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August 25, 2004

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

Re: Application for Temporary Exemption from Section 19(b) of the Securities
Exchange Act of 1934

Dear Mr. Katz:

On May 25, 2004, The Nasdaq Stock Market, Inc. ("Nasdaq") entered into a definitive agreement to purchase Brut ECN ("Brut"), a registered broker-dealer and Electronic Communications Network ("ECN"). Nasdaq and Brut expect to close the transaction and transfer ownership to Nasdaq on August 27, 2004.

Today, Brut is a member of the National Association of Securities Dealers, Inc. ("NASD") and participates in the Nasdaq Market Center execution system (formerly know as the Nasdaq National Market Execution System or SuperMontage) as a Nasdaq Order-Delivery ECN.¹ Brut's relationship with Nasdaq is limited to participating in the Nasdaq Market Center execution system in the same manner as other ECNs - - Nasdaq has no ownership interest in Brut.

Upon closing of the purchase transaction, Nasdaq will be the sole owner of Brut, and Brut will continue to operate as an ECN and submit orders to the Nasdaq Market Center.² Once acquired, Brut will become a "facility" of Nasdaq pursuant to Section 3(a)(2) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act") because it will be property of Nasdaq that is used for the purpose of effecting or reporting

¹ Rule 4701(t).

² Presently, the NASD is Brut's designated examining authority ("DEA") for financial responsibility rules. However, on August 6, 2004, Brut submitted an application for membership in the New York Stock Exchange ("NYSE"). Upon approval of Brut's membership in the NYSE, Nasdaq will seek the Commission's approval pursuant to Rule 17d-1 under the Act to have the NYSE appointed as Brut's DEA.

securities transactions.³ Thereupon, Nasdaq will be obligated, under Section 19(b) of the Act, to file with the Securities and Exchange Commission ("Commission") proposed rules governing the operation of Brut's systems and subscriber fees ("Brut filings").⁴

For the reasons set forth below, Nasdaq is unable to submit the Brut filings prior to close of the transaction and the transfer of ownership to Nasdaq. However, Nasdaq commits to submitting these filings within 60 days of the transfer. Therefore, Nasdaq requests that the Commission exercise its authority under Section 36 of the Act⁵ and grant Nasdaq/NASD a temporary exemption from Section 19(b) rule filing and approval requirements related to Brut systems and fees.⁶ This temporary exemption period would commence immediately upon Nasdaq's acquisition of Brut and continue during the pendency of the Commission's notice, comment, and final approval process of any filings submitted during this 60-day period.

³ Under Section 3(a)(2) of the Act a "facility" of an exchange "includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service."

The term "facility" is defined in the context of an "exchange." However, the Commission has concluded that the term applies to Nasdaq's operations as well, even though Nasdaq is not registered as an exchange. The Commission's conclusion is based on its findings that Nasdaq falls within the definition of the term "exchange." Securities Exchange Act Release No. 44201 (April 18, 2001) at note 22.

⁴ Section 15A of Act requires that "[T]he rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls." This standard is applicable to Nasdaq and Brut as a result of Nasdaq being a subsidiary of the NASD, a registered national securities association under Section 15A of the Act.

⁵ Section 36 of the Act provides in relevant part that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

⁶ The obligation to file with the Commission proposed changes to the NASD rules concerning Nasdaq systems has been delegated to Nasdaq by the NASD, pursuant to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"). Nasdaq is submitting this request for exemption pursuant the Delegation Plan; the exemption is necessary to provide Nasdaq the requisite time to develop the rules for the Brut system. In addition, on August 6, 2004, the NASD Board of Governors approved Nasdaq's proposal to seek the exemption. Further, Nasdaq staff provided NASD and NASD Regulation staff an opportunity to consult with respect to the request for exemption. No other action by the NASD is necessary for the filing of the exemption request.

Until transfer of ownership, Nasdaq and Brut remain legally separate entities, each engaged in, and competing for, the business of facilitating securities transactions, among other things. As a result, Nasdaq and Brut are constrained in the amount and type of information that can be exchanged between them prior to the acquisition's consummation. Outside counsel has advised Nasdaq that, as legally distinct entities, the exchange of sensitive information between Nasdaq and Brut pre-closing can and would subject them to Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, as well as to the "gun jumping" provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a. As a result of the foregoing, information from Brut that necessarily will be an important component of any rule filing submitted by Nasdaq related to that entity (*e.g.*, information about the technical specifications of Brut's execution algorithm, order types and pricing) must be kept confidential by Brut - - and cannot be shared with Nasdaq - - prior to the closing of the transaction. Therefore, Nasdaq is unable to submit the appropriate filings prior to the transfer of ownership in Brut.

The requested exemption is consistent with the protection of investors and the public interest because it will allow the continued operation of Brut in the period immediately after its purchase by Nasdaq. The exemption also provides Nasdaq a reasonable opportunity to analyze fully Brut's systems, operations, and fee structure to ensure an orderly integration of Brut and Nasdaq and make accurate filings based on such information. In addition, the exemption will not diminish the Commission's ability to monitor Nasdaq and Brut. To the extent Nasdaq makes changes to its non-Brut systems during the exemption period, or thereafter, it remains subject to Section 19(b) and thus obligated to file proposed rule changes with the Commission. Nasdaq also will be required to submit proposed rule changes with respect to any material changes to Brut's functions during the exemption period.⁷

In contrast, there is potential harm to investors if an exemption is not granted. Brut presently accounts for approximately thirteen percent of the share volume in Nasdaq-listed securities. If the exemption is not granted, Nasdaq will be forced to terminate immediately Brut's operations upon the transfer of ownership. Resumption of the services could occur under this scenario only when Nasdaq receives approval of the Brut filings. The summary termination of Brut's services will potentially harm investors, disrupt the functioning of an orderly market, and eliminate a point of access to the markets.

⁷ Nasdaq currently anticipates making no material changes to Brut's ECN functionality during the exemption period. If such changes become necessary as the result of continued competition, however, Nasdaq's commitment above to file proposed rule changes ensures the Commission the opportunity to review any such modifications.

As discussed earlier, after Nasdaq becomes the sole owner, Brut will continue to operate as an ECN and submit orders to the Nasdaq Market Center for display and execution.⁸ To provide the Commission the opportunity review and/or approve changes to Brut's fees and material changes to Brut's operations as an ECN, as well as ensure that the Commission's ability to monitor Nasdaq and Brut is not diminished by the exemption, Nasdaq commits to the following conditions while the exemption is in effect:

1. Brut will remain a registered broker-dealer, and continue to operate as an ECN;
2. Brut will be a subsidiary of Nasdaq;
3. Brut will operate in compliance with the obligations contained in Regulation ATS;⁹
4. In lieu of filing amendments to Brut's Form ATS, Nasdaq will file a proposed rule change under Section 19 of the Act if it seeks to make a material change to Brut's operations;
5. Nasdaq will file a proposed rule change under Section 19 of the Act if it seeks to modify Brut's fee schedule; and
6. Brut will continue to be treated the same as other ECNs that participate in the Nasdaq Market Center, and in particular Brut will not be accorded preferential treatment in how orders it submits to the Nasdaq Market Center execution system are displayed or executed.

Immediately upon consummation of the purchase, Nasdaq and Brut will be relieved of certain legal constraints in sharing information discussed earlier. Accordingly, Nasdaq and Brut staff will begin sharing the previously restricted information so that, among other things, Nasdaq can draft rules governing Brut's functionality and its fees.¹⁰ Nasdaq will submit these filings within 60 days of the date Nasdaq obtains ownership of Brut.

Based on the above, Nasdaq believes that the requested exemption draws an appropriate balance between Nasdaq's obligations as part of a self-regulatory organization and the

⁸ Brut will continue to be subject to, and have the rights under, the Rule 4700 Series and other NASD rules.

⁹ Once ownership of Brut transfers to Nasdaq, Brut will no longer be subject to Regulation ATS because a national securities association will operate it. Rule 301 provides an exemption from Regulation ATS for alternative trading systems operated by national securities associations. However, Nasdaq voluntarily commits to comply with the obligations set forth in the regulation, subject to the limitation discussed in condition number four, above.


¹⁰ Nasdaq and Brut also will immediately commence the process of combining certain aspects of the organizations (e.g., the finance and human resource departments and sales staff). The staff also will begin a comprehensive analysis of the respective technology platforms to determine how to maximize the operational and cost effectiveness of these assets.

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importance of ensuring the uninterrupted operation of Brut for its users – including public customers.

Should you have any questions regarding Nasdaq's exemption request, you can reach me at (301) 978-8480.

Sincerely,


Edward S. Knight

cc: Annette Nazareth, Division of Market Regulation
Robert Colby, Division of Market Regulation