

because it would eliminate the incentive and opportunity for gamesmanship,⁴¹ another commenter believed that the earlier cut off and dissemination aspect of the proposal has competitive effects on the Consolidated Close that is disseminated 88 seconds later, and excludes legitimate trades from consideration for Nasdaq's individual market closing price (*i.e.* those trades reported after 4:00:02 PM).⁴² Three of the commenters also stated that the timing is materially different and contrary to the Nasdaq UTP Plan and thus would undermine the Nasdaq UTP Plan's methodology used to calculate its close.⁴³

With respect to Nasdaq only considering trade reports submitted to ACT, either by NASD members or by UTP Exchanges that use Nasdaq's proprietary execution systems, two commenters stated that Nasdaq, as the primary market for Nasdaq securities, would clearly be in the best position to function in the capacity of determining the closing price.⁴⁴ In contrast, one commenter believed that other markets' trades should be measured separate from the Nasdaq market close,⁴⁵ and another commenter similarly questioned whether it would be appropriate to use UTP Exchange information in the "normalization" process for determining a Nasdaq market-specific close, or whether it would be more appropriate for Nasdaq to filter out UTP Exchange information from the Nasdaq BBO used in the "normalization" process.⁴⁶

Furthermore, some of the commenters indicated that the potential anti-competitive impact of Nasdaq's proposed methodology for calculating and disseminating the NOCP require that Nasdaq not use the term "official" to describe any value that it may disseminate according to the proposed methodology.⁴⁷ The commenters considered this to be misleading to

vendors and market participants as well as encourages consumers of closing price information (*i.e.* issuers, mutual funds, and the media) to use the NOCP to the exclusion of other closing price data. Furthermore, they believed that Nasdaq should not be permitted to characterize the price that it proposes to disseminate as the "official" price in view of its exclusion of so much Nasdaq volume from its calculation (*i.e.* transactions of Nasdaq UTP Plan participants not using ACT).⁴⁸

Finally, although one commenter favored Nasdaq's proposed process of "normalization" in calculating the NOCP,⁴⁹ two commenters believed that the "normalization" process could exacerbate the issue of inaccurate closing prices and create an incentive for Nasdaq market makers to manipulate quotes in order to set the closing price or potentially expose the NOCP to greater risk of manipulation than the current process, particularly in lower-volume securities.⁵⁰ One of these commenters further questioned whether the NOCP, through "normalizing" a Predicate Trade, would produce a better measurement of the closing price than the Predicate or the Nasdaq individual market close under the existing Nasdaq UTP Plan methodology.⁵¹

In its Second Response Letter, Nasdaq expressed the view that each market should be free to determine its own closing price methodology, provided its chosen method is consistent with the Act.⁵² Nasdaq indicated that it had carefully considered the aspects of the NOCP methodology and does not believe that its proposal raises any statutory basis for rejecting the proposal. Nasdaq also noted that the commenters failed to identify a way in which Nasdaq's proposal would be inconsistent with the Act.⁵³

With respect to the objections raised against Nasdaq's use of the term "official" in describing the NOCP, Nasdaq believes these arguments rely on the faulty premise that market participants are statutorily required to utilize the consolidated closing price established in the Nasdaq UTP Plan, when they are not. Nasdaq indicated that market participants are free to use myriad closing prices, each of which is consistent with the Act. Nasdaq believed that the consolidated closes, the individual closing price of the NYSE, and the NOCP, if approved, are constructs used to assess the value of a given security at the close of regular trading, leaving investors free to determine which closing price to use.

In response to issues raised by the commenters, Nasdaq indicated that ultimately it would be competition, rather than anti-competition, that would determine whether market participants consider the NOCP meaningful. Nasdaq argued that if Nasdaq's method for determining its own closing price is flawed, as some commenters claimed, then market participants would not utilize the NOCP and Nasdaq's attempt to compete would fail. However, based upon the overwhelmingly positive comments by disinterested market participants that would be using a closing price, Nasdaq is confident that its chosen methodology is valid and likely to be accepted in the marketplace. In either case, Nasdaq believes that competition would have occurred as contemplated by the Act.

Furthermore, Nasdaq acknowledged that no closing price methodology, the NOCP included, would produce a perfect closing price in every stock every day. In response, Nasdaq would like to ensure market participants that Nasdaq MarketWatch would continue its intensive, real-time surveillance of quoting and trading activity in Nasdaq at the close of trading. Just as Nasdaq MarketWatch has the authority to suppress trades that could improperly affect the closing price today, it would retain the same authority with respect to the NOCP.

IV. Discussion

After careful review of the proposed rule change, the comment letters, and Nasdaq's response to comments, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

⁴¹ See SSB Letter, *supra* note 4.

⁴² See CSE Letter, *supra* note 4.

⁴³ See Amex Letter, CSE Letter and Instinet Letter, *supra* note 4.

⁴⁴ See SSB Letter and UBSW Letter, *supra* note 4. The SSB Letter indicated that designating the closing process to Nasdaq and the establishment of a uniform, consistent system would have infrequent but important positive marketplace impact over the current environment. The UBSW Letter noted that this is similar to the New York Stock Exchange, Inc.'s ("NYSE") long-established practice of disseminating an NYSE Closing Price based upon the last NYSE-only regular way trade in each NYSE-listed security. *Id.*

⁴⁵ See CSE Letter, *supra* note 4.

⁴⁶ See Instinet Letter, *supra* note 4.

⁴⁷ See Amex Letter and Instinet Letter, *supra* note 4. The Amex Letter stated that any Nasdaq closing information designated as "official" should be as agreed to by all Nasdaq UTP Plan participants. *Id.*

⁴⁸ See Amex Letter and Instinet Letter, *supra* note 4. As the NOCP calculations would not take into account quotation and trade reporting activity occurring outside of Nasdaq, the Instinet Letter expressed the view that the NOCP would not be an acceptable surrogate for a consolidated closing price, and using it would not appear to present the complete view of the overall market required to ensure the accuracy and integrity of closing values and thus serve investors' interests. *Id.*

⁴⁹ See SSB Letter (noting that the process helps eliminate outlying inconsistencies and exclude from the closing price trades that are clearly unrelated to contemporaneous closing inside markets), *supra* note 4. See also S&P Letter (indicating that the proposal would reduce the risk of an outlier setting the closing price for a given equity security), *supra* note 4.

⁵⁰ See CSE Letter and Instinet Letter, *supra* note 4.

⁵¹ See Instinet Letter, *supra* note 4.

⁵² See Second Response Letter, *supra* note 6.

⁵³ Nasdaq also corrected the comment in the CSE Letter which inaccurately stated that Nasdaq would separately disseminate its NOCP information at

4:00:02 p.m., when, in fact, that information would be disseminated at 4:01:30 p.m. See Second Response Letter, *supra* note 6.