

March 26, 2010

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Risk Management Controls for Brokers or Dealers with Market Access**
File No.: S7-03-10

Dear Ms. Murphy:

On January 13, 2010, the Commission voted unanimously to propose SEC Rule 15c3-5, a new rule governing Risk Management Controls for Brokers or Dealers with Market Access (“SEC Proposed Market Access Rule”).¹ On the same day, the Commission approved new standards for sponsored access as set forth in NASDAQ Rule 4611(d), NASDAQ’s Market Access Rule.² Accordingly, NASDAQ is uniquely positioned to comment on proposed SEC Rule 15c3-5.

NASDAQ fully supports the SEC Proposed Market Access Rule. It is a necessary and well-reasoned approach to understanding, controlling, and reducing systemic risk created by market access practices in the trading of securities. As market participants have harnessed powerful new technology, market access has expanded rapidly and assumed multiple new forms. In particular, unfiltered market access combined with increased trading velocity enables market participants – both heavily regulated and less so – to create counter-party and systemic risk for investors, exchanges, and broker-dealers alike. The SEC proposal is well-designed to address those risks.

Like the Commission, NASDAQ believes it is important that regulation of market access be comprehensive and consistent and that it not create the opportunity for regulatory arbitrage. Adopting Proposed Rule 15c3-5 is vastly superior to requiring a dozen or more SROs to adopt, implement and simultaneously enforce uniform rules. Of course, SROs should be permitted to adopt market access rules that are more stringent than Proposed Rule 15c3-5, but not rules that are less stringent or inconsistent.

¹ Securities Exchange Act Release No. 61379 (Jan. 19, 2010) (“SEC Market Access Proposing Release”).

² Securities Exchange Act Release No. 61345 (Jan. 13, 2010)(approving SR-NASDAQ-2008-104) (“NASDAQ Market Access Approval Order”).

Nonetheless, NASDAQ sees several potential improvements to the proposed rule. **First**, the Commission should consider applying Proposed Rule 15c3-5 to all market participants that create risk, including non broker-dealers that access Alternative Trading Systems (“ATSs”) in the same manner as broker-dealers. **Second**, the Commission should explain why it chose not to require contracts between sponsored and sponsoring parties. **Third**, requiring each sponsored participant to enter the market through a unique market participant identifier (“MPID”) would further enhance regulation. **Fourth**, the Commission should clarify whether SEC Rule 15c3-5 applies to exchange-operated broker-dealers that exist solely to access other venues. Set forth below is NASDAQ’s rationale for these proposed modifications.

1. Proposed Rule 15c3-5 Should Apply Equally to All ATS Subscribers, Not Just Broker-Dealers.

As currently drafted, Proposed Rule 15c3-5 would apply to any broker-dealer that subscribes to or provides access to an ATS, but it would not apply to non-broker-dealers that also subscribe to ATSs. The Commission carefully catalogued the systemic risks that Proposed Rule 15c3-5 is designed to reduce. Yet, without analysis or explanation, the Commission exempted from regulation a category of market participants that poses the very same systemic risks. This lack of uniformity among similar participants entering orders into the public market undermines the goal of reducing overall systemic risk that is at the heart of the Commission’s proposed rule.

NASDAQ believes that non-broker dealers make a valuable contribution to the market and, therefore, barring non-broker dealers from accessing ATSs seems counter-productive and potentially harmful to the markets. Instead, NASDAQ recommends the Commission extend Proposed Rule 15c3-5 to non-broker dealers. Extension of the proposed rule to non-broker dealers that access ATSs would be a modest but meaningful step towards reducing overall systemic risk.

2. Proposed Rule 15c3-5 Should Consider Requiring Contracts Between Sponsored and Sponsoring Parties.

When the Commission initially attempted to expand and unify the regulation of market access, it did so by describing to each SRO the elements of a comprehensive rule and requesting that the SROs adopt such rules. NASDAQ was the first exchange to do so. Included in those elements were Financial and Regulatory Controls quite similar to those set forth in the Market Access Proposal, as were other elements of Proposed Rule 15c3-5. Contractual Requirements such as those contained in NASDAQ’s Market Access Rule were included in the earlier SRO-based efforts but they were omitted from Proposed Rule 15c3-5.

NASDAQ Rule 4611(d) requires each sponsored participant to execute a contract with the sponsoring member that specifies the minimum obligations of the sponsored participant. The contract was intended to guarantee access to sponsored participants’ books and records, to ensure

proper security for access devices, and to provide regulators with additional tools to regulate market access. NASDAQ Rule 4611(d) also requires the sponsoring member to execute a contract with any technology provider that supplies one or more elements of the sponsoring member's market access pre-trade risk management system. This contract also provided regulators with tools to address systemic risk associated with market access technology.

If the Commission chooses not to adopt contractual requirements in Proposed Rule 15c3-5, it should explain why that requirement was included in its earlier regulatory efforts but was omitted from its final proposal. If contracts are not essential to an effective Market Access Rule, the exchanges that currently require them, including NASDAQ, can use that guidance to evaluate that aspect of their market access rules.

3. *Requiring Each Sponsored Participant to Use a Unique Market Participant Identifier ("MPID") Will Improve Regulation.*

The SEC Market Access Proposal states at footnote 19 that "brokers-dealers typically access exchanges and ATSS through the use of unique MPIDs or other identifiers, which are assigned by the market." In actuality, while some participants access the markets through unique MPIDs, others access exchanges and ATSS under shared MPIDs. This can occur when one exchange member provides market access to multiple participants under the same MPID. Shared access may be for the convenience of the sponsoring member or at the insistence of the sponsored participant seeking to maintain anonymity.

Shared MPIDs hinder effective regulation. For NASDAQ and other SROs, MPIDs are the key to real-time and post-trade surveillance. The MPID is to securities regulation what DNA or fingerprints are to forensic investigations. The MPID is included in every message transmitted in NASDAQ systems; every quote, every order, every cancellation, every execution, every trade report, every clearing report, and every DROP copy. The MPID travels through NASDAQ execution systems and then downstream throughout NASDAQ's surveillance systems. Sponsoring members could also use individual MPIDs to perform more effective pre-trade risk management.

The sharing of MPIDs requires regulators to undertake extra, manual work to isolate the order flow of each participant using the MPID. If each market participant utilized a unique MPID, regulators could eliminate this inefficient manual separation and focus their efforts directly on effectively regulating market activity. Nor would it require substantial programming by exchanges, ATSS or network processors; market participants regularly add, eliminate, or change MPIDs. Finally, it should be noted that while a unique MPID requirement would assist in better understanding activities of particular market participants, it would not sacrifice their ability to anonymously represent trading interest using generic market MPIDs such as the "NSDQ" MPID available in NASDAQ.

4. *The Commission Should Clarify Whether Proposed SEC Rule 15c3-5 Applies to Exchange-Operated Broker-Dealers*

NASDAQ requests that the Commission clarify whether Proposed SEC Rule 15c3-5 applies to broker-dealers that are operated by exchanges for the sole purpose of accessing away markets on behalf of the exchange. Under Proposed SEC Rule 15c3-5(a)(1), the term “market access” is defined as access to trading in securities on an exchange or ATS as a result of being a member or subscriber of the exchange or ATS, respectively. The purpose of this broad definition, according to the Market Access Proposal, is to “protect against breaches of credit or capital limits, erroneous trades, violations of SEC or exchange trading rules, and the like.”

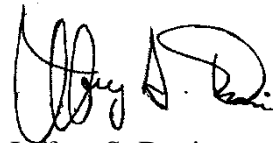
Exchange-operated broker-dealers that exist only to route orders for the exchange do not pose the type of risks that Proposed SEC Rule 15c3-5 is intended to address. First, exchange-operated broker-dealers are already heavily regulated as exchange facilities, including rules strictly limiting them to a single client, the exchange itself. Second, should the Commission adopt formal pre-trade risk management requirements for originating brokers, all orders routed by an exchange-operated broker will have already passed through such controls before reaching it. Put differently, applying Proposed SEC Rule 15c3-5 to exchange-operated broker-dealers would impose additional regulatory burdens without further reducing the risks created by market access.

The SEC Market Access Rule is silent on the application of Proposed SEC Rule 15c3-5 to exchange-operated broker-dealers. NASDAQ respectfully requests that the Commission clarify the proposal to specifically exclude exchange-operated broker-dealers.

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NASDAQ appreciates the opportunity to comment on and support Proposed SEC Rule 15c3-5. The Commission is to be congratulated for addressing the risks created by Market Access in a direct and sensible manner. With the improvements suggested above, NASDAQ believes that the proposed rule will dramatically improve regulation and reduce systemic risk.

Respectfully submitted,



Jeffrey S. Davis
Vice President and
Deputy General Counsel