

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

Nasdaq proposes to extend through February 28, 2003, the pilot period for Nasdaq PostData and the associated fees assessed under NASD rule 7010(s). In addition, Nasdaq proposes certain enhancements to PostData that will be available to direct and indirect users of PostData at no additional charge on a non-discriminatory basis. The text of the proposed rule change is below. Proposed additions are in italics; proposed deletions are in brackets.

Rule 7010 System Services.

(a)–(r) No changes.

(s) NasdaqTrader.com Volume and Issue Data Package Fee.

The charge to be paid by the subscriber for each entitled user receiving the Nasdaq Volume and Issue Data Package via NasdaqTrader.com shall be \$70 per month. The charge to be paid by market data vendors for this information shall be \$35 per month for each end user receiving the information through the data vendor. The availability of this service through NasdaqTrader.com shall be limited to NASD members, Qualified Institutional Buyers[*] (as defined in rule 144A of the Securities Act of 1933) and data vendors. The Volume and Issue Data package includes:

- (1) Daily Share Volume reports.
- (2) Daily Issue Data.
- (3) Monthly Volume Summaries.
- (4) Buy Volume Report.
- (5) Sell Volume Report.
- (6) Crossed Volume Report.
- (7) Consolidated Activity Volume Report.

[* For purposes of this rule, see definition of "Qualified Institutional Buyer" found in Section 144A of the Securities Act of 1933.]

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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 its proposal and discussed any comments it received regarding the proposal. 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 Website.⁶ PostData was launched on March 18, 2002. Nasdaq hereby proposes to extend the pilot period for PostData through February 28, 2003. Nasdaq also proposes to enhance PostData as described below.

Background. PostData originally consisted of three reports provided in a single package: (1) Daily Share Volume Report, which provides 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 provides monthly trading volume statistics for the top 50 market participants sorted by industry sector, security, or type of trading (e.g., block or total).

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.⁷ 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 February 28, 2003, subject only to the enhancements proposed below. 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 NasdaqOn-Line.com). Sell-side firms wanted to get credit for volume regardless of 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 to other Nasdaq initiatives.

Nasdaq addressed the first two issues by enhancing PostData in August 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.⁸ As demonstrated below, growth in the PostData subscriber base was 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

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. 46316 (August 8, 2002), 67 FR 52504 (August 12, 2002) (SR-NASD-2002-90).

⁸ See footnote 6, *supra*.