

extension before the previous pilot program expired. Nasdaq is making no substantive changes to the pilot program, other than to reestablish and extend its operation through March 31, 2003. The text of the proposed rule change is available at Nasdaq and at the Commission.

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

On January 11, 2002, the Commission approved, as a 12-month pilot, the creation of Nasdaq PostData, a voluntary trading data distribution facility, accessible to NASD members, buy-side institutions, and market data vendors through the *NasdaqTrader.com* Web site.⁶ On January 17, 2003, Nasdaq extended that pilot through February 28, 2003.⁷ Nasdaq hereby proposes to reestablish the pilot, and extend its operation through March 31, 2003. Nasdaq proposes to make the proposed rule change effective retroactive to March 1, 2003, to avoid a lapse of the previous pilot due to Nasdaq's failure to file for an extension before the pilot expired.

Background. PostData consists of three reports provided in a single package: (1) Daily Share Volume Report, which provide subscribers with T+1 daily share volume in each Nasdaq security, listing the volume by any NASD member firm that voluntarily permits the dissemination of this information; (2) Daily Issue Data, which contains a summary of the previous day's activity for every Nasdaq issue; and (3) Monthly Summaries, which provide monthly trading volume statistics for the top 50 market

participants sorted by industry sector, security, or type of trading (e.g. block or total). PostData was launched on March 18, 2002.

On August 5, 2002, Nasdaq expanded the information made available to PostData subscribers to include four additional reports: Buy Volume Report, Sell Volume Report, Crossed Volume Report, and Consolidated Activity Volume Report.⁸ Each report offers information regarding total Nasdaq reported buy (or sell, or cross, or consolidated) volume in the security, as well as rankings of registered market maker based upon various aspects of their activity in Nasdaq. The reports also provide recipients with information about the number and character of each market maker's trades. Finally, the reports provide the information described above with respect to block volume, be it buy, sell, cross or consolidated interest.

Extension of the Pilot. Nasdaq proposes to extend the PostData pilot through March 31, 2003. The pilot has been effective but adoption was slower than expected. For a variety of reasons, more time was required than originally anticipated to recruit sell-side firms to sign on to PostData to provide the critical mass of data necessary to have a product to sell to those subscribers (buy-side firms or institutional investors) interested in viewing the data. Nasdaq believes that adoption was slow because:

- Volume is attributed to the firm that has the reporting obligation based on ACT rules. This is also the methodology for the monthly share volume reports offered on Nasdaq Web sites (*NasdaqTrader.com* and *NasdaqOnline.com*). Sell-side firms wanted to get credit for volume regardless whether they were the reporting party or not in a trade.

- In the time since PostData was initially developed, the industry has moved to more commission-based or agency (riskless principal) trading. Firms that conduct predominantly more riskless principal trading with other sell-side firms are not well represented in PostData because in riskless principal trading only one leg of the transaction (the transaction with sell-side firm or market maker) is reported in ACT and in many cases these firms are not the reporting party.

- PostData's value and benefits were not well understood by firms, especially with firms' attention directed on other Nasdaq initiatives.

Nasdaq addressed the first two issues by enhancing PostData in August of 2002 to include volume attributed to both parties of a trade (reporting and the contra-party) and identification of the volume as being buy, sell or cross. These additional data sets addressed the issue of which party gets the volume credit and display some volume for firms that primarily engage in "riskless principal" trading. These enhancements resulted in seven additional sell-side firms participating in PostData by the end of August.

Therefore, at this time, Nasdaq is unable to effectively study the fees assessed for PostData, as initially requested in the order approving PostData.⁹ Growth in the PostData subscriber base was initially slower than anticipated. It was not until September 2002 that the number of subscribing firms first exceeded 25. Currently, there are 33 subscribing firms paying for PostData, and of those, most are also firms that post their data. This sample is too small to draw any meaningful conclusions about the price of the product. In addition, there is no data with respect to indirect subscribers because to date there are no vendors purchasing PostData for redistribution to their subscribers.

Nasdaq was able to start marketing PostData to potential subscribers such as buy-side firms and data vendors this past fall. It is from these marketing efforts that additional feedback was received such as whether more data can be provided. Nasdaq believes that these actions will increase the likelihood of attracting a meaningful number of subscribers sooner rather than later. It is difficult to predict when that will occur, but Nasdaq represents that it will update the staff regularly, and it will provide a full analysis of the fees as quickly as possible.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(5)¹⁰ and 15A(b)(6)¹¹ of the Act. Section 15A(b)(5) requires the equitable allocation of reasonable fees and charges among members and other users of facilities operated or controlled by a national securities association. Section 15A(b)(6) requires rules that foster cooperation and coordination with persons engaged in facilitating transactions in securities and that are

⁶ See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002)(SR-NASD-99-12).

⁷ See Securities Exchange Act Release No. 47210 (January 17, 2003), 68 FR 3912 (January 27, 2003)(SR-NASD-2003-02).

⁸ See Securities Exchange Act Release No. 46316 (August 6, 2002), 67 FR 52504 (August 12, 2002)(SR-NASD-2002-90).

⁹ See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002)(SR-NASD-99-12).

¹⁰ 15 U.S.C. 78o-3(b)(5).

¹¹ 15 U.S.C. 78o-3(b)(6).