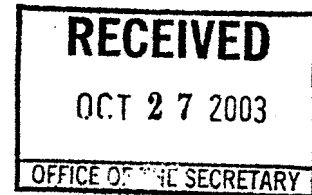


#12

October 17, 2003

VIA REGULAR MAIL

Margaret H. McFarland
Deputy Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549



Re: *NASD Proposed Amendments 4 & 5 to the NASD's Rule Relating to Business Continuity Plans and Emergency Contact Information (SEC Release No. 34-48503; File No. SR-NASD-2002-108)*

Dear Ms. McFarland:

Ameritrade Holding Corporation ("Ameritrade" or "the Firm") appreciates the opportunity to comment regarding NASD, Inc.'s ("NASD") amendments to the proposed rule relating to Business Continuity Plans and Emergency Contact information. Ameritrade supports NASD's efforts to require members to create and maintain business continuity plans ("BCPs") to be followed in the event of an emergency or significant business disruption. The Firm, however, believes that several provisions of Amendment Nos. 4 and 5 create unnecessary risk to the Firm or cause potential harmful delay in the implementation of adequate procedures by requiring: (1) the disclosure of plans in the event the broker decides to discontinue its business; (2) the disclosure of BCPs to investors; and (3) that only Executive Representatives have the authority to review and update emergency contact information.

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Ameritrade Holding Corporation has a 28-year history of servicing self-directed investors. Ameritrade Holding Corporation develops and provides innovative brokerage products and services tailored to meet the varying investing and portfolio management needs of individual investors and institutional distribution partners. With 3 million client accounts, Ameritrade, Inc., a subsidiary of Ameritrade Holding Corporation, is a leader in the online brokerage business, recently receiving Forbes "Best of Web" honors as well as an overall four-star rating, and a top rating for "Ease of Use" and "Research Amenities" on the Barron's 2003 Online Broker Survey. For more information, please visit www.amtd.com

1. Requirement that Plans be Reasonably Designed to Enable the Member to Continue its Business

NASD recommends amending Section 3510(c) by adding the further requirement that BCPs must address, “[h]ow the member will assure customers’ prompt access to their funds and securities in the event that the member determines that it is unable to continue to its business.”

Ameritrade Comment: Development of plans to assure customer access to funds after a member has chosen not to continue its business is not within the scope of a BCP. BCPs are, by definition, a methodology to recover and resume from interrupted services. A plan to provide access to customer funds after a decision not to recover is a plan of recoupment and is inappropriate for inclusion in a BCP. This topic could be addressed along with rules governing termination of a member’s business regardless of whether it is by choice, bankruptcy or due to a catastrophic event.

2. Disclosure Provision

NASD recommends amending Section 3510(e) by adding:

Each member must disclose to its customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. At a minimum, such disclosure must be made in writing to customers at account opening, posted on the member’s Internet Web site (if the member maintains a Web site), and mailed to customers upon request.

Ameritrade Comment: Although Ameritrade understands the reasoning behind requiring member firms to provide disclosure regarding BCPs, the Firm believes that the possible costs of such disclosure outweigh the perceived benefits.

- a. *Security Concerns:* Ameritrade believes that revealing the proprietary plans of how a firm intends to respond to extraordinary events will require the disclosure of trade secrets and confidential information. Additionally, if BCP disclosures are required to be specific enough to allow clients to reasonably assess risk, they likely will be specific enough to disclose enough information to allow a person the ability to penetrate a firm’s security and undermine the BCP. For example, if the disclosure reveals that an alternate site is a cornerstone to a BCP, a person could easily research and deduce the location of the alternate site and be positioned to disable that site in addition to a primary processing site. Disclosure would also allow comparative analysis of member plans to identify and target critical resources or services shared by multiple firms. By disclosing anticipated responses to varying scenarios, the company would be required to publish a large portion of its most sensitive internal security responses to the general public. Moreover, most clients would not have the level of knowledge necessary to make informed intelligent decisions on the validity of a BCP and differentiate between

plans. Hence, the risk of disclosing sensitive information to parties who may seek to use it against member firms far exceeds the potential benefits of allowing clients to assess a member's BCP risk. Finally, at a time when the Firm expends large amounts of resources protecting its systems and client accounts from unauthorized intrusions, providing a potential road map to perpetrators is alarming.

- b. **Liability Concerns:** BCPs provide a methodology for dealing with sudden changes in the business-operating environment. When implemented, a well-designed plan allows for the spontaneous adaptation to what, by definition, will be an extreme and unanticipated situation. The proposed amendment, however, requires members to publish how they would respond to undefined "events of varying scope." If a member determines to vary a course of action from that disclosed to the public in order to react more appropriately to a situation, the member could be subject to legal action for breach of contract or misrepresentation. As a result, such a requirement could have a chilling effect on the vital ability of members to have the flexibility necessary to adapt their plans to meet the immediate needs of the situation. There is also the risk of BCP disclosure being viewed as some type of implied warranty against future business disruption. Any business disruption could potentially be used as a basis for additional claims against member firms.

3. ***Review and Update of Emergency Contact Information***

NASD recommends amending Section 35020 (b) by adding the following underlined section: "Each member must promptly update its emergency contact information, via such electronic or other means as NASD may require, in the event of any material change. Each member must review and, if necessary, update its emergency contact information, including designation of two emergency contact persons, within 17 business days after the end of each calendar quarter to ensure the information's accuracy. The member's Executive Representative must conduct such review and any update. Furthermore, members must have adequate controls and procedures to ensure that only the Executive Representative may perform the review and update."

Ameritrade Comment: Ameritrade opposes the requirement that only the member's Executive Representative is allowed to perform this review and update. While we concur with the importance of placing the responsibility for compliance with the Member's Executive Representative, it is unrealistic to expect one individual to perform the review and complete the update without delegable authority. The Executive Representative may be on vacation or traveling on business for a period of more than 17 days and the requirement would cause an undo hardship in the absence of the ability to delegate the task. The requirement should allow an Executive Representative to delegate review and update responsibilities to another party in the organization. The delegation of authority should be communicated to the NASD through notifications and periodic reviews. Such

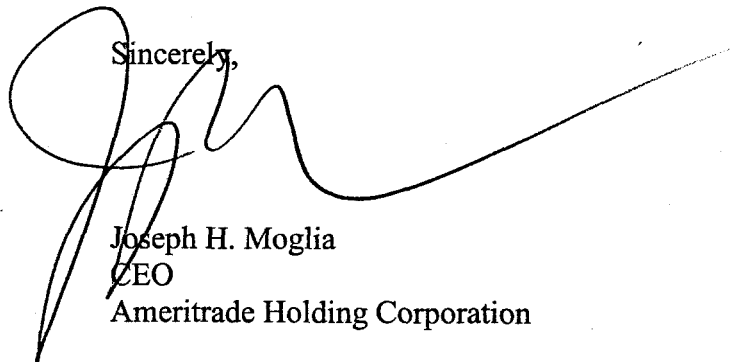
a “succession” plan is a prudent component of any BCP, yet still provides the NASD with plan accountability and oversight controls.

Conclusion

Ameritrade supports NASD’s efforts to draft the BCP requirements to ensure member firms are developing comprehensive planning in the event of future significant business disruptions. As noted above, however, the Firm believes that Amendments Nos. 4 and 5 impose certain obligations that are not appropriate for a BCP and place the Firm at undue **risk** of harm. As a result, Ameritrade believes the Securities and Exchange Commission should approve NASD’s proposal but **without** requiring: (1) the **firm** to disclose how investors can obtain access to their funds if the firm is unable to continue its business; (2) the firm to publicly disclose a summary of its BCP; and (3) imposing the restriction that Executive Representatives not be allowed to delegate the authority to review and update emergency contact information.

Thank you for allowing the Firm the opportunity to comment on NASD’s proposed amendments. If you have any questions regarding our comments, please do not hesitate to contact me at 402/597-7706.

Sincerely,



Joseph H. Moglia
CEO
Ameritrade Holding Corporation