

and to prevent locked and crossed markets.” However, Bloomberg also opined that the current decrementation procedures unfairly discriminate against Order Delivery ECNs, cuts squarely against an ECN’s obligations under the Order Display Rule,¹⁰ are subject to being gamed by market participants, and implicate a broker-dealer’s duty of best execution. In Bloomberg’s view, “[t]he problems decrementation has created * * * result from access fees ECNs are permitted to charge and the unwillingness of some market participants to pay those fees.” Bloomberg believed that the Commission should address the access fee issue, and that all access fees, including fees charged by market centers, should be eliminated.

Bloomberg also believed that Nasdaq’s proposed amendment would not reduce the adverse impact of decrementation on Order Delivery ECNs since each ECN’s Quote/Order would still be subject to decrementation. In addition, Bloomberg did not believe that Nasdaq’s proposed amendment would provide any practical benefit since ECNs manage their own internal matching engines and aggregate multiple orders for representation as a single Quote/Order in SuperMontage. Further, Bloomberg believed that the decrementation process could still be gamed since firms seeking to knock an ECN out of the quote in SuperMontage would still be able to do so.

In response to the Bloomberg Letter, Nasdaq stated that many of Bloomberg’s comments extended beyond the narrow scope of the proposed rule change to modify SuperMontage’s decrementation process to decrement only the ECN Quote/Order that an incoming order interacts with at a particular price level, as opposed to all of an ECN’s available trading interest at a particular price level.¹¹ In Nasdaq’s view, Bloomberg’s comments were directed at the decrementation process generally, its impact on ECNs and their customers, and its relationship to ECN access fees. In response, Nasdaq noted that the Commission approved the SuperMontage decrementation process, and that Nasdaq was merely proposing to modify the process. Nasdaq emphasized that its current decrementation process and its proposed modification to the process retain the key component that declining Quotes/Orders be removed from the

system. Further, Nasdaq stated that the only issue presented by the filing is the method of such removal; the proposed rule change does not seek to change ECN access fee standards. Therefore, according to Nasdaq, Bloomberg’s views on eliminating access fees would be more properly expressed in a petition for Commission rulemaking.

Nasdaq also offered general comments regarding the decrementation process. Nasdaq explained that decrementation was proposed as part of the original SuperMontage proposal to address locked and crossed markets that occurred in Nasdaq prior to SuperMontage. Nasdaq noted that access fee disputes could result in locked and crossed markets that would not only shut down Nasdaq’s automatic execution functionality, but also many internal order-execution systems of Nasdaq market participants, until the locks or crosses were resolved. Nasdaq also stated that decrementation allows Nasdaq to fairly balance the needs and desires of a wide variety of users by accommodating ECNs, by allowing them to receive and decline orders (as opposed to receiving executions) while eliminating locked and crossed markets.

With regard to Bloomberg’s specific comments on the proposed rule change, Nasdaq emphasized its proposed modification to the decrementation process is an internal SuperMontage system change that imposes no new obligation on any market participant. Instead, the proposal is intended to make the current decrementation process more discerning and provide options to ECNs that voluntarily elect to change the way they represent their Quotes/Orders in SuperMontage. Nasdaq stated that the proposed rule change gives ECNs the option to mitigate decrementation by providing them, if they enter multiple Quotes/Orders, an increased opportunity for their individualized Quotes/Orders to interact with counterparties with which the ECN is willing to trade. Nasdaq stated it should not be precluded from altering its system to provide options to ECNs that choose to take the initiative to serve their customers better. According to Nasdaq, if an ECN chooses to enter individual representations of trading interest, Nasdaq’s new processing would allow more of the ECN’s customers to remain in the SuperMontage system longer, thereby increasing the potential interaction of those customers with orders from parties that will pay the ECN’s access fee. Those ECNs that do not alter the way they represent their customers in SuperMontage would, in effect, continue to have their single quotes

decremented in the same manner as the current SEC-approved process. According to Nasdaq, Bloomberg opposes a rule that forces them to do nothing, and will have no impact on them if they continue to do business as they do today.

IV. Discussion

The Commission has carefully reviewed the proposed rule change, the Bloomberg Letter, and Nasdaq’s response and 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 association.¹² In particular, the Commission finds that the proposed rule change, as amended, is consistent with section 15A.¹³ Specifically, the Commission finds that the proposed rule change is consistent with section 15A(b)(6) of the Act because it is designed 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 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.¹⁴ The Commission also finds that the proposed rule change is consistent with section 15A(b)(11) because it is designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.¹⁵

While the Commission appreciates and considered Bloomberg’s comments regarding decrementation generally, whether decrementation is consistent with the Act was decided on January 19, 2001, when the Commission approved decrementation in SuperMontage.¹⁶ The ability of SuperMontage to decrement Quotes/Orders of Order Delivery ECNs is not at issue in the proposed rule change.¹⁷ Instead, what is at issue is

¹² 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).

¹³ 15 U.S.C. 78o-3.

¹⁴ 15 U.S.C. 78o-3(b)(6).

¹⁵ 15 U.S.C. 78o-3(b)(11).

¹⁶ See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2003) (“Original SuperMontage Approval Order”).

¹⁷ *Id.* See also *Domestic Securities, Inc. v. Securities and Exchange Commission*, 333 F.3d 239 (DC Cir. 2003). The Court found, in pertinent part, that the Original SuperMontage Approval Order marked the consummation of the Commission’s

¹⁰ 17 CFR 240.11Ac1-4.

¹¹ See letter from Thomas P. Moran, Office of General Counsel, to Jonathan G. Katz, Secretary, Office of the Secretary, Commission, dated July 30, 2003.