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Via email to www.rule-comments@sec.gov

November 10, 2005

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

Re: Nasdaq Registration as National Securities Exchange
Release No. 34-52559; File No. 10-131

NASD/Nasdaq Trade Reporting Facility
Release No. 34-52049; File No. SR-NASD-2005-087

Dear Mr. Katz:

The New York Stock Exchange supports Nasdaq's registration as a national securities exchange provided that Nasdaq relinquishes to the NASD all market data revenue and all market share credit associated with trades not executed on the Nasdaq exchange or other exchanges; i.e., trades executed in NASD broker-dealers' back offices.

Several weeks ago as part of the Nasdaq exchange's separation from NASD, NASD filed SR-NASD-2005-087, which purports to create a new NASD Trade Reporting Facility to disseminate off-exchange trades executed in NASD broker-dealers' back offices separately from those executed on the Nasdaq Stock Market. To provide the separate reporting necessary for Nasdaq's exchange registration, NASD proposes to create a new corporation, controlled by the Nasdaq exchange to funnel to the Nasdaq exchange tens of millions of dollars in market data revenue pertaining to off-exchange trades that the NMS data plans allocate to NASD. Moreover, by seeking a unique tape identifier for these NASD prints, the Nasdaq exchange places itself in a position to claim these off exchange trades as being associated with its facility, thereby masking and inflating its diminutive trading share.

As we noted in our August 12, 2005, letter, the facility is a sham.[1] Rather than using the market data revenue to recover its regulatory costs and thereby to reduce the regulatory fees for regulating the off-exchange activities of its broker-dealer members, NASD seeks to subsidize the Nasdaq exchange alone by enabling it to use the revenue from off-exchange trades to defray its business and exchange surveillance expenses – thereby discriminating against the other exchanges. The anticompetitive nature of such a relationship and the ability of Nasdaq to use the unearned revenue to defray operational expenses are inconsistent with sound public policy. It is also inconsistent with promoting the objectives the Regulation NMS's new market data revenue allocation rules. The Commission labored many months to devise a new market data allocation formula to decrease incentives to engage in sham trades, wash sales, tape shredding and the like. This Trade Reporting Facility represents the biggest and most blatant market data revenue rebate scam to date. Not only would this anti-competitive proposal promote unfair competition among exchanges and their unequal regulation, but it compromises the NASD's regulatory integrity and neutrality as the nation's sole self-regulator of the off-exchange markets and perpetuates the conflicts of interest that spinning off the Nasdaq exchange from the NASD was supposed to ameliorate.

In a proper transfer of assets to the Nasdaq exchange, the NASD would retain ACT, its reporting facility for off-exchange trades. Instead, the NASD will transfer ACT to the Nasdaq exchange and lease ACT back at a fantastic multiple of the cost-based value of ACT services. With no mention of the barriers to entry created by monopolizing ACT, an industry utility that holds workstation real estate captive and that has worn deep and wide channels for the reporting of off-exchange trades, Nasdaq coyly offers no objection to other exchanges creating their competing arrangements with the NASD – but not, of course, using the ACT channel. In fact, the proliferation of arrangements with multiple exchanges for printing off-exchange trades and their sharing of market data revenue under a multiplicity of new market identifiers is a recipe for chaos and confusion, and would necessitate the Commission recognizing ACT as a NMS facility and mandating that ACT be constituted as a neutral, cost-based NMS facility as required by section 11A of the 1934 Act.

We urge the Commission to disapprove the subsidy to the Nasdaq exchange embedded in the proposed Trade Reporting Facility and to continue to refuse to approve Nasdaq's exchange registration until the NASD abandons this illegal, anti-competitive artifice. The easiest solution would be for the NASD to simply retain ACT and print off-exchange trades with the NASD tape identifier. If it makes sense for the NASD to outsource to operation of ACT to Nasdaq, then Nasdaq should do so pursuant to a vanilla, cost-recovery facility management agreement. In either case, off-exchange trades would be

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[1] Letter dated August 12, 2005, to Jonathan Katz, Secretary, Securities and Exchange Commission, from Mary Yeager, Assistant Secretary, NYSE.

printed as NASD trades, and market data revenue and market share credit would accrue solely to the NASD.

We would be happy to discuss these concerns and public policy issues with you.

Sincerely,

Mary Yeager
Assistant Secretary

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
Mr. Robert L.D. Colby