee tiers that they cannot achieve separately.

The aggregator is performing the same service as other sponsoring members in that the aggregator firm is providing piggybacking access and is required to accept responsibility for every order and trade submitted by the Fee Rider due to it being the broker of record on each. The aggregator should be held to the same obligations to perform risk management measures and have the capability to prevent orders from being entered that exceed risk thresholds.

Conclusion

It is the duty of every member to have adequate financial and regulatory controls in place to ensure it can fulfill its regulatory, financial and risk management responsibilities with its clients' business and the various methods of access it deploys to trade on U.S. equity markets. OES believes that whether a firm is a retail broker, a proprietary trading firm, an investment bank, an agency-only broker-dealer, or any other form of brokerage business and whether a firm directly or indirectly access trading centers that the regulatory, financial and risk obligations for access should be similar. OES supports enhancing and strengthening the regulatory structure of the industry, and in doing so the Commission should ensure that all changes are fair and evenhanded so that regulations do not inadvertently create discriminatory terms or adverse competitive affects on unique segments of the market participants.

OES requests that the Commission reconsider the proposed modified Nasdaq Sponsored Access Rule and deny its approval. In the event the Commission deems the immediate need of financial, regulatory and risk controls related to trading center access then it should proceed in a manner that does not discriminate, is not anti-competitive for certain market participants, and is fair in the obligations it imposes.

We appreciate this opportunity to submit our thoughts on this important matter and are grateful for the Commission's consideration of our views.

Should any reason arise to contact OES with respect to our comment letter or to discuss this matter further, please feel free to contact me at (973) 286-8742 or at mbarth@tradeoes.com.

Sincerely,

Michael A. Barth

Michael A. Barth
Executive Vice President
OES MarketGroup