

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51326; File No. SR-NASD-2004-173)

March 7, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving a Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto to Establish Rules Governing the Operation of Nasdaq's Brut Facility

I. Introduction

On November 3, 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"), 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 establish rules governing the operation of its Brut trading facility. On January 24, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the Federal Register on January 31, 2005.⁴ The Commission received no comments on the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced and superseded the originally filed proposed rule change.

⁴ See Securities Exchange Act Release No. 51078 (January 25, 2005), 70 FR 4902 (January 31, 2005) (SR-NASD-2004-173) ("Release No. 51078").

On March 2, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.⁵ This order approves the proposed rule change, as amended by Amendment Nos. 1 and 2. Simultaneously, the Commission is providing notice of filing of Amendment No. 2 and granting accelerated approval of Amendment No. 2.

II. Description

On September 7, 2004, Nasdaq acquired Brut LLC, a registered broker-dealer and member of the NASD, and operator of the Brut ECN ("Brut" or "Brut System"), through an ownership interest in Toll Associates LLC ("Toll").⁶ Once purchased by Nasdaq, Brut became a facility of a national securities association. Nasdaq currently operates Brut pursuant to a Temporary Conditional Exemption under Section 36 of the Act ("Exemption"), which the Commission granted for a period of six months following Nasdaq's acquisition of Brut.⁷

A condition to the exemption required Nasdaq to submit rule filings under Section 19(b) of the Act fully articulating its operation of Brut and Brut's integration with Nasdaq within 60 days of the acquisition.⁸ Accordingly, Nasdaq proposes to establish rules governing the operation of its Brut trading facility. These rules, proposed as NASD Rule 4900 Series, address, among other things, the Brut System's order display and

⁵ The text of Amendment No. 2 is 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.

⁶ Toll is a wholly-owned subsidiary of Nasdaq. Toll owns 99.78% of Brut LLC and 100% of Brut Inc., which owns the remaining 0.22% of Brut LLC. Both Toll and Brut Inc. conduct no business other than serving as holding entities for their respective ownership interests in Brut LLC. See Release No. 51078 at 4906.

⁷ See Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004).

⁸ See Exemption supra note 7.

system matching, access standards, order types, time-in-force designations, out-bound order routing, order execution algorithm, clearly erroneous trade procedures, and other system features and standards.⁹ Under the proposal, Nasdaq would operate Brut on a platform separate from the Nasdaq Market Center. Ultimately, Nasdaq intends to unify Brut and the Nasdaq Market Center into a single platform that would use the Brut broker-dealer for out-bound access to other markets.¹⁰

In Amendment No. 2, Nasdaq amended the proposed rule change to clarify that Brut would continue temporarily to provide access to its system for approximately twelve non-NASD member entities.¹¹ Under Section 15A of the Act, as a facility of a self-regulatory organization, access to Nasdaq facilities like Brut would be limited to NASD broker-dealers, or those sponsored by such broker-dealers. Accordingly, Nasdaq proposes to allow non-NASD members to continue to participate in the Brut system through the Brut broker-dealer. Pursuant to proposed NASD Rule 4914, Nasdaq would implement procedures and internal controls to restrict the flow of confidential information between the Brut System and the separate introducing broker functions Brut performs for non-NASD member firms. These procedures and controls are intended to ensure that all Brut participants have access to the same information on the same terms.

⁹ See Release No. 51078, note 4 supra.

¹⁰ Id.

¹¹ Nasdaq proposes to continue to provide non-member access for a limited interim period to expire on July 31, 2005.

III. Discussion

After careful review, 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 organization¹² and, in particular, the requirements of Section 15A of the Act¹³ and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹⁴ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that the Brut System became a facility of a national securities association subject to the standards set forth in Sections 15A and 19(b)(1) of the Act when Nasdaq completed its purchase of the Brut System. As such, NASD and, pursuant to NASD's plan of allocation and delegation of function to its subsidiaries, Nasdaq are obligated to file rules governing the operation of the Brut System with the Commission. The Commission also notes that as a broker-dealer, Brut remains subject to the applicable NASD rules. The Commission believes that, as a result of this proposed rule change, the rules that the NASD and Nasdaq will be required to enforce, and that

¹² The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78o-3.

¹⁴ 15 U.S.C. 78o-3(b)(6).

Brut and Brut System participants will be required to follow should be readily discernable.

The Commission notes that the proposed rule change articulates Nasdaq's operation of Brut and Brut's integration with the Nasdaq Market Center. The Commission finds that this proposed rule change, as amended, should enable market participants in general and Brut System participants in particular to understand the operation of, and the rules applicable to, the Brut System as a Nasdaq facility. The rules that are the subject of this filing encompass a wide range of areas, including the Brut System's order display and system matching, access standards, order types, time-in-force designations, out-bound order routing, order execution algorithm, clearly erroneous trade procedures, and other system features and standards. The Commission believes that the proposed rules are designed to enhance order interaction and price competition. The Commission also notes that Nasdaq has stated that Brut will continue to participate in market surveillance and audit trail programs conducted by Nasdaq and the NASD.¹⁵ Finally, the Commission notes that this proposal represents an interim step toward Nasdaq's ultimate plan to have Brut and the Nasdaq Market Center unified into a single technology platform and to use the Brut broker-dealer as an out-bound order router to other markets.¹⁶

In Amendment No. 2, Nasdaq amended the proposed rule change to clarify that Brut would provide sponsored access to its system for approximately twelve non-NASD

¹⁵ See Release No. 51078 at 4906.

¹⁶ See Release No. 51078 at 4910.

member entities for a temporary period.¹⁷ Further, Nasdaq proposed to implement procedures and internal controls to ensure all Brut participants have access to the same information on the same terms.

The Commission notes that the changes to the proposal in Amendment No. 2 should permit non-NASD members to continue to participate in the Brut System without interruption on a temporary basis. Accordingly, the Commission finds that there is good cause, consistent with Section 15A(b)(6)¹⁸ and Section 19(b)(2) of the Act,¹⁹ to approve Amendment No. 2 on an accelerated basis prior to the 30th day of the date of publication of notice of filing thereof in the Federal Register.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

¹⁷ The Commission has expressed concern about the potential conflict of interest that arises for a self-regulatory organization (“SRO”) when a member firm is affiliated with the SRO and recently proposed rules to prohibit such affiliations. See Securities Exchange Act Release No. 50699 (November 18, 2004) 69 FR 71126 (December 4, 2004) (“SRO Proposal”). Pending Commission consideration of comments on this proposal, Nasdaq applied for membership to the New York Stock Exchange (“NYSE”) on behalf of Brut. Further, Nasdaq committed to seek the Commission's approval pursuant to Rule 17d-1 under the Act to have the NYSE appointed as Brut's Designated Examining Authority for financial responsibility rules upon approval of Brut's membership in the NYSE. See Exemption, supra note 7. Approval of this proposed rule change in no way prejudices Commission action on the SRO Proposal. Depending on the outcome of the SRO Proposal, further structural changes may be required of Nasdaq and Brut.

¹⁸ 15 U.S.C. 78o-3(b)(6).

¹⁹ 15 U.S.C. 78s(b)(2).

- 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-2004-173 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-2004-173. 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-2004-173 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (File No. SR-NASD-2004-173), as amended by Amendment No. 1, be, and hereby is, approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²¹

Margaret H. McFarland
Deputy Secretary

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).