AMERITRADE
Holding Corporation

September 22, 2004

VIA ELECTRONIC & FIRST CLASS MAIL

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

Re: *Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Enhancements to the Exchange's Existing Automatic Execution Facility (NYSE Direct+®), Rel. No. 34-50173; SR-NYSE-2004-05*

Dear Mr. Katz,

Ameritrade, Inc.[1] ("Ameritrade" or "the Firm") appreciates the opportunity to comment on the New York Stock Exchange, Inc.'s ("NYSE") proposal relating to enhancements to Direct+. Ameritrade fully supports the NYSE's goal of becoming a hybrid market that offers automated electronic execution to its quotes. Although a step in the right direction, Ameritrade generally believes that the NYSE proposal must go further in providing investors the ability to obtain automated executions at the price quoted. In addition, Ameritrade believes NYSE's proposal lacks the necessary specificity required to give a reader a full understanding of how Direct+ would operate. As this rule filing has the unusual effect of driving the debate concerning market structure and Regulation NMS,[2] it is imperative that the Securities and Exchange Commission ("Commission") and commenters fully understand the NYSE's proposal. As a result, Ameritrade believes that the Commission should require the NYSE to amend its proposal

1 Ameritrade Holding Corporation ("Ameritrade Holding") has a 29-year history of providing financial services to self-directed investors. Ameritrade Holding's wholly owned subsidiary, Ameritrade, Inc., acts as a self-directed broker serving an investor base comprised of over 3.5 million client accounts. Ameritrade does not solicit orders, make discretionary investments on behalf of our clients, or provide proprietary research or advice regarding securities. Rather, Ameritrade empowers the individual investor by providing them with tools they need to make their own investment decisions. In exchange for a low commission, we accept and deliver the order to buy or sell securities to the appropriate exchange, market maker, electronic communications network or other alternative market for execution. Ameritrade does not trade for its own account or make a market in any security.

2 *See* Regulation NMS, SEA Rel. No. 49,325 (March 9, 2004) and SEA Rel. No. 49,749 (May 26, 2004).

and allow the public sufficient time to consider its impact on the national market structure and Regulation NMS.

The NYSE is proposing a "hybrid market" in which investors will be given the ability to choose how their orders are executed. According to the NYSE, investors would be able to choose between the speed and certainty of an automated execution at the national best bid or offer ("NBBO"), versus a manual execution handled by a specialist in which the investor would be seeking the opportunity for price improvement.

Ameritrade applauds the NYSE's efforts to give investors the ability to control the manner in which their orders are executed. Many of the suggested changes will be beneficial to investors. For example, eliminating the order size restrictions, permitting immediate or cancel orders, eliminating the 30-second limitation for consecutive auto-ex orders and permitting market orders to be automatically executed are significant improvements to the current Direct+ offering. Unfortunately, the NYSE proposal is significantly deficient in several areas. First, the NYSE proposal should provide for truly automated trading 100% of the time. Second, there is a lack of specificity concerning the automation – for example, how long will it take for an immediate or cancel notification to be sent back to the firm or market center routing the order? Third, the proposal regarding the ability to sweep the NYSE book is confusing and lacks sufficient specificity to be understood. Fourth, should NYSE also be required to include automated execution utilizing a price improvement algorithm? And finally, we note the importance that the NYSE's OpenBook rule filing has on this proposal and Regulation NMS.

Ameritrade's position on Regulation NMS is that there is no need for the trade through rule. If, however, the Commission determines that a trade through rule is appropriate, Ameritrade believes that market centers should be required to provide an automated response to their quote.[3] The Firm believes that if the NYSE is going to provide an automated execution facility the executions should be automated 100% of the time. Our clients have made it clear to us that they seek consistency in trading – how does interrupted electronic trading further that goal? Does it provide enough certainty for retail investors? Ameritrade believes that retail investors would be best served by a system providing firm quotes and an unconditional, automated response to the displayed quote. Ameritrade notes that the NYSE could still provide investors with the choice of using the auction market if an investor believes that the auction market is in their best interests.

It also is unclear to us how certain orders will be displayed. For instance, if an auction market is displayed, how will it be differentiated from a Direct+ quote? In this regard, Ameritrade strongly believes that manual quotes should not be displayed along with automated, firm quotes. In fact, the inclusion of manual or "maybe" quotes would harm the national market system as it would result in investor confusion as to the best available prices in the marketplace.

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3 *See* Letter from Ellen L.S. Koplow, Executive Vice President and General Counsel, Ameritrade, to Jonathan G. Katz (June 30, 2004). If a trade through rule is adopted, Ameritrade strongly supports the "Automated Execution Alternative," whereby market centers would be required to provide an automated response to their quotes.

Ameritrade understands the NYSE has made statements that it intends to be electronic 98% of the time. Although that sounds like an impressive goal, from what we understand, the 2% of the time it will not be automated, appear to be the times our clients want automated, fast executions most. That is, Ameritrade client complaints often occur due to our inability to access a market's quote after important news is disseminated to the market, times of imbalance or fast trading markets. Simply put, the need for certainty of execution may be most important during the 2% of the time the NYSE will not be automated.

Ameritrade's experience with NYSE trading halts adds support to our position. In instances where NYSE temporarily halts trading in a listed security, alternative trading systems often continue trading the halted stock. Ameritrade generally has found that the automated trading systems tend to trade at or near the price at which the NYSE reopens the security for trading. We believe automated systems can and do provide critical liquidity at times of market stress and imbalance. Therefore, we question why the NYSE is not proposing 100% automated trading that other alternative trading systems currently provide.

The NYSE's rule filing also is deficient because it fails to provide enough information regarding automated executions. For example, who has the authority to turn off auto-ex? How often will auto-ex be turned off? Ameritrade believes that the Commission and commenters require more information regarding the extent of the auto-ex before it can be properly considered.

The NYSE's proposal and how it interacts with the current ITS trade through rule is unclear to us. Although NYSE is proposing to have ITS orders go directly to Direct+, there is no data concerning the speed of such executions. It also is vital that the Commission and commenters know how long it will take for the market center sending the order to receive back a response regarding an "immediate or cancel" order. We note that 5-10 second time frames for immediate or cancel orders is simply too long in today's markets where response times are in milliseconds. Ameritrade has serious concerns that Direct+ and ITS will work to create automated trading that falls seriously short of today's technology standards and that creates a slow, automated trading environment for listed securities.

Similarly, the NYSE's proposal regarding the "liquidity replenishment point" ("LRP") raises more questions than it answers. It appears that the NYSE's proposal is to provide a watered-down capability of "sweeping" the NYSE book. We question whether the LRP is in the public interest. Specifically, how does the NYSE's LRP speed bump protect investors? Or, is it primarily a restriction that acts to protect specialists? Ameritrade finds it unnecessarily complicated and requiring of further explanation. For example, how did NYSE derive its $0.05-$0.09 sweep points? Has NYSE completed a statistical analysis on how often the LRP would be hit in today's markets? We believe the Commission must have a full understanding not only of how the LRP works, but also how often it will occur.

The NYSE's proposed sweep mechanism also would appear to run counter to the goal of ensuring that investors receive the best price in the marketplace. For example, we understand that the NYSE is proposing that trade throughs will not occur for transactions occurring only at the top of the NYSE book. As we understand the proposal, sweep orders could be executed at prices below the top-of-the book regardless of whether better prices existed at other market centers. In this way, it appears NYSE has structured the sweep function to allow for trade throughs of other markets displaying a better price. We believe it may be in the public interest for the Commission to require NYSE to either match the best price in the other market center, or route the order to that market center.

We also question whether the Commission should require the NYSE to offer an additional option for investors – automated price improvement. The Commission has stressed that in the pursuit of best execution, order routing firms should be seeking more than the NBBO – they also should be looking for the possibility of price improvement.[4] As proposed, the NYSE automated solution will only execute orders at the NBBO without the possibility of price improvement. We question whether, consistent with the Commission's prior statements, order routing firms could send significant order flow to Direct+ because it lacks the possibility of price improvement. Moreover, we do not believe investors seeking an automated execution should be required to give up the possibility of receiving price improvement.

Today, many market centers use price improvement algorithms in executing orders. Although the price improvement in these cases is often less than a penny, we believe sub-penny price improvement is important, especially when a stock is trading at a penny spread. We believe that the Commission should require that the NYSE clarify that it will either offer investors an automated price improvement algorithm, or note that that the specialists will have the ability to program automated price improvement into the Direct+ system.

Finally, we note the importance that another NYSE rule filing has not only to this proposal, but to the consideration of Regulation NMS generally. In SR-NYSE-2004-43, the NYSE is proposing to establish fees for providing NYSE OpenBook® on a real-time basis. OpenBook is a compilation of limit order data that the NYSE provides to market data vendors, broker-dealers, private network providers and other entities through a data feed. NYSE charges $5000 per month for the right to receive and distribute the OpenBook data feed, and $50 per

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[4] As the Commission recently noted:

> A broker-dealer's duty of best execution is not necessarily satisfied by routing orders to a market center that merely guarantees an execution at the national best bid or offer. Various markets and market makers may provide opportunities for executions at prices superior to the national best bid and offer. The Commission believes that broker-dealers deciding where to route or execute small customer orders must carefully evaluate the extent to which this order flow would be afforded better terms if executed in a market or with a market maker offering price improvement opportunities.

Order Approving Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 by the Chicago Stock Exchange, Inc., Relating to Price Improvement of Orders Executed Automatically by the Exchange, SEA Rel. No. 49,736 (May 19, 2004).

month for each terminal. Ameritrade believes it is vital to both this proposal and Regulation NMS that the NYSE be required to structure OpenBook so that it is available to retail investors at a reasonable cost. As currently proposed, OpenBook would continue to disadvantage retail investors by allowing institutions and professionals to trade with an informational advantage concerning the depth-of-the NYSE market.

Providing retail investors access to the NYSE limit order book is clearly in the best interests of the investing public. Retail investors have been able to view the depth of the market in Nasdaq securities for years. Given that the Nasdaq offers a similar product, Level II quotes, to investors for $9 per month, the NYSE's proposed charge of $50 per terminal is clearly unreasonable. On top of this disparity, the NYSE adds onerous terms and conditions which preclude vendors and broker-dealers from consolidating OpenBook data with data from other market centers (thereby limiting its usefulness), and which place severe restrictions on how the data is presented to end users.

Ameritrade will be commenting on the OpenBook separately, but we note here that this rule filing, the OpenBook filing and Regulation NMS are intricately tied together. As a result, we request that these proposals be considered in total and that the Commission give the public as much time as allowed by statute to comment upon their impact.

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Ameritrade thanks the Commission for considering its comments. Please contact me at 443/539-2125 if you would like to discuss this matter further.

Sincerely,

Ellen L.S. Koplow
Executive Vice President and General Counsel