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Track ECN

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OFFICE OF THE SECRETARY

October 17,2003

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

Re: Nasdaq Fee Cap Proposal Dated September 30

Dear Secretary Katz:

We are strongly in favor of Nasdaq's proposed rule change, though we do believe the rule needs a slight alteration to address the entire issue of ECN access fees.

We believe Nasdaq's proposed rule change is a very positive one for two reasons. First, it will encourage more liquidity in easing fee concerns of various market participants. Second, it will benefit those ECNs participating in SuperMontage by providing them with the same price/time priority as other participants, leveling the playing field.

However, we have one major concern with the rule change. Currently, the rule caps ECN access fees at $.003 (3 *mils*), but does not address the collection of these fees. Fee collection has been a major issue for us (even though we charge less than 3 *mils*) and for other ECNs. Indeed, some ECNs have higher fees in part to make up for revenue lost because certain market participants refuse to pay access fees.

Until now, Nasdaq's attitude toward ECN access fees has been to let the ECNs charge what they feel like charging (up to the SEC limit) and to let the marketplace police itself in terms of some participants refusing to pay these fees. We believe this rule change should mark a change in both sides of this equation—capping ECN fees AND ensuring market participants actually pay them. There are three reasons for this. First, capping the fee at $0.003 indicates that Nasdaq feels this is a fair and reasonable fee. Part of Nasdaq's past reluctance to mandate that participants pay ECN access fees might have been that Nasdaq felt some of these fees were unreasonably high, but the cap removes this impediment. Second, failure to mandate that ECN access fees be paid will mean that some quotes will still go unexecuted upon being auto-decremented (when the quote belongs to an ECN and the contra party is a Market Maker who refuses to pay the access fee, even though the fee has been deemed reasonable by Nasdaq). This situation is bad for everyone—it makes the marketplace less efficient, it is unfair to the ECN and its clients, and it presents unscrupulous Market Makers with the potential for market manipulation. Third, it seems only fair that if Nasdaq is going to use its regulatory authority to limit the amount an ECN can charge that Nasdaq use the same authority to ensure that market participants live up to the most basic industry standards and pay the fee.

Track ECN
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691 Fulton Street, Brooklyn, NY 11217 ☎ (888) 287-8832 🖷 (718) 923-3137

Fortunately, there is a simple solution to the problem of collection of ECN fees— Nasdaq can collect ECN fees just like Nasdaq presently collects for Market Makers. The system is already in place. Nasdaq could solve the problem fairly quickly.

In summary, it is **our** strong belief that Nasdaq's proposal will have an immediate and beneficial effect on the marketplace; however, the rule as it is now written should be enhanced to include a mandate that market participants pay the newly capped ECN access fees.

Thank you for your consideration.

Sincerely yours,

Roderick Covlin
Executive Vice President

cc: Annette L. Nazareth, Director, Division of Market Regulation
Robert L.D. Colby, Deputy Director, Division of Market Regulation
Belinda Blaine, Associate Director, Division of Market Regulation
John Polise, Senior Special Counsel, Division of Market Regulation
Steve Joachim, Senior Vice President, NASD
Glen Wolyner, Executive Vice President, Nasdaq