

rules governing the operation of the Brut System with the Commission. The Commission also notes that as a broker-dealer, Brut remains subject to the applicable NASD rules. The Commission believes that, as a result of this proposed rule change, the rules that the NASD and Nasdaq will be required to enforce, and that Brut and Brut System participants will be required to follow should be readily discernable.

The Commission notes that the proposed rule change articulates Nasdaq's operation of Brut and Brut's integration with the Nasdaq Market Center. The Commission finds that this proposed rule change, as amended, should enable market participants in general and Brut System participants in particular to understand the operation of, and the rules applicable to, the Brut System as a Nasdaq facility. The rules that are the subject of this filing encompass a wide range of areas, including the Brut System's order display and system matching, access standards, order types, time-in-force designations, out-bound order routing, order execution algorithm, clearly erroneous trade procedures, and other system features and standards. The Commission believes that the proposed rules are designed to enhance order interaction and price competition. The Commission also notes that Nasdaq has stated that Brut will continue to participate in market surveillance and audit trail programs conducted by Nasdaq and the NASD.<sup>15</sup> Finally, the Commission notes that this proposal represents an interim step toward Nasdaq's ultimate plan to have Brut and the Nasdaq Market Center unified into a single technology platform and to use the Brut broker-dealer as an out-bound order router to other markets.<sup>16</sup>

In Amendment No. 2, Nasdaq amended the proposed rule change to clarify that Brut would provide sponsored access to its system for approximately twelve non-NASD member entities for a temporary period.<sup>17</sup> Further, Nasdaq proposed to

implement procedures and internal controls to ensure all Brut participants have access to the same information on the same terms.

The Commission notes that the changes to the proposal in Amendment No. 2 should permit non-NASD members to continue to participate in the Brut System without interruption on a temporary basis. Accordingly, the Commission finds that there is good cause, consistent with section 15A(b)(6)<sup>18</sup> and section 19(b)(2) of the Act,<sup>19</sup> to approve Amendment No. 2 on an accelerated basis prior to the 30th day of the date of publication of notice of filing thereof in the **Federal Register**.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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-2004-173 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

membership in the NYSE. See Exemption, *supra* note 7. Approval of this proposed rule change in no way prejudices Commission action on the SRO Proposal. Depending on the outcome of the SRO Proposal, further structural changes may be required of Nasdaq and Brut.

<sup>18</sup> 15 U.S.C. 78o-3(b)(6).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

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 the 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 available publicly. All submissions should refer to File Number SR-NASD-2004-173 and should be submitted on or before April 4, 2005.

#### V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (File No. SR-NASD-2004-173), as amended by Amendment No. 1, be, and hereby is, approved, and that Amendment No. 2 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority:<sup>21</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51325; File No. SR-NASD-2005-007]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to a Proposal To Adopt a New IM-10308 on Mediators Serving as Arbitrators

March 7, 2005.

#### I. Introduction

On January 19, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Regulation, Inc. ("NASD Regulation"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change to adopt a new Interpretive Manual ("IM")-10308 on mediators serving as arbitrators. The proposed rule

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>15</sup> See Release No. 51078 at 4906.

<sup>16</sup> See Release No. 51078 at 4910.

<sup>17</sup> The Commission has expressed concern about the potential conflict of interest that arises for a self-regulatory organization ("SRO") when a member firm is affiliated with the SRO and recently proposed rules to prohibit such affiliations. See Securities Exchange Act Release No. 50699 (November 18, 2004) 69 FR 71126 (December 4, 2004) ("SRO Proposal"). Pending Commission consideration of comments on this proposal, Nasdaq applied for membership to the New York Stock Exchange ("NYSE") on behalf of Brut. Further, Nasdaq committed to seek the Commission's approval pursuant to Rule 17d-1 under the Act to have the NYSE appointed as Brut's Designated Examining Authority for financial responsibility rules upon approval of Brut's

change was published for comment in the **Federal Register** on February 3, 2005.<sup>3</sup> The Commission received one comment letter on the proposed rule change.<sup>4</sup> For the reasons discussed below, the Commission is approving the proposed rule change.

## II. Description of the Proposed Rule Change

### A. Description of the Proposal

NASD proposed to adopt a new IM-10308 to clarify that (1) fees for service as a mediator are not included in determining whether an attorney, accountant, or other professional derives 10% of his or her annual revenue from industry-related parties; and (2) service as a mediator is not included in determining whether an attorney, accountant, or other professional devotes 20% or more of his or her professional work to securities industry clients. Recent changes to NASD's arbitrator classification rules amended the definitions of "public" and "non-public" arbitrators (non-public arbitrators have some current or recent connection with the securities industry, but do not necessarily work in the industry).<sup>5</sup> The changes led, among other things, to reclassifying some arbitrators from public to non-public or from non-public to public, and to dropping some arbitrators from the NASD's roster. One new part of the rule provided that arbitrators who were otherwise qualified as public could not continue to serve as public arbitrators if their firms derived more than 10% of their revenue from industry parties.<sup>6</sup>

Some arbitrators who also serve as mediators were of the opinion that the rule change encompassed income in the form of mediation fees paid by industry parties such that these individuals would no longer qualify as public arbitrators under the new rule. The NASD Dispute Resolution Board determined that the rule could be construed broadly enough to cover revenue derived from serving as a mediator but that such a broad interpretation was not intended. The proposed rule change would adopt a clarifying IM that would be printed in the Code following Rule 10308. The IM provides, in part, that mediation fees received by mediators who are also

arbitrators are not to be included in the definition of "revenue;" that mediation services performed by mediators who are also arbitrators are not to be included in the definition of "professional work;" and that arbitrators who also serve as mediators must disclose that information.

### B. Comment Summary

The proposal was published for comment in the **Federal Register** on February 3, 2005.<sup>7</sup> We received one comment on the proposal,<sup>8</sup> which was supportive. Citing confusion arising from the implementation of the NASD's 2004 changes to the arbitrator classification rules, the commenter agreed with the NASD Dispute Resolution Board that the rules should not be construed to cover revenues or work deriving from service as a mediator. The commenter accordingly called the proposed rule change appropriate.

## III. Discussion and Findings

The Commission finds the proposed rule change is consistent with the Act, and in particular with section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.<sup>9</sup> The Commission believes that the proposed rule change is consistent with the provisions of the Act noted above because it provides clarity to the operation of the rules regarding arbitrator classification and addresses an ambiguity in the interpretation of the arbitrator classification rules. The Commission believes that this clarification of the arbitrator rules will increase efficiency in the operation of the arbitrator selection process, as well as provide additional useful disclosure to claimants regarding an arbitrator's service as a mediator.

## IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>10</sup> that the proposed rule change (SR-NASD-2005-007) be, and hereby is, approved.<sup>11</sup>

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51323; File No. SR-NASD-2005-028]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Discontinuation of the Nasdaq PostData Pilot Program

March 4, 2005.

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 February 17, 2005, 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. Nasdaq has filed the proposal as a "non-controversial" rule change 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 is filing the proposed rule change to terminate the PostData pilot program, as of March 31, 2005, the date that its current pilot approval expires. The text of the proposed rule change is below. Proposed new language is in

<sup>3</sup> Securities Exchange Act Release No. 51097 (Jan. 28, 2005), 70 FR 5715 (Feb. 3, 2005) (the "Notice").

<sup>4</sup> See Letter to Jonathan Katz, Secretary, Commission, from George R. Kramer, Deputy General Counsel, Securities Industry Association ("SIA"), dated February 25, 2005 ("SIA Letter").

<sup>5</sup> See Exchange Act Release No. 49573 (Apr. 16, 2004), 69 FR 21871 (Apr. 22, 2004) (SR-NASD-2003-095).

<sup>6</sup> For further detail, see the Notice, note 3, *supra*.

<sup>7</sup> See note 3, *supra*.

<sup>8</sup> See note 4, *supra*.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

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

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

<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 the five-day pre-filing notice requirement. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii). The Commission granted Nasdaq's request.