

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 provide 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.<sup>4</sup> 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.

**Proposed Fee Waiver.** In order to increase the availability of PostData within the securities industry, Nasdaq proposes to waive all fees assessed upon new subscribers to PostData for a period of up to two months. Nasdaq has repeatedly been asked by potential subscribers to offer a free trial period in order to test PostData before committing to subscribe. Based upon these requests, Nasdaq believes that offering a free trial period will make this data more widely available and enable PostData to reach viability sooner.

This fee waiver period would be applied on a rolling basis, determined by the date on which a new subscriber or potential subscriber contacts Nasdaq to receive access to PostData. Additionally, any vendor who provides PostData to its clients would have the opportunity to waive the fee to any new subscriber for a period of up to two months. Nasdaq believes that this waiver is fair and non-discriminatory because it applies to all potential direct and indirect subscribers.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(5)<sup>5</sup> and 15A(b)(6)<sup>6</sup> of the Act. Section 15A(b)(5)

<sup>4</sup> See Securities Exchange Act Release No. 46316 (August 8, 2002), 67 FR 52505 (August 12, 2002)(SR-NASD-2002-90).

<sup>5</sup> 15 U.S.C. 78o-3(b)(5).

<sup>6</sup> 15 U.S.C. 78o-3(b)(6).

requires the equitable allocation of reasonable dues, fees and other charges among members and other users of facilities operated or controlled by a national securities association. Section 15A(b)(6) requires rules that foster cooperation and coordination with persons engaged in facilitating transactions in securities and that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. Nasdaq believes that this program involves a reasonable fee assessed only to users and other persons utilizing the system and will provide useful information to all direct and indirect subscribers on a non-discriminatory basis.

## 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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

- A. By order approve such proposed rule change, or
- B. Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-2003-03 and should be submitted by February 18, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47210; File No. SR-NASD-2003-02]

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend the Pilot Period for Nasdaq PostData and the Fees Assessed Under NASD Rule 7010(s)

January 17, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 9, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II and III below, which items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to section 19(b)(3)(A) of the Act,<sup>3</sup> and rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>7</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> The NASD provided the Commission with notice of its intent to file the proposed rule change on December 30, 2002. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii). Nasdaq asked the Commission waive the 30-day operative delay.

## 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.]

\* \* \* \*

## 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.<sup>6</sup> 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.<sup>7</sup> 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

<sup>6</sup> See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002)(SR-NASD-99-12).

<sup>7</sup> See Securities Exchange Act Release No. 46316 (August 8, 2002), 67 FR 52504 (August 12, 2002)(SR-NASD-2002-90).

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 NasdaqOnline.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.<sup>8</sup> 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

<sup>8</sup> See footnote 6, *supra*.

purchasing PostData for redistribution to their subscribers.

#### POSTDATA SUBSCRIBERS FROM MARCH TO DECEMBER 2002

Month	Number of sell-side firms posting their data	Number of firms subscribing to postdata
March .....	3	9
April .....	5	12
May .....	7	14
June .....	10	15
July .....	12	17
August .....	19	24
September .....	22	26
October .....	25	30
November .....	28	31
December .....	30	33

Nasdaq was able to start marketing PostData to potential subscribers such as buy-side firms and data vendors this past fall. It is from these marketing efforts that additional feedback was received such as whether more data can be provided. Nasdaq believes that these actions will increase the likelihood of attracting a meaningful number of subscribers sooner rather than later. It is difficult to predict when that will occur, but Nasdaq represents that it will update the staff regularly, and it will provide a full analysis of the fees as quickly as possible.

*Proposed Enhancements.* Based on feedback provided by potential subscribers, Nasdaq proposes to make the following data elements available to PostData subscribers at no additional charge:

- Daily share volume for all market participants per Nasdaq security on a T+10 basis including the ACT Reported, Buy, Sell, Crossed and Total Activity reports.

- Daily share volume aggregates for all market participants per Nasdaq index on a T+10 basis including the ACT Reported, Buy, Sell, Crossed and Total Activity reports.

Monthly share volume of all market participants on a per security basis has been available to Nasdaq broker-dealers for several years. Initially, the data was provided via computer diskettes sent to the head of Nasdaq trading at firms. Since October 1997, this data has been disseminated on the NasdaqTrader.com web site without charge. The monthly volume reports attribute volume to the reporting party of media-disseminated trades (trades reported to the "tape"). Monthly data is available about 10 business days after the end of the previous month. The web site provides monthly, quarterly and year-to-date

volume aggregates for up to 12 calendar months.

Subscribers and potential subscribers to PostData have requested the ability to access share volume information in customized timeframes outside of the daily and monthly information that is made available in PostData and the public part of NasdaqTrader.com. For example, a customer may track their firm's share volume activity in securities that they begin to perform research analysis for, or have raised capital in a public offering. Most often, these events do not begin at the beginning of a month. Therefore, they would like to be able to request data from customized timeframes (e.g., February 15 to March 15). The daily and monthly reports in PostData do not currently meet this customer base needs.

Additionally, some market participants, primarily buy-side firms, have requested to view all market participant data on a T+1 basis and not just those sell-side firms that voluntarily choose to post their data. Other participants, primarily sell-side firms, have expressed concerns that T+1 data would reveal their trading positions. Those firms have not, however, expressed concern about revealing all market participants' volume information on a T+10 basis because the 10-day delay prevents the disclosure of meaningful information about firms' current positions. Therefore, the proposal appropriately balances the needs and concerns of each customer group and the public interest. As more time passes, the sensitivity of a specific day's volume of a market participant decreases. Ten business days is an appropriate timeframe when the daily volume information of all market participants can be made available either on a per security basis or by a Nasdaq index for example.

Nasdaq proposes to make this information available to all PostData subscribers at no additional charge on a non-discriminatory basis. In its original proposal to create PostData, Nasdaq represented that it would make product enhancements available on an equal basis to all users of the proposed products, whether customers of Nasdaq or of a participating data vendor. Specifically, if Nasdaq offers a free product enhancement during the pilot program, it will be free to all direct and indirect users,<sup>9</sup> and that such

modifications to PostData during the pilot period would be limited to minor enhancements to the content of the package. Nasdaq believes that this rule proposal meets those requirements. In accordance with the conditions of approval of Nasdaq PostData, Nasdaq represents that the PostData modifications described in this proposed rule change will be made available at no charge to all vendors and direct subscribers of Nasdaq. Nasdaq also represents that it has made modification information available to market data vendors generally, but that no vendors are currently accepting the PostData data or redistributing that data to subscribers.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(5)<sup>10</sup> and 15A(b)(6) of the Act.<sup>11</sup> Section 15A(b)(5) requires the equitable allocation of reasonable dues, fees and other charges among members and other users of facilities operated or controlled by a national securities association. Section 15A(b)(6) requires rules that foster cooperation and coordination with persons engaged in facilitating transactions in securities and that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. Nasdaq believes that this program involves a reasonable fee assessed only to users and other persons utilizing the system, and will provide useful information to all direct and indirect subscribers on a non-discriminatory basis.

#### 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

Nasdaq neither solicited nor received written comments with respect to the proposed rule change.

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

Because the foregoing proposed rule change does not:

<sup>9</sup> Nasdaq also represented that it would seek Commission approval of any fees to be assessed for such enhancements. Nasdaq notes that this rule filing is properly made immediately effective because Nasdaq is not proposing to assess an

<sup>10</sup> 15 U.S.C. 78o-3(b)(5).

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

(i) Significantly affect the protection of investors or the public interest;  
 (ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>12</sup> and rule 19b-4(f)(6) thereunder.<sup>13</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow Nasdaq to operate the PostData pilot program without interruption through February 28, 2003. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>14</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-2003-02 and should be submitted by February 18, 2003.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47214; File No. SR-NASD-2002-124]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Amendment to Rule 2260 To Expand the Definition of "Designated Investment Adviser" To Include State Registered Investment Advisers for the Purpose of Receiving and Voting Proxy Materials on Behalf of Beneficial Owners

January 17, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 19, 2002, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by NASD. On January 8, 2003, the NASD submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NASD is proposing to amend NASD Conduct rule 2260 to expand the definition of "designated investment adviser" to include all state registered investment advisers.

<sup>1</sup> 15 CFR 200.30-3(a)(12).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Kosha K. Dalal, Assistant General Counsel, Regulatory Policy and Oversight, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated January 8, 2003 ("Amendment No. 1"). In Amendment No. 1, the NASD proposes to (1) revise the first footnote of proposed NASD rule 2260 to define the term "state" by reference to the Investment Advisers Act of 1940, instead of the Securities Exchange Act of 1934, and (2) underline the text of two proposed footnotes in proposed NASD rule 2260 to indicate that they are proposed new text.

Below is the text of the proposed rule change. Proposed new language is in *italics*.

#### Rule 2260. Forwarding Proxy and Other Materials.

(a)-(e) No change.

(f) For purposes of this rule, the term "designated investment adviser" is a person registered under the Investment Advisers Act of 1940 or registered as an *investment adviser under the laws of a state*,<sup>4</sup> who exercises investment discretion pursuant to an advisory contract for the beneficial owner and is designated in writing by the beneficial owner to receive proxy and related materials and vote the proxy, and to receive annual reports and other material sent to security holders.

(1) The written designation must be signed by the beneficial owner; be addressed to the member; and include the name of the designated investment adviser.

(2) Members who receive such a written designation from a beneficial owner must ensure that the designated investment adviser is registered with the Commission pursuant to the Investment Advisers Act of 1940 or with a state as an *investment adviser under the laws of such state*,<sup>5</sup> and that the investment adviser is exercising investment discretion over the customer's account pursuant to an advisory contract to vote proxies and/or to receive proxy soliciting material, annual reports and other material. Members must keep records substantiating this information.

(3) Beneficial owners have an unqualified right at any time to rescind designation of the investment adviser to receive materials and to vote proxies. The rescission must be in writing and submitted to the member.

(g) 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, NASD 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. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

<sup>4</sup> The term "state" as used herein shall have the meaning given to such term in section 202(a)(19) of the Investment Advisers Act of 1940, and as such term may be amended from time to time therein.

<sup>5</sup> Members may verify registration of an investment adviser through the use of the Investment Adviser Registration Depository ("IARD") system.