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 offices of the Exchange. 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–Amex–2005–008 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–352 Filed 1–28–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51078; File No. SR–NASD–2004–173]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc., To Establish Rules Governing the Operation of Nasdaq's Brut Facility

January 25, 2005.

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 3, 2004, 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. On January 24, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the

proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to establish rules governing the operation of its Brut trading facility. Nasdaq will implement the proposed rule change, as amended, immediately upon approval by the Commission. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deletions are in [brackets].

4900. BRUT SYSTEM (System)

4901. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a) The term ''System securities'' shall mean Nasdaq Market Center eligible securities as that term is defined in NASD Rule 4701(s) and exchange-listed Intermarket Trading System (ITS) eligible securities as defined in NASD Rule 5210(c).

(b) The term ''Effective Time'' shall mean, for orders so designated, the time at which the order shall become eligible for display and potential execution with other orders in the System.

(c) The term ''Immediate or Cancel'' shall mean, for limit orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant.

(d) The term ''limit order'' shall mean an order to buy or sell a stock at a specified price or better. This order type is available for Nasdaq-listed and Exchange-listed securities.

(e) The term ''market order'' shall mean an unpriced order to buy or sell a stock at the market's current best price. A market order may have a limit price beyond which the order shall not be executed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(f) The term ''mixed lot'' shall mean an order that is for more than a normal unit of trading but not a multiple thereof.

(g) The term ''Nasdaq Market Center'' shall mean the automated system owned and operated by The Nasdaq Stock Market, Inc. pursuant to NASD Rule 4700 Series.

(h) The term ''The BRUT ECN System,'' or ''System,'' shall mean the automated system owned and operated by Brut, which is owned and operated by The Nasdaq Stock Market, Inc.,

which enables Participants to execute transactions in System securities; to have reports of the transactions automatically forwarded to the appropriate National Market Trade Reporting System, if required, for dissemination to the public and the industry, and to ''lock in'' these trades by sending both sides to the applicable clearing corporation(s) designated by the System Participant(s) for clearance and settlement; and to provide System Participants with sufficient monitoring and updating capability to participate in an automated execution environment.

(i) The term ''Participant'' shall mean an NASD member that fulfills the obligations contained in Rule 4902 regarding participation in the System.

(j) The term ''System Book Feed'' shall mean a data feed for System eligible securities that Brut will make available to Participants and third-party vendors.

(k) The term ''odd-lot order'' shall mean an order that is for less than a normal unit of trading.

(l) The term ''Reserve Size'' shall mean the functionality that permits a Participant to display a portion of an order, with the remainder held in reserve on an undisplayed basis.

(m) The term ''Good-till-Cancelled'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution only until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

(n) The term ''Good-till-Cancelled-Overnight'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until 4 p.m. Eastern Time, after which it shall be held by the System in a pending state, ineligible for display or execution, until the following trading day, when it will become eligible for display and execution from 7:30 a.m. until 4 p.m. Eastern Time on that and all subsequent trading days, until a date provided by the entering party (or if no such date is given, indefinitely) until cancelled by the entering party.

(o) The term ''Good-till-Time,'' shall mean, for orders so designated, that if after entry into System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until the time designated by the entering party, after which the order will be cancelled by the system. This time may

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the originally filed proposed rule change.

be relative time (e.g. 30 minutes after entry) or an actual time (e.g. 2 p.m.).

(p) The term ''Day'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution only until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

(q) The term ''End-of-Day'' shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential execution and/or display until 8 p.m. Eastern Time, after which it shall be returned to the entering party.

(r) The term ''Pegged'' shall mean, for priced limit orders so designated, that after entry into the System, the price of the order is automatically adjusted by the System in response to changes in the Nasdaq inside bid or offer (for Nasdaq-listed securities) or the national best bid or offer (for ITS securities), as appropriate. The Participant entering a Pegged Order can specify that order's price will either equal the inside quote or improves the inside quote by an amount set by the entering party on the same side of the market (a ''Regular Pegged Order'') or offset the inside quote on the contra side of the market by an amount (the ''Offset Amount'') set by the Participant (e.g., $0.01 less than the inside offer or $0.02 more than the inside bid) (a ''Reverse Pegged Order''). The Participant entering a Pegged Order may (but is not required to) specify a limit price, to define a price at which pegging of the order will stop and the order will be permanently converted into an un-pegged limit order at limit price. This order type is available for Nasdaq-listed and Exchange-listed securities.

(s) The term ''Discretionary'' shall mean an order that when entered into System has both a displayed bid or offer price, as well as a non-displayed discretionary price range and size (which shall be equal to or less than the Order's Reserve Size) at which the Participant is also willing to buy or sell, if necessary. This order type is available for Nasdaq-listed and Exchange-listed securities.

(t) The term ''Post Only'' shall mean, for To Brut limit orders so designated, that if an order is marketable against an order then-displayed in the System upon receipt, it shall be rejected and returned to the entering Participant. If the order is marketable against a quote displayed outside of Brut, the price of the order is adjusted to a price $0.01

inferior to the best bid (or offer, as appropriate) then displayed in the Nasdaq Market Center, and then displayed in the System. This order type is available for Nasdaq-listed and Exchange-listed securities.

(u) The term ''Agency Away'' shall mean an agency order designated by the entering Participant as eligible for execution at a price inferior to the then-current national best bid/offer. This order type is available only for Nasdaq-listed securities.

(v) The term ''Principal Inside Only'' shall mean a principal order designated by the entering Participant as only eligible for execution at a price equal or better than the then-current national best bid/offer. This order type is available for Nasdaq-listed and Exchange-listed securities.

(w) The term ''normal unit of trading'' shall mean one hundred (100) shares.

4902. System Participant Registration

(a) Participation in Brut requires current registration with the System and is conditioned upon the Participant's initial and continuing compliance with the following requirements:

(1) Execution of a System Subscriber Agreement;

(2) Satisfaction of the Brut New Accounts Policies & Procedures requirements;

(3) Membership in, or access arrangement with a participant of, a clearing agency registered with the Commission that maintains facilities through which System compared trades may be settled;

(4) Acceptance and settlement of each System trade that System identifies as having been effected by such Participant, or if settlement is to be made through another clearing member, guarantee of the acceptance and settlement of such identified System trade by the clearing member on the regularly scheduled settlement date;

(5) Compliance with all applicable rules and operating procedures of the Association and the Securities and Exchange Commission.

(b) Access to the System by non-System participants is available through the Nasdaq Market Center as defined in NASD Rule 4701(r) and related rules.

4903. Order Entry Parameters

(a) To Brut Orders—

(1) General. A To Brut Order is an order that is displayed in the System and is executable only against marketable contra-side orders in the System. This order type is available for Nasdaq-listed and Exchange-listed securities. The following requirements

shall apply to To Brut Orders entered by Participants:

(A) A To Brut Order shall be a limit order, and shall indicate whether it is a buy, short sale, short-sale exempt, or long sale. A To Brut Order can be designated as End-of-Day, Immediate or Cancel, Good-till-Cancelled, Day, Good-till-Canceled Overnight, Good-till-Time, Effective Time, Post Only, Pegged or Discretionary.

(B) To Brut Orders shall be executed pursuant to the Brut Book Process as described in Rule 4905(a).

(C) A To Brut Order to sell short shall not be executed if the execution of such order would violate NASD Rule 3350 or, in the case of ITS Securities, SEC Rule 10a–1. In said circumstances, the price of the To Brut Order shall be adjusted to $.01 above the Nasdaq inside bid for Nasdaq-listed securities or, in the case of exchange-listed securities, $.01 above the national best bid or offer, and thereafter be processed as if a Reverse Pegged Order.

(D) The System shall not accept To Brut Orders that are All-or-None, or have a minimum size of execution.

(b) Brut Cross Orders—

(1) General. A Brut Cross Order is an order that is displayed in the System, and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. With the exception of Directed Cross Orders, once a Brut Cross Order is routed (in whole or in part) to another market center, any remaining unexecuted or returned portion of the order shall be posted in System and shall no longer be eligible for routing to other market centers.

(A) A Brut Cross Order shall be a limit order, and shall indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Brut Cross Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, Good-till-Cancelled Overnight, Good-till-Time, Effective Time.

(B) A Brut Cross Order may also be designated as an Aggressive Cross Order. An Aggressive Cross Order is an order that is displayed in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. If, after being posted in the Brut System, and after it has exhausted available liquidity

in the Brut System, the Aggressive Cross Order has its price crossed by the displayed quote of another market center, the System will be routed by Brut to that market center for potential execution. Aggressive Cross Orders may comply with paragraph (A) of this rule.

(C) A Brut Cross Order may also be designated as a Super Aggressive Cross Order. A Super Aggressive Cross Order is an order that is displayed in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If marketable upon receipt against both orders in the System as well as other market centers, the order shall execute first against System orders. If, after being posted in the Brut System, and after it has exhausted available liquidity in the Brut System, the Aggressive Cross Order has its price locked or crossed by the displayed quote of another market center the System will be routed by Brut to that market center for potential execution.

(D) A Brut Cross Order may also be designated as a Directed Cross Order. A Directed Cross Order is an order that entered in the System during market hours and is executable against marketable contra-side orders in the System. The order also is eligible for routing to other market centers. If, after being processed in the Brut System and exhausting available liquidity in the Brut System, the order is automatically routed by Brut to the specific market center selected by the entering party for potential execution. Any portion of the Directed Cross Order that remains unfilled after being routed to the selected market center will be returned to the entering party.

(E) Brut Cross Orders, including those designated as Aggressive Cross Orders, Super Aggressive Cross Orders and Directed Cross Orders, shall be executed pursuant to:

(i) The To Brut Order Process described in Rule 4905(a) to the extent marketable against an order resident in the System; and

(ii) With the exception of Directed Cross Orders, the Brut Order Routing Process described in Rule 4905(b) to the extent not marketable against an order resident in the System.

(F) A Brut Cross Order, including those designated as an Aggressive Cross Order, Super Aggressive Cross Order and Directed Cross Order, to sell short shall not be executed in the System if the execution of such order would violate NASD Rule 3350 or, in the case of ITS Securities, SEC Rule 10a–1. In said circumstances, the price of the Brut Cross Order shall be adjusted to $.01 above the Nasdaq inside bid for Nasdaq-listed securities or, in the case of exchange-listed securities, $.01 above the national best bid or offer, and thereafter be processed as if a Reverse Pegged Order.

(c) Thru Brut Orders—

(1) General. A Thru Brut Order is an order submitted to the System that is designated for routing to another market center. This order type is available for Nasdaq-listed and Exchange-listed securities. The following requirements shall apply to Thru Brut Orders:

(A) A Thru Brut Order shall be a market order or a limit order, and must indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Thru Brut Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, or Good-till-Time, or Effective Time.

(B) Thru Brut Orders do not participate in Brut Routing Process as described in Rule 4905(b). Instead such orders are sent directly to the market center selected by the entering party. If unexecuted, the order (or unexecuted portion thereof) shall be returned to the entering party.

(d) Hunter Orders—

(1) General. A Hunter Order is a non-displayed order that will execute against trading interest in the System or another market center. This order type is available only for Nasdaq-listed securities. After 6:30 p.m. Eastern Time, Hunter Orders will execute only against other orders in the System. The following requirements shall apply to Hunter Orders:

(A) A Hunter Order shall be a limit order, and must indicate whether it is a buy, short sale, short-sale exempt, or long sale. A Hunter Order can be designated as Immediate or Cancel, End-of-Day, Good-till-Cancelled, Day, or Good-till-Time, or Effective Time.

(B) Hunter Orders shall be executed as follows:

(i) To the extent marketable upon receipt against orders in the System, pursuant to the Brut Book Process as described in Rule 4905(a); then/or

(ii) If not marketable upon receipt against orders in the System but marketable against the displayed quotes of other market centers, pursuant to the Brut Routing Process as described in Rule 4905(b).

(iii) If not marketable upon receipt against any quote displayed in the System or another market center, the order shall be retained, but not be displayed, in the System and shall remain available for execution via the Brut Book and/or Brut Routing Processes should the order become marketable.

(e) Entry of Agency and Principal Orders—Participants are permitted to submit agency, riskless principal, and principal orders for processing in the System. Participants shall correctly note their capacity at the time of entry of an order(s) into the System.

(1) Unless designated as ''Agency Away'', no agency order shall be executed at a price inferior to the then current National Best Bid (for sell orders) or Best Offer (for buy orders), taking into account prior efforts to execute against the bids/offers of other market centers.

(2) Unless designated as ''Principal Inside Only'', principal and riskless principal orders may be executed at a price inferior to the then current National Best Bid (for sell orders) or Best Offer (for buy orders).

(f) Order Size—Any order in whole shares up to 1,000,099 shares may be entered into the System, subject to a dollar volume limitation of $25,000,000.

4904. Entry and Display of Orders

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

(1) Participants shall be permitted to transmit to the System multiple orders at a single as well as multiple price levels. Each order shall indicate the amount of reserve size (if applicable).

(2) The System shall time-stamp an order upon receipt, which time-stamp shall determine the ranking of the order for purposes of processing To Brut Orders and Brut Cross Orders.

(3) Good-till-Cancelled, Day, orders can be entered into the System (or previously entered orders cancelled) between the hours 7:30 a.m. to 4 p.m. Eastern Time. Pegged, Discretionary, Immediate-or-Cancel and End-of-Day To Brut Orders, Good-till-Time, Good-till-Canceled Overnight and GTX orders can be entered into System (or previously entered orders cancelled) between the hours 7:30 a.m. to 8 p.m. Eastern Time. Orders entered prior to market open and Good-till-Time orders carried over from previous trading days, shall not become available for execution until 7:30 a.m. Eastern Time. Good-till-Time orders carried over from previous trading days with an Effective Time will not become available for execution until the Effective Time on all subsequent trading days the order is held by the System.

(b) Display of Orders—The System will display orders submitted to the System as follows:

(1) System Book Feed—orders resident in the System will be displayed to Participants via the System Book Feed.

(2) Nasdaq Market Center—For each Nasdaq Market Center eligible security, the best priced order to buy and sell resident in the System shall be displayed and eligible for execution within the Nasdaq Market Center. The System may also provide to the Nasdaq Market Center additional orders, up to and including all orders in System, in Nasdaq Market Center eligible securities.

(3) Exceptions—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

(A) Odd-lots, Mixed Lots, and Rounding—The System Book Feed shall be capable of displaying trading interest in round lot and mixed-lot amounts, and sub-penny increments for quotations priced under $1.00.

For Nasdaq Market Center display purposes, the System shall aggregate all shares, including odd-lot share amounts, entered by Participants at a single price level and round the total share amount down to the nearest round-lot amount. Any odd-lot portion of an order that is not displayed as a result of the rounding process shall remain available for execution, in accordance with the time-priority of their original entry time. Round-lots that are subsequently reduced by executions to a mixed lot amount shall also be rounded for to the nearest round-lot amount for purposes of display in the Nasdaq Market Center. Any odd-lot number of shares that do not get displayed as a result of rounding will remain available for execution, in accordance with the time-priority of their original entry time.

(B) Minimum Increments and Rounding—The minimum trading increment for System quotations priced $1.00 and above is $.01. For quotations priced below $1.00 the minimum increment is $.0001.

(i) For System display purposes, quotations in sub-penny increments $1.00 and above will be rounded down (for bids) or up (for offers) by the System to the nearest $.01 increment. Orders so rounded shall have no superior execution priority compared to orders previously submitted at the relevant $.01 increment.

(ii) For Nasdaq Market Center display purposes, any quotations in sub-penny increments shall be rounded down (for bids) and up (for offers) to the nearest $.01 increment. Sub-penny quotations that are rounded for display purposes shall be executed at their actual price,

rather than the rounded price at which they are displayed.

(C) Reserve Size—Reserve Size shall not be displayed in the System, but shall be accessible as described in Rule 4905.

(D) Discretionary & Hunter Orders— Hunter Orders, and the discretionary portion of Discretionary Orders shall be available for execution only upon the appearance of contra-side marketable trading interest, and shall be executed pursuant to Rule 4905.

4905. Order Processing

(a) Brut Book Order Process
Orders subject to the Brut Book Order Process shall be executed as follows:

(1) Default Execution Algorithm— Price/Time—The System shall execute interest within the System in price/time priority in the following order:

(A) Displayed Orders;
(B) Reserve Size;
(C) Discretionary Orders within the Discretionary Order's discretionary price range; and
(D) Hunter Orders.

(2) Decrementation—Upon execution, an order shall be reduced by an amount equal to the size of that execution. In the case of orders that have both a displayed and reserve share component, share amounts shall be reduced starting first with their reserve portions.

(3) Processing of Locking/Crossing Orders: If during market hours, a Participant enters a To Brut order that will lock/cross the market (as defined in NASD Rule 4613(e) or in NASD Rule 5263(a) or (b)), the System shall adjust the price of the order to $.01 less than the current best bid quotation (for buy orders) or $.01 more than the current best offer quotation (for sell orders) and thereafter be processed as a Reverse Pegged Order.

(4) Processing of Directed, Aggressive and Super Aggressive Cross Orders— The System shall process crossed Directed and Aggressive Cross Orders, and locked or crossed Super Aggressive Cross Orders as follows:

(A) Displayed orders which are designated as ''Directed Cross Orders'' by a Participant shall be routed to the market center selected by the entering party for potential execution by the System. This order type is available Nasdaq-listed and Exchange-listed securities.

(B) Displayed orders which are designated as ''Aggressive Cross Orders'' by a Participant that are subsequently crossed by the displayed quotation of another market center shall be executed pursuant to the Brut Order Routing Process upon being so crossed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(C) Displayed orders which are designated as ''Super Aggressive Cross Orders'' by a Participant that are subsequently locked or crossed by the displayed quotation of another market center shall be executed pursuant to the Brut Order Routing Process upon being so locked or crossed. This order type is available for Nasdaq-listed and Exchange-listed securities.

(b) Brut Order Routing Process

(1) The Brut Order Routing Process shall be available to Participants from 7:30 a.m. to 6:30 p.m. Eastern Time, and shall route orders in accordance with parameters described in Rule 4903 for a particular order type.

(2) With the exception of Thru Brut and Directed Cross Orders that specifically direct which market center an order is to be routed, orders routed out of the Brut System to other market centers for potential execution are generally delivered to other market centers in price/size priority. If the routed order is smaller in size than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers the routed order to the available market centers in price/size priority. If the routed order is larger than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers over-sized orders to each displayed market center's quote in proportion to the individual market's center share of that total displayed share amount.

(3) In the event an order routed to another market center is not executed in its entirety, the remaining portion of the order shall be returned to the System and, if upon return the order is marketable against a System order then priced at the NBBO, it will be subjected to Brut Book Process prior to any further routing.

(4) An order that has been routed to another market shall have no time standing in the System execution queue relative to other orders in the System. A request from a Participant to cancel an order while it is outside the System shall be processed subject to the applicable rules of the market center to which the order has been routed.

4906. Clearance and Settlement

All transactions executed in, or reported through, System shall be cleared and settled by and between the System Participant and Brut, through a registered clearing agency using a continuous net settlement system.

4907. Obligation To Honor System Trades

(a) If a Participant, or clearing member acting on a Participant's behalf, is reported by the System, or shown by the activity reports generated by the System, as constituting a side of a System trade, such Participant, or clearing member acting on its behalf, shall honor such trade on the scheduled settlement date.

(b) Brut and/or Nasdaq shall have no liability if a Participant, or a clearing member acting on the Participant's behalf, fails to satisfy the obligations in paragraph (a).

4908. Compliance With Rules and Registration Requirements

(a) Failure by a Participant to comply with any of the rules or registration requirements applicable to the System identified herein shall subject such Participant to censure, fine, suspension or revocation of its registration a Participant or any other fitting penalty under the Rules of the Association.

(b) If a Participant fails to maintain a clearing relationship to honor its obligations under Rule 4906, it shall have its access to the System restricted until such time as a clearing arrangement is reestablished.

(c) The authority and procedures contained in paragraph (b) do not otherwise limit the Association's authority, contained in other provisions of the Association's Rules, to enforce its rules or impose any fitting sanction.

4909. Adjustment of Open Orders

Except when a cash dividend or distribution is less than one cent ($0.01), on the ex-date of a corporate action, the System shall automatically adjust the price and/or size of Good-till-Cancelled Overnight orders resident in the System in response to issuer corporate actions related to a cash dividend as follows:

(a) Sell Orders—Sell orders shall not be adjusted by the System and must be modified, if desired, by the entering party,

(b) Buy Orders—Buy orders shall be reduced by the dividend amount. To the extent that the dividend includes a sub-penny increment, the order will be displayed and processed as set forth in Rule 4904(b)(3)(B). Open buy and sell orders that are adjusted by the System pursuant to the above rules, and that thereafter continuously remain in the System, shall retain the time priority of their original entry.

4910. Anonymity

(a) Transactions executed in the System shall be cleared and settled with Brut. The transaction reports produced by the System will indicate the details of the transactions, and shall not reveal contra party identities other than Brut.

(b) Brut shall reveal a member's identity in the following circumstances:

(1) When the National Securities Clearing Corporation ("NSCC") ceases to act for a member, or the member's clearing firm, and NSCC determines not to guarantee the settlement of the member's trades;

(2) For regulatory purposes or to comply with an order of an arbitrator or court;

4911. Clearly Erroneous Transactions

All matters related to clearly erroneous transactions executed in the System shall be initiated and adjudicated pursuant to NASD Rule 11890.

[4912. Minimum Quotation Increment

The minimum quotation increment in the BRUT ECN System for quotations of $1.00 or above in Nasdaq-listed securities and in securities listed on a national securities exchange shall be $0.01. The minimum quotation increment in the BRUT ECN System for quotations below $1.00 in Nasdaq-listed securities and in securities listed on a national securities exchange shall be $0.0001.]

4912. Normal Business Hours

The Brut System operates from 6:30 a.m. to 8 p.m. Eastern Time on each business day.

4913. Limitation of Liability

The Association and its subsidiaries, as well as Nasdaq and Brut and their subsidiaries, shall not be liable for any losses, damages, or other claims arising out of the System or its use. Any losses, damages, or other claims, related to a failure of the System to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the System shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/ Order, message, or other data into the System.

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, as amended. 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.

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

1. Purpose

Background

On September 7, 2004, Nasdaq completed its purchase of Brut, LLC ("Brut"), a registered broker-dealer and member of the NASD, and operator of the Brut ECN (the "Brut System" or "System").[4] According to Nasdaq, as a member of the NASD, Brut remains subject to all NASD rules applicable to its activities as a broker-dealer, including those requiring its participation in market surveillance and audit trail programs conducted by Nasdaq and the NASD. Nasdaq states that, as an ECN, Brut participates in the Nasdaq Market Center system as an Order-Delivery ECN pursuant to the NASD Rule 4700 Series, and as an ITS Market Maker pursuant to the NASD Rule 5200 Series. Brut continues to act as a counter-party to all trades taking place in its system, for anonymity as well as clearance and settlement purposes. Brut also continues to provide outbound order routing services to other market centers for its subscribers. According to Nasdaq, to meet its limit order display obligations, Brut currently provides the Nasdaq Market Center its best single "top-of-file" priced orders in individual securities Brut has within the System.

Nasdaq states that, once purchased by Nasdaq, the Brut System became a "facility" of a national securities association subject to the standards set forth in Sections 15A and 19(b)(1) of the Exchange Act.[5] As such, Nasdaq is obligated to file with the Commission rules to govern the operation of the Brut System. This filing is intended to meet that obligation and includes a description of the Brut System, its

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[4] Nasdaq owns Brut via Nasdaq's 100% ownership interest in Toll Associates LLC. Toll Associates LLC, in turn, owns 99.78% Brut LLC and 100% of Brut Inc., which owns the remaining 0.22% of Brut LLC. Both Toll Associates LLC and Brut Inc. conduct no business other than serving as holding entities for their respective ownership interests in Brut LLC, the entity that operates the Brut ECN.

[5] Nasdaq currently operates Brut pursuant to a Temporary Conditional Exemption from Rule 19(b) of the Exchange Act issued by the Commission. See Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004).

various features, order processing method, and a proposed set of Brut System rules.

The Brut System

1. Order Display/Matching System

The Brut System allows subscribers to enter market and priced limit orders to buy and sell Nasdaq and Exchange-listed securities. Such orders may be in round-lots, mixed-lots, or odd-lots of any size up to 1,000,099 shares up to a maximum single order dollar cap amount of $25,000,000, and may be entered on a principal, riskless principal, or agency basis. Nasdaq states that Brut acts only as an agent on behalf of its subscribers and engages in no proprietary trading save that necessary to correct system errors. Subscribers may enter multiple orders at single or multiple price levels. Subscribers have the option to have a portion of their order held in reserve and not displayed to the marketplace. Brut, in turn, makes available to System subscribers and market data vendors a data feed of all displayable orders on both the bid and offer side of the market (excluding reserve size share amounts) for all price levels at which shares are available within its System. According to Nasdaq, to the extent that Brut displays orders in the Nasdaq Market Center, those orders are displayed under the same terms and conditions generally applicable to Nasdaq Quoting Market Participants, including the rounding and aggregation procedures contained in NASD Rule 4707. Although Brut currently provides only its best top-of-file prices to the Nasdaq Market Center, Nasdaq proposes that Brut be given the option to provide the Nasdaq Market Center additional orders at other price levels, up to and including Brut's full depth-of-book, so that Nasdaq Market Center users may have the full benefit of Brut's liquidity.

Brut also currently accepts sub-penny amounts for orders priced under $1.00 a share. Nasdaq states that, for orders priced $1.00 a share and above, Brut accept orders only in penny increments.[6] Sub-penny order prices are viewable by System subscribers. If a sub-penny order is required to be displayed via the Nasdaq Market Center, the Brut system rounds such orders down (for bids) or up (for offers) to the nearest $.01 increment. Sub-penny orders executed via the Nasdaq Market Center, however, will be executed at their actual price, rather than the rounded price at which they are displayed.[7]

2. Access Standards

According to Nasdaq, to obtain access to the Brut System as a system participant, a user must execute a Brut subscriber agreement and be a participant in, or have an access arrangement with a participant in, a Commission-registered clearing agency. In addition, the Brut subscriber must also agree to:

a. Comply with all applicable rules of the NASD and the Commission; and

b. Accept all Brut System trades identified by the System as being effected by the subscriber.

Broker-dealers may also access System orders through the Nasdaq Market Center, regardless of their status as a system participant as described above, provided they have met the conditions for access to the Nasdaq Market Center.

3. Order Types

The Brut System makes available to subscribers several order types. These order types are described below.

Limit Order—an order to buy or sell a stock at a specified price or better. This order type is available for Nasdaq-listed and Exchange-listed securities.

Market Order—an un-priced order to buy or sell a stock at the market's current best price. A market order may have a limit price beyond which the order shall not be executed. This order type is available for Nasdaq-listed and Exchange-listed securities.

Agency Away Order—an agency order that is designated by the entering party as eligible for execution at a price inferior to the then-current national best bid/offer. This order type is available for Nasdaq-listed securities.

Principal Inside Only Order—a principal order that is designated by the party as only eligible for execution at a price equal or better than the then-current national best bid/offer. This order type is available for Nasdaq-listed and Exchange-listed securities.

Brut Cross Order—an order that is displayed in Brut and executable against marketable contra-side orders in any market center, including the Brut System, at the time of receipt. If equally-priced executable orders are available both in Brut and another market center, the order will first execute against Brut System orders. Once a Brut Cross Order is routed out in whole or in part to another market center, any remaining

unexecuted or returned portion of the order will be posted in the Brut System and will no longer be routed out for potential execution, unless the order is designated as an Aggressive Cross Order or Super Aggressive Cross Order. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Brut Cross sell order, priced at 10.00.

Brut will route this order out to any crossing market center for potential execution.[8] If the routed order is only partially executed, the outstanding shares remaining will be posted in the Brut book on the offer at 10.00. Once posted, the order will no longer be routed out for execution.

Directed Cross Order—an order that if, after entry into the Brut System and after it has exhausted available liquidity in the Brut System is routed by Brut to that specific market center for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Directed Cross sell order, priced at 10.00 and directed to Market Center A.

After checking the Brut system for available liquidity, the system will route this order to Market Center A for potential execution. If the routed order is only partially executed, the outstanding shares are returned to the entering party.

Aggressive Cross Order—a Brut Cross Order that if, after being posted in the Brut System and after it has exhausted available liquidity in the Brut System, has its price crossed by the displayed quote of another market center is routed by Brut to that market center for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives an Aggressive Cross sell order, priced at 10.01.

Brut will first post this order on the offer at 10.01. Soon thereafter, another market center posts a bid price at 10.02. Since this 10.02 price is marketable against the Aggressive Cross Order's limit price of 10.01, the order will be routed out by Brut to the other market center for execution. If the liquidity priced at 10.02 is depleted, and the Aggressive Cross Order still has outstanding shares remaining, the order

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[6] *See* Securities Exchange Act Release No. 50956 (January 3, 2005), 70 FR 1746 (January 10, 2005) (NASD–2004–190).

[7] This filing relocates the standards governing the Brut System's acceptance and processing of sub-penny orders from current NASD Rule 4912 to proposed NASD Rule 4904(b)(3)(B).

[8] For all order type examples, the term ''market center'' refers to any trading venue other than Brut, including the Nasdaq Market Center.

will be re-posted in the Brut book at its price of 10.01. If the price of returned shares is again crossed, the shares will again be routed for potential execution.

Super Aggressive Cross Order—a Brut Cross Order that, if after being posted in the Brut System, has its price locked or crossed by the displayed quote of another market center, is routed by Brut for potential execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.01 offer

Brut receives a Super Aggressive Cross sell order, priced at 10.01.

Brut will first post this order on the offer at 10.01. Soon thereafter, another market center posts a bid price at 10.01. Since this 10.01 price is equal to the Super Aggressive Cross Order's limit price of 10.01, the order will be routed out by Brut to the other market center for execution. If the liquidity priced at 10.01 is depleted, and the Super Aggressive Cross Order still has shares remaining, the order will be re-posted in the Brut book at its price of 10.01. This same process would be followed if the other market center had posted a price that crossed the Super Aggressive Cross Order. If the price of returned shares is again locked or crossed, the shares will again be routed for potential execution.

Thru Brut Order—an order that is directed to a market center other than Brut for execution. This order type is available for Nasdaq-listed and Exchange-listed securities.

To Brut Order—an order eligible for execution upon receipt solely against Brut System orders, and displayed in the System to the extent the order cannot be executed upon receipt. This order type is available for Nasdaq-listed and Exchange-listed securities.

Hunter Order—an order that is not displayed in the System, but will execute against available trading interest residing in the Brut System or another market center. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.02 offer.

Brut receives a Hunter Order to buy, priced at 10.01.

Since there is no liquidity at the 10.01 price, Brut will hold the order undisplayed until marketable trading interest is available. If thereafter an offer is posted at 10.01 either in Brut or in another market center Brut will execute or route the Hunter Order to access that liquidity. Any unexecuted shares will remain/return to the book and wait undisplayed until another order is marketable against the Hunter Order or the Hunter Order times out. If the

returned shares of the Hunter Order again become marketable, the shares will again be routed for potential execution.

Pegged Order—a To Brut limit order that, after entry, has its price automatically adjusted by the System in response to changes in the Nasdaq Market Center (for Nasdaq-listed securities) or national best bid or offer (for Exchange-listed securities), as appropriate. Pegged Orders can specify that its price will either equal the inside quote on the same side of the market or improves the inside quote by an amount set by the entering party (a "Regular Pegged Order"), or a price that is offset from the inside quote on the contra side of the market by an amount (the "Offset Amount") set by the entering party (*e.g.*, $0.01 less than the inside offer or $0.02 more than the inside bid) (a "Reverse Pegged Order"). The Pegged Order only moves towards, or up to, the best price as appropriate. The entering party may voluntarily specify a limit price at which pegging price changes of the order will stop and the order will be permanently converted into an un-pegged limit order at the limit price. This order type is available for Nasdaq-listed and Exchange-listed securities. Pegged orders may not be combined with other order processing designations.

Example:

The market is 10.00 bid—10.01 offer.

Brut receives a Regular Pegged buy order, with a peg limit of 10.05.

Brut will post the order at 10.00. If the inside bid moves to 10.01, Brut will move the Pegged Order also to the 10.01 bid price. This process will continue until the order is executed or its price reaches the peg limit of 10.05.

Discretionary Order—an order that has both a displayed price, as well as a non-displayed discretionary price range and size (which shall be equal to or less than the order's reserve size) in which the entering party, if necessary, is also willing to buy or sell. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is 10.00 bid—10.50 offer.

Brut receives a Discretionary buy order, with a limit price of 10.00 and a display quantity of 200 shares, a discretion price of 10.25 and a discretion quantity of 1,000 shares.

Brut posts the order at 10.00. Thereafter, another market participant posts an offer for 1,000 shares at 10.20. Since this is within the Discretionary Order's price range, Brut will route the full discretion quantity (*i.e.*, 1,000 shares) for potential execution while the

displayed portion remains in the Brut book.

Post Only Order—a To Brut Limit Order that, if marketable upon receipt against an order then-displayed in the System, is rejected and returned to the entering party. If the order is marketable against a quote displayed outside of Brut, the price of the order is adjusted to a price $0.01 inferior to the best bid (or offer, as appropriate) then displayed in the Nasdaq Market Center, and then displayed in Brut. This order type is available for Nasdaq-listed and Exchange-listed securities.

Example:

The market is at 10.00 bid—10.01 offer. Brut is at the 10.00 bid.

Brut receives Post-Only sell order, priced at 10.00.

Normally, this order would execute against the Brut 10.00 bid, but since the order is post-only, the order is rejected back to the entering party. Had the 10.00 bid not been in Brut but another venue, Brut would not reject the order but instead adjust the order's price and post it in the Brut System.

4. Time in Force Designations

Orders entered into the Brut System may be designated by the entering party to remain in force and available for display and/or potential execution for varying periods of time. Unless cancelled earlier, once these time periods expire, the order (or the unexecuted portion thereof) is returned to the entering party. These "time in force" designations are described below:

Immediate or Cancel (IOC)—limit orders with this designation are returned to the sender if not immediately executed. If partially executed, un-executed remainders of these orders are returned immediately to the entering party.

Good-till-Canceled (GTC)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.[9]

Day (DAY)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party. This is the default

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[9] Currently, the Brut System processes orders designated as GTC and Day in the exact same manner. In the near future, Nasdaq states that Brut will modify the names of its order types to eliminate this duplication.

time in force where none is provided by the entering party.

Good-till-Canceled-Overnight (GTCO)—orders with this designation (or the unexecuted portions of such orders) are treated like GTC orders, but are held by the Brut System overnight and remain available for potential display/execution until 4 p.m. of a date provided by the entering party, or indefinitely, unless and until cancelled by the entering party. GTCO orders are not eligible for execution between 4 p.m. and 8 p.m. Eastern Time.

End-of-Day (GTX)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until 8 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.

Good-till-Time (GTT)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and remain available for potential display/execution until the time designated by the entering party. This time may be a relative time (*e.g.*, 30 minutes after receipt) or an actual time (*e.g.*, 2 p.m.).

Effective Time (EFT)—orders with this designation (or the unexecuted portions of such orders) are held by the Brut System and only become available for potential display/execution at an actual time during the trading day selected by entering party (*e.g.*, 3 p.m.).

Nasdaq states that the Brut System normally operates between the hours of 6:30 a.m. and 8 p.m. Eastern Time. Orders with the above time in force designations may be entered into the Brut System, or previously entered orders cancelled, starting at 6:30 a.m. Eastern Time. With the exception of the GTC and DAY designations, which may only be entered until 4 p.m. Eastern Time, all time in force designations may be entered into Brut until 8 p.m. Eastern Time. Though the entry of various time in force designations is permitted throughout the System's hours of operation, the Brut System will not execute an order in contravention of the time in force period selected by the entering party, and instead will hold all such entries until they can be processed in conformity with the time in force parameters selected upon entry.

5. Routing

The Brut System provides the capability to route orders to other available market centers between the hours of 7:30 a.m. and 6:30 p.m. Eastern

Time.[10] The entering party designates, through the order type it selects (*e.g.*, Thru Brut, Brut Cross, Aggressive Cross, Super Aggressive Cross, Directed Cross, or Hunter), whether the System should first seek to execute the order against contra-side marketable orders in the System prior to routing. Nasdaq states that in no event, however, does the router give an order to a market center displaying an inferior-priced order until the router has attempted to access better-priced displayed orders in that or other market centers.[11]

According to Nasdaq, with the exception of Thru Brut and Directed Cross Orders that specifically direct which market center an order is to be routed, orders routed out of the Brut System to other market centers for potential execution are generally delivered to other market centers in price/size priority. If the Nasdaq Market Center has displayed shares at the best price level, the System will first deliver to the displayed Nasdaq Market Center quote/order before routing to other market centers. If the routed order is smaller in size than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers the routed order to the available market centers in price/size priority. If the routed order is larger than the total combined displayed share amounts of accessible market centers at the best price level, the Brut System delivers over-sized orders to each displayed market center's quote in proportion to the individual market's center share of that total displayed share amount. For example, if Market Center A is showing 60% of the total amount of displayed shares across all markets at the best price level, and Brut has a routable order greater in size than the total displayed share amount across all markets, Brut will send an oversized order to Market Center A representing 60% of the total amount of shares Brut is attempting to execute via the routed order. The other market centers at that

price will likewise receive oversized orders in proportion to their displayed amounts.

Nasdaq states that orders routed by Brut to another market do not retain time priority with respect to other orders in Brut's System and Brut continues to execute other orders while the routed order is away at another market. Once routed by Brut, an order becomes subject to the rules and procedures of the destination market including, but not limited to, short-sale regulation and order cancellation.

6. Execution Algorithm

Nasdaq states that the Brut System has an execution algorithm of price/time priority. For each order, among equally-priced trading interest, the System executes against available contra-side displayed share amounts in full, in price/time priority, before then moving to reserve shares which are likewise executed in price/time priority. After display and reserve size are exhausted at a particular price level, the Brut System will then access, if available, share amounts of Discretionary Orders within the Discretionary Order's discretionary price range at that same price level, followed by executable Hunter Orders before moving on to the next price level.

For example, assume the following orders in particular security at the best price level in System:

2 p.m.—Order #1 BUY 100 at 20.00 (100 displayed, 0 reserved).
2:02 p.m.—Order #2 BUY 2,500 at 20.00 (1,500 displayed, 1,000 reserved).
2:03 p.m.—Order #3 BUY 1,000 at 20.00 (discretion to 20.07) (500 displayed, 500 reserved).
2:04 p.m.—Order #4 BUY 400 at 20.00 (Hunter Order) (0 displayed, 400 reserved).
2:05 p.m.—Order #5 BUY 500 at 20.00 (200 displayed, 300 reserved).

Thereafter, the system receives a 10,000 share To Brut limit order to sell at 19.99.

Matching

In the above situation, the System will match Order #1 for 100 shares, then match the 1,500 share displayed portion of Order #2, followed by the 500 share displayed portion of Order #3, and finally the 200 share displayed portion of Order #5 for a total of 2,300 shares. Since 7,700 shares are still needed to fill the market sell order in full, the system will then match the 1,000 share reserve amount of Order #2, and then 500 share displayed portion of Order #3, followed next by the 300 share reserve amount of Order #5.

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[10] Nasdaq states that Brut routes to other market centers trading Nasdaq securities as well as to National Securities Exchanges, including the American and New York stock exchanges and other regional stock exchanges using the Intermarket Trading System ("ITS"). Access to the New York Stock Exchange's DOT system is currently provided to Brut through an agreement with NYSE-member SunGuard Global Execution Services. As part of this access arrangement, Brut allows subscribers to send orders for immediate pass-through to SunGuard and then to DOT, including market on open/close and limit on open/close orders and orders with the fill-or-kill and all-or-none share amount designations.

[11] According to Nasdaq, use of the Brut router is voluntary. Users can select, by the type of order entered, if they want the Brut System to route their order to another market center for potential execution.

Decrementation

Having determined which orders are eligible for execution via the matching process, the Brut System then proceeds to decrement (reduce) share amounts from those orders. These share amounts are decremented from the matched orders starting with reserve size of the orders, if any.[12] (Order #1—no reserve, 100 shares display portion decremented in full; Order #2—1,000 shares reserve decremented followed by 500 shares of displayed 1,500 shares, leaving 1,000 shares displayed; Order # 3—500 shares (discretionary amount treated as reserve = 500 executed, 500 share displayed portion remains); Order #5—300 shares reserve decremented by 200 shares, leaving 300 shares). Finally, the System will execute the 400 share Hunter Order #4. Having exhausted all trading interest at the best price level in the system, the order would then move on to seek additional shares at the next price level in the System.

7. Clearly Erroneous Trade Procedures

According to Nasdaq, Brut adjudicates clearly erroneous trade disputes for executions taking place exclusively within its System. While generally reviewing clearly erroneous trade claims in response to subscriber requests, Brut reserves the right to take action on its own initiative if it determines that a trade is clearly erroneous and needs to be modified or cancelled. Nasdaq states that, in the normal course, Brut limits its clearly erroneous review to only those Brut System trades that execute at prices that are a certain percentage or raw dollar price away from the National Best Bid/Offer at the time of execution. These parameters, which vary based on the execution price of the asserted clearly erroneous trade, are summarized below:

Execution price	Range away from the NBBO
$.01–$.99	10%.
$1–$19.99	5%.
$20 and above	1 Point.

According to Nasdaq, if a Brut-only trade satisfies the above, Brut considers the trade potentially erroneous and conducts a facts and circumstances analysis to determine what, if any, action should be taken. In addition to the individual facts and circumstances of the trade, Brut also considers other

factors in evaluating clearly erroneous trade claims including: If the trade created a new high or low in the stock; if the trade consisted of an excessive number of shares; if the trade took place in close proximity to news released on the security; if the trade took place during a locked or crossed market or during a period of extreme volatility; if the trade took place before or after normal market hours; if the trade took place in close proximity to halt and subsequent resumed trading in the security; how soon after the trade the subscriber notified Brut of the potentially erroneous trade; and if the trade or trades at issue involves a security whose issuer was recently reorganized.

Nasdaq states that, while Brut follows the above procedures today, when Brut operates pursuant to rules approved by the Commission, Brut will automatically cease operating an independent clearly erroneous review process and instead trades taking place in its System will immediately become subject to NASD Rule 11890 that already governs trades in the Nasdaq Market Center and grants authority to designated Nasdaq officers "to review any transaction arising out of the use or operation of any execution or communication System owned or operated by Nasdaq and approved by the Commission, * * *"[13]

8. Other System Features and Standards

As part of the proposed set of rules governing its Brut Facility, Nasdaq is also proposing to codify current Brut system functions and, where appropriate, establish similar standards regarding operational issues between the Nasdaq Market Center and Brut. For example, Nasdaq is proposing that the Brut System have a limitation of liability rule substantially similar to that already in place for the Nasdaq Market Center.[14] Nasdaq is also proposing that the Brut system adjust open orders in its system in a manner substantially similar to the way they are adjusted in the Nasdaq Market Center,[15] as well codifying standards regarding the obligation of users to honor system trades,[16] and the removal of users for failing to maintain a required clearing relationship.[17]

9. Brut/Nasdaq Integration Plan

Though now sharing common ownership, Brut and Nasdaq currently operate separate order display and execution systems. With respect to the processing of quotes/orders, Nasdaq states that the interaction between the entities is limited to Brut participating in the Nasdaq Market Center as a Nasdaq Order-Delivery ECN pursuant to the NASD Rule 4700 Series and as an ITS Market Maker pursuant to NASD Rule 5200 Series. In these capacities Brut provides the Nasdaq Market Center its best single "top-of-file" price orders in individual securities Brut has within the System.

Nasdaq states that its goal is to increase the scope and quality of the interaction between its two systems to ensure that the users of either the Nasdaq Market Center or Brut have access to the best-priced orders in both systems. According to Nasdaq, as currently contemplated and proposed in this filing, Nasdaq's first step in integrating Brut's System and its orders more closely into the Nasdaq Market Center will be to have Brut provide its full depth of its order book to the Nasdaq Market Center. In addition, Brut will connect to the Nasdaq Market Center using a dedicated direct voluntary linkage that Nasdaq makes available to any Nasdaq Order-Delivery ECN that wants it.

Nasdaq states that its long-term vision is to have Brut and Nasdaq unified in a single technology platform that will further enhance execution quality for system users. Nasdaq currently contemplates using the Brut broker-dealer in a manner ancillary to the market execution system as an outbound access broker dealer to other market centers.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with section 15A of the Act,[18] in general, and furthers the objectives of section 15A(b)(6),[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

Nasdaq does not believe that the proposed rule change, as amended, will

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[12] This decrementation process differs from that of the Nasdaq Market Center, which decrements shares directly from the matched portion of quotes/orders and then refreshes those matched portions from any remaining reserve share amounts. See NASD Rule 4710.

[13] *See* NASD Rule 11890(a)–(b) and proposed NASD Rule 4911. Telephone conversation between Thomas Moran, Associate General Counsel, Nasdaq, and David Liu, Attorney, Division of Market Regulation, Commission, on January 25, 2005.

[14] *See* NASD Rule 4705(h).

[15] *See* proposed NASD Rule 4909.

[16] *See* proposed NASD Rule 4907.

[17] *See* proposed NASD Rules 4908.

[18] 15 U.S.C. 78*o*–3.

[19] 15 U.S.C. 78*o*–3(b)(6).

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, as amended; 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*. Please include File Number SR–NASD–2004–173 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–2004–173. 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–2004–173 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 05–1697 Filed 1–28–05; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51071; File No. SR-Phlx-2005–05]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change to Increase Position Limits and Exercise Limits for Options on Standard and Poor's Depositary Receipts (SPDRs®)

January 21, 2005.

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 January 19, 2005, the Philadelphia Stock Exchange, Inc., ("Phlx" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. In addition, the Commission is granting accelerated approval of the proposed rule change.

[20] 17 CFR 200.30–3(a)(12).
[1] 15 U.S.C. 78s(b)(1).
[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 1001, Position Limits, to increase position limits and exercise limits for options on the Standard and Poor's Depositary Receipts ("SPDRs®").[3] The text of the proposed rule change is available on the Phlx's Web site (*http://www.phlx.com*), at the Phlx'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, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in item III below. The Phlx 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 Exchange proposes to amend Exchange Rule 1001 to increase the position limits and exercise limits[4] applicable to options on SPDRs from 75,000 to 300,000 contracts on the same side of the market. The Exchange began trading options on SPDRs on the Exchange's electronic trading platform for options, Phlx XL, on January 10, 2005. Given the expected institutional demand for options on SPDRs, the Exchange believes that the current equity position limit of 75,000 contracts[5] is too low and could be a deterrent to the successful trading of the product. Options on SPDRs are 1/10th the size of options on the Standard and Poor's 500 Index ("SPX"). Thus, a position limit of 75,000 contracts in options on SPDRs is equivalent to a

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[4] Exchange Rule 1002, Exercise Limits, refers to exercise limits that correspond to aggregate long positions as described in Exchange Rule 1001. The position limit established in a given option under Exchange Rule 1001 is also the exercise limit for such option.

[5] *See* Exchange Rule 1001, Commentary .05(a).