trade match fee would also apply to each linkage order. Lastly, if a linkage order is executed in whole or in part on RAES,[5] a $.30 per contract RAES fee would apply, and if any portion of a linkage order is manually handled, a $.04 per contract floor brokerage fee is assessed.

2. Statutory Basis

The Exchange believes that the proposed rule change meets the requirement of section 6(b)(5) under the Act[6] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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

No written comments were solicited or received 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 self-regulatory organization 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.

[5] RAES is the automated execution system feature of the Exchange's order routing system that is owned and operated by the Exchange and that provides automated order execution and reporting services for options. *See* Exchange rule 6.8.

[6] 15 U.S.C. 78f(b)(5).

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 CBOE. All submissions should refer to File No. SR–CBOE–2003–11 and should be submitted by April 15, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–6989 Filed 3–24–03; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47517; File No. SR–NASD–2002–158]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to the Establishment of a Nasdaq Official Closing Price and a Trade Report Modifier With Which To Identify That Price to the Public

March 18, 2003.

I. Introduction

On November 1, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a Nasdaq Official Closing Price (''NOCP''), and a trade report modifier with which to identify that price to the public. The proposed rule change was published for comment in the **Federal Register** on December 26, 2002.[3] The Commission received seven comment letters regarding the proposal.[4] Nasdaq responded to the commenters in an amendment which Nasdaq filed with the Commission on January 28, 2003[5] and in a second response letter that Nasdaq filed with the Commission on March 7, 2003.[6] This order approves the proposed rule change, and approves Amendment No. 1 on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background

Nasdaq is proposing to establish an NOCP, and a trade report modifier with which to identify that price to the public. Nasdaq would program its proprietary systems to append the new

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 47022 (December 18, 2002), 67 FR 78840.

[4] *See* letter from Brett W. Redfearn, Senior Vice President, Business Strategy and Equity Order Flow, American Stock Exchange LLC, to Jonathan G. Katz, Secretary, Commission, dated January 29, 2003 (''Amex Letter''); letter from Jeffrey T. Brown, Senior Vice President, Secretary and General Counsel, the Cincinnati Stock Exchange, Inc., to Mr. Jonathan G. Katz, Secretary, Commission, dated January 24, 2003 (''CSE Letter''); letter from Jon Kroeper, First Vice President and Associate General Counsel, Instinet Group Incorporated, to Mr. Jonathan G. Katz, Secretary, Commission, dated February 13, 2003 (''Instinet Letter''); letter from Donald J. Boteler, Vice President-Operations, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Commission, dated January 15, 2003 (''Institute Letter''); letter from C. Thomas Richardson, Managing Director, Nasdaq Trading, and David Weisberger, Managing Director, U.S. Equities Models Trading, Salomon Smith Barney, to Mr. Jonathan Katz, Secretary, Commission, dated January 15, 2003 (''SSB Letter''); letter from Hendrik J. Kranenburg, Executive Vice President, Standard & Poor's, to Secretary, Commission, dated January 17, 2003 (''S&P Letter''); and letter from Scott W. Anderson, Associate Director and Counsel, Region Americas Legal, UBS Warburg LLC, to Jonathan G. Katz, Secretary, Commission, dated January 15, 2003 (''UBSW Letter'').

[5] *See* letter from Jeffrey S. Davis, Associate General Counsel, Nasdaq, to Alton S. Harvey, Office Head, Division of Market Regulation (''Division''), Commission, dated January 27, 2003 (''Amendment No. 1''). In Amendment No. 1, Nasdaq addresses the positive comments submitted with respect to the proposed rule change and proposes, in response to comments, to revise its original proposal to consider canceled or corrected trades submitted until 5:15:00 PM rather than 4:30:00 PM for the calculation of the NOCP.

[6] *See* letter from Jeffrey S. Davis, Associate General Counsel, Nasdaq, to Alton S. Harvey, Office Head, Division, Commission, dated March 7, 2003 (''Second Response Letter'').

modifier—''.M'' for Market Close—to one trade report message in each Nasdaq National Market and SmallCap security to identify it as the NOCP in that security. The dissemination of the NOCP would not affect the consolidated last sale price disseminated pursuant to the national market system plan governing trading of Nasdaq securities (''Nasdaq UTP Plan'') or the last sale price of any exchange that is a member of that plan.

Currently, Nasdaq does not have an official closing price. Instead, market participants generally use a last sale price that vendors identify from among the last sale prices that Nasdaq disseminates in its role as the Exclusive Securities Information Process (''ESIP'') for the Nasdaq UTP Plan. As the ESIP, Nasdaq currently disseminates a consolidated last sale price (''Consolidated Close''), which is the price of the last trade reported to the ESIP by any UTP Participant prior to 4:01:30 p.m. In addition, Nasdaq disseminates the last sale price of each individual participant in the Nasdaq UTP Plan (''Individual Market Close''), including Nasdaq, which is the price of the last trade reported by each individual participant market center prior to 4:01:30 p.m. Nasdaq market participants rely on either the Consolidated Close or Nasdaq's Individual Market Close for many post-close activities, including pricing indices, large institutional orders (commonly called ''market-on-close orders''), and mutual fund values. The Consolidated Close is the primary measure of the market for a variety of constituents, including sell-side and buy-side institutions, market indexers, securities issuers, and individual investors.

Nasdaq believes that, despite their widespread acceptance, the Consolidated Close and Nasdaq Individual Market Close are imperfect measures of the value of Nasdaq issues at the close of normal market hours. For instance, the Consolidated Close is somewhat arbitrary in that it is simply the price of the final unmodified trade to be reported to Nasdaq prior to 4:01:30 p.m. by any Nasdaq member or UTP Exchange. Due to wide disparities in the speed at which market participants report trades within Nasdaq's 90-second trade reporting window, trades reported at 4:01:30 p.m. can be significantly away from the market when it closes at 4:00:00 p.m. As a result, Nasdaq is concerned that the Consolidated Close may no longer reliably and accurately reflect each security's value at the close of the market.

B. Mechanics of the Proposal

Nasdaq proposes to replace the methodology currently used to calculate Nasdaq's Individual Market Close with the NOCP methodology described below. The NOCP would be based on the price of the last unmodified trade reported to Nasdaq's proprietary trade reporting system—Automated Confirmation Transaction System or ''ACT''—at or before 4:00:02 p.m. (the ''Predicate Trade''). Nasdaq systems would ''normalize'' the price of the Predicate Trade by comparing it to Nasdaq's best bid and ask prices (*i.e.*, the best prices displayed by all SuperMontage participants) at the time the Predicate Trade was reported, or by comparing it to the Nasdaq best bid and offer at 4:00:00 p.m. for trades reported after that time (''Predicate BBO'').[7] If the price of the Predicate Trade falls at either side of or within the Predicate BBO, that price becomes the NOCP. If the price of the Predicate Trade falls outside the Predicate BBO, Nasdaq would adjust it up to the Predicate BBO bid if it is below the bid price or down to the Predicate BBO ask if it is above the ask price. The NOCP methodology would only impact the Individual Market Close for Nasdaq; it would not impact the Consolidated Close or Individual Market Closes of the UTP Exchanges that are disseminated by the ESIP.

The Predicate Trade can be any trade that currently updates the Individual Market Close for Nasdaq, subject to certain limitations. First, Nasdaq would only consider trades submitted with the Nasdaq market center identifier. Specifically, Nasdaq would only consider trade reports submitted to ACT, either by NASD members or by UTP Exchanges that use Nasdaq's proprietary execution systems. Nasdaq would not consider trades reported by NASD members to any venue outside of Nasdaq, including the NASD Alternative Display Facility or other UTP Exchanges, nor would it consider any trades reported by UTP Exchanges not executed through Nasdaq proprietary systems. Thus, if no NASD member reports a trade in a given security to Nasdaq prior to 4:00:02 p.m., Nasdaq would report no NOCP in that security.

Second, Nasdaq would only consider unmodified trades reported at or before 4:00:02 p.m. Nasdaq chose 4:00:02 p.m. as the proper reference point to provide every trade type a reasonable chance to set the close. The current close disadvantages certain trade types that are reported too quickly to set the closing price, such as trades reported via Nasdaq execution systems or by market participants' own automated systems, which often report trades almost instantly. In fact, NASD members report over 90 percent of trades to Nasdaq within two seconds of execution, despite Nasdaq's 90-second trade reporting window. Nasdaq believes that unmodified trades would more accurately reflect the true state of the market at the close of normal market hours. Thus, Nasdaq would not consider trade reports submitted after 4:00:02 p.m. and, with one exception, it would not consider any trades reported with a modifier, such as a .T (after normal market hours), .OR (out of range), or .PRP (prior reference price).[8]

Third, in its original filing, Nasdaq proposed to adjust the NOCP only if the Predicate Trade is cancelled or corrected by 4:30:00 p.m., even though Nasdaq would continue to accept trade cancel and correction messages via ACT until 5:15:00 p.m. If, between 4:00:02 p.m. and 4:30:00 p.m., a market participant enters a cancel or correct message regarding the Predicate Trade, Nasdaq would process that message, and recalculate the NOCP. Nasdaq would not consider in the NOCP calculation any cancel or correct message that arrives after 4:30:00 p.m. However, as discussed more fully below, Nasdaq has revised its proposal in Amendment No. 1 to consider cancelled or corrected trades submitted until 5:15:00 p.m. rather than 4:30:00 p.m. for the calculation of the NOCP.[9]

C. Impact on the Consolidated Last Sale Calculation

The NOCP would not be eligible to set the Consolidated Close under the Nasdaq UTP Plan, although the Predicate Trade would be eligible as are all unmodified trade reports. While the NOCP is based on an actual trade, it is not necessarily an actual trade price. Therefore, Nasdaq believes that including it in the Consolidated Close is not consistent with the Nasdaq UTP Plan. It would also give Nasdaq an unfair advantage by providing an additional opportunity for Nasdaq to set the Consolidated Close. To avoid that

[7] Nasdaq Market participants would not have the ability to append the new modifier to trade reports; only Nasdaq trade reporting systems would append this modifier, and only for transactions in Nasdaq National Market and SmallCap Market securities.

[8] Nasdaq would consider a trade submitted to Nasdaq with a .SLD modifier (reported more than 90 seconds after execution) or a .PRP modifier to be the Predicate Trade if, and only if, it is the only trade of the day by any market participant. In that case, the Predicate BBO would be the BBO at the time the trade was reported.

[9] *See* Amendment No. 1, *supra* note 5.

result, Nasdaq would append the .M modifier and publish it with a trade size of zero to signal to the ESIP and vendors not to include it in the Consolidated Close calculation. The NOCP would, on the other hand, be used to populate the Nasdaq Individual Market Close field that the ESIP currently disseminates. The Predicate Trade would be reported to the ESIP according to Nasdaq's existing trade reporting rules and it would be eligible to set the Consolidated Close, as it would be today.

Nasdaq recognizes that it must educate investors and vendors about its new NOCP and the .M modifier to avoid creating confusion. Currently, the Nasdaq ESIP disseminates a Closing Trade Summary Report that includes the Consolidated Close as well as the Individual Market Closes for Nasdaq and for each UTP Exchange that trades Nasdaq securities. If this proposal is approved, the Individual Market Close field for Nasdaq in the Closing Trade Summary Report would contain the NOCP in place of its last sale price. Neither the Consolidated Close nor any of the Individual Market Closes for any UTP Exchange would be affected by this proposal.

The Nasdaq ESIP is engaged in a development effort to accommodate the new trade modifier and its treatment in the consolidated data streams. Nasdaq has also discussed the addition of the new .M trade modifier with the UTP Operating Committee, and has made it clear that any UTP participant can use the new trade modifier if it chooses.

III. Summary of Comments and Nasdaq's Responses

As noted above, the Commission received seven comment letters regarding the original proposal.[10] Nasdaq filed Amendment No. 1 to the proposal[11] to respond to the positive comments received by four of the commenters[12] and also filed the Second Response Letter[13] to address further concerns raised by three of the commenters.[14]

A. Amendment No. 1

Three of the commenters addressed in Amendment No. 1 fully supported Nasdaq's proposed rule change.[15] One commenter believed that the institution of an official closing price for the Nasdaq market would greatly enhance the overall integrity of the market and that the proposed methodology for calculating the NOCP appeared sensible and reasonably impervious to manipulation.[16] Another commenter stated that the implementation of Nasdaq's proposal would result in the determination of closing values that accurately and consistently reflect market conditions at the close and is an improvement that would provide greater financial market transparency.[17] The third commenter believed that the proposal would provide tremendous benefits to the marketplace and improve stability and predictability across the Nasdaq market and enthusiastically supported each of the three components of the proposal: (1) Reducing the consideration time for inclusion in the closing price from 4:01:30 to 4:00:02 p.m.; (2) restricting the closing price to trades effected on Nasdaq; and (3) "normalizing" closing prices based upon the closing inside market.[18]

Furthermore, under the proposal, Nasdaq would adjust the NOCP only if the Predicate Trade is cancelled or corrected by 4:30:00 p.m., even though Nasdaq would continue to accept trade cancel and correction messages via its ACT until 5:15:00 p.m. Although supporting the proposed rule change, one commenter questioned Nasdaq's willingness to accept trade cancel and correction messages via ACT until 5:15:00 p.m., inasmuch as this would result in a disconnect between the NOCP and ACT.[19] While Nasdaq asserted that it receives over 99 percent of cancel or corrections before 4:30:00 p.m., this commenter believed that material changes consistently occur after 4:30:00 p.m. The commenter also believed that a failure to synchronize these two events would very likely result in mutual funds being compelled to disregard the NOCP at 4:30:00 p.m.[20] Similarly, another commenter indicated that the 4:30:00 p.m. deadline would be 45 minutes prior to the time that other markets continue to accept adjustments.[21] In response to comments, Nasdaq revised its proposal in Amendment No. 1 to extend the calculation of the NOCP to 5:15:00 p.m.[22] Nasdaq believed that the 5:15:00 p.m. cut-off would permit flexibility to review and correct trades that occur during the busiest trading of the day, while fulfilling the equally important need for finality in the closing price calculation.

B. Second Response Letter

As noted above, the Commission received three comment letters that raised procedural, competitive, and methodological concerns with respect to the proposed rule change.[23] Nasdaq filed the Second Response Letter to specifically address these comments.[24]

1. Procedural Issues

Because Nasdaq would be replacing the Nasdaq UTP Plan's methodology in calculating its close with the NOCP methodology, proposing that the Predicate Trade be "normalized," and introducing new cut off times for calculating its individual close and disseminating that info through the ESIP facilities and thus changing the closing reports disseminated by the ESIP to display the NOCP instead of the Nasdaq UTP Plan's standard calculation, three of the commenters believed that Nasdaq should not be permitted to bypass the UTP Operating Committee or the terms of the Nasdaq UTP Plan, but instead should seek UTP Operating Committee interpretation or Nasdaq UTP Plan amendment to accommodate the NOCP.[25] The commenters also criticized Nasdaq for not involving other interested Nasdaq UTP Plan participants in developing the specifications for the SIP system changes before starting development work[26] and that Nasdaq designed the .M modifier accommodated by the ESIP in a fashion that is suited to its own particular system needs.[27] Furthermore, one of the commenters questioned Nasdaq's stated purpose for proposing the rule change, stating that if Nasdaq had a legitimate concern about the methodology specified in the Nasdaq UTP Plan for calculating the consolidated close, the appropriate forum to address that issue would be the UTP Operating

[10] *See supra* note 4.

[11] *See* Amendment No. 1, *supra* note 5.

[12] *See* Institute Letter, SSB Letter, S&P Letter and UBSW Letter, *supra* note 4.

[13] *See* Second Response Letter, *supra* note 6.

[14] *See* Amex Letter, CSE Letter and Instinet Letter, *supra* note 4.

[15] *See* SSB Letter, S&P Letter and UBSW Letter, *supra* note 4.

[16] *See* UBSW Letter, *supra* note 4.

[17] *See* S&P Letter, *supra* note 4.

[18] *See* SSB Letter, *supra* note 4.

[19] *See* Institute Letter, *supra* note 4.

[20] This commenter also suggested that the deadline for cancel and correction messages for both the NOCP and for ACT be set at 5:00:00 p.m. rather than 5:15:00 to provide mutual funds an additional 15 minutes to calculate daily closing prices. *See* Institute Letter, *supra* note 4. In response, Nasdaq stated that, while it cannot implement that recommendation via this proposal, it understands the logic of the commenter's recommendation and commits to continue discussions on this proposal with the commenter and with Nasdaq's membership. *See* Amendment No. 1, *supra* note 5.

[21] *See* CSE Letter, *supra* note 4.

[22] *See* Amendment No. 1, *supra* note 5.

[23] *See* Amex Letter, CSE Letter and Instinet Letter, *supra* note 4.

[24] *See* Second Response Letter, *supra* note 6.

[25] *See* Amex Letter, CSE Letter and Instinet Letter, *supra* note 4.

[26] *See* Amex Letter and CSE Letter, *supra* note 4.

[27] *See* CSE Letter and Instinet Letter, *supra* note 4.

Committee.[28] Moreover, this commenter believed that Nasdaq was baselessly questioning the integrity of the consolidated close and the surveillance conducted by the Nasdaq UTP Plan participants and argued that the quality of a market's surveillance procedures should be evaluated by the Commission and not by competing markets.

In the Second Response Letter, Nasdaq indicated that on March 4, 2003, the UTP Operating Committee unanimously approved a resolution that was designed to address the commentors' procedural concerns.[29] Nasdaq introduced this resolution to the UTP Operating Committee to address the concerns expressed by two of the commenters.[30] According to Nasdaq, the UTP Operating Committee discussed Nasdaq's proposal during several meetings in January and February, and, on March 4, 2003, unanimously voted that the establishment and use of the .M modifier would be consistent with the terms of the Nasdaq UTP Plan. The Operating Committee also approved the modifications to the SIP that are needed to implement the proposed establishment and use of the .M modifier.

Furthermore, Nasdaq agreed to delay the implementation of the proposal until April 14, 2003 to provide members of the UTP Operating Committee with additional time to consider the technical specifications prior to implementing the proposed trade message modifier in their own markets. Nasdaq believes that the approval of this resolution and the agreed-upon delay in implementation clearly address the commentors' procedural objections regarding compliance with the Nasdaq UTP Plan.

2. Competitive Issues

Two commenters believed that Nasdaq did not comply with its obligations as ESIP to operate independently of its associated order matching facility and that the apparent circumstances surrounding the exclusive SIP's engagement in system development work to accommodate the NOCP, without any apparent joint decisions by the UTP Operating Committee, raises serious competitive concerns.[31] Such circumstances may indicate that Nasdaq has undue influence over Nasdaq UTP Plan systems development priorities.

Two commenters expressed concern that Nasdaq may be disrupting the established system for calculating the consolidated close for its own anticompetitive reasons or may be receiving preferential treatment from the SIP and thus would frustrate the requirements for a national market system[32] in section 11A and section 11A(a)(1)(C)(ii) of the Act.[33] One commenter urged the Commission to examine whether the SIP is being operated in a truly market-neutral manner, is not unduly influenced by Nasdaq, and is not providing Nasdaq with any competitive advantages over other participant markets.[34] Similarly, the other commenter did not view Nasdaq's proposal as an example of the fair competition and regulatory harmony contemplated under the Act because Nasdaq appeared to be: disregarding the Nasdaq UTP Plan requirements and inappropriately using its position as ESIP to establish parallel dissemination practices applicable only to its market data for its own competitive advantage; dictating the introduction of earlier dissemination times without necessity of UTP Operating Committee vote, and unilaterally modifying the calculation of the consolidated close.[35] Furthermore, because the calculations and displays would no longer be based on a single standardized methodology and would introduce factors other than an actual reported trade in the determination of a closing price, both commenters believed that Nasdaq's proposal would afford the opportunity for investor confusion as it would eliminate the ''apples-to-apples'' comparison of individual market prices.[36] Due to the significant value of retaining consistent methodologies in a market like that for Nasdaq-quoted securities, where trading activity is widely dispersed among different trading venues, these commenters suggested that existing reports should continue to contain the same calculations as necessary to maintain the integrity and clarity of the closing price information across the markets.[37]

Finally, one commenter expressed the view that Nasdaq's actions were inconsistent with (b)(6) and (b)(9) of section 15A[38] which require that Nasdaq not design rules intended to discourage cooperation and coordination among regulators, regulate matters not related to the purposes of the administration of its markets, and impose unnecessary and inappropriate burdens on competition.[39]

In response to comments, Nasdaq stated that it is not attempting to disrupt the calculation of the consolidated close, but rather has avoided interfering with the existing consolidated close, which would be calculated and disseminated exactly as it has been regardless of this proposal.[40] Furthermore, every trade that currently is eligible to set the consolidated close would continue to be eligible if this proposal is approved, and no trade that is currently not eligible would become so. Similarly, Nasdaq clarified that the Predicate Trade that forms the basis of the NOCP would be eligible to set the consolidated close, as it is today, while the NOCP message itself, which is new, would not be eligible. Nasdaq also noted, in response to the comments, that use of the NOCP is completely voluntary on the part of industry participants; Nasdaq's proposal would simply create one alternative closing price for industry participants to use. Moreover, Nasdaq's proposal would not preclude the use of other closing prices, such as the consolidated close or market specific closing prices that exist today. In fact, Nasdaq believes that its proposal explicitly invites other markets to establish a competing market-centric closing price, and to use the .M modifier to designate their own official closing price to market participants.

Furthermore, Nasdaq does not believe that the commenters presented a credible argument that Nasdaq was operating anti-competitively. Specifically, Nasdaq believes that it has not abused its role as the SIP. Because Nasdaq is aware of its unique role as the processor for the Nasdaq UTP Plan and to avoid the appearance of bias, Nasdaq agreed to delay the implementation of its proposal until April 14, 2003 from the original, scheduled implementation date of March 24, 2003. According to Nasdaq, this extension would permit Nasdaq UTP Plan participants, including the commentors, extra time to program their systems to use the .M modifier or to develop a proposal that would better serve their needs.

3. Methodological Issues

Although one commenter supported reducing the inclusion time for calculating the NOCP at 4:00:02 p.m.

[28] *See* CSE Letter, *supra* note 4.

[29] *See* Second Response Letter, *supra* note 6.

[30] *See* Amex Letter and CSE Letter, *supra* note 4.

[31] *See* Amex Letter and Instinet Letter, *supra* note 4.

[32] *See* CSE Letter and Instinet Letter, *supra* note 4.

[33] 15 U.S.C 78k and 15 U.S.C. 78k–1(a)(1)(C)(ii).

[34] *See* Instinet Letter, *supra* note 4.

[35] This commenter was also concerned with the precedential impact this proposal would have on future proposals by any market participant. *See* CSE Letter, *supra* note 4.

[36] *See* CSE Letter and Instinet Letter, *supra* note 4.

[37] *See* CSE Letter and Instinet Letter, *supra* note 4.

[38] 15 U.S.C. 78o–3(b)(6) and 15 U.S.C. 78o–3(b)(9).

[39] *See* CSE Letter, *supra* note 4.

[40] *See* Second Response Letter, *supra* note 6.

because it would eliminate the incentive and opportunity for gamesmanship,[41] another commenter believed that the earlier cut off and dissemination aspect of the proposal has competitive effects on the Consolidated Close that is disseminated 88 seconds later, and excludes legitimate trades from consideration for Nasdaq's individual market closing price (*i.e.* those trades reported after 4:00:02 PM).[42] Three of the commenters also stated that the timing is materially different and contrary to the Nasdaq UTP Plan and thus would undermine the Nasdaq UTP Plan's methodology used to calculate its close.[43]

With respect to Nasdaq only considering trade reports submitted to ACT, either by NASD members or by UTP Exchanges that use Nasdaq's proprietary execution systems, two commenters stated that Nasdaq, as the primary market for Nasdaq securities, would clearly be in the best position to function in the capacity of determining the closing price.[44] In contrast, one commenter believed that other markets' trades should be measured separate from the Nasdaq market close,[45] and another commenter similarly questioned whether it would be appropriate to use UTP Exchange information in the ''normalization'' process for determining a Nasdaq market-specific close, or whether it would it be more appropriate for Nasdaq to filter out UTP Exchange information from the Nasdaq BBO used in the ''normalization'' process.[46]

Furthermore, some of the commenters indicated that the potential anti-competitive impact of Nasdaq's proposed methodology for calculating and disseminating the NOCP require that Nasdaq not use the term ''official'' to describe any value that it may disseminate according to the proposed methodology.[47] The commenters considered this to be misleading to vendors and market participants as well as encourages consumers of closing price information (*i.e.* issuers, mutual funds, and the media) to use the NOCP to the exclusion of other closing price data. Furthermore, they believed that Nasdaq should not be permitted to characterize the price that it proposes to disseminate as the ''official'' price in view of its exclusion of so much Nasdaq volume from its calculation (*i.e.* transactions of Nasdaq UTP Plan participants not using ACT).[48]

Finally, although one commenter favored Nasdaq's proposed process of ''normalization'' in calculating the NOCP,[49] two commenters believed that the ''normalization'' process could exacerbate the issue of inaccurate closing prices and create an incentive for Nasdaq market makers to manipulate quotes in order to set the closing price or potentially expose the NOCP to greater risk of manipulation than the current process, particularly in lower-volume securities.[50] One of these commenters further questioned whether the NOCP, through ''normalizing'' a Predicate Trade, would produce a better measurement of the closing price than the Predicate or the Nasdaq individual market close under the existing Nasdaq UTP Plan methodology.[51]

In its Second Response Letter, Nasdaq expressed the view that each market should be free to determine its own closing price methodology, provided its chosen method is consistent with the Act.[52] Nasdaq indicated that it had carefully considered the aspects of the NOCP methodology and does not believe that its proposal raises any statutory basis for rejecting the proposal. Nasdaq also noted that the commentors failed to identify a way in which Nasdaq's proposal would be inconsistent with the Act.[53]

With respect to the objections raised against Nasdaq's use of the term ''official'' in describing the NOCP, Nasdaq believes these arguments rely on the faulty premise that market participants are statutorily required to utilize the consolidated closing price established in the Nasdaq UTP Plan, when they are not. Nasdaq indicated that market participants are free to use myriad closing prices, each of which is consistent with the Act. Nasdaq believed that the consolidated closes, the individual closing price of the NYSE, and the NOCP, if approved, are constructs used to assess the value of a given security at the close of regular trading, leaving investors free to determine which closing price to use.

In response to issues raised by the commenters, Nasdaq indicated that ultimately it would be competition, rather than anti-competition, that would determine whether market participants consider the NOCP meaningful. Nasdaq argued that if Nasdaq's method for determining its own closing price is flawed, as some commenters claimed, then market participants would not utilize the NOCP and Nasdaq's attempt to compete would fail. However, based upon the overwhelmingly positive comments by disinterested market participants that would be using a closing price, Nasdaq is confident that its chosen methodology is valid and likely to be accepted in the marketplace. In either case, Nasdaq believes that competition would have occurred as contemplated by the Act.

Furthermore, Nasdaq acknowledged that no closing price methodology, the NOCP included, would produce a perfect closing price in every stock every day. In response, Nasdaq would like to ensure market participants that Nasdaq MarketWatch would continue its intensive, real-time surveillance of quoting and trading activity in Nasdaq at the close of trading. Just as Nasdaq MarketWatch has the authority to suppress trades that could improperly affect the closing price today, it would retain the same authority with respect to the NOCP.

IV. Discussion

After careful review of the proposed rule change, the comment letters, and Nasdaq's response to comments, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

[41] *See* SSB Letter, *supra* note 4.

[42] *See* CSE Letter, *supra* note 4.

[43] *See* Amex Letter, CSE Letter and Instinet Letter, *supra* note 4.

[44] *See* SSB Letter and UBSW Letter, *supra* note 4. The SSB Letter indicated that designating the closing process to Nasdaq and the establishment of a uniform, consistent system would have infrequent but important positive marketplace impact over the current environment. The UBSW Letter noted that this is similar to the New York Stock Exchange, Inc.'s (''NYSE'') long-established practice of disseminating an NYSE Closing Price based upon the last NYSE-only regular way trade in each NYSE-listed security. *Id.*

[45] *See* CSE Letter, *supra* note 4.

[46] *See* Instinet Letter, *supra* note 4.

[47] *See* Amex Letter and Instinet Letter, *supra* note 4. The Amex Letter stated that any Nasdaq closing information designated as ''official'' should be as agreed to by all Nasdaq UTP Plan participants. *Id.*

[48] *See* Amex Letter and Instinet Letter, *supra* note 4. As the NOCP calculations would not take into account quotation and trade reporting activity occurring outside of Nasdaq, the Instinet Letter expressed the view that the NOCP would not be an acceptable surrogate for a consolidated closing price, and using it would not appear to present the complete view of the overall market required to ensure the accuracy and integrity of closing values and thus serve investors' interests. *Id.*

[49] *See* SSB Letter (noting that the process helps eliminate outlying inconsistencies and exclude from the closing price trades that are clearly unrelated to contemporaneous closing inside markets), *supra* note 4. *See also* S&P Letter (indicating that the proposal would reduce the risk of an outlier setting the closing price for a given equity security), *supra* note 4.

[50] *See* CSE Letter and Instinet Letter, *supra* note 4.

[51] *See* Instinet Letter, *supra* note 4.

[52] *See* Second Response Letter, *supra* note 6.

[53] Nasdaq also corrected the comment in the CSE Letter which inaccurately stated that Nasdaq would separately disseminate its NOCP information at 4:00:02 p.m., when, in fact, that information would be disseminated at 4:01:30 p.m. *See* Second Response Letter, *supra* note 6.

association.[54] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of section 15A of the Act in general,[55] and section 15A(b)(6) of the Act in particular,[56] which provides that the rules of the association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the establishment of an NOCP and a trade report modifier with which to identify that price to the public may be a reasonable alternative closing price that industry participants may choose to use. The Commission also notes that Nasdaq has represented that the NOCP methodology would only impact the Individual Market Close for Nasdaq and would not impact the Consolidated Close or Individual Market Closes of the Nasdaq UTP Plan exchanges that are disseminated by the ESIP. While the NOCP is based on an actual trade, it is not necessarily an actual trade report. Therefore, the Commission believes that the NOCP may provide benefits to the marketplace and investors so long as investors are aware of the nature of the NOCP and its calculation. The Commission also believes that the elements of Nasdaq's proposal appear to be a reasonable attempt at increasing transparency and providing stability and predictability to the closing prices in Nasdaq securities.

Furthermore, in response to the procedural objections against Nasdaq for not consulting with and receiving approval from the UTP Operating Committee prior to filing the proposed rule change, the Commission notes that Nasdaq received a unanimous approval for the establishment and use of the .M modifier from the UTP Operating Committee and has also agreed to delay its implementation of the NOCP until April 14, 2003 in order to provide members of the UTP Operating Committee with additional time to consider the technical specifications prior to implementing the proposed modifier in their own markets.[57]

With regard to the other issues raised by commenters, the Commission is satisfied that Nasdaq has reasonably addressed the commenters' concerns.

Furthermore, the Commission finds good cause for approving Amendment No. 1 prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**.[58] Nasdaq filed Amendment No. 1 in response to comments it received after the publication of the notice of filing of the proposed rule change to address certain commenters' concerns.[59] Because Amendment No. 1 is responsive to these commenters' concerns, the Commission finds good cause for accelerating approval of Amendment No. 1.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1, including whether Amendment No. 1 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 Amendment No. 1 that are filed with the Commission, and all written communications relating to Amendment No. 1 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 No. SR–NASD–2002–158 and should be submitted by April 15, 2003.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[60] that the proposed rule change (SR–NASD–2002–158) be, and it hereby is, approved, and that Amendment No. 1 to the proposed rule change be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[61]

Margaret H. McFarland,

Deputy Secretary.

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[54] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[55] 15 U.S.C. 78o–3.

[56] 15 U.S.C. 78o–3(b)(6).

[57] *See* Second Response Letter, *supra* note 6.

[58] 15 U.S.C. 78s(b)(2).

[59] Certain commenters objected to Nasdaq's proposal to adjust the NOCP only if the Predicate Trade is cancelled or corrected by 4:30:00 PM, even though Nasdaq would continue to accept trade cancel and correction messages via ACT until 5:15:00 p.m. *See* CSE Letter and Institute Letter, *supra* note 4. However, in response to comments, Nasdaq revised its proposal in Amendment No. 1 to consider cancelled or corrected trades submitted until 5:15:00 PM rather than 4:30:00 PM for the calculation of the NOCP. *See* Amendment No. 1, *supra* note 5.

[60] 15 U.S.C. 78s(b)(2).

[61] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47516; File No. SR–NASD–2002–141]

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 Amendments to NASD Rules 4200 and 4350 Regarding Board Independence and Independent Committees

March 17, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 9, 2002, the National Association of Securities Dealers, Inc. (''NASD''), 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. On March 11, 2003, Nasdaq submitted Amendment No. 1 to the proposed rule change.[3] 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 the Substance of the Proposed Rule Change

Nasdaq proposes amendments to NASD Rules 4200 and 4350 to modify the definition of the term ''independent director.''

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated March 11, 2003 (''Amendment No. 1''). In Amendment No. 1, Nasdaq proposed revisions to (1) the definition of ''independent director'' and (2) Nasdaq's listing standards with respect to provisions governing independent directors and audit committees. Amendment No. 1 supersedes and replaces in its entirety the original proposed rule change that Nasdaq filed with the Commission on October 9, 2002.