

executed anonymously. According to Citigroup, members could then determine whether any risk-limiting actions should be taken. Additionally, by revealing the identities of those listed on the intra-day concentration report, members would know the exact dollar value of their aggregate purchases and sales with individual contra-parties. Citigroup believed that this added level of information about risk concentration and exposure should give members and their clearing firms better tools to limit their risk. Citigroup also believed that risk to clearing member firms should be reduced substantially because SuperMontage would provide trade information to the NSCC on a real-time basis.

Bloomberg and Brut expressed concern, however, that the proposal imposes new or increased financial risk on market participants. The commenters noted that from the time of the transaction until midnight of T+1, when the NSCC steps in as guarantor, the broker-dealer would be exposed to the risk of the anonymous contra-party's failure to settle a transaction. Brut questioned whether the proposal was worth such incremental risk, and whether Nasdaq should assume fiscal responsibility for such trades like ECNs and other providers of anonymous transaction services. Bloomberg also noted that specialists stand as guarantors of trades on SuperDot on the New York Stock Exchange ("NYSE"), and ECNs stand as the guarantors of anonymous trades within their internal systems.

In response to comments that the proposal increases risk, Nasdaq stated that there would be "little, if any, effect on a clearing firm's ability to monitor trading by itself or its correspondents."³⁵ Specifically, Nasdaq asserted that Nasdaq and the NSCC would know the identities of the members who traded using the anonymity feature. Furthermore, Nasdaq noted that members trading anonymously and individual trades executed anonymously, would be subject to NSCC's full risk management systems and included in ACT's risk management calculations. Nasdaq stated that a member's ability to assess its contra-party risk through the use of intra-day reports would be affected only to the degree the member uses its contra-parties' identities on a trade-by-trade intra-day basis. Nasdaq also disagreed with the assertion that a systemic risk is created by Nasdaq's unwillingness to guarantee settlement of anonymous trades in the period

between execution and the attachment of the NSCC guarantee. Nasdaq asserted that currently members are subject to the same risk that their contra-party, including ECNs, will default before the NSCC guarantee attaches.

C. Books and Records

Brut also commented that broker-dealers have certain recordkeeping requirements, such as recording the name or other designation of the person that is the contra-party to the transaction. Brut recommended, notwithstanding Nasdaq's representation that it would retain records to satisfy the recordkeeping requirements under Rule 17a-3 under the Act, that the Commission explicitly grant broker-dealers relief from the rule for transactions effected through SIZE. With regard to Brut's concerns regarding a broker-dealers obligations under Rule 17a-3, Nasdaq stated that it was a matter for the Commission to resolve.³⁶

D. Operation of Help Desk

Brut also expressed concern that completely anonymous trades between broker-dealers could create difficulties in resolving erroneous or disputed trades, which typically are resolved through direct broker-to-broker communication. Brut suggested that the Commission should ensure that the help desk has adequate resources and procedures to prevent unfair discrimination by Nasdaq in the resolution of disputes among SIZE users.

In response to Brut's concerns regarding the resolution of disputed trades, Nasdaq noted that erroneous trades, whether anonymous or not, may be resolved in accordance with NASD Rule 11890.³⁷ Further, Nasdaq clarified that the Market Operations Department would also be responsible for responding to requests from members.³⁸ Nasdaq staff would resolve disputes when the members choose not to utilize the clearly erroneous trade adjudication process provided in NASD Rule 11890. According to Nasdaq, Nasdaq staff would only effectuate the resolutions agreed to by the members who are the parties to the trade; Nasdaq staff will not issue independent decisions.³⁹

³⁶ *Id.* See *infra* discussion at note 56 and accompanying text.

³⁷ *Id.*

³⁸ See Amendment No. 4, *supra* note 9.

³⁹ According to Nasdaq, the existence of the help desk does not preclude members from pursuing other means to resolve disputed anonymous trades. For example, a member can seek arbitration to resolve a disputed trade. Nasdaq would reveal a contra-party's identity upon receiving a written request from a member, who is a party to the disputed trade, which indicates the information is

IV. Discussion

The Commission has carefully reviewed the proposed rule change, the comment letters, 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.⁴⁰ In particular, the Commission finds that the proposed rule change, as amended, is consistent with section 15A of the Act.⁴¹ 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 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.⁴²

The Commission finds that Nasdaq's proposal to generally extend anonymity through clearance and settlement of a trade, subject to certain exceptions, to be consistent with the Act. The Commission notes that post-trade anonymity is not new⁴³ and is offered by other market participants, including the Pacific Stock Exchange Equities ("PCXE").⁴⁴ As a result, the Commission does not believe that Nasdaq should be prohibited from offering similar services. The Commission believes that the SuperMontage post-trade anonymity feature should allow Nasdaq to offer some of the same benefits associated with anonymity, such as minimizing the market impact of institutional orders. As expressed by commenters, trading information can have an impact on the price of a security.⁴⁵ For example, Citigroup stated that other market participants will adjust their trading

being requested for the purposes of pursuing a claim in arbitration. According to Nasdaq, revealing a contra-party's identity so that a member can pursue its right to arbitrate is consistent with Nasdaq's authority, under proposed Rule 4719(c)(2), to reveal a contra-party's identity for regulatory purposes. See Amendment No. 4, *supra* note 9.

⁴⁰ 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).

⁴¹ 15 U.S.C. 78o-3.

⁴² 15 U.S.C. 78o-3(b)(6).

⁴³ See Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290, 48310, note 243 and accompanying text (September 12, 1996) (adopting Rule 11Ac1-4 and amending Rule 11Ac1-1) (discussing the benefits of anonymous trading).

⁴⁴ See PCXE Rules 7.7 and 7.36(b).

⁴⁵ See BAMM, Citigroup and STA letters.

³⁵ See Nasdaq Response Letter.