

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51683; File No. SR-NASD-2005-039)

May 11, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Incorporate the Brut System Book Feed Into the TotalView Entitlement

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 March 30, 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, II, and III 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.

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

Nasdaq proposes to modify NASD Rule 7010(q)(1) to incorporate Brut's System Book Feed, as described in NASD Rule 4901(j), within the TotalView entitlement. If approved, Nasdaq states that it will make this proposal effective on July 1, 2005. Below is the text of the proposed rule change. Proposed new language is italicized.

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7010. System Services

(a) – (p) No change.

(q) Nasdaq TotalView

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(1) TotalView Entitlement

The TotalView entitlement allows a subscriber to see all individual Nasdaq Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center, including the NQDS feed and the Brut System Book Feed.

(A) – (C) No change.

(2) – (3) No change.

(r) - (v) No change.

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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.

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

1. Purpose

On September 7, 2004, Nasdaq acquired Brut, LLC, a registered broker-dealer and member of the NASD, and operator of the Brut ECN System ("Brut" or "Brut System"). Once purchased by Nasdaq, Brut became a facility of a national securities association. On November 3, 2004, Nasdaq submitted a proposed rule change to establish rules governing the

operation of this facility.³ This proposed rule change was approved in amended form by the Commission on March 7, 2005.⁴

In its proposed rules governing the operation of the Brut facility, Nasdaq stated its intention of ultimately integrating the Brut facility with Nasdaq into a single technology platform that would further enhance execution quality for system users.⁵ As part of that process, Nasdaq stated its intention to, as a first step in this process, have Brut provide the full depth of its order book to the Nasdaq Market Center.⁶ Nasdaq states that this step was commenced upon Commission approval of the rules for the Brut facility as discussed above, and was completed on March 31, 2005.⁷

According to Nasdaq, a consequence of this integration is that market participants can now receive real-time information regarding the orders in Brut's order book via two distinct sources. Nasdaq's TotalView data feed provides information regarding all quotes and orders in the Nasdaq Market Center (including, but not limited, to Brut orders). In addition, Nasdaq continues to distribute the Brut System Book Feed, which contains the same information with respect to orders in Brut.⁸ Nasdaq currently intends to distribute Brut order information via both

³ See Exchange Act Release No. 51078 (January 25, 2005), 70 FR 4902 (January 31, 2005) (SR-NASD-2004-173).

⁴ See Exchange Act Release No. 51326 (March 7, 2005), 70 FR 12521 (March 14, 2005) (SR-NASD-2004-173).

⁵ See note 3 *supra*, at 4910.

⁶ *Id.*

⁷ Telephone conversation between Jeffrey Davis, Associate General Counsel, Nasdaq, and David Liu, Attorney, Division of Market Regulation ("Division"), Commission, on May 9, 2005.

⁸ See NASD Rule 4904(b)(1).

TotalView and the System Book Feed as long as Brut remains a separate Nasdaq facility, to ease the transition of market participants to a single platform.⁹

Nasdaq believes that the ability for market participants to receive Brut order book information via TotalView now warrants the incorporation of the Brut System Book Feed within the TotalView entitlement for fee purposes. Nasdaq states that the TotalView entitlement is intended to assess fees for the receipt of real-time information regarding depth of order book and related information, regardless of source. While Nasdaq believes that it is important to offer market participants the choice to receive Brut order book information via either the TotalView or the Brut System Book Feed, it further believes there is no justification to warrant differential fees based on the method of receipt.

Accordingly, Nasdaq proposes to incorporate the Brut System Book Feed into the TotalView entitlement effective July 1, 2005. As of that time, any recipient of the Brut System Book Feed would need to complete relevant market data agreements, begin submission of monthly usage reporting, and pay associated distributor and user fees. Nasdaq states that it intends to assess incremental fees only where a vendor market participant uses the Brut System Book Feed to provide order information in an application or context that does not already use TotalView to provide Nasdaq Market Center order book information. Nasdaq notes that, of the approximately sixty-five firms currently receiving the Brut System Book Feed, many are already

⁹ Nasdaq states that TotalView subscribers may obtain the Brut System Book Feed upon request of Nasdaq. Telephone conversation between William O'Brien, Senior Vice President, Market Data Distribution, Nasdaq, Jeffrey Davis, Associate General Counsel, Nasdaq, John Roeser, Assistant Director, Division, Commission, Marc McKayle, Special Counsel, Division, Commission, and David Liu, Attorney, Division of Market Regulation, Commission, on April 15, 2005.

TotalView recipients, and thus, for those firms, this rule change would not impose incremental expense unless their usage is expanded.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act,¹⁰ in general, and furthers the objectives of Section 15A(b)(5),¹¹ in particular, in that the incorporation of the Brut System Book Feed into the TotalView entitlement provides for the equitable allocation of reasonable charges among the persons distributing and purchasing Nasdaq depth of order book information. Nasdaq believes that the proposed pricing structure would enable Nasdaq to equitably charge for Brut depth of book information regardless of the source from which it is received, continue to provide market participants with choice regarding receipt of this information while Brut operates as a separate facility, and ease the transition to a single technology platform. Nasdaq further believes that this proposed rule change would encourage the broader redistribution of the Nasdaq Market Center depth of book order information, thus improving transparency and thereby benefiting the investing public.

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

Nasdaq does not believe that the proposed rule change will impose 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

No written comments were either solicited or received.

¹⁰ 15 U.S.C. 78o-3.

¹¹ 15 U.S.C. 78o-3(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

- (A) by order approve such proposed rule change; or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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-2005-039 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-2005-039. 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 such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-2005-039 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.¹²

Margaret H. McFarland
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).