

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52938; File No. SR-NASD-2005-138)

December 9, 2005

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

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 November 22, 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-members using Nasdaq's Brut Facility ("Brut"). Nasdaq requests approval to implement the proposed rule change retroactively for a pilot period running from December 1, 2005 through December 31, 2005. The text of the proposed rule change is below. Proposed new language is underlined. Proposed deletions are in [brackets].

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

* * * * *

7010. System Services

(a) – (h) No change.

(i) Nasdaq Market Center and Brut Facility Order Execution

(1) - (5) No change.

(6) The fees applicable to non-members using Nasdaq’s Brut Facility shall be the fees established for members under Rule 7010(i), as amended by SR-NASD-2005-019, SR-NASD-2005-035, SR-NASD-2005-048, and SR-NASD-2005-071, [and] SR-NASD-2005-125, and SR-NASD-2005-137, and as applied to non-members by SR-NASD-2005-020, SR-NASD-2005-038, SR-NASD-2005-049, SR-NASD-2005-072, [and] SR-NASD-2005-126, and SR-NASD-2005-138.

(j) - (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 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

In SR-NASD-2005-137, which applies to NASD members, Nasdaq modified its fee schedule for transaction executions in certain stocks listed on markets other than

Nasdaq by creating a pilot program under which liquidity providers (i.e., market participants that put quotes or orders that are accessed by incoming orders) may receive a credit of \$0.0005 per share executed.³ In this filing, Nasdaq is proposing to apply the same modification to non-NASD members that use Nasdaq's Brut Facility.

Nasdaq currently offers a liquidity provider credit with respect to securities whose primary listing is on Nasdaq, and its credit for transactions in exchange-traded funds ("ETFs") listed on the American Stock Exchange ("Amex") was recently extended to ETFs listed on other exchanges.⁴ Nasdaq notes that, with the exception of ETFs, however, such a credit has not been offered with respect to stocks whose primary listing is not on Nasdaq.

Nasdaq states that with the enhanced opportunities for electronic trading of non-Nasdaq listed stocks occasioned by market participant demand and upcoming regulatory changes, however, it expects that new competitive opportunities will develop for Nasdaq and other electronic venues. Nasdaq believes that the quality of executions that it can offer in such an environment will depend on the degree to which market participants in a position to provide liquidity opt to do so through Nasdaq. Because the market for executions of these stocks has not yet been subject to vigorous competition, and because the balance between the cost of providing credits and the revenue growth associated with increased liquidity provision has therefore not been tested in a fully competitive environment, Nasdaq believes that a pilot program, consisting of a modest \$0.0005 per

³ Telephone conversation between John Yetter, Associate General Counsel, Exchange, and David Liu and Michou Nguyen, Attorneys, Division of Market Regulation, Commission, on December 6, 2005.

⁴ See Securities Exchange Act Release Nos. 52757 (November 9, 2005), 70 FR 69791 (November 17, 2005) (SR-NASD-2005-125); and 52758 (November 9, 2005), 70 FR 69793 (November 17, 2005) (SR-NASD-2005-126).

share credit paid with respect to a limited number of stocks, would allow an assessment of the costs and benefits of the credit to Nasdaq and its market participants. Nasdaq represents that the forty stocks selected for inclusion in the pilot program⁵ are all stocks whose propensity to trade on electronic venues, high daily trading volumes, and large market capitalizations may correlate with a relatively high degree of price elasticity with regard to liquidity provision.

Nasdaq plans to run the pilot for a period of at least three months; however, because the authority for this proposal provided by the Nasdaq Board of Directors runs only through December 31, 2005, the pilot period covered by this filing is one month. Upon obtaining Board approval for a longer pilot, which Nasdaq expects to receive in December 2005, Nasdaq plans to file to extend the pilot through February 28, 2006.⁶ Nasdaq states that, based on information received regarding the trading characteristics of the forty stocks included in the pilot, it would then determine whether to submit a

⁵ Advanced Micro Devices Inc. (AMD); Apache Corp. (APA); AT&T Corp. (T); Avaya, Inc. (AV); Baker Hughes, Inc. (BHI); BJ Services Co. (BJS); Bristol-Myers Squibb Co. (BMY); Burlington Resources, Inc. (BR); Calpine Corp. (CPN); Charles Schwab Corp. (SCH); Citigroup Inc. (C); ConocoPhillips (COP); Corning Inc. (GLW); Devon Energy Corp. (DVN); EMC Corp. (EMC); Exxon Mobil Corp. (XOM); Ford Motor Co. (F); Gateway, Inc. (GTW); General Electric Co. (GE); Halliburton Co. (HAL); Hewlett-Packard Co. (HPQ); Johnson & Johnson (JNJ); JPMorgan Chase & Co. (JPM); Kohl's Corp. (KSS); LSI Logic Corp. (LSI); Micron Technology, Inc. (MU); Motorola, Inc. (MOT); Noble Corp. (NE); Occidental Petroleum Corp. (OXY); Office Depot Inc. (ODP); Pfizer Inc. (PFE); Phelps Dodge Corp. (PD); Pulte Homes, Inc. (PHM); Qwest Communications International Inc. (Q); Schlumberger Ltd. (SLB); Solectron Corp. (SLR); Sovereign Bancorp, Inc. (SOV); Time Warner, Inc. (TWX); Valero Energy Corp. (VLO); and Verizon Communications, Inc. (VZ).

⁶ Telephone conversation between John Yetter, Associate General Counsel, Exchange, and Michou Nguyen, Attorney, Division of Market Regulation, Commission, on December 7, 2005.

proposed rule change to extend the pilot further, modify the level of the liquidity provider credit, and/or offer a credit with respect to additional stocks.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁷ in general, and with Section 15A(b)(5) of the Act,⁸ 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. The proposed rule change applies to non-members that use Nasdaq's Brut Facility a fee change that is being implemented for NASD members that use the Nasdaq Market Center and/or Nasdaq's Brut Facility. Accordingly, Nasdaq believes that the proposed rule change promotes an equitable allocation of fees between members and non-members using Nasdaq's order execution facilities. Nasdaq believes that the proposed change will institute a liquidity provider credit available to all market participants that opt to provide liquidity through Nasdaq or Brut to support executions in any of forty stocks included in the pilot program.

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.

⁷ 15 U.S.C. 78o-3.

⁸ 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 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-2005-138 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-138. 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 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-2005-138 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.⁹ Specifically, the Commission believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act,¹⁰ 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 would retroactively modify pricing for non-NASD members using the Nasdaq's Brut Facility to be implemented on a pilot basis running from December 1, 2005 to December 31, 2005. This proposal would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that became effective November 22, 2005, pursuant to SR-NASD-2005-137 and that Nasdaq stated it would implement on a pilot basis from December 1, 2005 to December 31, 2005.

⁹ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78q-3(b)(5).

The Commission finds good cause for approving the proposed rule change prior to the 30th day of the date of publication of the notice thereof in the Federal Register. The Commission notes that the proposed fees for non-NASD members are identical to those in SR-NASD-2005-137, which implemented those fees for NASD members and which became effective as of November 22, 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,¹¹ to approve the proposed change on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹² that the proposed rule change (File No. SR-NASD-2005-138), is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Jonathan G. Katz
Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).