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NYSE

January 10, 2005

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

Re: NYSE Comments on the Nasdaq Proposal to Rectify Time Priority Issues
Release No. 34-50845, File No. SR-NASD-2004-181

Dear Mr. Katz:

The New York Stock Exchange, Inc. submits this letter to comment on the proposal of the Nasdaq Stock Market, Inc. to eliminate executions in the Nasdaq Market Center of internalized, preferenced and directed orders.[1] The Filing implies that elimination of these order types from the Nasdaq Market Center removes the impediments to registration of Nasdaq as a national securities exchange.[2] We disagree. Eliminating these three types of systemic orders is a necessary first step in bringing Nasdaq rules into conformity with the requirement for exchange registration that an exchange market maker comply with Section 11 of the 1934 Act by putting the ***same-side*** orders of ***other*** market makers' customers (as well as of its own customers) ahead of its proprietary interests. But it is not a sufficient one.

For Nasdaq ***system*** trades, the Filing significantly rectifies the internalization and preferencing barriers to exchange registration. However, the Filing does nothing to subject the ***non***-system

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1 Release No. 34-50845; File No. SR-NASD-2004-181 (the "Filing").

2 The Commission published notice of Nasdaq's application for registration as a national security exchange in the Federal Register on June 13, 2001 (Release No. 34-44396; File No. 10-131).

trades of a Nasdaq market maker – evidently the majority of Nasdaq trades[3] – to the negative obligation.[4]

Nor does Nasdaq impose ***any*** rules of priority and parity on non-system trades. Yet, such rules are also predicates to exchange registration.

Thus, if Nasdaq wishes both to preserve the internalization and preferencing practices of its market makers outside of its execution system and to register as an exchange, it must leave the ex-system trading behind with the NASD. As detailed in our 2001 comment letter on Nasdaq's application for exchange registration, that means that Nasdaq must also leave behind the tape prints and tape revenue from ex-system trading.[5]

We thank you for this opportunity to comment. We would be pleased to respond to any questions that you may have.

Sincerely yours,

cc: Chairman William H. Donaldson
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Harvey J. Goldschmid
Annette L. Nazareth
Robert L. D. Colby
Giovanni P. Prezioso

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3 Nasdaq no longer reports the percentage of trade volume executed through its execution platform of the Nasdaq Market Center (formerly SuperMontage). We base our "majority" estimate on Nasdaq's 11Ac1-5 filings from Market Systems, Inc.

4 Release No. 34-43863; File No. SR-NASD-99-53 (January 19, 2001). We note that, even as to system trades, the Filing still permits a market maker to retain priority over same-side orders of other market makers' public customers.

5 Letter to Mr. Jonathan Katz, Secretary, SEC, from Mr. James E. Buck, Secretary, NYSE, dated August 27, 2001. Our 2001 letter also points out how printing by an exchange of off-exchange trades also creates a series of collateral issues: it would confuse and mislead investors; inflate the volume of Nasdaq's trading activity; unfairly increase Nasdaq's share of market data revenues; contradict accepted rules of contract law, conflict of laws, equal regulation, fair competition and accurate disclosure; and violate the 1934 Act, SEC rules under the 1934 Act, the CTA Plan, and NASD's agreement with the CTA Plan processor. To facilitate a review of NYSE's prior comments on those other issues, we have attached a copy of our 2001 letter.