

(6) Nasdaq treats Brut the same as other ECNs that participate in the Nasdaq Market Center, and, in particular, Nasdaq does not accord Brut preferential treatment in how Brut submits orders to the Nasdaq Market Center execution system or in the way its orders are displayed or executed; and

(7) Nasdaq submits rule filings under Section 19(b) of the Exchange Act<sup>30</sup> fully articulating its operation of Brut and Brut's integration with Nasdaq within sixty days of the date Nasdaq assumes ownership of Brut.<sup>31</sup>

In addition, the Commission notes that NASD is currently the Designated Examining Authority ("DEA") for Brut. On August 6, Nasdaq applied for membership to the New York Stock Exchange ("NYSE") on behalf of Brut. In its Exemption Request, Nasdaq commits to seek the Commission's approval pursuant to Rule 17d-1 under the Exchange Act<sup>32</sup> to have the NYSE appointed as Brut's DEA for financial responsibility rules upon approval of Brut's membership in the NYSE.

In granting the Commission broad exemptive authority in Section 36 of the Exchange Act,<sup>33</sup> Congress intended to incorporate flexibility into the Exchange Act's regulatory scheme to reflect a rapidly changing marketplace. Congress particularly intended for the Commission to use this flexibility to promote efficiency and competition. The Commission believes that the requested temporary conditional exemption will help achieve these goals, while upholding the regulatory objectives of the Exchange Act. In granting this relief, the Commission makes no finding regarding whether Nasdaq's operation of Brut as a facility would be consistent with the Exchange Act. Proposed rule changes regarding Nasdaq's operation of Brut will be evaluated by the Commission in accordance with the procedures set forth under Section 19(b) of the Exchange Act.<sup>34</sup>

The Commission notes that without its approval of rules governing the operation of Brut, Nasdaq would be unable to operate Brut, thereby causing Brut to cease operations until the Brut Filings are approved by the Commission. Should Brut be required to abruptly cease operations, a significant source of liquidity would be lost, which could potentially disrupt the functioning of an orderly market and harm investors. This exemptive relief

should facilitate competition in the market by allowing Brut to continue to provide liquidity and compete with other market centers, while also providing NASD and Nasdaq with a reasonable opportunity to comply with their obligations under Section 19(b) of the Exchange Act. Therefore, the Commission believes that this exemption strikes an appropriate balance between the Commission's interest to encourage competition in the rapidly changing market place and to uphold the procedural requirements under Section 19(b) of the Exchange Act, and thus is necessary and appropriate in the public interest and is consistent with the protection of investors.

For the reasons discussed above, the Commission finds that the temporary conditional exemptive relief requested by NASD and Nasdaq is necessary and appropriate in the public interest and is consistent with the protection of investors.

*It is ordered*, pursuant to Section 36 of the Exchange Act,<sup>35</sup> that the application for a temporary conditional exemption is granted for a period of six months following Nasdaq's acquisition of Brut.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50318; File No. SR-NASD-2004-127]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the National Quotation Data Service Fee Pilot

September 3, 2004.

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 August 23, 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 and II, below, which Items have

been prepared by Nasdaq. Nasdaq filed this proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> 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 extend for one year a pilot program under NASD Rule 7010(h) ("Pilot"), which reduced from \$50 to \$10 the monthly fee that non-professional users pay to receive National Quotation Data Service ("NQDS").<sup>6</sup> Nasdaq proposes no substantive changes to the Pilot, other than to extend its operation through August 31, 2005. There is no new proposed rule language.

#### 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.

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

###### 1. Purpose

Nasdaq proposes to extend the Pilot that reduced from \$50 to \$10 the monthly fee that non-professional users pay to receive NQDS, which is set forth in NASD Rule 7010(h), through August 31, 2005. NQDS delivers market maker quotations, Nasdaq Level 1<sup>7</sup> service (including calculation and display of the inside market), and last sale information that is dynamically updated on a real-time basis. NQDS data is used

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> Nasdaq asked the Commission to waive both the five-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> See Securities Exchange Act Release No. 43190 (August 22, 2000), 65 FR 52460 (August 29, 2000) (SR-NASD-2000-47).

<sup>7</sup> Pursuant to NASD Rule 7010(e), Nasdaq separately distributes Level 1 data to non-professionals for a monthly fee of \$1.00.

<sup>30</sup> 15 U.S.C. 78s(b).

<sup>31</sup> See Exemption Request, *supra* note 6.

<sup>32</sup> 17 CFR 240.17d-1.

<sup>33</sup> 15 U.S.C. 78mm(a).

<sup>34</sup> See *supra* notes 20-23.

<sup>35</sup> 15 U.S.C. 78mm.

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

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

not only by firms, associated persons, and other market professionals, but also by non-professionals who receive the service through authorized vendors, including, for example, on-line brokerage firms. Before August 31, 2000, NQDS data was available through authorized vendors at a monthly rate of \$50 for professionals and non-professional users alike. In August 2000, NASD, through Nasdaq, filed a proposed rule change to reduce from \$50 to \$10 the monthly fee that non-professional users pay to receive NQDS data. The Commission approved the pilot on August 22, 2000, and the fee reduction began on August 31, 2000 on a pilot basis.<sup>8</sup> On September 4, 2001, August 29, 2002, and August 15, 2003, Nasdaq filed proposed rule changes to extend the pilot for additional one-year periods.<sup>9</sup>

Nasdaq proposes to extend the Pilot for another year, beginning September 1, 2004 and running through August 31, 2005. Nasdaq proposes no other changes to the Pilot at this time.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>10</sup> in general, and with Section 15A(b)(5) of the Act,<sup>11</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
- (ii) Impose any significant burden on competition; and
- (iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup> At any time within 60 days of the filing of the 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.

Nasdaq has asked that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay contained in Rule 19b-4(f)(6)(iii) under the Act.<sup>14</sup> The Commission believes such waivers are consistent with the protection of investors and the public interest, for they will allow the Pilot to operate without interruption through August 31, 2005. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>15</sup>

## 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-2004-127 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-2004-127. 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 Section, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of such filing also will be available for inspection and copying at the principal office of NASD. 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-2004-127 and should be submitted on or before October 1, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3615]

#### State of Florida (Amendment #2)

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective August 30, 2004, the above numbered declaration is hereby amended to establish the incident period for this disaster as beginning August 11, 2004, and continuing through August 30, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>8</sup> See footnote 6, *supra*.

<sup>9</sup> See Securities Exchange Act Release Nos. 44788 (September 13, 2001), 66 FR 48303 (September 23, 2001) (SR-NASD-2001-56); 46446 (August 30, 2002), 67 FR 57260 (September 7, 2002) (SR-NASD-2002-117); and 48386 (August 21, 2003), 68 FR 51618 (August 27, 2003) (SR-NASD-2003-132).

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

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

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).