

execution, that it has internalized a trade through SuperMontage. Nasdaq would also reveal to the member at the end of the day when it has internalized across MPIDs.²⁴

Nasdaq also committed to retain, for the period specified in Rule 17a-4(a), the actual identities of the members that executed anonymous trades through SuperMontage in its original form or a form approved under Rule 17a-6.²⁵ For anonymous trades, Nasdaq would possess the information necessary under Rule 17a-3(a)(1) and would retain member identities for the period of time that broker-dealers are required to by Rule 17a-4(a) under the Act. However, for the universe of trades for which Nasdaq reveals to members the identities of the contra-parties, including when the contra-party is themselves, members would retain the record keeping obligation because the members would have the information to comply with Rule 17a-3(a) under the Act.²⁶ In addition, members that submit, and receive an execution of, a Non-Attributable Quote/Order that is a Preferred Order would have to comply with Rules 17a-3(a)(1) and 17a-4(a) since they would possess the identity of their contra-party.²⁷

III. Summary of Comments and Nasdaq's Response

The Commission received five comment letters on the proposed rule change.²⁸ BMM, Citigroup and STA supported the proposed rule change. Bloomberg expressed support for Nasdaq's goals, but expressed reservations regarding the proposal in its current form. Brut did not explicitly state whether it supported or opposed the proposal, but advised the Commission to review compliance, risk management and administrative issues carefully prior to taking action.

BMM, Citigroup and STA generally believed that post-trade anonymity is commonplace today. Specifically,

²⁴ See Amendment No. 4, *supra* note 9. Nasdaq also is studying the feasibility of immediately revealing to members when they internalize across MPIDs.

²⁵ See Amendment Nos. 2 and 5, *supra* notes 4 and 10.

²⁶ See Amendment Nos. 4 and 7, *supra* notes 9 and 12.

²⁷ *Id.*

²⁸ See *supra* note 6. Citigroup and STA also commented on ECN access fees in general. STA reiterated its view that ECN access fees should be abolished. Citigroup stated that "either all broker/dealers that represent orders as agent or riskless principal in the public market should be permitted to charge an access fee, or none should." The Commission notes that ECN access fees are not at issue in the current proposal, instead what is at issue is whether post-trade anonymity feature, as proposed herein, is consistent with the Act.

Citigroup noted that exchanges and ECNs currently offer anonymity through execution and BMM stated that anonymity has become a core feature of execution systems. As a result, these commenters believed that allowing Nasdaq to provide post-trade anonymity would level the competitive playing field.²⁹ Citigroup also suggested that the proposal would improve the Nasdaq market because the current pre-trade anonymity feature does not adequately minimize market impact, and post-trade anonymity would assist brokers and dealers in obtaining better executions for their customers.³⁰ According to Citigroup, "Nasdaq's proposal should promote efficiency, reduce trading costs, and increase competition in the market, as broker/dealers will now be able to represent and execute their customer orders on an anonymous basis directly through a Nasdaq facility." BMM stated that by increasing choice and competition, the proposal would increase liquidity in the marketplace, reduce fragmentation, and further reduce transaction costs.

A. ECN Participation

Bloomberg believed that the proposal "unnecessarily denies [ECNs] the opportunity to use SuperMontage's facilities in the way all other market participants can use them." The basis of Bloomberg's assertion was that market makers and OE Firms receive post-trade anonymity when taking and posting liquidity, but ECNs benefit from post-trade anonymity only when taking liquidity and not when posting liquidity. Bloomberg suggested that a viable solution would be to keep the execution report anonymous while providing broker-dealers with information after settlement disclosing an aggregate total of fees a broker-dealer had accumulated through an ECN. Bloomberg also opined that the disparate treatment puts ECNs at a competitive disadvantage, which is in contravention of sections 15A(b)(6) and 15A(b)(9) of the Act.³¹

Nasdaq responded to Bloomberg's concerns regarding the disparate

treatment of ECNs.³² Nasdaq stated that the proposal balances the need for post-trade anonymity with an ECN's ability to charge quote access fees and not accept automatic executions in SuperMontage. Nasdaq opined that there is a reasonable distinction between how ECNs and other members participate in SuperMontage, and that the special accommodations that have been made to allow ECNs to participate in SuperMontage are not discriminatory. According to Nasdaq, the anonymity feature is designed to provide ECNs the information they need to administer their access fees. Similarly, revealing the ECN's identity provides other members information they desire to monitor these fees. In contrast, market makers and OE Firms are not permitted to charge quote access fees, and they must accept automatic executions in SuperMontage. Accordingly, similar accommodations are not necessary when these parties execute trades with each other in SuperMontage.

Furthermore, Nasdaq asserted that its proposal cannot be deemed discriminatory when it is the ECN's decision that would result in the inability to remain anonymous. In Nasdaq's view, an ECN's ability to retain anonymity when its quote is hit through SIZE is a result of the way the ECN chooses to participate in SuperMontage (charging a quote access fee and not accepting automatic executions), and not a result of Nasdaq's unfair discrimination. Nasdaq stated that Bloomberg's suggestion to preserve the contra-party anonymity for SIZE trades that hit the quote of Order Delivery ECNs, would "impose additional costs and burdens on other members and Nasdaq, not to mention that it would be unfair to those members that traded with Bloomberg to expose their identities immediately while masking Bloomberg's identity until the end of the day. Nasdaq believes these costs and burdens are unnecessary in light of the other options available to ECNs seeking full anonymity."

B. Risk Management

BMM and Citigroup believed that Nasdaq adequately addressed certain operational or regulatory issues in its proposal, such as back office processing³³ and risk exposure.³⁴ For example, Citigroup believed that the intra-day concentration report would assist members with measuring their exposure if one or all of their contra-parties failed to settle all trades

³² See Nasdaq Response Letter.

³³ See BMM Letter.

³⁴ See Citigroup Letter.

²⁹ See BMM Letter and Citigroup Letter. See also STA Letter.

³⁰ See also BMM Letter.

³¹ Furthermore, Bloomberg noted that they are not currently able to use the SIZE facility, because SuperMontage does not provide a "locked/crossed" warning message as SuperMontage does for quotations entered by Order Delivery ECNs under their own acronyms. Without such warning, Bloomberg stated they will not be able to avoid the possibility of double execution. See Bloomberg Letter. Nasdaq, in its response, stated that it would be implementing a systems change to address the double execution issue. See Nasdaq Response Letter.