

Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to section 19(b)(3)(A)(ii) of the Act,³ and Rule 19b-4(f)(2) thereunder⁴ as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq proposes to reduce fees for the use of the Automated Confirmation Transaction Service ("ACT").⁵ The new fee schedule will be implemented beginning on December 1, 2003. Additionally, the proposed rule change (i) makes minor modifications to the rule language describing the existing discount for transactions in Nasdaq-listed securities through the Nasdaq National Market System ("NNMS"), (ii) deletes a reference to a "terminal fee" for an "ACT only terminal," because Nasdaq no longer provides this service, and (iii) deletes text describing a three-month trial period following the introduction of the ACT Workstation, since the text refers to a period that has fully transpired. The text of the proposed rule change is available at Nasdaq and at the Commission.

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 for transactions reported to Nasdaq, including trades in Nasdaq-listed securities, exchange-listed securities, and OTC Bulletin Board securities. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated directly between market participants and transactions that are internalized by market participants.

As part of an ongoing effort to reduce the costs incurred by market participants to use Nasdaq services, Nasdaq is reducing the fees for trade reports in exchange-listed securities by introducing a volume-based discount. The discount applies to all reports in ITS Securities, a term defined in NASD Rule 5210(c) that includes all securities listed on the New York Stock Exchange, the American Stock Exchange, and other exchanges whose listed securities trade through the Intermarket Trading System (defined as "ITS Covered Transactions"). Thus, the discounts offered by the proposed rule change apply to reports that are automatically generated by Nasdaq's automated systems for trading exchange-listed securities,⁶ as well as internalized trades in ITS Securities and reports for such securities submitted pursuant to "automated give-up" ("AGU") and Qualified Service Representative ("QSR") arrangements.⁷ However, the discounts do not apply to transactions that are subject to trade comparison through ACT, for which Nasdaq will continue to charge \$0.0144 per side for each 100 shares (subject to a minimum charge of \$0.0576 and a maximum charge of \$1.08).

Under the proposal, the per side fee paid by an ACT participant for trade reports during a particular month would depend upon the volume of media transaction reports for ITS Covered Transactions (i) that were submitted to ACT automatically by a Nasdaq trading system and in which the participant was

identified as the reporting party,⁸ or (ii) that were submitted or introduced to ACT by the participant (regardless of what party is identified as the reporting party).⁹ If an ACT participant's average daily volume of such media trade reports was 5,000 or less, its fee for all ACT reports for ITS Covered Transactions during the month would be \$0.029 per report. An ACT participant with an average daily volume of more than 5,000 media reports, however, would pay \$0.029 per report for a number of reports equal to 5,000 times the number of trading days in the month, but all additional reports during the month would be free.

Nasdaq is also making minor modifications to the rule language describing the existing discount for transactions in Nasdaq-listed securities through the NNMS. These modifications do not alter the substance of this discount, under which the \$0.029 fee for reports of trades in Nasdaq-listed securities through the NNMS is waived during any month in which a market participant is a party (either reporting or non-reporting) to an average daily volume of at least 10,000 reports of such trades during the month. As with the proposed discount for ITS Securities, Nasdaq determines eligibility for the NNMS discount by aggregating activity associated with all of the MPIDs associated with a single CRD number (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

Finally, Nasdaq is deleting a reference to a "terminal fee" for an "ACT only terminal," a service that Nasdaq no longer provides, and is deleting text describing a three-month trial period following the introduction of the ACT Workstation, since the text refers to a period that has fully transpired.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,¹⁰ in general, and with section 15A(b)(5) of

⁶ At present, those systems are the Intermarket Trading System/Computer Assisted Execution System ("ITS/CAES") and Primex. However, Nasdaq has recently proposed to allow the trading of exchange-listed securities through the Nasdaq National Market Execution System ("NNMS"). See SR-NASD-2003-149 (October 3, 2003). At the time of implementation of SR-NASD-2003-149, the fee schedule adopted herein (rather than the fee schedule for trades in Nasdaq National Market and SmallCap Market securities executed through the NNMS) will apply to reports of executions of ITS Securities through the NNMS (unless Nasdaq amends its ACT fee schedule prior to that time).

⁷ AGU and QSR arrangements allow a participant to report trades executed with other brokers with whom they have entered into a contractual relationship.

⁸ Volume will be measured with reference to the market participant identifier ("MPID") appearing in the reporting party field of trade reports. If a particular corporate entity has multiple MPIDs associated with the Central Registration Depository ("CRD") number under which it conducts business, Nasdaq will aggregate trade reports associated with all of its MPIDs. However, Nasdaq will not aggregate one corporate entity's trade reports with those associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number.

⁹ Volume will be measured with reference to the MPID of the submitting or introducing party as reflected in the data received by Nasdaq in the trade report, with aggregation of multiple MPIDs associated with a single CRD number.

¹⁰ 15 U.S.C. 78o-3.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ This proposed rule change applies to usage of ACT by NASD members. The usage of ACT by non-members is governed by NASD Rule 6120.