

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51630; File No. SR-NASD-2005-049)

April 28, 2005

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. to Modify the Pricing for Non-NASD Members Using Nasdaq's Brut Facility

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 8, 2005, 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. On April 12, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On April 27, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

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

Nasdaq proposes to modify the pricing for non-NASD members using Nasdaq's Brut Facility ("Brut"). Nasdaq requests approval to implement the proposed rule change retroactively as of April 11, 2005. The text of the proposed rule change, as amended, is

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 corrected a clerical error in the originally filed proposed rule change to clarify that the filing was submitted under Section 19(b)(2) of the Act.

<sup>4</sup> Amendment No. 2 replaced and superseded the originally filed proposed rule change, as amended.

available on the NASD's Web site (<http://www.nasd.com>), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

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, as amended, 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 III 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

Nasdaq currently charges a fee of \$0.004 per share executed with respect to any order to buy or sell exchange-listed securities that is routed by Brut to an exchange using such exchange's proprietary order delivery system (such as the New York Stock Exchange's SuperDOT system). In SR-NASD-2005-048, which became effective immediately upon filing, Nasdaq reduced this fee for NASD members for some orders and eliminated it entirely for others effective April 11, 2005. In this filing, Nasdaq proposes to put in effect the same fee changes for non-members.

Under the proposal, the fee for orders to buy or sell exchange-listed securities (assuming such securities are subject to the Consolidated Quotations Service and Consolidated Tape Association Plans and are not Exchange Traded Funds listed on the American Stock Exchange) that are routed by Brut to an exchange using the exchange's proprietary order delivery system would be reduced to \$0.0004 per share executed. This fee would only be charged, however, if the orders to which it otherwise applies are routed

outside Brut and the Nasdaq Market Center ("NMC") without first attempting to execute within Brut or the NMC. If an order to which this fee would otherwise apply first attempts to execute against the book maintained by Brut or the NMC, then this fee would no longer be applicable.

By lowering (and eliminating in many cases) the routing fees for certain orders for exchange-listed securities received by Brut, Nasdaq states that it seeks to continue to improve Brut's competitiveness in attracting buy and sell orders for exchange-listed securities. Nasdaq believes that its participants would benefit from the increased liquidity in exchange-listed securities that the proposal is designed to stimulate. Furthermore, Nasdaq states that all investors would benefit from increased competition in this area. Finally, Nasdaq believes that the distinction for fee purposes between orders that check the Brut (or NMC) book before routing and those that are designated for routing regardless of available prices in such book would encourage orders to check the Brut book, which it believes would benefit both the particular investor (who, as a result, may find a better execution) and the market as a whole.

At the same time, the proposed rule change seeks to apply to non-members a new fee (which is being instituted for members) designed to recover the commissions billed by NYSE specialists to Brut for certain types of limit orders. According to Nasdaq, generally, NYSE specialists charge Brut for executions of limit orders that remained unexecuted on the specialists' books for more than 5 minutes. While the specialists' fee schedules vary, Nasdaq states that the proposed Brut fee of \$0.009 per share is generally designed to recover for Brut some of the associated cost.

The new fee would apply when a limit order is delivered to the NYSE via the NYSE's proprietary order delivery system and the time to execute such an order exceeds five minutes (measured as the difference between the time of the NYSE's electronic acknowledgment of the order and the time of execution). The new fee would not apply, however, to day orders executed in the specialists' opening and to good-till-cancelled orders if executed in the opening on the day when they were entered. The new fee would also not apply to any on-close orders or market orders.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,<sup>5</sup> in general, and with Section 15A(b)(5) of the Act,<sup>6</sup> in particular, in that the proposed rule change 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Nasdaq states that written comments were neither solicited nor received.

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<sup>5</sup> 15 U.S.C. 78o-3.

<sup>6</sup> 15 U.S.C. 78o-3(b)(5).

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-049 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-2005-049. This file number should be included on the subject line if e-mail is used. To help the Commission process 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 Room. Copies of the 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-2005-049 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.<sup>7</sup> Specifically, the Commission believes the proposed rule change, as amended, is consistent with Section 15A(b)(5) of the Act,<sup>8</sup> which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal, which permits the retroactive application of a routing fee for certain orders to buy or sell exchange-listed securities and a fee for certain limit orders delivered to the NYSE for non-NASD members to be effective as of April 11, 2005, would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that was effective as of April 11, 2005 pursuant to SR-NASD-2005-048.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the 30<sup>th</sup> day of the date of publication of notice thereof in the Federal

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<sup>7</sup> The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78q-3(b)(5).

Register. The Commission notes that the proposed fees for non-NASD members are identical to those in SR-NASD-2005-048, which implemented these fees for NASD members and which became effective as of April 11, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing schedule with the same date of effectiveness for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,<sup>9</sup> to approve the proposed rule change on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (File No. SR-NASD-2005-049), as amended, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

J. Lynn Taylor  
Assistant Secretary

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<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).