



July 29, 2003

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attention: Jonathan G. Katz, Secretary

Re: File No. SR-NASD-2003-85

Ladies and Gentlemen:

Brut, LLC (“Brut”)¹ appreciates the opportunity to provide the Securities and Exchange Commission (the “Commission”) with its comments in response to Exchange Act Release No. 48088 (the “Proposing Release”),² in which the Commission solicits industry feedback regarding a proposal of the Nasdaq Stock Market, Inc. (“Nasdaq”), an affiliate of the National Association of Securities Dealers (the “NASD”) to “add a post-trade anonymity feature to its SuperMontage Trading System.”³ This feature would shield the identity of users submitting certain order types from the counterparties with which they trade through settlement date, building on SuperMontage’s current pre-trade anonymity features (known as the “SIZE acronym” or “SIZE”).

Brut cautions the Commission to consider the far-reaching implications of allowing a facility operated by a self-regulatory organization to allow trades to occur between counterparties on a completely-anonymous basis, as it may raise several compliance, risk management and administrative issues for broker-dealers. In particular:

1. Books and Records Compliance. Exchange Act Rule 17a-3(a)(1) requires all broker-dealers to maintain a blotter which contains an “itemized daily record of all purchases and sales of securities” which must include “the name or other designation of the person” that was the counterparty to the transaction. On its face, it is unclear how firms would comply with this requirement with respect to the transactions that Nasdaq proposes to effect on a completely-anonymous basis in SuperMontage. While Nasdaq has represented that it will retain records of these trades to satisfy member compliance obligations under these rules,⁴ the Commission should be explicit in granting exemptive relief from these provisions to broker-dealers effecting transactions through SIZE.

¹ Brut operates The BRUT ECN System, one of the significant electronic communication networks (“ECNs”) in the Nasdaq market. The company is headquartered in New York City.

² June 25, 2003. 68 Fed. Reg. 39605 (July 2, 2003).

³ *Id.*, at 39605.

⁴ *Id.*, at n.4.

2. Risk Management. Under the proposal, Nasdaq is principally relying on the role of the National Securities Clearing Corporation (“NSCC”) as guarantor of transaction settlement to mediate any risk a firm would incur by not knowing their trading counterparty. The identities of the counterparties on fully anonymous trades will be submitted to NSCC in real time. The fact remains, however, that a window exists from the time of a transaction until midnight of T+1, which is when NSCC officially steps in as guarantor,⁵ where a firm faces exposure that their anonymous counterparty may fail to settle a transaction. This begs the question whether the service Nasdaq proposes to offer is worth such incremental systemic risk, and whether it is appropriate for Nasdaq to assume fiscal responsibility for such trades, like ECNs and other providers of anonymous transaction services currently do.
3. Operational Administration. Transactions involving broker-dealers that are completely anonymous from one another could create difficulties in resolving erroneous and/or disputed trades, which typically are resolved through direct broker-to-broker communication. While Nasdaq states it will provide a “help desk” to coordinate resolution of such issues,⁶ the Commission should thoroughly review the resources Nasdaq will dedicate to this effort and the procedures put in place to govern the administration of this function, so that Nasdaq can fulfill its Exchange Act responsibilities to prevent unfair discrimination by Nasdaq in the resolution of disputes among SIZE users.⁷

While Nasdaq is free to evolve SuperMontage as it sees fit, it must do so in a manner consistent with its regulatory responsibilities and its general duty to preserve fair and orderly markets. The complete removal of counterparty identity from the trade-execution process is a significant modification of modern market operational practices, and should be approved only when the Commission is completely satisfied that all direct and ancillary issues raised by the Proposing Release have been addressed.

Please do not hesitate to contact me at (917) 637-2560 regarding this letter, or how Brut can assist the Commission and the staff in evaluating these issues in the future.

Sincerely yours,

William O’Brien
Chief Operating Officer
Brut, LLC

⁵ See NSCC Rules and Procedures, Addendum K (July 1, 2003).

⁶ See Proposing Release, *supra* n.2, at 39606 n.11.

⁷ See Exchange Act Section 15A(b)(6).

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cc: The Hon. William Donaldson, Chairman
The Hon. Cynthia Glassman, Commissioner
The Hon. Paul Atkins, Commissioner
The Hon. Roel Campos, Commissioner
The Hon. Harvey Goldschmid, Commissioner
Giovanni Prezioso, General Counsel
Annette Nazareth, Director, Division of Market Regulation
Robert L.D. Colby, Deputy Director, Division of Market Regulation
Lawrence Harris, Chief Economist
Terri Evans, Assistant Director, Division of Market Regulation
Steve Williams, Assistant Director, Division of Market Regulation
Katherine A. England, Assistant Director, Division of Market Regulation
John Polise, Senior Special Counsel, Division of Market Regulation
Robert Greifeld, CEO and President, Nasdaq Stock Market, Inc.
Edward Knight, Executive Vice President and General Counsel, Nasdaq Stock Market, Inc.