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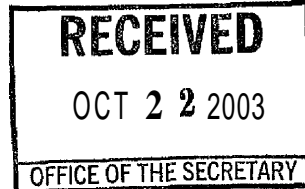
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Security Traders Association  
New York, New York

October 20, 2003

Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549-0609



Re: **File No. SR-NASD-2003-128**  
**Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Relating to Establishing a Maximum ECN Access Fees in SuperMontage and Elimination of SuperMontage's Price/Time With Fee Consideration and Price/Size Execution Algorithms**

Dear Mr. Katz:

The Security Traders Association ("STA") is pleased to provide the U.S. Securities and Exchange Commission ("Commission" or "SEC") with comments on the National Association of Securities Dealers, Inc.'s ("NASD") Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the NASD Relating to Establishing a Maximum ECN Access Fee in SuperMontage and the Elimination of SuperMontage's Price/Time With Fee Consideration and Price/Size Execution Algorithms

The STA is a worldwide professional trade organization that works to improve the ethics, business standards and working environment for its members, who are engaged in the purchase, sale and trading of securities. The STA represents the shared interests of its approximately 6,000 members that belong to one of 29 national and international affiliate organizations. The STA is the largest organization of its kind in the world.

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*Dictum Meum Pactum*

The STA applauds the **NASD** for developing and proposing a potential resolution to the effects the charging of ECN access fees has had on the market, however, the STA, as described below and consistent with previous statements to the NASD on this issue, believes that the proposal does not go **far** enough and that ECN access fees be abolished.

## **BACKGROUND**

In the above referenced proposal, Nasdaq **seeks** to amend **NASD** Marketplace Rules 4623 and 4710 to: (1) establish a maximum level of quote/order access fees for Electronic Communications Networks (“ECNs”) that elect to participate in Nasdaq’s National Market Execution System (“SuperMontage”); (2) eliminate SuperMontage’s Price/Time with access fee consideration execution algorithm; and (3) eliminate SuperMontage’s Price/Size execution algorithm.

Specifically, Nasdaq has determined to establish, as explicitly permitted by Rule 301(b)(4) of Regulation **ATS**, a maximum permissible quote/order access fee amount of \$0.003 (three mils) **per** share for ECNs that elect to participate and execute transactions in the SuperMontage system, an amount equal to **the** execution fee Nasdaq currently imposes on parties automatically executing against quotes/orders through SuperMontage and, in Nasdaq’s belief equal to the level of access fees imposed by most ECNs today. ECNs that desire to charge more than the \$0.003 maximum amount for access to its quote/orders will not be permitted to post liquidity in SuperMontage **as** an **NNMS** ECN, however, they will be permitted to continue to participate in SuperMontage as NNMS Order Entry Firm.

Nasdaq believes that the establishment of this maximum access fee makes unnecessary the Price/Time with fee consideration execution algorithm currently available in SuperMontage and seeks to eliminate it. Nasdaq has also proposed to eliminate SuperMontage’s Price/Size execution algorithm because it is used in less than **7%** of orders on SuperMontage and will reduce system complexity.



## DISCUSSION

As the SEC is aware, in 1996 and 1997, the Commission determined to allow ECNs to charge fees for accessing their systems that were similar to the communications and systems charges imposed by other markets so long as those access fees were not structured to discourage access by non-subscriber broker-dealers. The SEC granted no-action relief to ECNs based, in part, on representations by the ECNs that they would charge non-subscribers fees no greater than the fees charged their active broker-dealers subscribers, and in no event more than \$0.015 per share (the most current SEC mandate has revised this to \$0.009 per share).<sup>1</sup> Although decimalization of the markets has given rise to reduced spreads and market makers changing their business models to execute retail and sometime institutional orders in the same manner as ECNs, the SEC has steadfastly prohibited, based on its interpretation of Rule 11Ac1-1 (the "Quote Rule"), to allow market makers to charge similar fees. This difference in treatment has created an unlevel playing field and a regulatory imbalance that raises market transparency, firm quote and best execution concerns that have yet to be addressed.

While the STA applauds the NASD for making an effort to finally address this controversial issue, consistent with the STA's prior comments submitted to the SEC on this issue,<sup>2</sup> the STA believes that the NASD's proposal does not go far enough and that ECN access fees should be abolished. As previously stated, the STA considers ECN access fees a hidden cost to accessing ECN quotations and because they are not reflected in the ECN's published quotation, such quotations do not reflect the true price available at an ECN, make best execution difficult, and, as a result cause

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<sup>1</sup> Currently, various ECNs charge anywhere from \$0.025 to \$0.009 per share; the resulting amounts paid to ECNs by certain non-subscriber broker-dealers are significant.

<sup>2</sup> *Fulfilling the Promise of the National Market System: STA's Perspective on U.S. Market Structure*, <http://www.securitytrader.org/STA%20paper%final%207-03.pdf>, p.5, 8 (August 2003); Letter to the Honorable William H. Donaldson, Chairman, Securities and Exchange Commission, regarding ECN Access Fees from John C. Giese, President, Security Traders Association (April 16, 2003); Letter to the Honorable Harvey Pitt, Chairman, Securities and Exchange Commission from Security Traders Association Trading Issues Committee (March 5, 2002).



distortion and a lack of market transparency. The **NASD** proposal may reduce but will not eliminate these harmful effects. Anything other than the abolition of such fees will result in the markets operating in a manner inconsistent with the National Market System.

## CONCLUSION

While the **STA** supports **the** **NASD's** efforts to address this issue and its attempt to respond to the deleterious effects ECN access fees have **had** on the marketplace, it does not go far enough. The **STA** believes that the **NASD's** proposal provides the **SEC** and the marketplace the opportunity to review the unwelcome and damaging results the imposition of these fees has caused in the context of today's marketplace rather than the marketplace of 1996-1997 when such fees were initially allowed. We believe that such an analysis will inevitably lead to the conclusion, as the **STA** has argued **for** years, **that** such fees be abolished. We respectfully refer the **SEC** to the **STA's** previous statements on this issue.

Please do not hesitate to contact me if you have any questions or wish to discuss this matter further.

Sincerely,

*John P. Hughes / JCH*

John P. Hughes  
Chairman

*John C. Giese*

John C. Giese  
President & Chief Executive  
Officer

*Mary McDermott-Holland / JCH*

Mary McDermott-Holland  
Chair, **STA** Trading Issues Committee

*Lisa Utasi / JCH*

Lisa Utasi  
Chair, **STA** Institutional  
Committee