



THE NASDAQ STOCK MARKET  
8800 BLACKWELL ROAD, SUITE 300  
ROCKVILLE, MD 20850

December 15, 2005

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission

**Re: Response to Comments - SR-NASD-2005-090**

Dear Mr. Katz:

The Nasdaq Stock Market, Inc. ("Nasdaq") welcomes the opportunity to respond to comments submitted by the New York Stock Exchange ("NYSE") in connection with the above-captioned rule proposal modifying the Brut Directed Cross Order. The Brut Directed Cross Order allows Brut system users to voluntarily direct that orders be sent to the Nasdaq Market Center and to other automated execution venues before being sent to the NYSE. As outlined in more detail below, the NYSE's comments demonstrate a misunderstanding of both the operation of electronic markets and the regulatory standards applicable to order processing.

As an initial matter, it must be noted that use of the Brut Directed Cross Order is purely voluntary. No party is required to use the Brut system, or any particular one of its many order types. As a strictly agency broker, Brut processes the orders sent to it based on the order type selected by the entering party. In turn, the selection of a particular order type directs the Brut system as to how the user wants the order handled. This ability to choose among multiple order execution methods is a hallmark of today's open and competitive electronic market structure. In this structure, market participants, not markets, select the combination of order types and execution venues that best suit their trading goals. The NYSE's comment letter attempts to turn this virtue into a vice by incorrectly asserting that the Brut Directed Cross Order is inconsistent with Brut's fiduciary obligations as to order handling and best-execution.

First, to the extent that a Brut Directed Cross Order operates exactly as described, it obviously follows the directions of the party entering it. Nasdaq cannot think of a process that is more faithful to Brut's fiduciary obligations as an agent for its customers. The NYSE's failure to recognize this is evidenced by its consistent mischaracterization of the Brut Directed Cross Order as one that ignores the wishes of the entering party by sending the order "to every market other than the one that the customer has requested." To the contrary, the customer entering a Brut Directed Cross Order has, in effect, specifically directed that its order be sent to other available automated venues before being sent to the NYSE. While such a result may not be what the NYSE desires, it is in no way inconsistent with any fiduciary obligation.

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The NYSE's equation of its interests with market regulatory obligations also leads it to the incorrect assertion that the Brut Directed Cross Order is inconsistent with best-execution obligations. The Brut system accepts many types of order flow from many types of market participants. A substantial portion of this order flow is proprietary, and not subject to a best execution analysis. To the extent that best-execution standards apply to the remainder, those orders are being entered into Brut by broker-dealers that themselves have specific and ongoing best-execution obligations. Nothing in the adoption or ongoing use of the Brut Directed Cross Order relieves those market participants of their duty to meet those obligations. Than being said, the NYSE offers no objective factual support for the dubious claim that any use of the Brut Directed Cross Order is inconsistent with best-execution simply because it doesn't put the NYSE at the front of the line for order flow. Such a contention is particularly inappropriate for the Brut Directed Cross Order which is programmed so as to not trade-through accessible better prices, including those at the NYSE, and is part of a Brut system that also provides a method for users to choose to send orders directly to the NYSE or any other accessible market.<sup>1</sup>

Finally, the NYSE takes issue with Brut's not providing access to the NYSE via the exchange's Direct+ system. Leaving aside the NYSE's equation of its Direct+ system with the automated systems of other markets that do not have Direct+'s restrictions on order size and its ability to be turned off, the Commission should be aware that Brut worked for many months to program its systems to provide Direct+ access and now does makes Direct+ available as an option to Brut system users. This enhancement, just like the Brut Directed Cross Order, is intended to provide Brut users flexible and efficient trading tools so as to allow them to obtain the best quality trade executions. That process should not be interfered with based on the complaints of a market center that, under the guise of protecting execution quality, seeks to substitute its own order processing and routing preferences for those of Brut's customers.

Sincerely,



Thomas Moran  
Associate General Counsel

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<sup>1</sup> The Brut system provides this functionality via the Thru Brut Order type. See NASD Rule 4903(c).