

management. Therefore, Nasdaq's proposal provides anonymity but also provides members with information that will allow members to continue to manage their risk.

Nasdaq is proposing to add four new measures that should help members monitor their exposure to other members and take action quickly if a contra party ceases operation. Nasdaq believes that the first and second measures will assist members directly in their efforts to assess the risk associated with their anonymous trading, whereas the third and fourth measures involve closer coordination between Nasdaq and the NSCC, which indirectly should benefit members trading anonymously.

First, Nasdaq will provide members with an intra-day concentration report that will disclose a member's aggregate dollar value of purchases and sales with other members with whom it has traded anonymously. This information will help members quantify their "worst case scenario," which would occur if one or all of their contra parties failed to settle all trades executed anonymously. With this information, members can determine whether any risk-limiting actions should be taken.

Second, Nasdaq will reveal after 4 p.m. Eastern Time the identities of the members listed on the intra-day concentration report.¹⁵ With this information, members will know the exact dollar value of their aggregate purchases and sales with individual contra parties. This information then can be incorporated into a member's risk management system and analyzed on a contra party-by-contra party basis. If a member is concerned about trading with a particular member, the member will possess information that can help it assess whether any risk-limiting actions should be taken.

Third, Nasdaq will begin providing trade information to the NSCC in real time as trades are executed in SuperMontage. In comparison, today Nasdaq collects trade information and sends it to the NSCC at five pre-determined intervals throughout the day. With real time submission, the NSCC will possess trade information within seconds after a trade is executed and it can incorporate this information into its risk analysis of its participants. Ultimately, this could result in the NSCC reaching a decision earlier to cease to act for a participant, which would prevent other members from executing any additional trades with the firm or a firm that clears through that participant. Once the NSCC ceases to act for a participant, that firm, and any

other firm that clears through the participant, will not be able to continue trading.

Fourth, once the NSCC has ceased to act for a participant and determined not to guarantee the settlement of the participant's trades, Nasdaq will coordinate with the NSCC and promptly disclose to members each trade executed anonymously with the firm the NSCC ceased to act for and any firms that cleared through that the NSCC participant.¹⁶ As described earlier, when the NSCC ceases to act for a participant is one of the two general scenarios in which Nasdaq will reveal contra party identities on a trade-by-trade basis. This measure will allow members to determine quickly their potential exposure from anonymous trades with the failed firm and its correspondents and take any necessary risk-reducing actions.

The second scenario in which Nasdaq will reveal contra party identities on a trade-by-trade basis is when a member whose Quote/Order is decremented (*i.e.*, the liquidity providing member) is an Order-Delivery ECN that charges an access fee. The ultimate result is that members cannot trade with complete anonymity when accessing liquidity provided by Order-Delivery ECNs that charge access fees. Trades executed with these ECNs are processed differently because they have the discretion to reject trades with certain contra parties if the ECN is in dispute with the contra party concerning the ECN's quote access fee. Therefore, to provide fee-charging Order-Delivery ECNs with the opportunity to reject trades with certain members, Nasdaq must disclose each contra party's identity. Nasdaq believes that this process also will benefit members that execute trades with these ECNs because the members will be able to track the access fee charges accumulated with each ECN.

To preserve some degree of anonymity, while also accommodating the unique rights and needs of these ECNs, Nasdaq is proposing a rule that would prohibit fee-charging Order-Delivery ECNs from disclosing the identity of the member that submitted the Non-Attributable Quote/Order that decremented their Quote/Order.¹⁷ The prohibition contains an exception, however, if the ECN is requested to provide such information to regulators or is ordered to disclose the information

by a court or arbitrator. Based on conversations with ECNs, Nasdaq understands that ECNs do not normally disclose contra party identities for any trades executed through their systems because such a practice would diminish the anonymity features they provide. Therefore, Nasdaq believes the proposed rule prohibiting disclosure of this information is consistent with existing practices.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of section 15A(b)(6) of the Act.¹⁸ Section 15A(b)(6) requires the rules of the NASD to be designed 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. Nasdaq believes the proposal is consistent with this standard because it balances two competing needs with respect to disclosure of contra party information. Masking contra party identities will help members in obtaining the best execution for their customer orders by limiting the market intelligence that is obtained, and the market impact that results, when a seller's or buyer's identity is revealed. Recognizing, however, that this same information is helpful to members in assessing contra party risk, Nasdaq has responded by proposing additional risk management features that should help members in monitoring trades executed anonymously.

Nasdaq also believes that the proposal balances the need to provide an anonymity feature in SuperMontage and the unique needs of Order-Delivery ECNs that charge quote access fees. The proposal will continue to provide fee-charging Order-Delivery ECNs with the identities of their contra parties so that they have the information necessary to decide whether to trade with an individual member or reject an order because of a dispute regarding the payment of fees. However, to limit the effect of the special processing on the anonymity provided by SuperMontage, Nasdaq is proposing to prohibit these ECNs from disclosing the identities of their contra parties for anonymous trades, which Nasdaq understands is consistent with existing practices. Fee-charging Order-Delivery ECNs would be permitted to disclose this information if

¹⁶ *Id.*

¹⁷ Non-Attributable Quotes/Orders contain an indicator noting that the order is to be processed anonymously. As such, Order-Entry ECNs will be able to distinguish Non-Attributable Quotes/Orders from those orders for which the prohibition will not apply.

¹⁵ See Amendment No. 2, *supra* note 4.

¹⁸ 15 U.S.C. 78o-3(b)(6).