

("MPID").¹³ When a trade is executed with an order that resides under the SIZE MPID, the identity of the member that anonymously submitted the order is revealed immediately to the other member involved in the trade.¹⁴ SuperMontage produces an execution report that is sent to the parties to the trade and also creates a report in Nasdaq's Automated Confirmation Transaction Service ("ACT"). These reports contain the MPIDs for the members that executed the trade.

The proposed anonymity feature builds upon the pre-trade anonymity feature available today using the Non-Attributable Quote/Order feature and generally extends anonymity beyond the time of execution by masking the identities of the members executing the trade. Under the proposal, when a member uses the Non-Attributable Quote/Order feature, instead of revealing the members' MPIDs, SuperMontage will generally substitute a four-letter identifier that indicates the trade is anonymous (*i.e.*, SIZE). Therefore, instead of seeing its contra-party's MPID on the reports, the reports will indicate SIZE as the contra-party.¹⁵ Replacing the members' MPIDs with SIZE would not alter how information is reported to the consolidated tape or Nasdaq's surveillance systems or the type of information reported to the consolidated tape or Nasdaq's surveillance systems. In addition, clearing firms would continue to receive immediate notification of trades executed by their correspondent firms,¹⁶ and, except as described below, the new anonymity feature would not change

how trades would be processed and settled through the National Securities Clearing Corporation ("NSCC").¹⁷

The ACT reports that the NSCC receives from Nasdaq for anonymous trades would contain the identities of the parties to the trade. This measure would enable the NSCC to continue its normal risk management functions and settle anonymous trades in the same manner as trades that are executed without the anonymity feature with one exception. The ACT report sent to the NSCC would contain an indicator noting that the trade is anonymous. The effect of this indicator is that, on the contract sheets the NSCC issues to its participants, the NSCC would substitute SIZE for the MPID of the contra-party. The purpose of this masking is to preserve anonymity through settlement.

Nasdaq also proposes to offer members additional risk management tools for monitoring their exposure to members they have traded with on an anonymous basis. First, Nasdaq would provide members with an intra-day concentration report that would disclose a member's aggregate dollar value of purchases and sales with other members with whom it has traded anonymously. Second, Nasdaq would reveal after 4 p.m. Eastern Time the identities of the members listed on the intra-day concentration report. With this information, members would know the exact dollar value of their aggregate purchases and sales with individual contra-parties. Third, Nasdaq would begin providing trade information to the NSCC in real-time as trades are executed in SuperMontage. With real-time submission, the NSCC would possess trade information within seconds after a trade is executed and can incorporate this information into its risk analysis of its participants. Once the NSCC ceases to act for a participant, that firm, and any other firm that clears through the participant, would not be able to continue trading.¹⁸ Fourth, once the NSCC has ceased to act for a participant and determined not to guarantee the settlement of the participant's trades,

Nasdaq would coordinate with the NSCC and Nasdaq would promptly disclose to members each trade executed anonymously with the firm the NSCC ceased to act for and any firms that cleared through that NSCC participant.¹⁹

Nasdaq would also reveal contra-party identities on a trade-by-trade basis 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 would not trade with complete anonymity when accessing liquidity provided by Order Delivery ECNs that charge access fees. Order Delivery ECNs would generally be prohibited, however, from disclosing the identity of the member that submitted the Non-Attributable Quote/Order that decremented their Quote/Order.²⁰

Nasdaq would also disclose contra-party information when a member executes an order by matching against other trading interest it has in the system on the other side of the market (*e.g.*, internalizes) on a trade-by-trade basis,²¹ including if a member executes a Preferred Order²² sent to the same or another MPID used by that member.²³ If the buying and selling interest submitted under the same MPID matches, Nasdaq would reveal, in all cases, to the member at the time of

¹³ Market makers and ECNs may also display Attributable Quotes/Orders under the market participant's MPID. However, OE Firms can only post Non-Attributable Quotes/Orders for display in SuperMontage. See Securities Exchange Act Release No. 47830 (May 12, 2003), 68 FR 27126 (May 19, 2003).

¹⁴ For the purpose of execution reports, OE Firms have distinct MPIDs. Telephone conversation between Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission, on June 24, 2003.

¹⁵ Nasdaq will know the identities of the members executing an anonymous trade and will provide a "help desk" that members can call to assist them in resolving disputed anonymous trades. Nasdaq staff's role will be limited to helping members resolve disputes, such as erroneous trades, when the members choose not to utilize the clearly erroneous trade adjudication process provided in NASD Rule 11890. See Amendment No. 4, *supra* note 9.

¹⁶ When a correspondent firm executes an anonymous order in SuperMontage, its clearing firm would continue to receive a real-time SuperMontage execution report and ACT report containing all the trade details (*e.g.*, the number of shares and the price of the trade), except the identity of the correspondent's contra-party. The details of anonymous trades also would be included in ACT's risk management tools.

¹⁷ Nasdaq would not assume any responsibility to settle anonymous trades and the NSCC's settlement guarantee, and close-out procedures for failed firms, would not be affected by Nasdaq's anonymity proposal. Therefore, as required today by NASD Rules 4712 and 6160, members would be obligated to settle matched trades reported to the NSCC, including trades executed anonymously that have been matched and reported to the NSCC, but not yet guaranteed by the NSCC.

¹⁸ See Amendment No. 3, *supra* note 8. In Amendment No. 3, Nasdaq clarified the process through which its members may be removed from SuperMontage for failure to maintain a clearing relationship. Members who are removed from a Nasdaq system can invoke their right to seek redress under the NASD 9700 series.

¹⁹ Telephone conversation between Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission, on September 11, 2003.

²⁰ Under the proposed rule change, Non-Attributable Quotes/Orders would contain an indicator noting that the order is to be processed anonymously. As such, Order Delivery ECNs would be able to distinguish Non-Attributable Quotes/Orders from those orders for which the prohibition would not apply. 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. NASD would also be entitled to reveal a members' identity for regulatory purposes, including enabling a member to pursue arbitration, or to comply with an order of an arbitrator or a court. See Amendment No. 4, *supra* note 9.

²¹ See Amendment No. 4, *supra* note 9.

²² See NASD Rule 4701(aa).

²³ Telephone conversation between Thomas Moran, Associate General Counsel, Nasdaq, and Marc McKayle, Special Counsel, Division, Commission, on September 10, 2003, clarifying that a Preferred Order may be sent to the same MPID or another MPID of the member. Members cannot submit anonymous orders through the SuperMontage Directed Order process. Telephone conversation between Peter R. Geraghty, Associate Vice President and Associate General Counsel, Nasdaq, and Terri Evans, Assistant Director, Division, Commission, on September 18, 2003. See also Letter from Edward S. Knight, Executive Vice President, Nasdaq, to Catherine McGuire, Associate Director and Chief Counsel, Division, Commission, dated September 15, 2003 ("Rule 10b-10 Exemption Request").