

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

Nasdaq proposes to calculate and disseminate a Nasdaq Official Opening Price for Nasdaq-listed securities. Nasdaq would disseminate the Nasdaq Official Opening Price over the Nasdaq Index Dissemination Service data feed ("NIDS"), a proprietary data feed of Nasdaq. Because the Nasdaq Official Opening Price would be neither a quotation nor a last sale report, it would not be disseminated over either the UTP Quote data feed or the UTP Trade data feed. The Nasdaq Official Opening Price message would contain the prevailing inside quote and the Nasdaq Official Opening Price value. Nasdaq states that the fees for the NIDS feed have previously been filed with the Commission, and that it is not proposing to change those fees.

The Nasdaq Official Opening Price would be equal to the reported price of the first trade executed in the Nasdaq National Market Execution System ("SuperMontage"), which would be based upon orders that are in queue when SuperMontage begins trading at 9:30 a.m. ET ("SuperMontage Opening Match"). SuperMontage executions that are in queue when SuperMontage begins trading at 9:30 a.m. but that are not executed until after 9:30:05 (as a result of being delivered to an order delivery participant that has not responded) would not be eligible to be the SuperMontage Opening Match. SuperMontage executions that result from orders entered into the system after 9:30 also would not be eligible to be the SuperMontage Opening Match.

If there were to be no SuperMontage Opening Match within five seconds after the system opens at 9:30, the Nasdaq Official Opening Price for that security would be based upon the first, last sale eligible trade ("Predicate Trade")³ that is reported to Nasdaq's Automated Confirmation Transaction System ("ACT"). The Predicate Trade could be an internalized execution

reported to ACT or a SuperMontage execution resulting from an order entered into the system after 9:30, and also reported to ACT. The Predicate Trade could also be a SuperMontage execution based on an order that was in queue in SuperMontage at 9:30 but not executed until after 9:30:05 as a result of being sent to an order delivery participant.

If the Nasdaq Official Opening Price were to be based upon a Predicate Trade rather than a SuperMontage Opening Match, Nasdaq would be able to use the same normalization process that currently applies to the Nasdaq Official Closing Price.⁴ Specifically, if the price of the Predicate Trade were to be within the best bid and offer quote entered in the SuperMontage system at the time the trade is reported, the Nasdaq Official Opening Price would equal the reported price of the Predicate Trade. If the price of the Predicate Trade were to be lower than the Nasdaq inside bid, the Nasdaq Official Opening Price would equal the Nasdaq inside bid. Likewise, if the price of the Predicate Trade were to be higher than the Nasdaq inside ask, the Nasdaq Official Opening Price would be the Nasdaq inside ask.

Nasdaq believes that bounding the first ACT trade report by the Nasdaq inside would reduce the extent to which market participants could deliberately affect the Nasdaq Official Opening Price, since firms would need to affect not only the inside quotes but also the Predicate Trade. On the other hand, SuperMontage executions occur only at the prevailing inside bid or ask; therefore, such executions would not need to be bound by a SuperMontage quotation. To be consistent in the delivery of the opening message to market data vendors, the prevailing Nasdaq inside bid and ask would be disseminated with the Nasdaq Official Opening Price whether a SuperMontage trade or an ACT trade sets it.⁵

To illustrate the bounding of an ACT trade report, consider the following example. There is no SuperMontage Opening Match. However, at 9:30:10 a.m., the first, last sale eligible ACT trade is reported with a price of 19.98. The Nasdaq inside bid and ask at 9:30:10 is 20.00 to 20.02. Under the proposal, the Nasdaq Official Opening

Price would be equal to the Nasdaq inside bid, in this case 20.00. If the first, last sale eligible ACT trade price were 20.04 instead of 19.98, the Nasdaq Official Opening Price would equal the Nasdaq inside ask at the time of the trade report, in this case 20.02.

The Nasdaq Official Opening Price value would be disseminated as soon as it is calculated, and changes to the underlying trade report would not affect the Nasdaq Official Opening Price.⁶

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,⁷ in general, and with section 15A(b)(6) of the Act,⁸ in particular, which requires the NASD's rules to be designed, among other things, to protect investors and the public interest. Nasdaq believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because Nasdaq believes the proposal would result in the public dissemination of information that more accurately reflects the trading in a particular security at the open. Furthermore, to the extent a security is a component of an index, Nasdaq believes the index would more accurately reflect the value of the market, or segment of the market, the index is designed to measure. Nasdaq believes that the corresponding result should be trades, or other actions, executed at prices more reflective of the current market when the price of an execution, or other action, is based on the last sale, the high price or low price of a security, or the value of an index.

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

Nasdaq does not believe that the proposed rule change will 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.

⁶ Nasdaq represents that it will make an effort to inform users of Nasdaq of when the Nasdaq Official Opening Price is based upon a trade executed in SuperMontage or a Predicate Trade that may have been normalized. Telephone conversation among Jeffrey S. Davis, Associate Vice President and Associate General Counsel, Nasdaq, Alton S. Harvey, Office Head, Office of Market Watch, Division of Market Regulation ("Division"), Commission, and Cyndi Rodriguez, Special Counsel, Division, Commission on November 13, 2003.

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(6).

⁴ See Securities Exchange Act Release No. 47517 (March 18, 2003), 68 FR 14446 (March 25, 2003) (SR-NASD-2002-158).

⁵ In the event that a security is in a trading halt prior to market open and that halt continues past 9:30, the Nasdaq Official Opening Price for that security would equal the reported trade price of the first last sale eligible trade reported after the trading halt is lifted and the inside market for the security is uncrossed.

³ Four types of trade reports are not last sale eligible and, thus, would not be eligible to affect the Nasdaq Official Opening Price: cash sales (which include the "C" trade report modifier), next day sales (.ND), seller trades (.S), and after hours trades (.T).