AMERITRADE
Holding Corporation

June 30, 2004

VIA ELECTRONIC AND REGULAR MAIL

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

Re: Regulation NMS, File Number S7-10-04, SEA Rel. No. 49325 (February 26, 2004 and 49749 (May 20, 2004)

Dear Mr. Katz:

Ameritrade, Inc. ("Ameritrade" or "the Firm")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("Commission") proposed Regulation NMS. Ameritrade commends the Commission for taking this important step in updating the nation's securities markets. Ameritrade believes that through Regulation NMS the Commission has the unique opportunity to promote greater market efficiency and competition, to the ultimate benefit of the individual investor.

I. EXECUTIVE SUMMARY

Ameritrade is an advocate for the retail investor. Ameritrade brings a unique perspective to the current debate concerning market structure in that we are one of the largest broker-dealers that does not internalize order flow. As a result, Ameritrade's position as a pure agency broker allows us to comment on the Commission's proposals without concern for how the proposals

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, acts as a self-directed broker serving an investor base comprised of approximately 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 individual investors 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 ("ECN") or other alternative market for execution. In addition, we provide our clients with the ability to route their orders to certain market destinations that they can choose. Ameritrade does not trade for its own account or make a market in any security.

may impact an affiliated market maker or ECN. We believe this business model positions Ameritrade as qualified to speak, with unwavering dedication, for the clients that we serve and retail investors as a whole.

Ameritrade believes in a market structure that treats all investors fairly. We believe that both the largest institutional investor and the average retail investor deserve a market structure that enables orders to be filled in their entirety, as fast as possible, at the price they are quoted upon order entry, or better. Ameritrade opposes the creation of a bifurcated national market system of fast and slow markets or quotes in which institutional investors trade with privilege, while retail investors trade at a disadvantage. Ameritrade believes a bifurcated market system could lead to investor confusion and cause investors to lose faith in the integrity of the markets. It is Ameritrade's belief that orders should interact on a level playing field where quotes are real, costs are transparent, and liquidity is accessible. Such a market structure requires that investor orders drive price discovery, rather than having manual systems interfere with the workings of the marketplace.

Ameritrade representative, Kurt D. Halvorson, Chief Administrative Officer of Ameritrade Holding, participated in the April 21, 2004 hearing ("April 21 Hearing") held by the Commission. These comments supplement Mr. Halvorson's testimony delivered on that day. We also have included an appendix that responds to specific questions presented by the Commission in the Supplemental Request for Comments, issued May 20, 2004.[2]

1. Ameritrade's Positions on Regulation NMS

i. Trade Through Proposal

As evidenced by the competitiveness of the Nasdaq marketplace, Ameritrade does not believe a trade-through rule is necessary and, in fact, creates impediments to competition and market efficiency. Ameritrade believes that market center competition combined with a broker's duty of best execution result in a national market system providing the best combination of efficient pricing, low costs and liquidity.

If a trade-through rule is adopted, Ameritrade believes investors are best served by a rule that requires market centers to provide automated execution of their quotes. In the national market system of the 21st century, "quoting should be synonymous with trading." As a result, Ameritrade strongly supports the Commission's proposed "Automated Execution Alternative."

Ameritrade also believes that to promote a greater level of order interaction and transparency to the investor, the Commission should require the display of internalized orders before execution.

[2] Extension of Comment Period and Supplemental Request for Comments, SEA Rel. No. 49749 (May 20, 2004).

ii. Non-Discriminatory Access and Access Fees

Ameritrade supports requiring non-discriminatory access for market participants, as it will further the goal of ensuring that investors can access displayed quotes. Ameritrade further believes that requiring market centers to provide automated execution to their quotes and banning sub-penny quoting will alleviate the need for the Commission to act as an access fee rate setter.

iii. Sub-Penny Quoting

Ameritrade supports the Commission's proposal to ban generally sub-penny quoting. The Firm believes retail investors are harmed by professional traders who step ahead of competing limit orders for an insignificant amount for the purpose of gaining execution priority and arbitrage opportunities. Ameritrade also supports the Commission's proposal to allow for the use of sub-penny executions.

iv. Market Data

Ameritrade's believes that the Commission should take steps to ensure that the costs of providing market data to investors are transparent and the revenues collected are reasonably related to the data production costs. Ameritrade believes that transparency could be achieved by requiring self-regulatory organizations ("SROs") to disclose publicly audited financials detailing the cost of market data. It is the Firm's belief that aligning costs and revenues ultimately will result in reduced fees to investors.

Ameritrade also believes that in a decimal trading environment where liquidity may exist beyond the best-displayed prices, investors should have low cost access to both the national best bid or offer ("NBBO") and the depth-of-book (*e.g.*, Level II quotes).

II. DISCUSSION

1. Trade-Through Proposal

Ameritrade agrees that the current national market structure is in need of reform and that maintaining the status quo is unacceptable. In particular, we strongly believe the current ITS trade-through rule is antiquated and must be significantly revamped or repealed. Briefly, the ITS trade-through rule is unfair in that it requires advanced electronic systems to compete with manual, floor-based exchanges on the exchanges' terms – the speed at which orders can be handled with human intervention. The ITS trade-through rule simply has no place in the modern national market system.

As with the Nasdaq market, we believe the listed market can operate efficiently without the presence of a trade-through rule. We believe that repeal of the trade-through rule would lead to greater intermarket competition, and increased connectivity and transparency, which would propel the listed market to greater efficiency – all to the benefit of the investing public.

The Commission has proposed and requested comment on three alternatives:

1. **Fast Market/Slow Markets**: Market centers would be considered either "fast markets" or "slow markets." Fast markets would be allowed to trade through slow markets in certain limited situations. In addition, investors could "opt-out" of trade through protection, on an order-by-order basis to obtain the certainty of a fast execution. There also would be an exception for "*de minimis*" trade throughs.

2. **Automated Execution Alternative**: Commission would require all market centers to provide an automated response to electronic orders at their quote.

3. **Fast Quotes/Slow Quotes**: Market centers would be allowed to identify which quotes are automated or "fast" and which ones are non-automated or "slow." Market centers would be allowed on a quote-by-quote basis to trade through "slow quotes."

We believe it is important to emphasize that the debate over the trade-through rule has wrongly been simplified as the choice between fast executions versus slower executions at better prices. Rather, the debate should focus on the fact that better prices may or may not be available by the time the order is filled. As a result, it does not necessarily follow that the slower execution always gets the better price, and the fast execution gets the worse price – the pursuit of fast executions is a means to achieve a higher degree of certainty of execution at a specific price.

If the Commission adopts an intermarket trade-through rule, Ameritrade's position is as follows:

1. First, Ameritrade strongly urges the Commission to adopt the Automated Execution Alternative proposal that would require market centers to provide an automated response to electronic orders at their quote. Ameritrade believes that requiring market centers to provide automated trading access to their quotes will resolve many difficult issues such as the opt-out and *de minimis* exceptions, and will eliminate the necessity of defining what qualifies as a "fast" market. The Commission's goal should be to create a national market system in which "quoting is synonymous with trading." In addition, access and protection should be expanded to the entire book, not just the best bid or offer.

2. Second, Ameritrade believes that the trade-through proposal must preempt existing anti-competitive rules such as the ITS trade-through rule, and clarify that SROs shall not adopt varying standards.

3. Third, if the Commission decides not to adopt the Automated Execution Alternative, it should consider revising the opt-out exception to allow consent on a global basis and eliminate the *de minimis* exception.

4. Finally, Ameritrade believes that to promote a greater level of order interaction and transparency to the investor, the Commission should require the display of internalized orders before execution.

a. <u>Automated Execution Alternative</u>

As part of the trade-through proposal, the Commission requested comment on an Automated Execution Alternative, whereby "all market centers would be required to provide an automated response to electronic orders at their quote." Ameritrade strongly believes this Alternative is in the best interests of the investing public, and at the same time, resolves many difficult issues surrounding the trade-through proposal.

As noted, our experience is that many investors demand the certainty of fast execution at the specified price, over the possibility of a delayed execution at a better or, for that matter, worse price. Ameritrade believes that retail investors would be best served by a rule that requires market centers to provide automated execution of electronic orders at their quote. If the Commission adopts such an approach, a market center would be required to either execute an electronic order at its quote, or if the market center's quote is not at the best price, route the order to a market center that was displaying the best price. In this way, Ameritrade believes retail investors will more likely receive the price displayed at the time they submitted their order.

As the Commission notes, the Automated Execution Alternative also resolves potential flaws contained in its proposal. Requiring market centers to provide an automated execution facility largely would eliminate the necessity of having the "opt-out" and "*de minimis*" exceptions. If a market center was required to fill an order at its quote, or route it to another market center displaying the best price: (1) there would be less need for investors to opt-out; and (2) trade throughs would be less likely.

In addition, adoption of the Automated Execution Alternative would allow the Commission to avoid determining what qualifies as a "fast" versus a "slow" market, which could lead to definitional gamesmanship. Moreover, creating the fast/slow market continuum would necessarily create a marketplace for arbitrageurs who will seek to profit from the pricing discrepancies that will occur between the two markets.

Ameritrade believes that market centers offering automated executions would compete with each other on all measures of best execution, including, but not limited to, speed of execution, price and liquidity. It is Ameritrade's position that such a market structure would lead to greater intermarket competition, transparency and price discovery – all to the benefit of the investing public.

The Commission requested comment on whether it should promulgate performance standards to ensure that the quotes of all market participants are available for automatic execution. We agree that the Commission will need to establish specific performance standards with respect to response time. In adopting a standard, the Commission should not disadvantage new technology and faster markets, as what may be a fast response time today may be slow tomorrow. Currently, Ameritrade believes a one second response time is appropriate. At the same time, Ameritrade believes the Commission should consider requiring that market centers include response time with their Rule 11Ac1-5 disclosures. Such disclosure would provide order routing firms another data point by which to compare market centers when completing "regular and rigorous" best execution reviews. The Commission also could utilize the data to revise performance standards as technology evolves. In addition, the Commission's examination staff could examine market centers to ensure that their response times are consistent with required standards.

In response to the April 21 Hearing, the Commission requested comment on an additional alternative whereby market centers would be required to designate automated and non-automated quotes and to allow for the trade through of non-automated quotes. In our view, that the Commission's proposed "fast quote/slow quote" alternative is not the panacea that other participants have proposed. Rather, Ameritrade believes the fast quote/slow quote proposal is simply a refinement of the flawed fast market/slow market approach. That is, the fast quote/slow quote approach will create bifurcated markets and necessarily require a determination of what qualifies as "fast" and "slow." In addition, Ameritrade believes the fast quote/slow quote approach would be confusing to investors. For example, what happens if both the best bid and offer are slow quotes? In such a case, investors accessing the NBBO will see two manual quotes that may not be available. Moreover, as noted above, it is Ameritrade's experience that clients expect to receive the price that is displayed to them when they submit their order – they will not appreciate that the quote they saw was a "manual" one and unavailable at the time of order routing.

The use of fast and slow quotes seemingly would allow market centers to decide when to turn off their automated fast quote execution as the markets became more volatile – which, in turn, likely would increase volatility. Moreover, the Firm believes such an approach would appear to allow market participants the ability to trade to the detriment of retail order flow (*e.g.*, frontrunning).

The Commission also requested comment on whether the scope of the proposed trade-through rule should include protection beyond the best-displayed bid or offer. In the post-decimalization world where there often is a lack of size quoted at the top-of-book, we believe it is in the best interest of investors for the Commission to require access to the entire book.

b. Existing SRO Rules

The Commission's proposal would allow SROs to maintain more restrictive trade-through plans, such as the current ITS plan. If the Commission adopts a trade-through rule for all markets, the Commission should abrogate existing trade-through rules in order to create a uniform rule. Allowing different trade-through rules, even if participants can withdraw from them, will result in uneven regulation and regulatory arbitrage. Moreover, the existence of different trade-through rules will most certainly result in investor confusion over what standard applies. Ameritrade believes that the Commission should consider promulgating a uniform rule and not allow SROs to adopt varying versions of the same rule.

c. Opt-Out and De Minimis Exceptions

Ameritrade believes that requiring market centers to provide automated execution of electronic orders largely will eliminate the need to have opt-out and *de minimis* exceptions. If the Commission, nevertheless, decides to adopt the trade-through proposal, Ameritrade strongly encourages the Commission to revise the proposed opt-out and eliminate the *de minimis* exception.

Ameritrade believes the proposed opt-out is flawed because it is intended for institutional investors, not retail investors. We are proud of our business model of providing services to retail investors that historically were only available to institutional investors. We are concerned that the opt-out, as proposed, turns back toward the provision of services in the old two-tiered manner. Ameritrade believes it is inherently unfair to limit the opt-out in this way.

Ameritrade has extensive experience in providing investors with the ability to decide how they want their orders executed. Ameritrade currently offers its clients the ability to directly route their trades to certain market destinations. "Direct access" routing, while utilized by only a small percentage of Ameritrade clients, is important to these investors. Before an Ameritrade client may directly route orders to a market destination, the client must execute a standing consent to terms and conditions that should address the Commission's concerns, including disclosure that they might not receive the best possible price and that the speed of execution might be worse than they would otherwise experience if they used Ameritrade's auto-routing.

Once a client agrees to the terms and conditions of direct access routing, he or she can use Ameritrade's electronic order ticket to send orders to certain market destinations. The Commission's proposal of imposing an order-by-order informed consent requirement on direct access clients would effectively emasculate this offering. That is, requiring client consent on an order-by-order basis, and imposing on the broker that it "must be confident that the customer fully understands this disclosure and the nature of the consent," would unnecessarily complicate seamless electronic trading systems offered by brokers, and place an impossible standard on brokers to know whether a client actually understands the disclosure that he or she is reading. Ameritrade's experience is that investors use direct access routing in order to display their limit orders on ECNs. Ameritrade submits that the Commission should promote, not prohibit, such activity. Moreover, Ameritrade believes that clients understand the risks of direct access routing, and we note that it has not been the subject of customer complaints. We urge the Commission to clarify how, as a practical matter, the order-by-order decision-making process could be implemented to enable electronic retail investors to utilize the opt-out.

In addition, Ameritrade questions whether the benefits of requiring brokers to disclose the NBBO at the time of execution for those clients who have opted-out justify the costs of the exception. First, it is unclear what purpose such a disclosure serves, as the NBBO at the time of the trade may or may not be available. In many ways, the disclosure is tantamount to saying to investors, “there was possibly a better price out there at the time of execution which we may or may not have been able to access on your behalf.” Ameritrade submits that such disclosure is of little relevance if a quote is inaccessible. Second, the Commission estimates that this disclosure will result in a one-time cost of $193 million, with an annual cost of $148 million. Given the size of these numbers, which may even be understated, we strongly encourage the Commission to carefully consider whether the benefits outweigh the significant costs to be imposed on the securities industry, which in turn could be transferred to the retail client in the form of higher fees.

Ameritrade does not oppose the Commission requiring disclosure concerning direct access routing by clients, along with a consent approach whereby clients would consent once before using direct access routing, as Ameritrade does today. The Commission also could supplement this approach with a mandatory annual notice sent to clients in much the same way as privacy policy notices are annually required.

Similarly, if the Commission does not adopt the Automated Execution Alternative, Ameritrade urges the Commission not to adopt the proposed *de minimis* exception. Ameritrade opposes the Commission’s proposed *de minimis* exception, as it will result in artificial spreads and investor confusion. That is, if “fast” markets are allowed to trade through “slow” markets by one to five cents, these *de minimis* amounts will necessarily act to widen the spread. Moreover, as occurs today, professional traders will attempt to arbitrage by selling at a higher price, and buy to cover in a market displaying the best price – at the expense of retail investors.

As proposed, we also believe the *de minimis* exception will be unduly complicated and result in investor confusion. Retail investors demanding executions at specified prices generally do not appreciate rules that allow market centers to fill their orders as long as they are “close” to the best price. Moreover, these investors may not be receiving the executions at the price they are quoted as demonstrated by published Rule 11Ac1-5 data, which shows that since the *de minimis* program began, quoted spreads have narrowed while trading spreads have widened.[3] The *de minimis* exception, as proposed by the Commission, adds a further layer of confusion by establishing a range of permissible trade throughs based on the price of the security. Overall, Ameritrade believes that the proposed *de minimis* exception will harm price transparency and

[3] Source: Public SEC Rule 11Ac 1-5 data comparing effective/quoted spreads prior to the *de minimis* and after the implementation of the *de minimis* pilot program on the QQQ security.

discovery. As a result, if the trade-through rule is adopted, the Commission should not adopt the *de minimis* exception.

d. Internalization and Limit Order Display

Although not part of the Commission's set of proposals, Ameritrade strongly believes that true price transparency and discovery will not be achieved until the Commission requires internalized orders to be subject to public display and available for interaction prior to execution. Requiring firms that internalize order flow to publicly display those orders and to make them available for interaction with other orders prior to execution would increase transparency for all investors. The benefits would be twofold: (1) investors using a broker that internalizes order flow will be ensured that these orders will interact with the market as a whole; and (2) other investors will have the opportunity to interact with these orders. Ameritrade believes that extending limit order protection in this way will greatly increase order interaction – to the ultimate benefit of the investing public.

This principle has been used in the options markets for many years, and is easily applied in an electronic trading environment. For example, the newest approved exchange, the Boston Options Exchange, or BOX, requires the display of an order for 3 seconds prior to internalization. Ameritrade strongly encourages the Commission to consider adopting a similar rule in the equities markets.

2. Non-Discriminatory Access and Access Fees

Ameritrade supports the Commission's efforts to require market centers to provide non-discriminatory access to market participants. As noted earlier, Ameritrade strongly believes that the Commission should require all market centers to provide electronic access to allow participants to trade at the price they are being quoted. If a market center aggressively quotes, market participants must have the ability to access these quotes. A quote that is unavailable undermines the integrity of the marketplace and leads to investor confusion and frustration. In addition, market centers presumably will be less able to cherry-pick uninformed order flow, while avoiding aggressive limit orders.

As for access fees, Ameritrade believes that if the Commission requires market centers to provide automated executions to their quotes and bans sub-penny quoting, free competition among market centers will eliminate the need for the capping of fees. That is, if free competition is allowed, order flow will naturally gravitate to the automated market centers that provide the best combination of speed, reliability, costs and liquidity.

3. Sub-Penny Quoting

Ameritrade previously commented to the Commission that the Firm ceased allowing clients to submit orders in sub-pennies in April 2003 because it had determined that clients were using sub-pennies to step ahead of resting limit orders and undermining the Manning provision.

As a result, we applaud the Commission's proposal to prohibit market participants from accepting, ranking or displaying orders, quotes or indications of interest in increments finer than a penny. Given the evidence that sub-penny quoting is being used by professional traders at the expense of the investing public, we believe that the elimination of sub-penny quoting can help to further restore investor confidence in the markets and result in increased transparency and higher liquidity. Furthermore, participants at the April 21 Hearing noted almost universal support for such a proposal.

As for the Commission's proposed exception for securities trading under $1.00, Ameritrade's experience is that most of the sub-penny quoting occurs in those exact securities. We note that the answer to this problem is for the NYSE and Nasdaq markets to uniformly enforce listing standards, which generally require a security to trade above $1.00. Ameritrade urges the Commission to act quickly on this aspect of Regulation NMS.

4. <u>Market Data</u>

Four years have passed since the Commission issued its Concept Release concerning market data structure, and the Commission has not moved any closer to addressing the central issue – whether the costs imposed by the current system are justified. In this regard, Ameritrade is disappointed that: (1) the Commission did not use Regulation NMS to address market data and related revenues in a comprehensive fashion; and (2) the Commission has failed to take the step of requiring transparency by requiring SROs to disclose publicly the cost of providing market data to the public. By comparative example, Rules 11Ac1-5 and 11Ac1-6 have contributed greatly to transparency and competition in the order flow arena. Similar market data transparency would increase competition and potentially reduce costs for end users.

Ameritrade is interested in first gaining an understanding of the costs associated with providing market data, and then determining the appropriate structure to allow for either a return of excess revenues back to investors, or a model in which market data revenues simply equal the costs of providing such information to the investing public.

Not only are market participants forced to pay the costs of the very data they provide, the participants do not know whether the fees are reasonable given that there is no transparency concerning the costs that the SROs incur in providing this vital service to investors. We note that the need for transparency of market data costs enjoys wide support as evidenced by the Securities Industry Association ("SIA") comment letter, which is being submitted to the Commission at the same time.

Any broker or vendor who conducts business in the current environment will tell you that the current structure is costly, complicated and burdensome. For retail brokers like Ameritrade, the administration of market data contracts is onerous and costly. SROs require detailed information about how a firm will use market data, the type of services the firm provides, the firm's use of technology and how a firm monitors its users. Ultimately, brokers must share confidential and competitively sensitive materials with the SROs.

SROs also require individual investors to consent to an agreement that requires the payment of discriminatory fees and is replete with legalese and confusing terms and conditions. Ameritrade spends an inordinate amount of time and money simply complying with the administrative burdens of tracking market data use by its customers, and maintaining two separate systems, one for real-time data and one for delayed data. The Commission's proposal does nothing to address these issues.

Under the current system, the SROs are granted monopoly powers, and wield these powers at will both in terms of the fees charged and the control over the dissemination of the data. Moreover, market data fees are imposed in an entirely discriminatory fashion. First and foremost, investors accessing real-time quotes through an account executive by telephone, from devices in branch offices, and from media distributors do not incur market data fees. If the same investor, however, uses an online brokerage account to access real-time quotes, market data fees are charged based on each instance a real-time quote is accessed. In this case, either the brokerage firm pays the fee, or passes the cost on to the investor. Either way, costs to investors are higher.

Ameritrade also believes the current market data definitions around professional and non-professional users are inconsistent and costly to the retail investing public.

The Commission notes that out of the $424 million in revenues derived from market data fees, $386 million was distributed to SRO participants. Unfortunately, although the Commission previously stated that, "the total amount of market information revenues should remain reasonably related to the cost of market information,"[4] there is no transparency to determine whether it actually costs anywhere near $424 million to provide the data to investors.

This issue is vitally important to both Ameritrade and its retail clients. Ameritrade currently is paying approximately $1.44 million per month for market data, or an estimated $17 million for the current year. These fees are paid by investors directly in the form of charges for quotes, or indirectly, in the form of commissions or other fees.

Ameritrade submits that the only way to determine whether there has been an equitable and reasonable allocation of costs is to require each SRO to publicly provide audited financials regarding the costs of providing market data to end users. Ameritrade recommends these financial statements be made available to the investing public through the Commission's (or particular SRO's) website. Given that investors ultimately pay these fees, either directly or indirectly, we clearly believe requiring the transparency of such information is in the public's best interest. Only then can such cost data be analyzed and serve as the basis and direction for future market data reform, both in terms of pricing and, ultimately, in the distribution of such revenues.

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[4] "Regulation of Market Information Fees and Revenues," SEA Rel. No. 42208 (Dec. 9, 1999).

As evidenced by the SIA comment letter, Ameritrade believes there is widespread support for the Commission requiring that market revenues be reasonably related to the costs of providing the data. Moreover, at the April 21 Hearing, Nasdaq, which receives approximately 25% of its total revenues[5] in the form of market data fees, agrees with the brokerage industry that market data costs are too high. As Robert Greifeld, CEO and President of Nasdaq, stated at the April 21 Hearing:

> *But we believe the government should only be involved where the government must be involved. So we must limit the monopoly to the data that is part of the public good, and provide it at a low cost. Currently that cost for professional investors is around $20. That cost in a Nasdaq market was established by Nasdaq over 20 years ago. It was about $17 twenty years ago. There was no great wisdom in that number, and we look at the number today, that number is too high.*
>
> *We agree with that concept. The number probably should be somewhere around five to seven dollars. And that's after some thoughtful analysis on our side, and trying to imply a rough cost plus basis to the analysis.*
>
> *With the current market structure, data is not provided at a low enough cost and it does create, as Bob [Britz, NYSE] mentions, unintended results and distortions in our market. The market centers today are the beneficiaries of that excessive rent and are utilizing this money to buy prints independent of market center value.*
>
> *If the utility rate was five to seven dollars, then the market centers would have a very difficult time buying prints. And I think that is the problem we're trying to solve.*[6]

Ameritrade applauds Mr. Greifeld's statement and joins Nasdaq in seeking to reduce market data revenues so that such revenues are reasonably related to the costs of providing the data to investors. We strongly support reductions in market data costs across the board, not just specific to those investors who are deemed professional. We think it is important that revenues related not only the NBBO, but also to the depth-of-book (*e.g.*, Level II quotes), should be reasonably related to the actual costs. Ameritrade believes that market data revenue reductions will clearly inure to the benefit of retail investors, as retail brokers compete aggressively on the ultimate costs charged to investors.[7]

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5 *See* The Nasdaq Stock Market, Inc. Annual Report (Form 10K) for the period ended December 31, 2003.

6 April 21 Hearing Transcript at 224-25.

7 This is especially true for the online brokerage industry that focuses heavily on the value of the product offered to investors. Ameritrade prides itself on being a leading low-cost provider. We note that reduced costs due to competition are often passed directly on to investors. For example, over the past few years increasing competition in the options market has led online brokers to reduce commission rates charged to investors.

We understand that Nasdaq will be submitting details concerning its proposal to the Commission. Ameritrade will comment on the Nasdaq proposal once the Firm has a sufficient chance to review the details of the proposal.

Given the widespread support within the industry and by Nasdaq, one of the very recipients of market data revenue, Ameritrade believes that it is clearly in the public interest for the Commission to take steps to ensure that investors are receiving what they are paying for and ensure that the costs of market data are reasonably related to the costs of producing the data.

Finally, we note that the SIA is commenting that multiple securities information processors ("SIPs") compound market data inefficiencies and that a consolidated SIP would result in considerable cost and time savings at no risk to the investor. Although Ameritrade agrees that multiple SIPs utilizing non-standard technologies result in considerable additional costs to the industry, the Firm has concerns regarding the creation of a consolidated SIP. First, Ameritrade believes that before a single SIP is considered, the Commission must address the fact that such an organization would represent a single point of failure for all market data provided by the markets. Second, we question granting monopoly powers to such an organization and thereby removing the ability for price comparison and the innate drive to innovate. We support, however, the standardization of technologies across SIPs.

III. CONCLUSION

Ameritrade applauds the Commission and its staff for taking an important step in proposing Regulation NMS. As noted above, Ameritrade opposes any trade-through rule as an unnecessary impediment to competition. Ameritrade is, however, a strong advocate for the Automated Execution Alternative whereby all market centers would be required to provide an automated response to electronic orders at their quote. Furthermore, Ameritrade supports the Commission's efforts to address market access and sub-penny quoting. Finally, the Firm strongly believes that the Commission should not focus on market data revenue allocation, but rather, on whether market data revenues are reasonably related to the actual costs to produce such data.

Ameritrade believes that Regulation NMS should be refined to require automated markets that provide non-discriminatory access, quotations in penny increments and a transparent market data structure. Such a structure will be a tremendous improvement to the current national market system, with retail investors reaping the ultimate benefits.

We appreciate the opportunity to present our views to the Commission. If you wish to discuss Ameritrade's comments please contact me (443/539-2125) or John S. Markle (443/539-2128).

Sincerely,

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

cc: The Hon. William H. Donaldson, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Harvey J. Goldschmid, Commissioner
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APPENDIX

RESPONSES TO SPECIFIC QUESTIONS FROM SUPPLEMENTAL REQUEST

I. <u>TRADE THROUGH</u>

1. *Whether the exception from the proposed trade-through rule should apply to quotes that are not immediately accessible through an Auto-Ex Facility (a manual or non-automated quote), rather than providing an overall exception for a manual market.*

   The primary reason for not adopting a quote-by-quote approach is that manual quotes cause confusion for retail clients. Ameritrade has first hand experience with a manual market quoting aggressively in an automated market. When the American Stock Exchange started quoting Nasdaq securities, it caused chaos in the marketplace. Simply put, manual quotes that are inaccessible in a timely, automated manner have no place in today's national market system.

   In addition, manual quotes adversely impact technology systems because such systems must be programmed to account for human intervention. It is unclear how brokers will satisfy their best execution obligations when analyzing market centers using manual systems. For instance, how can a broker justify routing to a market destination that aggressively quotes, but is generally unavailable because it uses manual systems?

   Furthermore, many brokerage firms like Ameritrade utilize third party vendors to analyze execution information to determine if a client is due a better execution. Ameritrade submits that the inclusion of manual quotes will make the process of determining whether the client is due a better fill much more difficult as firms will be unable to decide whether a manual quote would have been available to the client.

2. *Would narrowing the scope of the proposed exception to manual quotes allow market centers and broker-dealers to more efficiently execute orders across markets, while at the same time preserving the protections of a trade-through rule?*

   No. Narrowing the scope of the proposed exception does not resolve the fundamental problems with an approach that creates a bifurcated market. Whether it is fast/slow markets or fast/slow quotes, order routing firms will be required to seek best execution for clients in two different markets – one that is automated and accessible and one that is uncertain, manual and inefficient. As noted above, investors are not served well by bifurcated markets and a broker's ability to obtain best execution necessarily suffers.

3. *By not forcing a market center into a rigid classification – automated or manual – would providing an exception for manual quotes, on a quote-by-quote basis, provide more flexibility for market centers with different market structures to compete more fairly with each other? For instance, would narrowing the exception to manual quotes, which*

would allow a market center with an Auto-Ex Facility to display a manual quote in particular limited circumstances, provide more flexibility for a market center with a floor-based structure to effective integrate its trading floor with an Auto-Ex Facility, if it so desired?

No to both questions. As noted above, a quote-by-quote exception likely will result in investor confusion and additional burdens on order routing firms.

4. *Would a quote-by-quote exception allow markets more flexibility to provide investors a choice as to a manual or automatic execution? Comment also is requested on whether a quote-by-quote exception would create difficulties for routing systems that could not be easily managed.*

   No. Ameritrade believes that quotes must be accessible and manual quotes have no place in today's markets. Any additional flexibility is obtained at the cost of investor confusion. As for order routing systems, it is unclear how routing systems that operate in milliseconds should be programmed to take advantage of slow, manual quotes. Manual quotes create more than difficulties – in an automated market they create chaos.

5. *The Commission requests comment as to the best way to effectuate a quote-by-quote exception to the proposed trade-through rule for manual quotes. Panelists at the NMS Hearing stated that it would be possible to attach an identifier to manual quotes in the consolidated quote stream so that all market participants would know the quote was a manual quote. The Commission requests comment on the feasibility of this approach, and how it would work in practice.*

   Although an identifier may be feasible for market participants, it is unclear how fast and slow quotes will be displayed to investors. For example, will there be one NBBO that includes both fast and slow quotes? What if the inside market consists of manual quotes – how do you set investor expectations that the quoted market may be not available to them? Or, do you create two different NBBOs – one for fast quotes and one for manual quotes? How will SEC 11Ac1-5 statistics be calculated and compared?

   In addition to investor confusion, the creation of two markets will create arbitrage opportunities for professionals, who will likely trade at the expense of retail order flow.

6. *Should the Commission explicitly require each market center, as part of its required policies and procedures, to implement a process to identify any non-automated bid or offer that it posts in the consolidated quote stream as manual?*

   As explained above, Ameritrade believes the creation of two separate quoting markets likely will not be beneficial to retail investors and will unnecessarily complicate a broker's ability to seek best execution for its clients. If, however, such an approach is adopted, market centers will need to implement procedures for identifying manual quotes.

7. *Should the Commission require that the NMS plans that govern the collection, consolidation and dissemination of quotes in NYSE, Amex and Nasdaq-listed stocks be amended to provide for this functionality with regard to the quotes sent to the processors for those plans?*

   The Firm does not believe that fast/slow quotes are appropriate. However, if this approach is adopted, the NMS plans will need to be modified to ensure that investors receive accurate quote information.

8. *Should each self-regulatory organization ("SRO") be required, as part of its policies and procedures for complying with the proposed trade-through rule, to impose a requirement on its members that they identify their bids and offers as manual when submitting them to the SRO?*

   If firms are required to identify fast and slow quotes, it does not matter whether the Commission does so directly or requires SROs to promulgate rules in this regard. We note, however, that there should be consistent rules across markets.

9. *Comment also is requested on whether a market center should be able to decide on a security-by-security basis whether its quotes will be automated or manual.*

   Ameritrade does not support the bifurcated markets approach. In addition, the Firm notes that whether it is by quote or by security, the same issues regarding investor confusion and additional complexity result.

10. *If the Commission adopted an exception to the trade-through rule for manual markets rather than manual quotes, however, should the exception explicitly allow a market to choose to be automated or manual on a security-by-security basis?*

    Ameritrade's position is that all markets in the national market system should be required to offer automated response to their quotes. A security-by-security basis raises the issues of investor confusion and unnecessary complexity.

11. *The Commission requests comment on whether it should make explicit in the proposed definition of an automated market or automated quote that providing an immediate automated response would include immediately sending a report back to the market center that submitted the order, either reporting an execution or cancellation. In addition, should the Commission make explicit that the automated market or quote must provide an automatic execution functionality for the whole order or provide an automatic cancellation for the remaining portion of an order not executed against the quote?*

    Automated responses should not be limited to executions, but also should include outs, cancels, and price changes.

12. *The Commission requests further comment on whether it should impose performance standards, such as no less than one second, or a quarter of a second, or some other time*

frame, on the total time for a market center to respond to an order in an automated manner, i.e., the time from when the order is received by the executing market center to the time that the executing market center sends a report back to the order router indicating the action taken with respect to the order.

Ameritrade believes that a one second response time is an appropriate standard to establish initially. Furthermore, by requiring firms to disclose their response times along with the 11Ac1-5 information, the Commission could update the standard as technology improves and response times decrease.

a. Would imposing a performance standard alleviate concern that, because each market otherwise would be able to determine what "immediate" means with respect to its own bids and offers, a market participant might be required to access a better price on a market center that it did not believe provided an immediate response?

Ameritrade believes that performance standards are necessary, because one market may view 15 seconds as automated and others may view a tenth of a second as automated. Although one second may be fast today, it may be slow with the technology of tomorrow. That being said, Ameritrade believes there is no reason why responses should take more than a second. Our position is that any response time performance standards must include cancels, outs and price changes.

b. Would market centers continue to have an incentive to compete on the basis of execution speed if a performance standard were imposed?

Ameritrade believes it is vitally important that market centers have both the right and the incentive to continue to offer innovative products to the marketplace. The Firm believes that requiring market centers to disclose their response times will offer order routing firms an important additional measurement in making best execution and order routing determinations. With this additional information, we believe it is reasonable to argue that market centers will continue to innovate to gain order flow. We note that even with the inherent flaws of the current ITS trade-through rule, retail online brokerage firms have been extremely competitive in offering their clients execution guarantees. As the firm who originally established the standard in this area, we believe this innovation will continue to develop as long as the performance standards are reasonable and well thought out.

13. The Commission also requests comment on whether there is a need to impose a response time of less than one second.

a. Specifically, would investors benefit significantly, or at all, from sub-second response times?

Yes. Investors will benefit if they receive the price they are displayed when they submit their order. As noted above, however, sub-second response times are irrelevant if the NBBO consists of inaccessible manual quotes.

b. *If so, how would they benefit?*

Investors will benefit from fair, transparent markets that are built on automated executions, which provide greater certainty of execution. We believe it is imperative that our markets promote integrity and transparency for retail clients.

c. *Additionally, would it be necessary or advisable to impose sub-second response times in order to promote a smoothly operating marketplace?*

As noted above, Ameritrade believes it is appropriate for the Commission to adopt a one second response time initially and update it as technology evolves.

14. *The Commission requests comment with regard to surveiling for and enforcing compliance with a performance standard. In particular, the Commission requests comment on whether, if it were to adopt a performance standard, it should require that each market center publicly disclose the percentage of time, or each actual instance, that it did not provide a response in compliance with the standards required by the rule.*

a. *Would requiring public disclosure provide an added incentive for market centers to continue to improve their technology and the services they provide?*

Yes. Ameritrade believes that the more innovative market destinations will still attract order flow.

b. *Would it allow market participants and the Commission to better determine if the quotes of a market center that the market center determine to be automated are indeed automated in compliance with the proposed standards?*

Yes. Public disclosure would allow both market participants and the Commission the necessary transparency to monitor execution quality at the various market centers.

c. *Is there any other mechanism by which market participants could determine whether market centers were providing an immediate automated response in compliance with any performance standards imposed?*

Ameritrade believes that the Rule 11Ac1-5 and 11Ac1-6 public disclosures have been useful to retail investors, market participants and the Commission. As a result, we believe that requiring market centers to disclose performance standards with the 11Ac1-5 data would be useful.

15. *One panelist at the NMS Hearing expressed the view that a market center posting a bid or offer should be required to automatically update that quote, in order to be deemed an automated market. The Commission agrees that providing an automatic update to the best bid or offer is important because market participants other than the participant whose order executed against the quote need to know whether a particular quote is still available or not. Not updating a quote to immediately reflect the true status of the quote inhibits full transparency and could lead to uncertainty as to whether the market center's quotes are indeed immediately accessible through an Auto-Ex Facility.*

    a. *The Commission therefore requests comment on whether, in order for a market center or quote to be considered automated, the market center posting the quote should be required to provide for an automated update to the quote it is executed against.*

       Yes. Automated responses should include all possible market center responses to an order that is delivered for execution.

    b. *The Commission also requests comment on whether it should impose a performance standard, such as one second, on the time within which the order execution facility would be required to update its automated quote.*

       Yes. As noted above, Ameritrade believes a one second response time is appropriate initially with the idea that the Commission will update the standard as technology evolves.

    c. *Finally, comment is requested on whether the Commission should require market centers to provide an automatic cancellation functionality that would allow a market participant that has put a limit order on the market center's limit order book to automatically cancel the limit order.*

       Yes. Ameritrade believes it is important that the Commission require market centers to provide automated access to their quotes. We believe the ability to automatically cancel pending orders is a necessary component of an automated execution facility. We note that the Commission can require such generally without dictating how market centers design their systems.

    d. *If so, should the Commission require that cancellations be honored within a certain time frame, such as less than one second?*

       Yes. The ability to cancel should be subject to the same performance standards applicable to originating orders generally.

16. *The Commission requests further comment as to the amount by which a market should be allowed to trade through a manual quote. Specifically, the Commission requests comment as to whether there should be no limit.*

Ameritrade believes the adoption of the Automated Execution Alternative will alleviate the need for a *de minimis* trade-through amount. Furthermore, the Firm's position is that establishing *de minimis* trade-through amounts is neither good for the markets or investors. This is because it creates investor confusion when executions are "close" to the best price. The Firm believes a *de minimis* exception will only serve to increase effective over quoted spreads translating into higher costs to the retail investor.

17. *Panelists were split about the need for an opt-out exception. Some panelists at the NMS Hearing expressed the view that there would be no need, or valid policy reason, to allow a market to trade through an automated market or automated quote of another market. In addition, representatives of two floor-based exchanges have publicly expressed the intent to take the necessary steps to become automated for purposes of the proposed exception to the trade-through rule. Thus, the Commission requests comment as to whether, if it were to adopt an exception to the trade-through rule for manual quotes, the proposed opt-out exception would still be necessary or desirable.*

In the absence of manual quotes, an opt-out generally should not be necessary. We note, however, that investors should be given the ultimate choice in how they want to trade. That is, if an investor wishes to execute an order at a specific market center, they should have the ability to do so. For some Ameritrade clients, this means having the ability to directly route to specific market center destinations. We believe a reasonable opt-out exception would allow clients to opt-out on a global consent basis. The speed at which today's markets trade makes an order-by-order consent approach simply unworkable.

18. *Would there be less of a need for the opt-out as a mechanism for market discipline if the Commission were to adopt explicit performance standards with regard to defining what an "immediate" automated response means under an exception for manual quotes?*

Ameritrade believes that the Automated Execution Alternative will largely eliminate the need for an opt-out provision. At the same time, we strongly believe an opt-out should be available to those investors that value the ability to direct their orders to the market destination they choose.

19. *If commenters believe that an additional mechanism is needed to exert market pressure on market centers, what type of mechanism would be effective but still support the underlying goals of price protection and best execution? For instance, as discussed above in Section II.A.1, whether or not the Commission adopted a performance standard with regard to an exception for a manual market or quote, should the Commission require each market center to publicly disclose how often it provided an immediate automated response within certain time frames or within the performance standards?*

Yes. The Firm's position is that the Commission should require automated quotes and executions. Market centers should be required to adhere to performance standards and information regarding their performance should be made publicly available.

20. *Another potential use of the opt-out exception could be to by-pass quotations likely to be unavailable due to prior execution. Such a use could arise, for example, when a*

quotation suddenly becomes attractive to many traders at the same time (e.g., because of a price change in a related security). One can conceive of circumstances in which a large, and perhaps rapidly growing, number of orders pursues a small and rapidly changing number of quotations. The Commission would be concerned if such scenarios could severely impact individual market centers or even interfere with the smooth functioning of the marketplace.

   a. The Commission requests comment on whether such scenarios are likely, what their potential impact might be, and whether a specific exception to the trade-through rule is needed to provide market participants with acceptable means to execute their orders under such conditions.

      Ameritrade submits that this is what happens in the Nasdaq market today. A trade-through rule is irrelevant because as one order executes there is now a new best price in the market. If a market center is unwilling to honor a price, they are required to remove the quote. Ameritrade strongly believes that "quoting and trading should be synonymous."

   b. If commenters believe an exception is needed, the Commission requests information on the nature of the requirement and the form that such an exception might take.

      If a trade-through rule is adopted, Ameritrade believes it is important to adopt an opt-out exception based on a global consent, not order-by-order consent. Ameritrade believes that institutional and retail investors should be permitted the same ability to opt-out.

   c. The Commission requests comment on whether an opt-out exception would be needed for customers of order execution facilities that do not currently interact with other exchanges or order execution facilities.

      If a trade-through rule is adopted, Ameritrade believes an opt-out exception is important because it provides investors with choice. In this example, if an order is routed to a market maker, the market maker should still be under the obligation to interact with the best bid/offer. Again, the key is to now make "maybe" quotes firm and automatically accessible.

21. The Commission also is requesting further comment as to whether there are particular types of transactions the execution of which should be excepted from the proposed trade-through rule that are not covered by the proposed exceptions, consistent with the fundamental policies of price priority.

   a. For example, should there be an exception provided for basket or program trades that are executed at a single price distinct from current prices for each of the securities contained in the basket?

Ameritrade's clients generally do not participate in basket or program trades so we do not take a position on whether an exception is appropriate. Ameritrade, however, submits that if institutional investors are provided a specific exception for basket or program trades, retail investors should be allowed an exception for direct access trading.

b. *In addition, should an exception be provided for an "intermarket sweep order" by which a market participant can simultaneously route orders to interact with all best bids and offers displayed in the consolidated quote system?*

As with basket/program trades, Ameritrade does not take a position regarding whether an intermarket sweep order exception is appropriate. It is important that institutional and retail investors are treated similarly.

c. *As proposed, paragraph (b)(7) of Rule 611 of Regulation NMS would provide an exception for those instances where an order execution facility sends an order to execute against a better-priced order displayed on another market at the same time or prior to executing an order in its own market at an inferior price. The Commission recognizes, however, that a market center that receives one part of an "intermarket sweep order" would not know that other "sweep" order(s) have been sent to other market centers to attempt to execute against any better-priced bids or offers displayed on those markets, unless the order(s) were identified in some manner. Thus, the receiving market could, pursuant to the proposed trade-through rule, route the order it received to another market displaying a better price, even though the order router already has attempted to take out those better prices. Therefore, the Commission is requesting comment as to how each order sent by a market participant in compliance with a "sweep order" exception should be identified so that the receiving market center would be able to execute the order without regard to whether a better price were displayed on another market center.*

Ameritrade does not take a position regarding whether intermarket sweep orders are appropriate. Ameritrade believes that an opt-out exception should be equally available to both institutional and retail investors.

22. *Some panelists at the NMS Hearing questioned the need for a trade-through rule and argued against extending the trade-through rule to the Nasdaq market. Given the prospect of greater automation of execution facilities discussed at the NMS Hearing, the Commission requests comment on how such a development would affect the need for a trade-through rule in the market for listed securities. In this connection, the Commission also reiterates its request for comment on the need to expand the trade-through rule to the Nasdaq market.*

The Firm does not believe that the Commission has made a case for finding that it is in the public interest to impose a trade-through rule in the Nasdaq market. Implementing a trade-through rule in Nasdaq would set the industry back 30 years. In today's era of technical acumen, there is no reason to implement a trade-through rule as further demonstrated by the success of alternative trading systems operating today. Our experience has shown that the Nasdaq market has narrower spreads and better execution statistics.[8]

As noted above, Ameritrade favors the Automated Execution Alternative. We believe in a transparent marketplace where the retail client is on as level playing field as professionals. If a client is displayed a price, we believe they should have the ability to receive that price. Unfortunately, we believe the Commission's proposed fast/slow markets or fast/slow quotes is unnecessarily complicated and will result in greater investor confusion and increased cost burdens to market participants.

[8] Source: Public SEC 11Ac1-5 data comparing the Nasdaq 100 to the S&P 100 markets in effective to quoted spreads.

II. NON-DISCRIMINATORY ACCESS AND ACCESS FEES

23. *The Commission continues to request comment on all of the issues relating to standards of direct and indirect access that were raised in the Proposing Release. In addition, panelists at the NMS Hearing indicated that access could remain a problem at relatively inactive ATSs or market makers with little trading volume whose quotations were displayed only in the ADF (and therefore fell within the proposed definition of a QMP). Market participants could obtain access to such quotations only through direct connections with the particular ATS or market maker. Panelists suggested that such an entity should be required to publish its quotations in an SRO order execution facility, at least until its share of trading reached a point where the cost of direct connections with multiple market participants would not be out of proportion to the entity's level of trading. Comment is requested on this issue. Alternatively, SROs without an order execution facility could be required to ensure that any potential QMP is directly connected to most market participants, before publishing that QMP's quotations. Finally, comment is requested in general on whether market participants currently have effective and efficient access to SRO order execution facilities and QMPs and whether this access provides a sound basis for the proposed regulatory approach.*

    Ameritrade believes that market participants should not be required to establish private connections with all market centers and that it is reasonable to require all market centers to make their top-of-book, as well as depth-of-book (*e.g.*, Level II data), available to other market participants through a public intermarket linkage facility.

24. *Comment is requested on the structure of the various fee limitations set forth in proposed Rule 610(b). Comment also is requested on whether the Commission should simply adopt a single accumulated fee limitation, such as the one set forth in paragraph (b)(4) that would apply to all types of market centers.*

    No. Ameritrade believes that the adoption of the Automated Execution Alternative and sub-penny quoting ban will result in competition among market centers and resolve the issues relating to access fees. Ameritrade is concerned that the capping of access fees could result in innovative, electronic trading systems going out of business.

25. *If a single accumulated fee limitation were adopted, would $0.002 per share be an appropriate amount, or should it be higher or lower?*

    Ameritrade does not believe that the Commission should act as a rate setter, but rather should take steps to ensure competition.

26. *Comment also is requested on whether fee limitations should apply to undisplayed orders at prices better than the best displayed quote, reserve size at the displayed quote, or quotes displayed or available at prices inferior to the displayed quote.*

    a. *Are these limitations needed to avoid discouraging the display of quotes?*

Ameritrade urges the Commission to require markets to provide automated access to their quotes, and the banning of sub-penny quoting.

We do note, however that in the absence of a uniform rule that applies to all order types, arbitrage opportunities will be created. If fee limitations are not applied to undisplayed orders, the unintended consequence could be to reduce the display of limit orders.

b. *Further, would limiting access fees discourage the display of quotes?*

Ameritrade does not believe it is appropriate for the Commission to act as a rate setter and cap access fees. Innovation and competition in the marketplace should serve to drive down costs.

27. *Panelists at the NMS Hearing suggested that quotations not accessible through an Auto-Ex Facility should be identified as such in the consolidated data stream. Comment is requested on whether market participants submitting quotations that are automatically executable should be allowed to lock or cross quotations that are identified as not being automatically executable.*

Ameritrade believes the creation of two separate quoting markets will not be beneficial to retail investors and will unnecessarily complicate a broker's ability to seek best execution for its clients. If the Commission adopts a bifurcated market-place, quoting reliance should not be impeded between fast/slow market centers or fast/slow quotes.

28. *The Commission renews its request for comment on whether it should or should not adopt any access fee limitation and, if it does not adopt a fee limitation, on alternative measures that potentially could be adopted. In particular, should quotations with high fees be treated differently than quotations with de minimis fees for purposes of the other proposals? The differing treatment could reflect the fact that, for example, a $10.00 quotation with a high fee is not equal to $10.00 quotation with a de minimis fee. Quotations with fees of more than a de minimis amount could be identified as such in the consolidated data stream, analogous to the identification of quotations not accessible through an Auto-Ex Facility that was discussed above. Such high-fee quotations could be excluded from protection under the trade-through rule, eliminated from the allocation of market data revenues, and subject to locking quotations from market centers with de minimis fees. Comment is requested on the advisability of these alternatives, as compared with adopting a limitation on access fees.*

Ameritrade believes that the competition is the ultimate answer and that the appropriate response is for the Commission to require markets to provide automated access to their quotes, and ban sub-penny quoting.

III. MARKET DATA FEES

29. The Commission would welcome public comment addressing the reasonableness of market data fees and whether the Commission should modify its approach to reviewing such fees. As noted in the Proposing Release, one of the Commission's primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of market information. Indeed, an extensive public record has been developed on this issue over the last five years. This record includes the Commission's 1999 concept release on market information fees and revenues ("Concept Release"), the public comments received in response to the Concept Release, and the 2001 report of the Commission's Advisory Committee on Market Information ("Advisory Committee"). In formulating their comments on these matters, commenters are encouraged to consider and respond to the views reflected in the public record.

Ameritrade generally supports aligning the revenues of market data with the actual cost of displaying the data to investors. We support the approach by which the NBBO and depth-of-book (*e.g.*, Level II quotes) would be available at a greatly reduced cost and markets would be allowed to competitively sell additional products to market participants.

30. The Commission requests comment on whether only quotes that are accessible through an Auto-Ex Facility should be considered in the allocation of market data revenues, thereby eliminating any need for the formula to include an automatic cutoff applicable to manual quotes.

Ameritrade strongly supports the Automated Execution Alternative. Consistent with this approach, Ameritrade agrees that it is appropriate to allocate market data revenues based solely on automated quotes.

31. Second, comment is requested on whether, if manual quotes were excluded from the calculation of Quoting Shares, the proposed additional measure of quoting activity -- the proposed NBBO Improvement Share -- should be eliminated from the formula.

Ameritrade does not have a position regarding the NBBO Improvement Share. Rather, we note that if market data revenues were more in line with costs, the allocation would be less controversial as there would be fewer incentives for market centers to alter their business models in order to garner additional revenues.

32. The NBBO Improvement Share is significantly more complex than the other aspects of the formula, which essentially are calculated already by those who track the trading and quoting activity of market centers. The NBBO Improvement Share was designed primarily to single out and reward price leaders -- those market centers that quote most aggressively by frequently displaying better prices and thereby helping to narrow quoted spreads. An additional measure of quoting activity was particularly important to offset the advantage that manual quotes could have in the calculation of Quoting Shares. Such manual quotes might merely match the prices set by other markets, yet not be accessed *quickly because not automatically executable. As a result, manual quotes would tend to equal the NBBO for long periods of time merely because they were the least accessible quotes available at the price. If manual quotes were excluded from the calculation of Quoting Shares, the need for an additional quoting measure would be somewhat diminished. Comment is requested on whether the benefit of rewarding aggressive quote improvement justifies the increased complexity of calculating the NBBO Improvement Share.*

Ameritrade disagrees with the notion that market data fees should be used to "reward price leaders." Rather, in a competitive marketplace with automated execution capability, price leaders should be rewarded with more order flow. Ameritrade submits that market data revenues should approximate the costs of producing the data. To use an apt analogy, market data should be provided as public utilities provide water to residents – a necessary resource provided at a low cost.

33. *Finally, although the Proposing Release itself recognized that the proposed formula is relatively complex, the difficulty and cost of implementing the formula may have been overstated at the NMS Hearing. No additional data is necessary to calculate the formula beyond the quote and trade data that already is disseminated by the Network processors and stored by data vendors. The formula would not need to be calculated in real-time, nor would anyone other than the Network processors and other industry participants need to deal with the formula directly. Consequently, it does not appear that adoption of the formula would impose any additional "downstream" systems costs on vendors or broker-dealers. Indeed, if necessary, a single vendor could be retained by all three Networks to program and process the calculations required by the proposed formula, thereby potentially reducing the implementation costs by a significant amount. Comment is requested on the potential implementation costs of the proposed formula and on possible ways to minimize such costs.*

As noted above, Ameritrade is not taking a position concerning the proposed allocation except for noting that if market data costs are addressed comprehensively so they track costs, the allocation formula would be entirely different than that proposed.