

include the .T modifier, or any other modifier, are assumed to be timely reports of normal market hours trades and are included in the last sale, high price, and low price calculations for a security, which calculations are designed to provide information about the current trading of a security during normal market hours.⁸ Therefore, when reports of trades executed outside normal market hours erroneously do not include the .T modifier, the trades appear as normal market hours trades, which can distort the market because the price being reported may be significantly different from the prices in the normal market hours. These erroneously reported trades can cause confusion for members, issuers, and investors and can lead to investment decisions being made based upon inaccurate information. Automatically appending the .T modifier in these circumstances will prevent this market confusion.

In some circumstances today, ACT appends the .T modifier automatically. If a trade is executed and reported at or after 4:01:30 p.m. and up until 6:30 p.m., ACT automatically appends the .T modifier.⁹ However, if the submission to ACT is a report of a trade executed between midnight and 9:30 a.m., or between 4 p.m. and 4:01:30 p.m., ACT does not append the .T modifier automatically; the member must submit the report with the .T modifier attached. As described earlier, members occasionally fail to include the .T modifier on these reports. While NASD can, and does, bring disciplinary actions against members when they do not properly report trades, the immediate result of an improperly reported trade is that potentially misleading information is disseminated. Therefore, to prevent this result, Nasdaq is proposing to modify ACT to append the .T modifier automatically to any transaction report that contains an execution time between

midnight and 9:30 a.m., or between 4 p.m. and 4:01:30 p.m.¹⁰

To append the .T modifier automatically, ACT must be reprogrammed to include a validation parameter that compares the time of execution and the modifier field.¹¹ Once the validation parameter is operative, if the time of execution on a submission to ACT indicates a trade was executed between midnight and 9:30 a.m. or between 4 p.m. and 4:01:30 p.m., and the .T modifier is not included in the report, ACT will append the .T modifier automatically.¹²

The validation parameter relies on the time of execution to identify improperly reported trades and to append the .T modifier. Today, nearly all trades reported to Nasdaq include the time of execution, but some trades are still reported without this information.¹³ Therefore, a small number of improperly reported trades will not be corrected automatically and thus will continue to be included in the last sale, high price, and low price calculations. However, Nasdaq staff will continue to conduct surveillance for these instances and manually correct the calculations when such errors are discovered. To eliminate the small number of incidences in which ACT cannot identify and correct improperly reported trades, Nasdaq soon will file a proposal to require the time of execution on all trade reports.

Nasdaq also is proposing to codify a requirement that members must report on the following day on an "as/of" basis trades executed between midnight and 9:30 a.m., but not reported before 9:30 a.m. on trade date. This guidance has been given to members in the past, but Nasdaq believes it is necessary to codify the requirement at this time so that the rules clearly state a member's obligations.¹⁴ Nasdaq believes that requiring members to report these trades the following day is necessary to prevent members from reporting pre-open trades during the normal or after-hours sessions, which could distort the prices in these time periods due to the potential differences in prices between

the pre open session and these other sessions.¹⁵

Finally, Nasdaq is proposing non-substantive language changes to NASD Rule 6420(a)(1) to clarify the meaning of the phrase "executed during the trading hours of the Consolidated Tape." Until recently, this phrase was commonly understood to mean between the hours of 9:30 a.m. and 4 p.m. Eastern Time. However, the Consolidated Tape recently began disseminating trades executed on an exchange whose normal market hours are from 8 a.m. to 8 p.m. Thus, some members have sought clarification of their trade reporting responsibilities.

The proposed language change does not modify members' trade reporting obligations. Paragraphs (a)(1), (a)(2)(B), and (a)(3)(A) of NASD Rule 6420 specifically articulate members' reporting obligations between 4 p.m. and 6:30 p.m., and outside the hours of 9:30 a.m. and 6:30 p.m., which leads to the logical conclusion that the only time period that could be governed by the phrase "executed during the trading hours of the Consolidated Tape" is the period between 9:30 a.m. and 4 p.m. However, to prevent any further confusion, Nasdaq is proposing to replace the phrase at issue with the phrase "executed between 9:30 a.m. and 4:00 p.m. Eastern Time."

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁶ which requires that NASD's rules, among other things, protect investors and public interest. Nasdaq believes the proposal to append the .T modifier automatically to trade reports submitted to ACT is consistent with this obligation because it will prevent nearly all reports of trades executed outside normal market hours from being included in the calculations designed to inform investors of the current market for a security during normal market hours. As a result, members and the public will possess more accurate information when making investment decisions. In

instead are required to be reported as "as/of" trades on the day following the date of execution. For example, Rule 5430(a) requires members to report a trade on an "as/of" basis if the trade is executed between 6:30 p.m. and midnight. A trade executed during this time period must be reported the following day as an "as/of" trade. The current proposal to append the .T modifier automatically does not change members "as/of" reporting obligations.

⁸ Nasdaq's systems assume that trades reported without the .T modifier have been executed during normal market hours and are indicative of the current market for the security.

⁹ *Id.* Trades executed between 6:30 p.m. and midnight must be reported the following day on an "as/of" basis.

¹⁰ A trade executed at 9:30 a.m. or 4 p.m. Eastern Time is considered executed during normal market hours, and thus not reported with a .T modifier.

¹¹ Nasdaq intends to implement the ACT program changes on, or about, November 3, 2003.

¹² *Supra* note 8. The .T modifier will not be appended to a trade report that contains a time of execution of 9:30 a.m. or 4 p.m. Eastern Time.

¹³ Today, over 99% of the trades submitted to ACT include the time of execution.

¹⁴ The proposed requirement would apply only to those NASD members that are required to report trades to ACT or that choose to report trades to ACT, as specified in NASD Rule 5430(b).

¹⁵ While members have been informed of this position in the past, there is no written guidance on the issue. As such, pre-open trades sometimes are reported during normal market hours. Once the current proposal is implemented, the .T modifier will be appended automatically to any report of a pre-open trade that contains the time of execution. For example, if a member attempts to report a pre-open trade during normal market hours, ACT will append the .T modifier. However, ACT also will reject the trade, because during normal market hours ACT rejects any report containing the .T modifier, even a report that contains a .T appended by ACT itself. In these circumstances, the member must resubmit the report the following day.

¹⁶ 15 U.S.C. 78o-3(b)(6).