

Nasdaq members are obligated to settle all matched trades reported to the NSCC prior to the NSCC guarantee.⁵⁴ This proposal does not change the responsibilities of Nasdaq, its members, or the NSCC. The Commission notes that, like today, a firm's primary exposure prior to T + 1, when the NSCC guarantee attaches, would be its contra-party defaulting on the trade. This risk exists today. Further, to the extent that market participants are concerned with their ability to effectively monitor and manage their risk exposure as a result of anonymous trades, the Commission notes that Nasdaq will provide intra-day concentration reports that will disclose a member's aggregate dollar value of purchases and sales with other members with whom it has traded anonymously. This information should assist members in calculating a worst-case scenario and allow them to take risk-limiting actions, if desired.

The Commission has long held the view that competition and innovation are essential to the health of the securities markets. Indeed, competition is one of the hallmarks of the national market system. The Commission believes that the post-trade anonymity feature being proposed by Nasdaq is a reasonable effort by the NASD to enhance the quality of the Nasdaq market and provide market participants with the benefits of anonymity currently being offered by ECNs and PCXE. The Commission notes that to the extent that market participants are unwilling to trade in SuperMontage because of concerns regarding risk, broker-dealers may continue to use other alternative order routing and execution services such as ECNs, which guarantee trades executed through their systems, exchanges trading Nasdaq securities pursuant to unlisted trading privileges, and the NASD's alternative display facility.

Brut also requested that the Commission clarify a broker-dealer's obligations under Rule 17a-3 under the Act with respect to completely anonymous transactions on SuperMontage. Rule 17a-3(a)(1) under the Act requires that broker-dealers make and keep current records of all purchases and sales of securities, including "the name or other designation of the person from whom purchased or received or to whom sold or delivered." Rule 17a-4(a) under the Act requires that the records be

preserved for six years, the first two years "in an easily accessible place." Nasdaq has represented and codified in its rules that it will, except in limited circumstances, retain for the period specified in Rule 17a-4(a) a record of the identities of the members that execute anonymous trades through SuperMontage in its original form or a form approved under Rule 17a-6.⁵⁵ Commission staff will not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, the broker-dealer relies on Nasdaq's retention of the identities of members that execute anonymous trades through SuperMontage to satisfy the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Act.⁵⁶

Brut also suggested that the Commission review the procedures and resources that Nasdaq will dedicate to the help desk to coordinate the resolution of erroneous or disputed trades for anonymous contra-parties. The Commission believes that Nasdaq has adequately responded to Brut's comments. As Nasdaq clarified, market participants involved in anonymous trades can use NASD Rule 11890 to resolve erroneous transactions, as well as the help desk. Further, market participants will continue to be able to arbitrate trades since Nasdaq will provide the identity of a contra-party in those instances where one party wishes to arbitrate a dispute.⁵⁷ The Commission expects that Nasdaq will continue to monitor its procedures and the adequacy of the help desk resources as post-trade anonymity is utilized and, if necessary, provide additional resources to ensure the maintenance of a fair and orderly market.

The Commission finds good cause for accelerating approval of Amendment Nos. 3, 4, 5, and 7 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Amendment No. 3 merely clarifies the

process by which the Nasdaq would remove a member from SuperMontage if the member failed to maintain a clearing relationship, and makes non-substantive conforming changes to NASD Rules 4705, 5012, and 6120. Amendment No. 4 merely: (1) Conforms its rule text to reflect the mandatory nature of certain disclosures as described in the Notice, (2) responds to comments regarding the operation of the help desk, (3) clarifies Nasdaq's commitment to retain certain records, and (4) ensures that members will be able to satisfy their obligations under Rule 10b-10.⁵⁸ Amendment Nos. 5 and 7 merely codify Nasdaq's earlier representation in Amendment Nos. 2 and 4 regarding its retention of information on behalf of its members. The Commission notes Amendment No. 2, which includes Nasdaq's general representation that it would retain contra-party information on behalf of its members, was published for notice and comment. Only one comment, that the Commission be explicit in granting relief, was received on the issue. The Commission believes that these amendments merely clarify the recordkeeping obligations of Nasdaq and its market participants, assist Nasdaq members in complying with their Rule 10b-10 obligations, and do not raise any substantive issues. The Commission finds specifically that Amendment Nos. 3, 4, 5, and 7 are consistent with section 15A(b)(6) of the Act as they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.⁵⁹ Accordingly, pursuant to section 19(b)(2) of the Act,⁶⁰ the Commission finds good cause to approve Amendment Nos. 3, 4, 5, and 7 prior to the thirtieth day after notice of the Amendment is published in the **Federal Register**.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 3, 4, 5, and 7, including whether Amendment Nos. 3, 4, 5, and 7 are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary,

⁵⁵ See Amendment Nos. 2, 4, 5, and 7, *supra* notes 4, 9, 10, and 12, respectively.

⁵⁶ The Commission notes that a broker-dealer has the responsibility to make, keep current, and preserve records of all purchases and sales of securities in accordance with Exchange Act Rules 17a-3 and 17a-4 for trades through SuperMontage if the broker-dealer knows the identity of the contra-party, including those instances where Nasdaq discloses the contra-party to a trade (e.g., internalized trades). Also, a member that submits a Non-Attributable Quote/Order that is a Preferred Order to another member retains the recordkeeping responsibilities described above because that member would know the identity of the contra-party to which it sent the Preferred Order. In addition, even where the broker-dealer does not know the identity of the contra-party, the broker-dealer retains the responsibility to maintain such records, except for a record of the identity of the contra-party.

⁵⁷ See Nasdaq Response Letter.

⁵⁸ See also Rule 10b-10 Exemption Request, *supra* note 23. The Division, pursuant to delegated authority, granted limited exemptive relief from the contra-party identity requirement of Rule 10b-10(a)(2)(i)(A) to NASD members using the post-trade anonymity feature. Letter from Brian A. Bussey, Assistant Chief Counsel, Division, Commission, to Edward S. Knight, Executive Vice President, Nasdaq, dated September 23, 2003.

⁵⁹ 15 U.S.C. 78o-3(b)(6).

⁶⁰ 15 U.S.C. 78s(b)(2).

disclaim any liability that arises from the use of their facilities. See e.g., NYSE Constitution, Article II, Section 6, American Stock Exchange Constitution, Article 4, Section 1(e), and PCXE Rules 7.42 and 13.2.

⁵⁴ See NASD Rules 4712 and 6160.