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OFFICE OF THE SECRETARY

April 5, 2004

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth St., N.W.
Washington, DC 20549

Re: Request to Testify – Proposed Regulation NMS (File No. S7-10-04)

Dear Mr. Katz:

On March 16, 2004, the Nasdaq Stock Market, Inc. ("Nasdaq") requested to participate in the hearing concerning proposed Regulation NMS that was to be held on April 1, 2004, in Washington, DC. Because that hearing was postponed, Nasdaq is requesting to participate in the hearing scheduled for April 21, 2004, in New York.

Nasdaq is resubmitting its summary of intended testimony, which was filed originally on March 26, 2004.

If you have any questions concerning our request, you can contact me at 202.912.3030.

Sincerely,

Edward Knight

Enclosure

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SUMMARY OF TESTIMONY
OF
ROBERT GREIFELD
CHIEF EXECUTIVE OFFICE
AND PRESIDENT
THE NASDAQ STOCK MARKET, INC.
ON
PROPOSED REGULATION NMS
WASHINGTON, DC
APRIL 1, 2004

Trade-Through Proposal

The Securities and Exchange Commission ("SEC") believes its proposed trade-through rule could improve the price discovery process and contribute to depth and increase liquidity by encouraging market participant to quote aggressively and use limit orders. When coupled with adequate access among markets, the Commission believes the rule also could help reduce the effects of fragmentation and promote order interaction among competing markets. By applying a trade-through rule to the trading of Nasdaq-listed securities, the Commission also is promoting uniformity of regulation.

Nasdaq supports the goal of uniform regulation because it promotes fair competition and eliminates a "race to the regulatory bottom." However, the Commission should use its authority carefully and impose new rules only when facts demonstrate there is a problem that needs to be fixed. With respect to the trading of Nasdaq securities, this record does not exist. Moreover, the problems that a trade through rule can cause are clearly demonstrated in the market for listed securities – lack of intermarket competition and limited freedom of choice. Therefore, in the interest of equal regulation, Nasdaq believes investors' interests can be served best not by imposing a trade-through rule on the market where competition is the most intense, but instead by eliminating the rule where it dampens competition.

Investors have benefited from this competition in the Nasdaq market through lower prices and a wider range of services. If the Commission believes it cannot eliminate the trade-through rule for listed securities, and thus can achieve uniformity only by imposing the rule on Nasdaq securities, it must ensure that its proposal does not inadvertently eliminate competition and deprive broker-dealers and their customers of the freedom of choice they enjoy today.

The opt-out and automated/non-automated market exceptions if implemented properly should preserve freedom of choice and promote automated executions. However, there could be several unintended consequences that result from how the exceptions are presently structured. The opt-out exception will be burdensome to implement and administer for parties placing orders and those receiving them, which could limit its usefulness, thus defeating the Commission's attempt to preserve freedom of choice. In addition, the problems that exist today at slow markets could remain, even if all markets provide automated executions. In other words, an automated market can still be slow in executing orders – automation does not guarantee speed. Nasdaq believes the exceptions can be modified in a manner that preserves their investor protection aspects, while not creating undue burdens on market participants.

Market Access Proposal

The provisions of proposed Regulation NMS regulating market access seek to address many of the challenges posed by market fragmentation while preserving the benefits of competition. However, there are several respects in which the access proposal could be improved.

Access Fees. Nasdaq applauds the Commission for moving to address, on a market-wide basis, the issue of ECN access fees, which Nasdaq recently capped in its own market. Nasdaq is continuing to analyze the potential impacts of the proposal. At a minimum, however, Nasdaq believes that the final rule should make it clear that a self-regulatory organization ("SRO") retains the ability to submit proposed rule changes that regulate the access fees charged by broker-dealers within its own market.

Access Standards. Nasdaq supports the Commission's goal of mandating linkages among market centers. That said, Nasdaq believes that the Commission will have to be vigilant in overseeing the relations between market centers and broker-dealers that provide linkages. Nasdaq also believes that the proposal to broaden the fair access requirement for alternative trading systems ("ATSs") does not go far enough, and therefore endorses the Commission's alternative proposal to apply the fair access standard to all ATSs that provide their quotes to an SRO.

Locked/Crossed Markets. Nasdaq endorses the Commission's locked/crossed market proposal. Nasdaq believes, however, that an exception is necessary to the rule for the quotes of an automated market that lock or cross the quotes of a manual market, or a market that is experiencing a system delay or malfunction. Nasdaq also believes that the Commission must work closely with market centers and market participants to ensure that the rule is implemented and enforced on a consistent basis across markets.

Market Data Proposal

Nasdaq welcomes the Commission's efforts to address the "serious economic and regulatory distortions caused by the current Plan formulas." In Nasdaq's view, however, the Commission cannot use market data revenue alone to effect regulatory policy. The Commission, by focusing on a few symptoms of regulatory distortion, such as print shops and wash sales, misses the underlying problem: government-mandated data consortia that collect substantial data revenue and then distribute it to without regard for regulatory policy. To achieve regulatory excellence, the Commission must set high standards of regulation and then ensure that each SRO commits its share of the resources needed to meet those standards.

The Commission should eliminate the enticement to engage in substandard regulatory behavior: market data revenue sharing programs. In July of 2002, the Commission abrogated several member revenue sharing programs out of concern for their impact on SRO regulation. Nasdaq believes that the Commission's concerns were well founded. Several markets use member revenue sharing programs to simply buy trade reports, and when the Commission adds quoting to the formula, those markets will buy quotes too. Accordingly, we urge the Commission to ban member revenue sharing programs.

The Commission should also reduce the role of national market system plans by reducing the amount of data subject to those plans. Reducing the scope of plan data would reduce the importance of the plan allocation formulas and increase the data that SROs could distribute independently. Nasdaq strongly urges the Commission to reconsider both the competing consolidator and partial-deconsolidation models, as set forth in the report of the Seligman Commission. At the most, only the national best bid and offer ("NBBO") should be subject to a national market system plan.

Nasdaq applauds the Commission for reducing the scope of "consolidated" data that market data vendors and broker/dealers must display. The Commission, by eliminating the current montage requirement and limiting the definition of consolidated information to the NBBO and last sale, has eliminated the forced display of what in many cases is excessive data. The Commission also affirmed Nasdaq's ability to sell its market maker quotes independently and to remove those quotes from the national market system plans.

While Nasdaq believes that simply modifying the existing formulas is insufficient, the proposed modifications appear well designed to accomplish the laudable goal of rewarding active quoting across all securities, but the formula is likely to substitute a new set of distortions for the existing ones. For example, rewarding time at the inside disadvantages faster markets by enabling slower markets to quote in greater size without reporting any trades. Also, Nasdaq agrees that the Security Income Allocation ("SIA") methodology will reduce the disparity between the value of data of the most active and least active securities. In fact, applying the SIA square root methodology across all three networks in aggregate rather than applying it separately within each network would reduce the differences that exist today between the values of trades reported to the different networks.

Sub-Penny Proposal

Nasdaq welcomes the Commission's sub-penny quoting proposal. Nasdaq is pleased that this proposal fully addresses the issues raised in Nasdaq's August 2003 petition on this subject and is gratified that the information presented in that petition was of help to the Commission. Nasdaq believes that a uniform approach to sub-pennies across all market centers continues to be an important objective and expects that the Commission's current proposal will help achieve it.

Nasdaq notes that under the Commission's proposal, sub-penny quoting for stocks priced below one dollar would still be permitted. Since Nasdaq's own rules currently prohibit all sub-penny quoting, Nasdaq plans to assess the desirability of amending its rules to permit sub-penny quoting for the under-one-dollar stocks. Nasdaq expects to make this decision once the Commission finalizes the terms of this new rule, and Nasdaq will, of course, submit any possible proposed Nasdaq rule changes for Commission review.

Nasdaq also believes that the Commission's sub-penny quoting proposal raises different and distinct issues from those raised by the other Regulation NMS proposals. To avoid possible unnecessary delays, Nasdaq would support establishing a separate review and approval process for the sub-penny proposal.

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