

(h)–(s) No change.

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

ACT is an automated trade reporting and reconciliation service that speeds the post-execution steps of price and volume reporting, comparison, and clearing of trades completed in Nasdaq, the OTC Bulletin Board, and other over-the-counter markets. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated over the telephone and internalized transactions. It also manages post-execution procedures for transactions in exchange-listed securities that are traded in the Nasdaq InterMarket.

When ACT was first implemented over a decade ago, the majority of firms transacted Nasdaq securities via non-automated means, such as over the telephone. The trade comparison process was extremely cumbersome given the lack of a standard, automated means for two trading partners to match the details of a trade, such as the number of shares traded or the price of the security. ACT helped alleviate this problem by providing all NASD members with an automated, centralized, rule-based trade matching system. Once a trade was matched within ACT, it was then forwarded to the National Securities Clearance Corporation ("NSCC") for clearance and settlement. In the majority of cases, these ACT matches took place via the ACT "browse/query" and "accept/decline" functions.

In a typical transaction, two parties agree to transact with one another over the telephone. The reporting party, typically the selling market maker, enters its version of the trade details, including the contra party's identity, into the ACT system for 90-second trade reporting. This record is now classified

as "open" until the contra party takes action to lock-in the transaction. To locate the open trade, the contra party scans its trade records in the specified security via the ACT "browse/query" function. Once located, the contra party reviews the trade details to ensure the accuracy of the information (e.g., number of shares and execution price). If the contra party agrees with the trade details entered by the reporting party, it then "accepts" the transaction. If the contra party disagrees with the trade details, it "declines" the transaction. When most firms traded with one another over the telephone, the majority of ACT reported trades were reported, compared, and locked-in in this manner.

In the above example, the ACT billing process generally has three steps. First, ACT assesses a fee to the contra party that performed the "browse/query" action. Second, ACT assesses a fee to both the reporting and contra party for locking-in the transaction via the "accept/decline" function. Third, ACT reverses the fee for the contra party's accept/decline action. As a result, each side of the trade pays an equal fee for the trade even though their system usage differed.

ACT usage and pricing have changed dramatically in recent years. Initially, the browse/query and accept/decline process was one of the few options available to firms for reporting and locking-in trades; therefore, it was deemed more equitable to equalize the fees paid by each side of the trade. Since this process constituted a significant proportion of overall ACT usage, it was possible for Nasdaq to implement this process while still adequately covering ACT operating costs.

Today firms have a wide range of options for reporting and locking-in trades, and less than one-half of one percent of all ACT records are locked-in via the browse/query and accept/decline functions. The increase in trading volumes and use of external execution systems such as SuperMontage and electronic communication networks ("ECNs") allow firms to automatically lock-in participants for trade reporting and clearing, bypassing the manual comparison process in ACT. Firms have also adopted new reporting arrangements whereby one participant automatically locks-in its trading partner by reporting on its behalf. Recent pricing changes have eliminated ACT fees for the majority of these locked-in trades in Nasdaq securities.

Nasdaq is currently in the process of migrating many of its services, including ACT, onto a new, more

efficient internal billing platform. The billing process for each ACT service would transfer seamlessly onto this new platform except for the fee reversal described as step three of the process described above. In light of the sharply reduced usage of this functionality, it would be impractical and expensive to duplicate the third step in the new billing system. Doing so would raise the overall costs of the system, which would then have to be passed on to other users. Therefore, Nasdaq has determined that it is more equitable for the small number of users who continue to use this functionality to pay the actual costs associated with each step of the process. As noted above, there are numerous ways for a broker-dealer to report trades in ways that would avoid these charges altogether.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act⁴ in general and with Section 15A(b)(5) of the Act⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The rationale for not charging members for certain system usage in order to equalize the costs between trading contra parties is no longer compelling in light of the myriad of new options members have for locking in trades. Members who elect to continue to use the browse/query and accept/decline functions will pay the incremental cost associated with this type of system usage or can choose to avoid the incremental cost by reporting trades in other ways.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Nasdaq asserts that the proposed rule will become effective on November 14,

⁴ 15 U.S.C. 78o-3.

⁵ 15 U.S.C. 78o-3(b)(5).