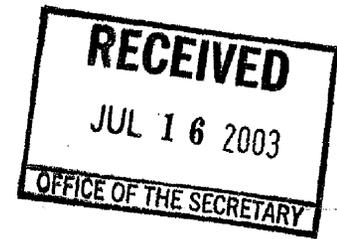


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July 10, 2003

VIA FIRST CLASS MAIL

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

07-11-03

**Re: Request for Comment on Nasdaq Petition Relating to Regulation of Nasdaq-listed Securities (Rel. No. 34-4 7849)**

Dear Mr. Katz:

Ameritrade, Inc.<sup>1</sup> (“Ameritrade” or “the Firm”) appreciates the opportunity to comment on the petition for rulemaking submitted by the Nasdaq Stock Market, Inc. (“Nasdaq”) concerning the regulation of Nasdaq-listed securities. Ameritrade believes that fair competition among market centers is a vital aspect of the today’s National Market System. Ameritrade’s clients have benefited greatly from the unfettered competition between market centers that has resulted in increased transparency and tighter spreads. Ameritrade believes that Nasdaq’s concerns can be addressed through greater SRO coordination and Commission oversight. Moreover, Ameritrade strongly believes that the Commission must be vigilant in ensuring that market centers do not: (1) degrade the overall quality of the markets by allowing a “race to the bottom” whereby markets offer sub-par trading venues for investors; or (2) use requests for regulatory intervention as a method of obtaining a competitive advantage.

On April 11, 2003, Nasdaq filed a Petition requesting that the Commission take action to protect investors trading Nasdaq securities. Nasdaq requests Commission action on three issues: (1) amend the rules of all markets that trade Nasdaq-listed securities to establish Uniform trading rules to ensure equal surveillance and enforcement of those rules; (2) order the exchanges’ cost of regulation, including the costs associated with proper data collection, surveillance and

<sup>1</sup> Ameritrade has a 28-year history of providing investors a self-directed approach to investing. In May 2003, Ameritrade’s approximately 2.9 million clients averaged a total of 157,000 trades per day.

enforcement, be aggregated **and** deducted **from** the market data revenue collected pursuant to the Nasdaq Unlisted Trading Privileges Plan (“UTP Plan”); and **(3)** identify markets that trade Nasdaq securities without approved order audit trails, surveillance and examination programs and exercise its authority to prohibit the **launch or** continuation of **Nasdaq** trading by any market that fails **to** protect investors as required under the Securities Exchange Act of 1934 (“Exchange Act”).

Nasdaq’s proposal to have the Commission require universal Nasdaq trading rules for Nasdaq-listed securities **goes too far** in that it fails to recognize legitimate differences in business models **and** the manner in **which** market centers **are** designed and operated. **As** a result, rather **than** Nasdaq’s **approach** of imposing its **rules across markets** that trade **Nasdaq** securities, Ameritrade believes that markets should **be** allowed to develop their own rules for surveilling and enforcing their rules, subject to oversight by the Commission. The Commission has the ultimate discretion of how best to exercise this oversight. **For** instance, the Commission could use one **or** more of the following approaches: (1) coordinate more interaction among the SROs **through** the Intermarket Surveillance **Group** (“ISG”); (2) promulgate a basic set of trading rules applicable to **all** SROs, **rather** than imposing Nasdaq rules on the other SROs; **or** (3) strengthen **and expand** the role **of** the Office of Compliance, Inspections and Examinations (“OCIE”) in overseeing the SROs.

#### Coordination of SROs

Ameritrade believes that the preferable approach is **for** the Commission is to coordinate more interaction among the SROs **by** promoting the efforts of the ISG. In this regard, Ameritrade agrees with several of the positions taken by the Cincinnati Stock **Exchange** (“CSE”), in **its** **letter** to the Commission concerning the “*Nasdaq Regulation White Paper: A Call for a Fairer Allocation of Responsibilities and Costs in a Fragmented Market.*”<sup>2</sup> Specifically, Ameritrade believes that the **Nasdaq** should use the **ISG** forum to better coordinate with other **SROs** in improving the intermarket regulatory structure. One possible solution is **for** **the** SROs to create **an** intermarket surveillance **group** that surveils for the most serious trading violations – those involving fraud, manipulation or insider trading. In the event competing SROs are not appropriately coordinating the Commission can use its oversight role **to** resolve such differences.

#### Standardized Trading Rules

Ameritrade believes that market centers should be free to design their own rules as long **as** they comply with the requirements under the Exchange **Act**. **As** a result, **the** Firm does not believe it is appropriate to impose one SRO’s trading rules upon other SROs. It is Ameritrade’s position **that** the Commission may want to **promulgate** a basic set of trading rule requirements for all **SROs**. The Commission would **require** SROs to comply with these minimum standards in designing trading rules specific to their marketplace.

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<sup>2</sup> See Letter from Jeffrey T. Brown, Senior Vice President, Secretary and General Counsel, CSE to Chairman Harvey Pitt, et al. (Feb. 19, 2003).

Ameritrade specifically questions Nasdaq's **proposal to** require all SROs to **have** an electronic audit trail identical to NASD's OATS Rules. In **particular**, Ameritrade believes the Commission should undertake **a** close examination of NASD's OATS reporting structure **and** the **costs** imposed on brokers before **expanding the** requirement to all SROs. The Firm believes that the OATS reporting process is cumbersome, imposes significant costs on member firms and suffers **from** system imperfections that **should** be addressed before it is **expanded**.

#### Allocation of Regulatory Costs

As noted, the Nasdaq argues **that** regulatory costs involving the supervision of trading in Nasdaq securities should **be aggregated** and deducted from the market **data** revenue collected **pursuant** to the UTP Plan. Ameritrade believes that the Nasdaq's **proposal** to allocate the regulatory costs of supervising the trading **of** Nasdaq stocks is based on a flawed premise -- that Nasdaq is required to supervise **all** trading that **occurs** in Nasdaq-listed securities. Rather, we think it is clear that **under** the **current** SRO structure **each** SRO is responsible for supervising the trading activity that occurs in its market. **As a** result, the Firm does not believe **that** other SROs should be responsible **for** subsidizing Nasdaq's surveillance of its own interdealer market.

Notwithstanding this, it is impossible to evaluate Nasdaq's allocation proposal because of **a lack** of **transparency regarding** SRO revenues **and** costs. Ameritrade strongly believes **that** before accepting the Nasdaq's claims concerning its costs in regulating trading in Nasdaq securities, the Commission must require the **Nasdaq** to submit **a** complete accounting regarding its fees **and** costs. In particular, Nasdaq must be able to support the revenues **and** costs regarding market data fees given its proposal to use these specific **fees as a way** to allocate costs. Such **an** accounting is absolutely necessary to **support** its claim that **it is** subsidizing other SROs.

#### Commission Oversight

While increase coordination between SROs and the establishment of **a basic** set of trading **rules** would alleviate many concerns **raised** by **Nasdaq**, ultimately **the** Commission must take **an** active role in ensuring that the pursuit **of** intermarket competition does not occur at the **expense of** the investing public.

**Specifically**, Ameritrade's clients witnessed first hand **how** an SRO acting unilaterally can **cause** great disruption to the operation of **fair** and orderly markets. In the fall of 2002 when **the American Stock Exchange** ("Amex") **began** trading Nasdaq-listed securities, Ameritrade clients complained to the Firm that they were not receiving the **price** they **were** displayed **at** the time they placed their order. Ameritrade determined that Amex specialists were aggressively quoting **Nasdaq** securities, but market participants **were** unable to quickly access the securities at the price they were **quoted**. During that time, **Amex** did not provide market participants the ability to access quotes electronically, relying on the manual processing **of** trades. While other market centers on Nasdaq were **executing** orders in milliseconds, a broker accessing Amex's quotes was **forced** to wait to receive confirmation, while the rest of the market was moving. In

the end, a broker **acting on behalf of its client** may have ended **up receiving** a worse price from other liquidity pools. In hindsight, Ameritrade believes the Commission should have addressed the **access issues before** approving Amex's trading of Nasdaq securities. **At** the very least, the Commission should have immediately halted trading on Amex once other market participants raised the issue with the Commission.

Conclusion

As **noted above**, Ameritrade **is a** strong proponent of fair competition among markets. The Firm believes **that although** the Nasdaq has **raised** intermarket **issues** that require Commission **action**, Nasdaq's **proposed** solutions would **operate** to undermine this important **pillar of** our National Market System. Ameritrade's **position** is that the Commission assert its oversight role in addressing these intermarket issues without imposing Nasdaq's rules **and** costs **on** the other SROs. Ameritrade believes that this **can** be largely accomplished through increased Commission/SRO coordination.

Thank you for allowing the Firm the **opportunity** to comment on Nasdaq's Petition. If you have any questions regarding our comments, **please** do not hesitate to contact me at the above number.

Sincerely,



John S. Markle  
Associate General Counsel