

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50956; File No. SR-NASD-2004-190)

January 3, 2005

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Establish the Minimum Quotation Increment for the BRUT ECN System

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 December 30, 2004, 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 and II below, which Items have been prepared by Nasdaq. Nasdaq has filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 establish a new NASD Rule 4912 to set the minimum quotation increment for the BRUT ECN System ("BRUT"). Nasdaq has designated this proposal as non-controversial and has requested that the Commission waive the 30-day pre-operative waiting period contained in Rule 19b-4(f)(6)(iii) under the Act.⁵ If the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ 17 CFR 240.19b-4(f)(6)(iii).

Commission grants such a waiver, then this rule proposal, which is effective upon filing with the Commission, shall become operative on January 3, 2005 pursuant to Rule 19b-4(f)(6) under the Act.⁶

The text of the proposed rule change is below. Proposed new language is italicized.⁷

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4912. Minimum Quotation Increment

The minimum quotation increment in the BRUT ECN System for quotations of \$1.00 or above in Nasdaq-listed securities and in securities listed on a national securities exchange shall be \$0.01. The minimum quotation increment in the BRUT ECN System for quotations below \$1.00 in Nasdaq-listed securities and in securities listed on a national securities exchange shall be \$0.0001.

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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.

⁶ 17 CFR 240.19b-4(f)(6).

⁷ The proposed rule change will add a new NASD Rule 4912 to a pending new NASD Rule series 4900 (proposed NASD Rules 4901 through 4911), which has been filed with the Commission. See SR-NASD-2004-173. When the proposed rule change contained herein becomes operational, Nasdaq will make a conforming amendment to the pending filing.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, the minimum quotation increment in the Nasdaq Market Center ("NMC") is \$0.01 for all quotations. However, in BRUT, which was recently purchased by Nasdaq, the minimum quotation increment can be below \$0.01 for orders priced under \$5.00. Nasdaq states that the purpose of the proposed rule change is to bring BRUT closer to the existing NMC practice by lowering the \$5.00 threshold to \$1.00 and setting the minimum quotation increment at \$0.01 for all Nasdaq-listed and exchange-listed security quotations of \$1.00 or higher.⁸ As such, the language of the proposed new rule closely mirrors the language of similar provisions applicable to NMC quotations. See NASD Rules 4613(a)(1)(B) and 6330(d). The minimum quotation increment for quotations below \$1.00 will remain at \$0.0001.

Nasdaq believes that reducing "sub-penny" quoting in BRUT will benefit investors for many of the same reasons cited by the Commission in its original Regulation NMS Proposing Release (the "Regulation NMS Release"),⁹ which would similarly restrict sub-penny quoting to under-\$1 securities. For example, this proposal would address the "hidden market" problem of prices not being transparent to the general public, and it would decrease the incidence of "flickering quotes" and the attendant difficulties for members. In its Regulation NMS Release, the Commission analyzes in

⁸ If BRUT receives a "sub-penny" order priced at or above the threshold (i.e., at or above \$5 today and \$1 when the proposed rule becomes operational), BRUT automatically adjusts the price of such an order down (for bids) or up (for offers) to the nearest penny for display, execution, and routing purposes.

⁹ Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126 (March 9, 2004).

great detail the benefits of limiting sub-penny quoting, and Nasdaq agrees with this analysis.

Since the proposed rule change would bring BRUT's rules closer to the long-established NMC rules, Nasdaq believes that the proposed rule change should not be seen as controversial, and asks that the Commission waive the 30-day pre-operative period applicable to non-controversial rule changes contained in Rule 19b-4(f)(6)(iii) under the Act.¹⁰

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹¹ in general, and with Section 15A(b)(6) of the Act,¹² in particular, in that it is designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market. Specifically, Nasdaq believes that the proposal would address the "hidden market" problem of prices not being transparent to the general public, and would decrease the incidence of "flickering quotes" and the attendant difficulties for members.¹³

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.

¹⁰ 17 CFR 240.19b-4(f)(6)(iii).

¹¹ 15 U.S.C. 78o-3.

¹² 15 U.S.C. 78o-3(b)(6).

¹³ Telephone conversation between Alex Kogan, Associate General Counsel, Nasdaq, and David Liu, Attorney, Division of Market Regulation, Commission, on January 3, 2005.

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 proposed rule change is subject to Section 19(b)(3)(A) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder¹⁵ because the proposal: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that Nasdaq has given the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

Nasdaq satisfied the five-day pre-filing requirement. In addition, Nasdaq has requested that the Commission waive the 30-day operative delay requirement to permit the proposed rule change to become operative on January 3, 2005. The Commission believes that accelerating the operative date is consistent with the protection of investors and the public interest because such acceleration will permit Nasdaq to lower the minimum quotation increment threshold for BRUT from \$5.00 to \$1.00, thereby more closely mirroring the minimum quotation increment applicable to NMC quotations. For

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6).

this reason, the Commission designates the proposal to be effective upon filing with the Commission and operative as of January 3, 2005.¹⁶

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate 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.¹⁷

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. Please include File Number SR-NASD-2004-190 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-190. This file number should be included on the subject line if e-mail is used. To help the Commission process

¹⁶ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁷ See Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. 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 Number SR-NASD-2004-190 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Jill M. Peterson
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).