

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54376; File No. SR-NASD-2006-093)

August 28, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding Pricing for Non-Members Using Nasdaq's Brut and Inet Facilities

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 July 31, 2006, 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. 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.

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

Nasdaq proposes to modify the pricing for non-NASD members using Nasdaq's Brut and Inet Facilities to trade non-Nasdaq securities. The filing will apply to these non-members the same rule change that Nasdaq is instituting for members.<sup>3</sup> Nasdaq seeks approval to implement the proposed rule change retroactively as of August 1, 2006. The text of the proposed rule

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

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

<sup>3</sup> See Securities Exchange Act Release No. 54375 (August 28, 2006) (File No. SR-NASD-2006-092).

change is set forth below. Proposed new language is underlined; proposed deletions are in [brackets].<sup>4</sup>

**7010. System Services**

(a) – (h) No change.

(i) ITS/CAES System, Brut, and Inet Order Execution and Routing

(1) - (8) No change.

(9) The fees applicable to non-members using Nasdaq's Brut and Inet Facilities shall be the fees established for members under Rule 7010(i), as amended by SR-NASD-2005-019, SR-NASD-2005-035, SR-NASD-2005-048, SR-NASD-2005-071, SR-NASD-2005-125, SR-NASD-2005-137, SR-NASD-2005-154, SR-NASD-2006-013, SR-NASD-2006-023, SR-NASD-2006-031, SR-NASD-2006-057, [and] SR-NASD-2006-078, and SR-NASD-2006-092 and as applied to non-members by SR-NASD-2005-020, SR-NASD-2005-038, SR-NASD-2005-049, SR-NASD-2005-072, SR-NASD-2005-126, SR-NASD-2005-138, SR-NASD-2005-155, SR-NASD-2006-014, SR-NASD-2006-024, SR-NASD-2006-032, SR-NASD-2006-058, [and] SR-NASD-2006-079, and SR-NASD-2006-093.

(j) - (y) No change.

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<sup>4</sup> Changes are marked to the rule text that appears in the electronic NASD Manual found at [www.nasdaq.com](http://www.nasdaq.com). The Nasdaq Exchange states that it will not file conforming changes to its rules with regard to order execution and routing by non-members, since persons that are not members of the Nasdaq Exchange will not be permitted to use its order execution and routing systems.

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 had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III 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

In SR-NASD-2006-092,<sup>5</sup> Nasdaq amended NASD Rule 7010(i), which has historically contained the fees for the trading systems of The Nasdaq Stock Market, to reflect the Nasdaq Exchange's commencing operations for trading of securities listed on the Nasdaq Exchange. During a transitional period, the Nasdaq Exchange will operate for its own listed stocks, while The Nasdaq Stock Market, Inc. continues to operate under authority delegated by NASD to provide quotation, execution, and trade reporting services for non-Nasdaq listed securities. Nasdaq states that the Brut and Inet platforms owned by Nasdaq will be operated as facilities of the Nasdaq Exchange for purposes of trading Nasdaq-listed securities, and as facilities of NASD for purposes of trading non-Nasdaq securities. Accordingly, SR-NASD-2006-092 amended NASD Rule 7010(i) to remove fees and credits associated with trading Nasdaq-listed stocks,

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<sup>5</sup> See supra note 3.

which are now contained in Rule 7018 of the Nasdaq Exchange.<sup>6</sup> Nasdaq states that NASD Rule 7010(i) would continue to govern fees and credits for the ITS/CAES System (formerly the Nasdaq Market Center) operated by Nasdaq for trading non-Nasdaq securities, as well as Brut and Inet to the extent that they are used for trading non-Nasdaq securities. The ITS/CAES System, Brut and Inet are collectively referred to in the rule as the Nasdaq Facilities.

SR-NASD-2006-092 also added a sentence to the rule to provide that for purposes of determining a member's volume in all securities under NASD Rule 7010(i), the term "Nasdaq Facilities," shall also be deemed to include the member's volume in Nasdaq-listed securities traded through the facilities of the Nasdaq Exchange (i.e., the Nasdaq Market Center, Brut and Inet). Nasdaq states that this clarification was necessary to ensure that fees and credits for trading non-Nasdaq securities remain at their current levels during the transitional period before the Nasdaq Exchange begins to trade non-Nasdaq securities.

In SR-NASD-2006-092, Nasdaq also changed its fees for routing orders to the New York Stock Exchange ("NYSE") through its DOT system. NYSE recently announced that it would impose a significant fee increase on broker-dealers, such as Nasdaq's Brut broker-dealer, that route orders to the NYSE floor through DOT, effective August 1, 2006.<sup>7</sup> Nasdaq states that as a result, it must pass these increased costs through to market participants that make use of the

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<sup>6</sup> See Securities Exchange Act Release No. 54285 (August 8, 2006) (File No. SR-NASDAQ-2006-023) (notice of filing and immediate effectiveness of proposed rule change regarding technical and conforming changes to Nasdaq Rule 7018). Telephone conversation among John Yetter, Senior Associate General Counsel, Nasdaq, David Liu, Special Counsel, Division of Market Regulation ("Division"), Commission, and Theodore S. Venuti, Attorney, Division, Commission, on August 14, 2006.

<sup>7</sup> See Securities Exchange Act Release No. 54142 (July 13, 2006), 71 FR 41493 (July 21, 2006) (File No. SR-NYSE-2006-46). Effective August 1, 2006, the NYSE is imposing a new charge of \$0.00025 per share executed, subject to a monthly cap of \$750,000.

routing service. Specifically, for orders that attempt to execute in the Nasdaq Facilities prior to routing and that are not charged a fee by the NYSE specialist,<sup>8</sup> Nasdaq is imposing a charge of \$0.0002 per share executed; however, the total fee for all such orders routed during a month is capped at \$60,000 per firm. For orders that are routed through DOT but that do not attempt to execute in the Nasdaq Facilities, the routing fee is \$0.0003 per share executed, with no cap.

Finally, to encourage greater liquidity provision with respect to securities that are listed on both the NYSE and the Nasdaq Exchange, SR-NASD-2006-092 increased the credit to liquidity providers in these securities, from \$0.0005 or \$0.0006 per share executed to \$0.0007 per share executed. Nasdaq believes that the change would promote greater competition between Nasdaq and NYSE and enhance market quality with respect to Nasdaq's trading of these dual-listed securities.

Nasdaq is submitting this filing to apply the foregoing changes to non-NASD members using Nasdaq's Brut and Inet Facilities to trade non-Nasdaq securities. These non-members cannot use the facilities of the Nasdaq Exchange to trade Nasdaq-listed securities, but are currently permitted to use Brut and Inet to trade non-Nasdaq securities.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>9</sup> in general, and with Section 15A(b)(5) of the Act,<sup>10</sup> in particular, in that it

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<sup>8</sup> Nasdaq states that the NYSE specialist fees are distinct from the new DOT fees imposed by the NYSE itself. Specialist fees are generally imposed when orders routed to the NYSE remain unexecuted for a period of time. The routing fee for orders that are charged by the specialist remains \$0.01 per share executed.

<sup>9</sup> 15 U.S.C. 78o-3.

<sup>10</sup> 15 U.S.C. 78o-3(b)(5).

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 the NASD operates or controls. Nasdaq states that the proposed rule change applies to non-members that use Brut and Inet a fee change that is being implemented for NASD members that use Brut, Inet, and the ITS/CAES System to trade non-Nasdaq securities. Accordingly, Nasdaq believes that the proposed rule change promotes an equitable allocation of fees between members and non-members using these order execution facilities.

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.

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. 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-2006-093 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-093. 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 the 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 publicly available. All submissions should refer to File Number SR-NASD-2006-093 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.<sup>11</sup>

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<sup>11</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Specifically, the Commission believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>12</sup> which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal would retroactively modify pricing for non-NASD members using Nasdaq's Brut and Inet Facilities that would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that became effective July 31, 2006, pursuant to SR-NASD-2006-092.

Nasdaq has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the Federal Register. The Commission notes that the proposed fees for non-NASD members are identical to those in SR-NASD-2006-092, which implemented those fees for NASD members and which became effective as of July 31, 2006. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing schedule with the same date of effectiveness for both NASD members and non-NASD members. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the Federal Register.

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<sup>12</sup> 15 U.S.C. 78o-3(b)(5).

<sup>13</sup> 15 U.S.C. 78s(b)(2).



V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NASD-2006-093) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

Nancy M. Morris  
Secretary

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<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).