

Committee.<sup>28</sup> Moreover, this commenter believed that Nasdaq was baselessly questioning the integrity of the consolidated close and the surveillance conducted by the Nasdaq UTP Plan participants and argued that the quality of a market's surveillance procedures should be evaluated by the Commission and not by competing markets.

In the Second Response Letter, Nasdaq indicated that on March 4, 2003, the UTP Operating Committee unanimously approved a resolution that was designed to address the commentors' procedural concerns.<sup>29</sup> Nasdaq introduced this resolution to the UTP Operating Committee to address the concerns expressed by two of the commenters.<sup>30</sup> According to Nasdaq, the UTP Operating Committee discussed Nasdaq's proposal during several meetings in January and February, and, on March 4, 2003, unanimously voted that the establishment and use of the .M modifier would be consistent with the terms of the Nasdaq UTP Plan. The Operating Committee also approved the modifications to the SIP that are needed to implement the proposed establishment and use of the .M modifier.

Furthermore, Nasdaq agreed to delay the implementation of the proposal until April 14, 2003 to provide members of the UTP Operating Committee with additional time to consider the technical specifications prior to implementing the proposed trade message modifier in their own markets. Nasdaq believes that the approval of this resolution and the agreed-upon delay in implementation clearly address the commentors' procedural objections regarding compliance with the Nasdaq UTP Plan.

## 2. Competitive Issues

Two commenters believed that Nasdaq did not comply with its obligations as ESIP to operate independently of its associated order matching facility and that the apparent circumstances surrounding the exclusive SIP's engagement in system development work to accommodate the NOCP, without any apparent joint decisions by the UTP Operating Committee, raises serious competitive concerns.<sup>31</sup> Such circumstances may indicate that Nasdaq has undue influence over Nasdaq UTP Plan systems development priorities.

Two commenters expressed concern that Nasdaq may be disrupting the

established system for calculating the consolidated close for its own anticompetitive reasons or may be receiving preferential treatment from the SIP and thus would frustrate the requirements for a national market system<sup>32</sup> in section 11A and section 11A(a)(1)(C)(ii) of the Act.<sup>33</sup> One commenter urged the Commission to examine whether the SIP is being operated in a truly market-neutral manner, is not unduly influenced by Nasdaq, and is not providing Nasdaq with any competitive advantages over other participant markets.<sup>34</sup> Similarly, the other commenter did not view Nasdaq's proposal as an example of the fair competition and regulatory harmony contemplated under the Act because Nasdaq appeared to be: disregarding the Nasdaq UTP Plan requirements and inappropriately using its position as ESIP to establish parallel dissemination practices applicable only to its market data for its own competitive advantage; dictating the introduction of earlier dissemination times without necessity of UTP Operating Committee vote, and unilaterally modifying the calculation of the consolidated close.<sup>35</sup> Furthermore, because the calculations and displays would no longer be based on a single standardized methodology and would introduce factors other than an actual reported trade in the determination of a closing price, both commenters believed that Nasdaq's proposal would afford the opportunity for investor confusion as it would eliminate the "apples-to-apples" comparison of individual market prices.<sup>36</sup> Due to the significant value of retaining consistent methodologies in a market like that for Nasdaq-quoted securities, where trading activity is widely dispersed among different trading venues, these commenters suggested that existing reports should continue to contain the same calculations as necessary to maintain the integrity and clarity of the closing price information across the markets.<sup>37</sup>

Finally, one commenter expressed the view that Nasdaq's actions were inconsistent with (b)(6) and (b)(9) of section 15A<sup>38</sup> which require that

Nasdaq not design rules intended to discourage cooperation and coordination among regulators, regulate matters not related to the purposes of the administration of its markets, and impose unnecessary and inappropriate burdens on competition.<sup>39</sup>

In response to comments, Nasdaq stated that it is not attempting to disrupt the calculation of the consolidated close, but rather has avoided interfering with the existing consolidated close, which would be calculated and disseminated exactly as it has been regardless of this proposal.<sup>40</sup> Furthermore, every trade that currently is eligible to set the consolidated close would continue to be eligible if this proposal is approved, and no trade that is currently not eligible would become so. Similarly, Nasdaq clarified that the Predicate Trade that forms the basis of the NOCP would be eligible to set the consolidated close, as it is today, while the NOCP message itself, which is new, would not be eligible. Nasdaq also noted, in response to the comments, that use of the NOCP is completely voluntary on the part of industry participants; Nasdaq's proposal would simply create one alternative closing price for industry participants to use. Moreover, Nasdaq's proposal would not preclude the use of other closing prices, such as the consolidated close or market specific closing prices that exist today. In fact, Nasdaq believes that its proposal explicitly invites other markets to establish a competing market-centric closing price, and to use the .M modifier to designate their own official closing price to market participants.

Furthermore, Nasdaq does not believe that the commenters presented a credible argument that Nasdaq was operating anti-competitively. Specifically, Nasdaq believes that it has not abused its role as the SIP. Because Nasdaq is aware of its unique role as the processor for the Nasdaq UTP Plan and to avoid the appearance of bias, Nasdaq agreed to delay the implementation of its proposal until April 14, 2003 from the original, scheduled implementation date of March 24, 2003. According to Nasdaq, this extension would permit Nasdaq UTP Plan participants, including the commentors, extra time to program their systems to use the .M modifier or to develop a proposal that would better serve their needs.

## 3. Methodological Issues

Although one commenter supported reducing the inclusion time for calculating the NOCP at 4:00:02 p.m.

<sup>28</sup> See CSE Letter, *supra* note 4.

<sup>29</sup> See Second Response Letter, *supra* note 6.

<sup>30</sup> See Amex Letter and CSE Letter, *supra* note 4.

<sup>31</sup> See Amex Letter and Instinet Letter, *supra* note 4.

<sup>32</sup> See CSE Letter and Instinet Letter, *supra* note 4.

<sup>33</sup> 15 U.S.C. 78k and 15 U.S.C. 78k-1(a)(1)(C)(ii).

<sup>34</sup> See Instinet Letter, *supra* note 4.

<sup>35</sup> This commenter was also concerned with the precedential impact this proposal would have on future proposals by any market participant. See CSE Letter, *supra* note 4.

<sup>36</sup> See CSE Letter and Instinet Letter, *supra* note 4.

<sup>37</sup> See CSE Letter and Instinet Letter, *supra* note 4.

<sup>38</sup> 15 U.S.C. 78o-3(b)(6) and 15 U.S.C. 78o-3(b)(9).

<sup>39</sup> See CSE Letter, *supra* note 4.

<sup>40</sup> See Second Response Letter, *supra* note 6.