

a national securities exchange. The Commission notes that the trading of standardized, exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because options on the NYSE Indexes will be subject to the same regulatory regime as the other standardized options traded currently on the ISE, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Index Options.

### C. Surveillance

The Commission generally believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the market(s) trading the stocks underlying the derivative product is an important measure for the surveillance of the derivative product and the underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation. In this regard, the ISE and the NYSE, the NASD, and the Amex are members of the ISG and the ISG Agreement will apply to the trading of Index Options.<sup>39</sup> In addition, the ISE will apply to the options on the NYSE Indexes the same surveillance procedures it uses currently for existing index options trading on the ISE.

The NYSE International 100 Index and the NYSE World Leaders Index both contain foreign component ADRs that all trade on the NYSE. As mentioned above, 98 out of the 100 underlying components are subject to effective surveillance sharing agreements as set forth in ISE Rule 502. The remaining two components, representing only 0.86% of the Index, also meet surveillance requirements in ISE Rule 502(f)(2), because 50% of the volume for the underlying ADRs occurs on the NYSE. Accordingly, the Commission expects that there will be adequate surveillance mechanisms to detect and deter potential manipulation when

<sup>39</sup> The ISG was formed on July 14, 1983, to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. All of the registered national securities exchanges and the NASD are members of the ISG. In addition, futures exchanges and non-U.S. exchanges and associations are affiliate members of ISG.

trading Index options on the NYSE Indexes, which contain the foreign components.<sup>40</sup>

### D. Market Impact

The Commission believes that the listing and trading of options on the NYSE Indexes will not adversely impact the underlying securities markets.<sup>41</sup> First, as described above, the NYSE Indexes are highly capitalized and their underlying components are actively traded. Second, the position and exercise limits applicable to the options on the NYSE Indexes should serve to minimize potential manipulation and market impact concerns. Third, the risk to investors of contra-party non-performance will be minimized because the options on the NYSE Indexes, like other standardized options traded in the U.S., will be issued and guaranteed by the Options Clearing Corporation. Fourth, existing ISE index options rules and surveillance procedures will apply to the options on the NYSE Indexes.

### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>42</sup> that the proposed rule change (SR-ISE-2004-27), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>43</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51683; File No. SR-NASD-2005-039]

### 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

May 11, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>40</sup> Under the maintenance standards, 80% of the Indexes would have to meet the standards of ISE Rule 502, which would ensure that the Indexes with foreign components are adequately covered by effective surveillance mechanisms. See also *supra* note 18, and accompanying text.

<sup>41</sup> As noted above, the ISE represented in a confidential submission to the Commission that it has the necessary systems capacity to support the introduction of options on the NYSE Indexes.

<sup>42</sup> 15 U.S.C. 78s(b)(2).

<sup>43</sup> 17 CFR 200.30-3(a)(12).

(“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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*.

\* \* \* \* \*

#### 7010. System Services

- (a)–(p) No change.
- (q) Nasdaq TotalView
- (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.

\* \* \* \* \*

### 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.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

*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.<sup>3</sup> This proposed rule change was approved in amended form by the Commission on March 7, 2005.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> Nasdaq currently intends to distribute Brut order information via both 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.<sup>9</sup>

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

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

<sup>5</sup> See note 3 *supra*, at 4910.

<sup>6</sup> *Id.*

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

<sup>8</sup> See NASD Rule 4904(b)(1).

<sup>9</sup> Nasdaq states that TotalView subscribers may obtain the Brut System Book Feed upon request of Nasdaq. Telephone conversation between William

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 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,<sup>10</sup> in general, and furthers the objectives of Section 15A(b)(5),<sup>11</sup> 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

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.

<sup>10</sup> 15 U.S.C. 78o-3.

<sup>11</sup> 15 U.S.C. 78o-3(b)(5).

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.

**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](mailto: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 June 7, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51672; File No. SR-PCX-2005-62]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Exchange Fees and Charges

May 9, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 27, 2005, the Pacific Exchange, Inc. ("PCX" or "Exchange") 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 PCX. The Exchange filed this proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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

PCX proposes to amend the Trade-Related Charges portion of its Schedule of Fees and Charges ("Schedule"). The text of the proposed rule change is available on PCX's Web site (<http://www.pacificex.com>), at PCX's Office of the Secretary, and at the Commission's Public Reference Room.

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

In its filing with the Commission, PCX 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. PCX 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

The purpose of this proposed rule change is to amend the Trade-Related Charges portion of the Schedule in order to eliminate an incentive program for Market Makers with respect to transaction charges. In December 2003, the Exchange implemented an incentive program for Market Makers with respect to transaction charges.<sup>5</sup> The purpose of the incentive program was to secure existing volumes and attract higher levels of liquidity. The incentive program has been in place for approximately sixteen months. The Exchange has reviewed the incentive program and determined that it has not had its desired effects. As such, the Exchange is proposing to eliminate the incentive program and reinstate the \$0.21 per contract transaction fee for

Market Makers. The \$0.21 per contract transaction fee for Market Makers is the same fee that was in place prior to the adoption of the incentive program.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>7</sup> in particular, in that it provides for the equitable allocation of dues, fees, and other charges among its members.

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

The Exchange 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

Written comments on the proposed rule change were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>9</sup> because it is concerned solely with the administration of the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> See Securities Exchange Act Release No. 48976 (December 23, 2003), 68 FR 75701 (December 31, 2003).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.