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September 14, 2005

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Nasdaq's Proposed Changes to the
Brut Directed Cross Order Routing Process
Release No. 34-52170, File No. SR-NASD-2005-090

Dear Mr. Katz:

The New York Stock Exchange, Inc. ("NYSE") submits this letter to comment on the proposal of the Nasdaq Stock Market, Inc. ("Nasdaq") to direct a broker-dealer to disregard a customer's instructions and ignore its best execution obligations. This rule is a blatant violation of agency law and a broker-dealer's responsibility to use due diligence in obtaining the best execution for a customer order. We fail to understand how the NASD, as a self-regulatory organization, could approve such a proposition. The Commission should immediately abrogate the rule change.

A Brut Directed Cross Order is an order that is executable against marketable interest in Nasdaq's Brut System and, if it exhausts trading interest in Brut, is then automatically routed to such other market center as the customer may select – ***unless that customer chooses the NYSE***. Under the proposed rule change, Nasdaq proposes to direct Brut to single out for less favorable treatment those orders that customers specifically direct to the Exchange. The proposed rule provides:

> For Directed Cross Orders in exchange-listed securities ***directed to the New York Stock Exchange*** if, after being processed in the Brut System and exhausting available liquidity in the Brut System, such orders will be

> automatically routed to the Nasdaq Market Center for potential execution and thereafter to other market centers that provide automated electronic executions ***before being sent to the New York Stock Exchange.*** (Emphasis added.)

The proposed rule directs a broker to breach its fiduciary obligation as the agent for Directed Cross Orders. The Regulation NMS adopting release explains this fiduciary duty:

> A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws. . . . The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, i.e., at the best reasonably available price.[1]

When a customer directs a broker-dealer to send his order to a particular market, common law agency principles and the broker-dealer's fiduciary obligation to the customer require it to execute the order on the most favorable terms reasonably available in the context of the customer's instructions. Sending an order to every market ***other than the one that the customer has requested*** cannot possibly comply.

Nasdaq justifies this rule by claiming that increased interaction among NYSE-listed Directed Cross Orders with venues that provide automatic execution will improve the overall speed and efficiency of executing these orders.[2] The Commission has made clear, however, that speed and efficiency are only two among a number of relevant factors that a market is required to consider in evaluating whether customer orders receive best executions. Nasdaq's proposal ignores such other key best execution factors as the possibility of price improvement, the likelihood of execution, the availability of liquidity and lower volatility, not to mention that it ignores the very wishes of its customers. The voluntary nature of this order should not excuse the NASD and Nasdaq from preventing Brut from complying with its regulatory and fiduciary responsibilities. In a broader sense, all securities trading is voluntary, yet laws, regulations, and rules exist to protect investors in this voluntary activity.

We believe that this rule change is unreasonably discriminatory and inconsistent with Brut's obligations as a broker/dealer. Furthermore, we believe it is clearly inconsistent for Nasdaq, as a marketplace, to adopt a rule that unilaterally overrides customer instructions and disregards fundamental principles of best execution. We believe that the

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[1] See Regulation NMS adopting release at pp. 159-160 (Release No. 34-51808; File No. S7-10-04 (June 9, 2005)). The Commission emphasized that new Rule 611 (the Order Protection Rule) in no way lessens a broker-dealer's duty of best execution.

[2] Brut, a broker-dealer member of the NYSE, sends a daily average of 650,000 orders to the NYSE. Brut chooses not to offer its customers automatic execution through NYSE Direct+® even though close to 85 percent of its order flow is eligible.

Commission should immediately abrogate this filing and require the NASD to explain how this rule could possibly meet requirements of Federal and state law as it relates to regulatory and fiduciary obligations of best execution and the 1934 Act's prohibitions on unreasonable discrimination against customers and markets.

We thank you for this opportunity to comment. We would be pleased to respond to any questions that you may have.

Sincerely yours,

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
Robert L. D. Colby