

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51498; File No. SR-NASD-2005-038)

April 6, 2005

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change 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 March 28, 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. The Commission is publishing this notice to solicit comments on the proposed rule change 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. Nasdaq requests approval to implement the proposed rule change retroactively as of April 1, 2005. The text of the proposed rule change 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.

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

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

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

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 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

On March 28, 2005, Nasdaq filed with the Commission SR-NASD-2005-035, modifying the fee structure applicable to NASD members using the Nasdaq Market Center ("NMC") or Nasdaq's Brut Facility ("Brut"). This filing seeks to impose, effective April 1, 2005, that exact same fee structure on non-NASD members using Brut. As set forth in SR-NASD-2005-035, fees in both the NMC and Brut are based upon multiple volume-based usage tiers that take into account the volume of a market participant across both systems. Currently, market participants must provide more than 500,000 shares of average daily liquidity each month to reduce their per-share execution costs or routing charges. In order to receive a higher liquidity provider credit, users must provide in excess of 1,000,000 shares of average daily liquidity each month in Nasdaq and/or Brut.

Just like the fees applicable to NASD members in SR-NASD-2005-035, for non-NASD members, Nasdaq proposes in this filing to: (1) increase to just over 2,000,000 shares the amount of average daily liquidity needed to be provided by a market participant to have its per-share execution or routing costs reduced; and (2) increase to 2,000,000 shares the number of shares of average daily liquidity needed to be provided each month before a market participant becomes eligible for an increased liquidity provider credit. The resulting modified fee structure is summarized below:

<b>Charge to member entering order:</b>	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 10 million	\$0.0027 per share executed (but no more than \$108 per trade for trades in securities executed at \$1.00 or less per share)
Greater than 2,000,000 but less than or equal to 10,000,000	\$0.0028 per share executed (but no more than \$112 per trade for trades in securities executed at \$1.00 or less per share)
2,000,000 or less	\$0.0030 per share executed (but no more than \$120 per trade for trades in securities executed at \$1.00 or less per share)

<b>Credit to member providing liquidity:</b>	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 20 million	\$0.0025 per share executed (but no more than \$100 per trade for trades in securities executed at \$1.00 or less per share)
Greater than 2,000,000 but less than or equal to 20,000,000	\$0.0022 per share executed (but no more than \$88 per trade for trades in securities executed at \$1.00 or less per share)
Less than or equal to 2,000,000	\$0.0020 per share executed (but no more than \$80 per trade for trades in securities executed at \$1.00 or less per share)

<b>Routed Orders</b>	
Any order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility and that does not attempt to execute in Nasdaq's Brut Facility prior to routing	\$0.004 per share executed
Any other order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month and average daily shares accessed through and/or routed from the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month (excluding orders routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility that do not attempt to execute in Nasdaq's Brut Facility prior to routing):	
Greater than 20 million shares of liquidity provided and greater than 50 million shares accessed or routed	\$0.0025 per share executed

Greater than 10 million but less than or equal to 20 million shares of liquidity provided and any amount accessed or routed, OR greater than 20 million shares of liquidity provided and 50 million or fewer shares accessed and/or routed	\$0.0027 per share executed
Greater than 2,000,000 but less than or equal to 10,000,000 shares of liquidity provided and any amount accessed and/or routed	\$0.0028 per share executed
Less than or equal to 2,000,000 shares of liquidity provided and any amount accessed and/or routed	\$0.0030 per share executed

Nasdaq believes that the proposed changes to its fee structure are reasonable, and draw an appropriate balance between the value-added benefits provided to the users by the Nasdaq Market Center and Brut systems and the fees imposed for such services.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>3</sup> in general, and with Section 15A(b)(5) of the Act,<sup>4</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.

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

<sup>4</sup> 15 U.S.C. 78q-3(b)(5).

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.

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.

III. 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-038 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-2005-038. 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-2005-038 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 is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.<sup>5</sup> Specifically, the Commission believes the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>6</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 the pricing and rebate schedule for non-NASD members that covers

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<sup>5</sup> The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

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



activity both on the NMC and Brut and is effective as of April 1, 2005, would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that was effective as of April 1, 2005 pursuant to SR-NASD-2005-035. The Commission believes that the fees are scaled according to objective criteria applied across-the-board to all categories of users, i.e., the pricing and rebate schedule will now apply equally to non-members as well as members, and is based on the volume of business they conduct on the NMC and Brut.

The Commission finds good cause for approving the proposed rule change prior to the 30<sup>th</sup> day of the date of publication of notice of filing thereof in the Federal Register. The Commission notes that the proposed pricing and rebate schedule for non-NASD members are identical to those in SR-NASD-2005-035, which implemented a new pricing and rebate schedule for NASD members and which became effective as of April 1, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing and rebate 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>7</sup> to approve the proposed rule change on an accelerated basis.

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<sup>7</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (File No. SR-NASD-2005-038) be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).