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Harvey Pitt, Chairman
Securities and Exchange Commission
450 Fifth St. NW
Washington DC 20549

NASDAQ and CTA/CQS Non-professional Access Fees and the Related Denial and/or Limitation of Access To Market Information

Dear Chairman Pitt;

This is a request that the Securities and Exchange Commission (The Commission) withdraw their approval of and/or review the Consolidated Tape Association (CTA), Consolidated Quotation Association (CQS) and National Association of Securities Dealers/ NASDAQ (NASDAQ), non-professional subscriber access fees (the subject fees) imposed upon online investors[1]. The subject fees are not fair and reasonable; they are unreasonably discriminatory; and online investor access to current (un-delayed) market information is denied and/or limited by the subject fees.

The enforcing mechanism for the subject fees are restraints on competition in exclusive processor broker and marketmaker subscriber agreements that are intended to monopolize and that do not appear to be germane to the exclusive processors' self-regulatory responsibilities. They limit in various ways the ability of brokers and marketmakers to communicate bid and offer quotation prices to their clients and their clients' customers.[2]

Therefore, it is requested that The Commission also withdraw their implied approval of restrictions in exclusive processor subscriber contracts (agreements) with brokers and marketmakers that restrain directly or indirectly their ability to provide un-delayed quotation and last sale information to individual investor clients.

[1] In addition to being an online investor, I am an outside director of Ameritrade Holding Corporation; but the views expressed here are my own and should not be attributed to anyone else associated with Ameritrade. Online investor includes any investor that accesses information for purposes of transacting for his/her own accounts utilizing computer, Internet, and/or related technologies.
[2] See for example NASDAQ Workstation II Subscriber Agreements; Query only and Marketmaker versions. Sections 8-9.

I write this letter as an individual online investor who has declined to sign exclusive processor subscriber agreements and to pay non-professional fees required for access to un-delayed last sale and bid/offer quotation information generated by investors' orders and transactions. As a consequence, my access to un-delayed information has been denied and/or limited by SIAC (Securities Industry Automation Corporation) the exclusive processor for NYSE, and AMEX listed securities, and NASDAQ Inc., the exclusive information processor for NASDAQ listed securities.

This differential treatment of online investors and the related obstruction and/or interference with efficient communications between investors and their brokers is the subject of this letter petitioning elimination of the subject fees.[3] This request seeks what numerous past letters have sought through the comment process[4], a Commission review of the subject non-professional fees and a Commission decision to withdraw their approval of the subject fees, as presently applied, as not necessary in furtherance of the purposes of the Act.

**Background**

Online investors who decline to become non-professional subscribers to NASDAQ and /or NYSE and/or AMEX and who decline to pay the subject fees are denied access to current (un-delayed) market information for securities listed in the respective markets. Moreover access is also denied by NASDAQ to OTC (over-the-counter) securities that are quoted and reported through the NASDAQ system but that are not included in the NMS (National Market System) market data plan for NASDAQ.[5] Access is limited and/or denied by a 15 to 20 minute delay that is selectively imposed by the exclusive processors (CTA/CQS and NASDAQ), [6] upon non-subscriber online investors that manage their own accounts[7]

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[3] This letter is not submitted in response to any particular notice or filing. The Commission, if persuaded, certainly has the power to take up this issue on its own initiative. However delay in the review of this issue is extremely costly to investors in fees and in denial of access. The intent of this letter is to separate this issue from the broader more complicated market data issues and to end this costly delay.

[4] See also letters to the SEC from Gene L. Finn dated: July24, 1997, File No. S7-16-97; May 1, 1998 SR-NASD-98-17; June 17, 1998, File No. SR-CTA/CQ-97-3; March 30, 1999, Rel. No. 34-40869; September 21, 1999, File No. SR-CTA/CQ-99-02, March 5, 2000, File no. S-7-28-99 and Letter to Arthur Levitt, Chairman, dated Dec. 3, 1999, File no. SR-CTA-99-53.

[5] The non-NMS securities are tied-in with the NMS in a single network bundle for pricing purposes.

[6] For example, when a non-subscriber online investor accesses his account for stock prices, his screen likely will show prices that are purposefully delayed 15-20 minutes. No quotations prices will appear for NYSE and AMEX stocks because the denial of access for those quotations prices apparently is "ad infinitum".

[7] Many investors are self-directed, choosing to access information electronically over their computers, without the inter-positioning of an account executive between them, their transactions and the information necessary to price their limit orders and execute trades. Such investors' brokerage commissions are lower; and their access to the market and information is more efficient, frequently without manual intervention. Restraints in subscriber agreements specifically permit telephone communication of information to clients by account executives but prohibit broker communication of equivalent information using computer or Internet related technologies, unless a special fee is applied.

Online investor access fees [8] and non-professional access fees are interchangeable names for the same fees. The subject non-professional fees are only applicable to investors that utilize computer, Internet and related technologies to access market information. Whether the fees are paid directly by the subscriber investors or by the investors' brokers for the investors is irrelevant. Investors who access the identical information from account executives by telephone or from media distributors do not pay the subject fees. Moreover investors whose accounts are managed by their brokers on a discretionary basis do not pay the non-professional fees; and none of these groups are required to sign subscriber agreements.

Although competition has prompted online brokers to offer free access to their more valued accounts, signed subscriber agreements are required for freely provided online broker paid access for customers. This merely transfers the discriminatory impact to the online broker and causes higher commissions. Exclusive processors should not be permitted to accomplish indirectly what is inappropriate if attempted directly.

**Non-professional Information Access Fees**

The CTA/CTQ and NASDAQ networks receive hundreds of millions of dollars collecting subscriber fees from professionals who enter quotation and trade report information, from professionals who access but do not display quotation and trade report information, from other professionals that access for their clients only the national best bid/offer quotation (NBBO) and last sale reports, and from non-professionals who access the latter information for purposes of transacting and managing their own brokerage accounts. The subject market information includes the un-delayed last sale trade prices and size of trade and the NBBO or any of those individual items as a group or singly. Thus the pricing unit to non-professional investors is a last sale price or a last sale price with bid and offer quotations and sizes. [9]

Exclusive processor monthly fees for the subject information are charged to professional subscribers on a per-device basis and to nonprofessional subscribers on a per-customer, per account, or per login[10] basis and to broadcast media on a per household basis. Monthly fees for professional subscribers range from $18.00 to $127.25 per network (NYSE listed, NASDAQ listed, AMEX/Regional listed). Non-professional subscribers

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[8] It is sometimes represented, incorrectly, that the non-professional fee is imposed on the broker. The subscriber agreement must be signed by the online investor; and the denial of access is imposed upon the online investor if no fee is paid for his/her access.

[9] It appears that the information is bundled, arbitrarily, by type of information and by markets. An item is defined as any part or all of the data set including last sale, bid, offer, and size for the given security. Access must be purchased for each of three markets and access to all securities in that market must be purchased as a package. For example, online investors cannot purchase access to only information for the few stocks in their portfolios or only Dow stocks. They must pay for the right to access all stocks or none. Similarly, they cannot choose to access only bid prices or only last sale prices.

[10] For example, NYSE controlled CTA/CQS fees apply, not to each customer, but to each customer login. If a customer has two accounts with different login numbers and/or has a simultaneous login from two personal computers, that form of access to his broker requires payment of multiple CTA/CQS non-professional fees, even though CTA/CQS costs are not affected by the multiple logins, multiple accounts, or the frequency of access.

receiving information via broker broadcasts over their computers and touch tone phones are charged a monthly fee of $1.00 for unlimited access to a particular network; and per-query fees range from $.0025 to $.02. Charges paid by media broadcast are on a per household basis approximating $.002 per household per month.[11]

Exclusive processor contracts require the denial of access to be imposed by brokerage firms upon their customers as a condition of brokerage firm access to the subject information. This denial of access requires online brokers to maintain two information systems for customers accessing information utilizing their personal computers (online): 1) un-delayed information for non-professionals who become fee-paying subscribers and 2) delayed information for non-professionals who do not become subscribers. Moreover, online brokers are required to incur extensive costs for administration of the fees, for periodic internal and external audits of fee administration processes.[12]

This denial and/or limitation on access is the economic lever used by the exclusive processors (CTA/CQS and NASDAQ) to collect access fees selectively from online investors. For online investors who choose not to become subscribers, the limitation on access obstructs the efficient execution of transactions.

**Per Se Discrimination**

The subject non-professional fees are per se discriminatory. They are differentially applied to a selected group of non-professional investors; they are not cost-based; they are imposed without the application of any commonly accepted standards of fairness, reasonableness of costs or rate of return on capital; they may have an implied immunity from anti-trust statutes[13]; they are grossly excessive in relation to access charges for equivalent un-delayed information provided to other similarly situated groups; they are a limitation and/or denial of investor access to un-delayed market information; they limit, restrain and obstruct efficient communications between online brokers and their clients; they restrain, unnecessarily, the efficiency of the transactions process; they reduce, arbitrarily, the potential for public orders to meet without the participation of a dealer by artificially delaying small investor online access to subject information; and they competitively disadvantage online brokers and/or online transaction processes as compared to other brokers, other transaction processes and other information distribution channels.

Consequently, the non-professional fees, as currently applied, are unfair and unreasonable; and they are unreasonably discriminatory. Also they are an inappropriate denial and/or limitation of investor access to market information. Indeed, they operate as

[11] See Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change, September 2001, Securities and Exchange Commission, Washington, DC p.30.
[12] If the fees were limited to properly assignable costs of the exclusive processors and/or the comparable media broadcast household fees, the administrative costs and other implicit costs in customer time, inconvenience and denial of access would undoubtedly exceed the fee revenues.
[13] See Silver, Doing Business As Municipal Securities Co., Et Al. V. New York Stock Exchange, 373 U.S. 341, pp. 344-345,349,356-35, and 364.

a denial and/or limitation on reasonably efficient investor access to the securities transactions process.

**Securities Exchange Act of 1934 Mandates**

In Section 11A of the Exchange Act, Congress articulated general findings and objectives for achieving a national market system, and granted The Commission broad authority in overseeing its development. The recent report of the SEC market information advisory committee, chaired by Professor Joel Seligman, (The Seligman Report), emphasized that:

> Section 11A(c)(1) of the Exchange Act prohibits SROs, SIPs, and broker-dealers from contravening rules prescribed by the SEC to: (1) prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative market information; (2) assure the prompt, accurate, reliable, and fair collection and dissemination of market information, and that the form and content of the information is fair and useful; (3) assure that exclusive processors make their market information available to all SIPs on terms that are "fair and reasonable;" (4) assure that all persons have access to market information from SROs and SIPs on terms that are "not unreasonably discriminatory;" (5) assure that all broker-dealers transmit orders in a manner consistent with the establishment of a national market system; and (6) assure equal regulation of all markets and broker-dealers effecting transactions in national market system securities.

The objectives set forth in Section 11A(a) to guide the SEC in its oversight of the national market system were to assure**:** (1) economically efficient execution of securities transactions; (2) fair competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets; (3) the availability to broker-dealers and investors of market information; (4) the practicability of broker-dealers executing investors' orders in the best market; and (5) an opportunity for investors' orders to be executed without the participation of a broker-dealer. [14]

The subject fees are discriminatory, excessive and anti-competitive. They are arguably inconsistent with each of the above objectives of Section 11A(a) of the Exchange Act.[15]

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[14] See Seligman Report p. 14

[15] For example: 1)Transactions efficiency is reduced. Subject fees are not cost based; they appear to be excessive, retail broker costs of administration and application of subject fees are large; and the limitation and/or denial of access to individual investors to critical market information for purposes of managing their own account competitively disadvantages such investors as participants in the market process and increases investor side time required to manage his/her activities. 2) The fairness of competition is reduced. The key competitive mechanism that enables online brokers to un-bundle brokerage services and charge petitioner lower commissions is the application of computer, Internet and related technologies to the retail brokerage service processes. Provision of access to information, especially un-delayed market data is a major component of that competition. Because subject fees selectively restrict, arbitrarily and unnecessarily, the manner in which online customers are permitted to access information from their online brokers, the fees and the related denial of access competitively disadvantages online brokerage processes that petitioner utilizes. 3) In addition, because the subject fees are not cost-based, the selective use of revenue surpluses to finance other activities of SROs and selected members and facilities used by members competitively disadvantages non-exchange markets relative to exchange markets. The rush of market centers to become

The Seligman Report points out that Congress viewed exclusive processors as public utilities that must function in a manner that is "…absolutely neutral with respect to all market participants."[16] Conversely, the Report recommends that The Commission not use a cost-based utility type approach in their review of exclusive processor fees.[17]
The Commission needs to consider whether Congress actually intended that only the final consolidation (from market participants) where a single processor might emerge was considered to be regulated potentially as a utility, with competition determining both the collection and the distribution stages of the information process.

Clearly, the applications of the non-professional fees of the network exclusive processors are not "neutral" probably because the on both the collection and distribution sides of their activities the exclusive processors are insulated from competition. With the possible exception of the narrow role of exclusive consolidator, there is no reason to believe that this non-competitive structure is necessary for the information processes to work. With respect to the subject fees, there is no evidence that competition would unfairly discriminate against particular groups of participants, given the availability of anti-trust relief to limit monopoly abuses.

**Pricing of Information: Arbitrary and Capricious Differentiation of Fee Basis**

The non-professional fee bases are discriminatory in comparison to fee bases used for other non-professionals and professionals receiving access to the identical class of information.

Non-professional access fees, including last sale and the best bid/offer quotations, while described as per customer fees are often calculated as per account and per login fees. For example, a client and spouse cannot be simultaneously logged on to a joint account to access NYSE information. Similarly, an IRA (Individual Retirement Account) and a

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exchanges is clear evidence of that disadvantage. 4) The availability to investors of market information is reduced, by fiat. Access to information is being limited and/or denied to petitioner and other non-subscriber online investors on reasonably non-discriminatory terms by exclusive processors. Furthermore, online investor brokers' ability to compete in the efficient provision of market information to their online customers is being arbitrarily restrained. 5) Execution of customer orders in the best market is arbitrarily and unreasonably impeded. Market prices frequently change within the few seconds that self-directed non-subscriber investors must check back and forth between web pages to check undelayed bid/offer quotations, provided free by online brokers, before acceptance of trades for execution in order to meet their best execution obligations. The forced time delays associated with denial of un-restricted access to un-delayed information, when coincident with quotation changes sometimes prevents a self-directed investor from executing at the "best market". 6) Opportunities for execution of online investors' orders without the intervention of a dealer are reduced. When restrictions on online investor access to quotation and last sale prices information delay their triggering of the execute key for a market order, it is reasonable to assume that quotation changes that sometimes occur reflect the execution of ECN limit orders that were narrowing market bid/offer spreads. Quotation prices reflecting small ECN orders change more quickly than do dealer quotation prices because the former are being executed against very quickly and the limit order is being cleared form the market, changing the quotation price. As a result, anything that delays investors' ability to monitor quotation prices would reduce the opportunity for their trades to execute without the intervention of a dealer.

[16] See Seligman Report p. 43.

[17] See Seligman Report p. 50.

regular account at the same broker are separately charged a fee if they have separate login numbers. Each customer with such access must sign exclusive processor subscriber agreements and non-professional fees must be paid either directly or indirectly by the broker for that customer as required to reconcile exclusive processor denial of access with broker's best execution obligations and/or to overcome competitive disadvantages caused by the selective denial of access.

Some distributors of market information to general public groups, such as media distributors, are charged on the basis of the number of households served [18]with no subscriber agreement required of viewer households and no separate fee charged. Similarly, customers that receive information over the telephone from their brokerage firms' account executives are not required to become non-professional subscribers or pay fees. Likewise, customers whose accounts are managed on a discretionary basis by a broker are not required to become non-professional subscribers.

**Non-professional Fees are Excessive**

Non-professional fees Charged for individual investors' access to market data information over a personal computer range from $.0025 to $.02 per item capped at $ 1 per month per customer account or per computer login number for each market NYSE, NASDAQ and AMEX. In contrast, for distribution of such information on television, distributors are billed by the exclusive processor for one market's access at $1.60 per 1,000 households or approximately $ .0016 per household per month with the distributor charges capped at $125,000 annually. NASDAQ currently has a four year old pilot program involving distribution of real-time data on television with monthly fees that are $.002 per household for the first 10,000,000 households, $.001 per household for the next 10,000,000 households, and $.0005 per household for additional households.[19]

The implicit per item access fees of households to broadcast information are infinitesimal. The per customer non-professional access fee rates applied to online customers of brokers are literally hundreds of times the per household rates charged for media broadcast of the same information.

Fees levied upon professionals, manually providing information to customers over telephones or over monitors in branch offices and through discretionary account management are per device fees, levied upon devices without adjustment for the number of customer devices used to call the broker, the number of separate customer access queries made etc. For example, if account executives sharing or using a device singly are serving 500 client accounts, the professional per device fee, reported by The Seligman Report as ranging from $0.85 to $6.00 daily, [20]translates into a per client monthly fee ranging from $0.06 to $0.25. Again no subscriber agreement must be signed by such customers for access and no non-professional access fee is required of such customers.

[18] See Seligman Report pp.29-31.
[19] See Seligman Report pp.29-31.
[20] See Seligman Report pp.30.

The differential bases for charges used by exclusive processors illustrate how exorbitant fees are being extracted from online brokerage customers. The basis for the subject fee is not households as in the broadcast of data over CNBC or per account executive device serving 300 or 500 or 1000 accounts but rather each computer login number/password of each online investor. This, of course, is unreasonably and unnecessarily discriminatory.

**Non-Professional Fees are not Cost-based**

There is no evidence that the provision of access to un-delayed market information by online brokers to their individual investor clients increases the costs[21] of either the exclusive processors or the SRO owned market centers that share the subject non-professional fee revenues. Costs of the exclusive processor are essentially unaffected by the variety of ways and frequency of access that a broker's customers employ in managing their accounts.

However there is clear evidence that the selective imposition of non-professional fees on online investors increases the costs of the investor and the broker who must administer the fee.The Seligman Report described the many complaints respecting the onerous administrative requirements imposed upon investor clients and online brokers that were made in comment letters to the SEC.[22]

Yet, in year 2000, SIAC (Securities Industry Automation Corporation) as the exclusive processor for NYSE, AMEX, and Regional securities, had total consolidator costs of $7.7 million and NASDAQ the exclusive processor for NASDAQ securities had consolidator costs totaling $29.2 million while revenues obtained by the two exclusive processors from non-professional fees alone were $115 million in 2000.  Subscriber revenues from professionals were another $469 million.[23] Clearly, the subject fees are not cost-based.

The fact that the revenues generated solely by non-professional fees for access to consolidated information are three times the consolidator's total costs of consolidation by itself should persuade The Commission that denial of reasonably non-discriminatory access to online investors is resulting from the selectively applied non-professional fees.

**Subject Fees are imposed Through Exclusive Arrangements that are Anti-Competitive and Discriminatory**

The subject fees are imposed by exclusive SIPs under NMS plans jointly administered by SRO's that are permitted to join the plans as voting participants. The plans are also exclusive, permitting only SROs to be revenue sharing and voting participants in the plans. Thus, unlike the National Stock Clearing Corporation (NSCC), the plans are not user –controlled but rather they are essentially economically independent SRO cartels for

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[21] There may have been some cost impact when the fees were originally imposed because, at that time, each customer inquiry accessed the processor's computer system. That is no longer the case. Access is now from data stored in brokers' and vendors' computers.

[22] See Seligman Report, pp.20-21

[23] See Seligman Report pp.30.

managing the consolidation and distribution of market data and market data fee revenues including the subject non-professional fee revenues. Even large non-SRO originators of the information are excluded from participation in existing SRO controlled NMS market data plans.

Exclusive processors are the agents of the SRO groups forming the cartel for purposes of consolidating market data input by members and other input subscribers. In that capacity exclusive processors act as billing agents for the cartel, not just for exclusive processor consolidation services included in the non-professional fees but also for undefined SRO non-processor services included in the subject fees. This loading on of unrelated costs results in the fees being grossly excessive as well as discriminatory.

These arrangements that prevent, limit, and/or distort competition enable the imposition of the subject fees that deny and/or limit the access of online investors to the subject market information.

**Contractual restraints on Competition That Limit Investor Access**

In order to successfully participate in the market transactions service business, brokers and their agents serving as agents for online individual self-directed investors, the largest originators and producers of component streams of market information, are required to sign exclusive processor contracts that transfer to the exclusive processors of the subject information, without remuneration, all proprietary rights in the investor information input into exclusive processor systems. Additionally, such input subscribers are required to agree to do nothing that will reduce (i.e. compete with) the subsequent value of that information to the exclusive processors. [24]

As a result, both the collection and distribution processes for the subject information are purged of competition; and online investors' access to competitively generated alternative sources of equivalent information is denied and or limited. These arbitrary and capricious restraints on competition not only reduce transactions efficiency but they also infringe on the inherent right of information producers to publish quotation and last sale information and the inherent right of online investors to receive that information without the limitation of the subject fees and the related administrative burdens and invasion of privacy.

**Sharing of Exclusive Processor Surpluses is Discriminatory**

After deduction of operating expenses, each Network's revenues generally are distributed to its SRO participants in accordance with their proportional share of the total transaction volume for the Network**.** Fee surpluses can be used to pay for orderflow, expand into new domestic and foreign markets, promote SRO facilities in competition with non-SRO facilities etc.

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[24] For example,see Workstation II Subscriber agreements Marketmaker and Order Entry firm versions, Section 8.

There is no requirement that surpluses be shared with non-SRO market participants that bring orderflow to the SROs' market centers. Consequently, the competitive process of sharing orderflow byproduct value with investors'retail brokers and their clients, through payment for orderflow and service enhancements, arbitrarily excludes the market information revenue value that non-exclusive and reasonably non-discriminatory sharing of exclusive processor surpluses would permit.

As a result the denial and/or limitation of access to online investors is exacerbated by fees that exceed exclusive processor costs (including cost of capital) and by sharing arrangements that distort competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

**Impact on competition among Brokers**

Non-professional fees, because they are selectively applied to online customers of brokerage firms, competitively disadvantage brokers who serve those customers; and they discourage the adoption of more efficient methodologies for communications between such brokers and their customers.

Securities markets are information systems. Everything that happens in securities trading has an information side. Indeed brokers are in the information business almost as much as they are in the asset and transaction business. Online investors seek a highly efficient time-saving and time-utilizing process for receiving information, placing orders, and transacting.

Non-professional fees are being used by SRO market centers to extract the benefit of technological efficiencies from online brokers and their customers for the benefit of other participants, particularly the SRO's that are sharing the non-professional fee surpluses. As a result some online investors pay unnecessary and excessive fees. Others, who remain non-subscribers and who are subjected to a denial or limitation on access, must spend more time, visit more computer pages, and be satisfied with less than current information when routinely viewing portfolio information. Also, online investors must pay higher commissions or other charges than would otherwise be necessary because online broker costs are increased unnecessarily by the need to administer the non-professional fee process.

**Summary**

The subject non-professional fees, are excessive and discriminatory. They are not cost-based; they are not neutral in their application to investors; and they are enforced by a limitation and/or denial of access of millions of online investors to un-delayed quotation and last sale information, essential to the efficient execution of their transactions and efficient management of their brokerage accounts.

Consequently, online investors are being discriminated against unfairly. More important, the limitation and/or denial of investor access to market information through their brokers is not necessary in furtherance of the purposes of the Exchange Act.

The Commission needs to separate out the non-professional fees from the other broader market data structure questions and deal with the most egregious unfairness in the process, the non-professional access fees.

A review is needed of the reasonableness of the anti-competitive mandatory clauses in exclusive processor agreements with brokers that restrict the mode of transmission of the subject market information from brokers to clients and that arbitrarily require the mandatory transfer of proprietary rights to market information input to exclusive processor systems. .

The Commission needs to withdraw their approval of the non-professional fees and the anti-competitive clauses of exclusive processor subscriber agreements that support them; that would allow individual investors and the markets to benefit from the competition for their business.

Respectfully submitted,

Gene L. Finn

Cc: J. Joe Ricketts, Chairman of the Board, Ameritrade Holding Corporation
Honorable Paul S. Sarbanes, Chairman, Committee on Banking, Housing, and Urban Affairs, US Senate