THE NASDAQ STOCK MARKET
ONE LIBERTY PLAZA, 50TH FLOOR
NEW YORK, NY 10006

December 13, 2005

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Securities Exchange Act Release No. 52559; File Number 10-131

Dear Mr. Katz:

On November 9, 2000 and March 15, 2001, The Nasdaq Stock Market, Inc. ("Nasdaq") filed an Application on Form 1 to register as a national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934 (the "Act"). Nasdaq filed Amendments Nos. 1, 2, 3, 4, and 5 to its Form 1 on November 14, 2001, December 5, 2001, January 8, 2002, August 15, 2005, and September 23, 2005, respectively. Amendment No. 4 superseded and replaced Nasdaq's original filing and intervening amendments. In Amendment No. 4, Nasdaq proposed the creation of a limited liability company, The NASDAQ Stock Market LLC ("NASDAQ LLC"), that would be registered as a national securities exchange. Nasdaq will transfer all or substantially all of its assets and liabilities to NASDAQ LLC and other subsidiaries and will become a holding company. Notice of Amendment Nos. 4 and 5 was published for comment in the Federal Register on October 11, 2005,[1] and the comment period closed on November 10, 2005. In this letter, Nasdaq is submitting its response to comments filed by interested persons.

Comments Supportive of Exchange Registration

Amendment Nos. 4 and 5 are themselves a response to comments presented by a range of interested parties with respect to Nasdaq's original application for exchange registration during a comment and review process that has spanned more than four years. Specifically, Amendment Nos. 4 and 5 reflect the following key changes from the original application:

1) each of NASDAQ LLC's transaction execution systems will operate in accordance with principles of price/time priority;

[1] Securities Exchange Act Release No. 52559 (October 4, 2005), 70 FR 59097 (October 11, 2005).

2) the rules of NASDAQ LLC do not assert authority to regulate the reporting of transactions that are not effected through NASDAQ LLC transaction execution systems;

3) twenty percent of the directors and key standing committees of NASDAQ LLC will be elected by its members, in accordance with Securities and Exchange Commission (the "Commission" or the "SEC") interpretations of the scope of the statutory requirement to provide for a fair representation of members; and

4) the NASDAQ LLC Board of Directors will establish a Regulatory Oversight Committee ("ROC") composed of directors that are affiliated neither with management, members, or issuers.

The comments received on Amendment Nos. 4 and 5, in turn, reflect a recognition by market participants, key Members of Congress, and even to a certain extent Nasdaq's competitors that Nasdaq's application is consistent with applicable legal requirements and sound public policy and therefore merits prompt approval. Significantly, some parties that filed comments critical of Nasdaq's initial application have simply opted not to file comments on the amended application. Moreover, letters voicing support of the application have been submitted by thirteen members of the Banking Committee of the United States Senate,[2] twenty-five members of the Financial Services Committee of the House of Representatives,[3] the Security Traders Association ("STA"),[4] the Securities

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[2] Letter from the Honorable Christopher Dodd, United States Senate, to the Honorable Christopher Cox, Chairman, SEC (November 22, 2005); Letter from the Honorable Thomas R. Carper, United States Senate, to the Honorable Christopher Cox, Chairman, SEC (November 22, 2005); Letter from the Honorable Chuck Hagel, the Honorable Tim Johnson, the Honorable Mike Crapo, the Honorable John Sununu, the Honorable Evan Bayh, the Honorable Mike Enzi, the Honorable Wayne Allard, the Honorable Elizabeth Dole, the Honorable Jim Bunning, the Honorable Robert Bennett, and the Honorable Rick Santorum, Members of Congress, to the Honorable Christopher Cox, Chairman, SEC (November 9, 2005).

[3] Letter from the Honorable Vito Fossella, United States House of Representatives, to Jonathan G. Katz, Secretary, SEC (November 8, 2005); Letter from the Honorable Carolyn McCarthy, United States House of Representatives, to Jonathan G. Katz, Secretary, SEC (November 3, 2005); Letter from the Honorable Ginny Brown-Waite, the Honorable David Scott, the Honorable Spencer Bachus, the Honorable Sue Kelly, the Honorable Paul Gillmor, the Honorable Patrick Tiberi, the Honorable Christopher Shays, the Honorable Steven LaTourette, the Honorable Ed Royce, the Honorable Tom Feeney, the Honorable Gregory Meeks, the Honorable Michael Fitzpatrick, the Honorable Jeb Hensarling, the Honorable Dennis Moore, the Honorable Stephen Lynch, the Honorable Darlene Hooley, the Honorable Brad Miller, the Honorable Donald Manzullo, the Honorable Jim Matheson, the Honorable Brad Sherman, the Honorable Mike Castle, the Honorable Gresham Barrett, and the Honorable Emanuel Cleaver, United States House of Representatives, to Jonathan G. Katz, Secretary, SEC (October 31, 2005).

[4] Letter from James A. Duncan, Chairman, and John C. Giesea, President/CEO, Security Traders Association, to Jonathan G. Katz, Secretary, SEC (November 18, 2005).

Traders Association of New York,[5] J.P. Morgan Securities, Inc.,[6] and the International Securities Exchange, Inc. ("ISE").[7] With regard to these letters, we especially note the comments of the ISE and the Security Traders Association in support of NASDAQ LLC's proposed regulatory structure, which we believe correctly characterize the benefits of the proposal. Specifically, we believe that it would be inappropriate to impose managerial responsibilities upon members of a self-regulatory organization's ("SRO") board of directors; rather, NASDAQ LLC's ROC will, consistent with the traditional function of corporate directors, monitor the adequacy and effectiveness of the regulatory program. Its monitoring function will include authority to review NASDAQ LLC's regulatory budget and a requirement to meet regularly in executive session with NASDAQ LLC's Chief Regulatory Officer ("CRO"). The CRO, in turn, will report to NASDAQ LLC's CEO, to ensure that both the CEO and the CRO are fully accountable for the effectiveness of the regulatory program.

Comments Regarding Use of OATS Data

In its notice of publication of Amendment Nos. 4 and 5, the Commission specifically requested comment from interested parties "on the extent to which Nasdaq should be able to use OATS data for non-regulatory purposes" and "whether Nasdaq should have access to OATS data regarding: (1) all orders its members receive, including those orders that are routed to markets other than Nasdaq; and (2) reports of executions by its members that are reported to the new NASD trade reporting facility."[8] In response to this request, Bloomberg L.P. filed a comment letter firmly asserting that NASDAQ LLC should not be permitted to use OATS data for non-regulatory purposes.[9] In addition, although the letter is not entirely clear, it further appears to argue that (i) NASDAQ LLC should not have access to OATS data regarding orders that are executed

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5 Letter from Michael Santucci, President; Kimberly Unger, Executive Director; and Stephen J. Nelson, Co-Chair, STANY Trading Issues Committee; Security Traders Association of New York, to Jonathan G. Katz, Secretary, SEC (November 8, 2005).

6 Letter from James T. Brett, Managing Director, J.P. Morgan Securities Inc., to Jonathan G. Katz, Secretary, SEC (November 4, 2005).

7 Letter from Michael J. Simon, Secretary, International Securities Exchange, Inc., to Jonathan G. Katz, Secretary, SEC (November 3, 2005).

8 79 FR at 59097. In Securities Exchange Act Release No. 52049 (July 15, 2005), 70 FR 42398 (July 22, 2005) (SR-NASD-2005-087), the NASD proposed the establishment of a new limited liability company, The Trade Reporting Facility LLC (the "TRF"), that would operate for the purpose of collecting reports of trades in securities subject to SEC-approved transaction reporting plans (i.e., securities listed on Nasdaq, the NYSE, the American Stock Exchange, or a regional exchange). NASD will be the SRO Member of the LLC, which will be operated as a facility under the NASD's license as a national securities association, while Nasdaq or a subsidiary of Nasdaq would maintain business and technological responsibility and authority over the LLC.

9 Letter from Kim Bang, Bloomberg, L.P., to Jonathan G. Katz, Secretary, SEC (November 17, 2005).

outside of NASDAQ LLC and (ii) NASDAQ LLC should not have access to data of any sort associated with the TRF. The STA's letter states its "understanding that NASDAQ's sole use of OATS information is for regulatory purposes" and opposes any broader use.[10]

The Commission's Order dated August 8, 1996 (the "1996 Order"),[11] issued in connection with a Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Market, mandated the creation of OATS by the NASD, and Commission staff has made it clear that NASDAQ LLC will continue to be subject to all material terms of this Order as an exchange. Accordingly, NASDAQ LLC's proposed 6000 Series rules incorporate the NASD's OATS rules by reference, thereby subjecting all members of NASDAQ LLC (including those who are not members of the NASD) to OATS rules. Because the NASD will administer the NASDAQ OATS rules pursuant to the Regulatory Services Agreement (the "Regulatory Contract") with NASDAQ LLC, however, Nasdaq members will comply with their obligations under these rules by submitting OATS data to the NASD, whether they are NASD members or not. Because NASDAQ LLC, as an SRO, will retain ultimate legal responsibility for regulatory functions administered by the NASD under the Regulatory Contract, however, there will undoubtedly be circumstances under which regulatory employees of NASDAQ LLC will need to have access to OATS data regarding its members.[12]

For example, if the NASD, acting on behalf of NASDAQ LLC pursuant to the Regulatory Contract, initiates a disciplinary action against a Nasdaq member and uses OATS data to support its case, an appeal of the case to the Nasdaq Review Council and/or the NASDAQ LLC Board of Directors, as provided for in NASDAQ LLC's proposed 9000 Series rules, would require NASDAQ regulatory staff to have access to the data in question. Moreover, limiting regulatory access to the data based on where an order is ultimately executed would be consistent neither with effective rule enforcement nor the 1996 Order. Since OATS is designed to provide a comprehensive audit trail to ensure that members cannot mask violative activity by spreading it across multiple venues, regulatory access to all the data is necessary. For example, OATS data regarding held customer limit orders that are ultimately executed outside of NASDAQ may be necessary to investigate and initiate action with respect to a NASDAQ market maker that trades ahead of such orders. Accordingly, the 1996 Order requires an audit trail beginning with order receipt "documenting the life of the order through the process of

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[10] See STA Letter, supra n. 4. The STA's letter also urges the Commission to set a date for NASDAQ LLC to operate as an exchange that is sufficiently far in the future to allow "examination and remedy of … subtle issues that may occur with exchange status." Although we believe that NASDAQ LLC should be permitted to operate as an exchange as soon as it joins relevant national market system plans, we are committed to working closely with the Commission, market participants, and issuers to ensure a smooth transition to exchange status.

[11] Securities Exchange Act Release No. 37538 (August 8, 1996).

[12] NASDAQ LLC would not, however, have access to OATS data regarding NASD members who are not also members of NASDAQ LLC.

execution" without regard to the venue of execution. Although, as Bloomberg posits, there may be limits on an SRO's authority to regulate trading on other venues, this does not mean that regulatory staff should be denied access to data that is necessary to effectively prosecute violations occurring on the SRO's own systems.

Nasdaq was surprised to see the question of commercial use of OATS data highlighted in the Commission's notice, however, since Nasdaq has not actually proposed to make commercial use of this data. In the past, Nasdaq has publicly recognized that OATS data exists solely because of regulatory needs and should therefore not be commercialized,[13] and we hereby reaffirm our commitment with regard to use of OATS data. In the past, we have also expressed the view to Commission staff that occasional, and carefully controlled, use of OATS data by Nasdaq's Department of Economic Research to study public policy issues, such as sub-penny trading and decimalization, does not constitute a commercial use of the data. Nevertheless, because of expressed concerns that it may be difficult to draw a line between studies that have clear public policy benefits and those that are commercial in nature, Nasdaq further commits that its Department of Economic Research will not use OATS data for any reason without obtaining the prior consent of the Commission's Division of Market Regulation. If Nasdaq were to seek such consent, it would submit a letter to the Director of the Division detailing the study to be conducted, the public policy benefits of the study, and the reasons why OATS data would be necessary to conduct the study. Staff of the Division would be free to reject any or all such requests, and Nasdaq would abide by the terms of all guidance received.

Finally, we note that Bloomberg seems to expand upon the Commission's stated request regarding OATS data and makes a generalized statement that NASDAQ LLC should not have access to "data from the NASD Trade Reporting Facility." To the extent that this concern is limited to OATS data, for the reasons discussed above, Nasdaq rules would require Nasdaq members to submit OATS data regarding orders ultimately reported to the TRF, but Nasdaq would have access to such data strictly for regulatory purposes. Nasdaq would not, however, have access to OATS data submitted by NASD members who are not also Nasdaq members.

To the extent that Bloomberg's comment concerns trade reports submitted to the TRF generally, however, it is in effect a comment opposing the TRF itself, since the NASD's filing regarding the TRF contemplates that Nasdaq or a subsidiary thereof would operate the TRF, and in doing so, would have access to data regarding the trades reported to it. As the party responsible for managing the business affairs of the TRF and receiving an allocation of all of its profits and losses, Nasdaq may make commercial use of the trade reporting data associated with TRF trades, just as it makes commercial use of comparable data today. Because it is not possible to reconcile Bloomberg's concern with the stated purposes of the TRF, we discuss this comment below in the context of other

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[13] See, e.g., Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) (SR-NASD-99-53).

comments linking criticisms of NASDAQ LLC's exchange application to opposition to the TRF.

Comments by Nasdaq's Competitors

The New York Stock Exchange ("NYSE") repeats arguments that it made in an August 2005 comment letter in opposition to the TRF,[14] and is joined in its efforts by its merger partner, Archipelago Holdings ("Arca Holdings").[15] Because Nasdaq provided its views with regard to many of the NYSE's arguments in an October 2005 letter to the Commission, we attach a copy of that letter to facilitate review. We highlight, however, the fact that the TRF proposal relies upon the precedent established by the operation of the Archipelago Exchange ("ArcaEx") as a facility of the Pacific Exchange, Inc. ("PCX") during the period prior to Arca Holdings' acquisition of PCX.

Specifically, this precedent permits an SRO to use a third party to provide services; in return for the services and payment of associated costs, the third party may receive the related revenues. Since 2002, Arca Holdings has operated ArcaEx as the exclusive equities trading facility of PCX. In approving PCX's arrangement with ArcaEx, the Commission found that "the PCX's proposal to establish ArcaEx as an exchange facility is consistent with the Act, as well as with previous proposals of national securities exchanges … to use the personnel and equipment of third parties to operate trading platforms."[16] In return for its services, ArcaEx has received all transaction fees, all market data fees and all listing fees from the operation of ArcaEx, and has made commercial use of associated trade reporting data. Similarly, the TRF reflects an agreement between NASD and Nasdaq, pursuant to which Nasdaq or one of its subsidiaries is responsible for the business operations and technology of a system to collect reports of trades otherwise than on an exchange ("Non-System Trades"), pays all associated costs, and receives all associated revenues, including revenues derived from market data products based on these trade reports.

In its latest letter, NYSE contends that market data revenue may not be used to compensate Nasdaq for the services that it would provide to the TRF because, it contends, such revenues should be used by NASD to recover regulatory costs. Because

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14 Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (November 10, 2005). See also Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (August 12, 2005) (the "August Letter").

15 Letter from Kevin J.P. O'Hara, Chief Administrative Officer and General Counsel, Archipelago Holdings, Inc., to Jonathan G. Katz, Secretary, SEC (November 10, 2005).

16 Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55229 (November 1, 2001) (SR-PCX-00-25). We note that the precedent is not limited to operation of exchange facilities, as the Commission cited the operation of the OptiMark System, a system formerly operated by OptiMark Services Inc., as a facility of the NASD in support of its determination regarding ArcaEx's operation as a facility of PCX. Id. at 55229 & n.61.

Nasdaq is responsible for ensuring payment of all regulatory and other costs associated with the TRF, however, a sizeable portion of these revenues will be used for precisely the purpose that NYSE believes they should be used. NYSE further contends, however, that no portion of such revenues may be used to defray the operational expenses incurred by Nasdaq in running the technology that will support the TRF, unless perhaps this is done pursuant to a "vanilla, cost-recovery facility management agreement." As ArcaEx was not held to a similar limitation when it arranged to operate PCX's equity trading facility, however, the NYSE does not appear to have a principled basis for its contention that Nasdaq may not earn a return on its commitment of capital to the operation of TRF. Similarly, to the extent that Bloomberg appears to argue that the TRF should not be permitted to make commercial use of (non-OATS) TRF data, we believe that its argument is foreclosed by the ArcaEx precedent.

Although the NYSE has previously characterized the regulatory costs associated with operating the LLC as "moderate,"[17] in fact a significant portion of Nasdaq's current $41 million regulatory budget is attributable to regulation of Non-System Trades, and includes the allocated costs of on-site examinations by the NASD and operation of its advanced regulatory systems as well as the more labor-intensive analysis that is often associated with regulatory review of Non-System Trades. Moreover, the introduction of the TRF will be accompanied by regulatory changes that may have a profound impact on the allocation of market data revenue and the order routing practices of market participants, as well as changes to the competitive landscape that will offer market participants order execution choices not previously available. In particular, it should be noted that the adoption of the market data allocation formula of Regulation NMS will affect the revenues associated with the operation of the TRF, since it will not be eligible to earn a Quoting Share in connection with trades executed by NASD members and reported to it. Thus, the TRF will operate in an environment in which direct revenues will face new constraints while expenditures for regulatory services and technology maintenance and development continue as before.[18] The Commission should not give credence to the NYSE's remarks regarding the allegedly "fantastic multiple" that Nasdaq might be expected to earn from operating the TRF.

NYSE goes on to accuse the TRF of being a "scam" that is somehow contrary to the Commission's efforts through Regulation NMS's allocation formula to "decrease incentives to engage in sham trades, wash sale, tape shredding and the like." Although it is not clear, the NYSE appears to believe that all this will occur because the TRF allegedly perpetuates conflicts of interest and thereby threatens NASD's regulatory integrity and neutrality.

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17 See August Letter, supra n. 14.

18 We note that if the TRF's direct revenues prove inadequate to cover its operating and regulatory costs, Nasdaq will be responsible for making up the shortfall.

It is generally recognized that some degree of conflict of interest is inherent in the concept of an SRO because the SRO is called upon to regulate its own customers. Thus, it is posited that an SRO may be tempted to avoid strict regulation of members whose activities are key to its profitability. The proposed structures of both the TRF and NASDAQ LLC work to ameliorate the potential for conflict to an unprecedented extent, however, because the NASD will serve as regulator but not as market operator. Specifically, the conflict is mitigated in the case of the TRF because any profits associated with its operation do not accrue to the NASD. Thus, the NASD has little incentive to engage in less effective regulation of TRF trade reporting in order to boost its bottom line or increase executive remuneration. In contrast, the NYSE's current structure houses regulator and market under the same roof, albeit with a bifurcated management structure; nevertheless, the whole enterprise is affected by the profitability of the market.

In the case of NASDAQ LLC, although the exchange will retain ultimate responsibility for ensuring effective regulation of its members, its Regulatory Contract with the NASD vests front-line regulatory authority in the NASD, leaving NASDAQ LLC with oversight and appellate responsibilities. Thus, NASDAQ LLC will have no means by which to affect the investigatory and prosecutorial duties of NASD under the Regulatory Contract with respect to NASDAQ LLC members. For its part, the NASD intends to divest itself of all ownership interest in Nasdaq, so that its revenues will not be tied to the trading volumes of NASDAQ LLC or the TRF in any way.

NYSE and Arca Holdings also contend that internalization of orders is undesirable and should be discouraged. They further assert that internalization will increase if the TRF filing is approved, and therefore argue for its rejection. The merits of internalization are simply not at issue in either NASDAQ LLC's exchange application or the NASD's TRF filing, however, because rejection of either filing would not limit internalization, while approval of the TRF will simply ensure the broker-dealers can continue to use the technology that many of them currently use to trade report.

Notably, NYSE and Arca Holdings fail to articulate the mechanism through which an increase in internalization would occur under the TRF. Because the NYSE has previously posited that internalization exists primarily because of market data revenue sharing,[19] the NYSE may believe that revenue sharing will somehow increase following implementation of the TRF proposal and lead to more internalization.[20] We note,

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[19] See, e.g., Letter from Darla Stuckey, Corporate Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (July 2, 2004) (commenting on Regulation NMS).

[20] Arca Holdings does not share its merger partner's views with regard to revenue sharing, and recently supplemented its long-standing program for stocks listed on the NYSE and the American Stock Exchanges with a program to share revenue associated with cross orders in Nasdaq-listed stocks. Securities Exchange Act Release No. 52672 (October 25, 2005), 70 FR 66885 (November 3, 2005) (SR-PCX-2005-121).

however, that the extent of revenue sharing associated with the trades reported to the TRF (or similar competing platforms) will be a question for the NASD as well as Nasdaq and any competitors, since any fees and rebates associated with the TRF must be approved by the NASD and filed by the NASD with the Commission. We also note that although the Commission explicitly countenanced the continuation of revenue sharing programs in Regulation NMS,[21] the Regulation also reflects an effort to proactively manage the extent of internalization and revenue sharing through the adoption of the Order Protection Rule and changes to the formulae for allocation of market data revenues to SROs. For all of these reasons, we do not believe that a concern about greater internalization or revenue sharing may reasonably be cited as a reason for inaction on the NASD's TRF filing or NASDAQ LLC's exchange application. If the Commission concludes that these practices should be subject to greater regulatory limits, the appropriate course is an additional rulemaking.

NYSE also makes arguments concerning the competitive effects of the TRF. As Nasdaq has previously noted, the TRF is a non-exclusive arrangement (unlike PCX's arrangement with ArcaEx). Although NASD is the only registered national securities association, other technology providers may work with the NASD to develop systems for collecting reports of Non-System Trades and offer them to market participants under the umbrella of NASD regulation. However, the NYSE now contends simultaneously that the mere existence of the technology by which many market participants currently report Non-System Trades is a barrier to entry by others seeking to offer similar technology, and that entry should not occur because it would be "a recipe for chaos and confusion." Thus, uncertain whether competition is bad or impossible, NYSE advocates a forced sale of the Nasdaq-owned ACT system to NASD, after which it would be "constituted as a neutral, cost-based NMS facility."

Having experienced first-hand the challenges and ultimate benefits of competition in the markets for order execution and routing, Nasdaq finds little merit in the assertion that the existence of technology precludes the emergence of competitors or their ability to compete vigorously and add value if their product is more compelling to the marketplace. It is troubling that NYSE believes that forced monopolization and public utility-style ratemaking is preferable to greater competition. Certainly, the success of various electronic communications networks and routing service providers during the past decade demonstrates the ease with which new entrants can challenge the status quo, and the

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Significantly, a cross order is an internalized trade that prints to the tape after checking ArcaEx and other venues for price improvement opportunities. Similarly, the NYSE has a practice of "upstairs trading" in which internalized trades may be negotiated between brokers and then reported to the NYSE.

[21] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37567 n. 645 (June 29, 2005).

benefits that market participants can experience as a result.[22] Moreover, as discussed above, competition would likely not be premised on a race to share the most market data revenue, but rather on the quality and/or cost of the technology used to collect Non-System Trade reports. Competition could also have additional benefits in terms of prompting enhancements to the systems NASD uses to regulate Non-System Trades, and would certainly allow an allocation of the costs associated with such systems across multiple service providers. Set against these potential benefits, NYSE raises only the concern that anything but the status quo may result in confusion. Accordingly, we urge the Commission to reject NYSE's position.

In its letter, Arca Holdings focuses on the structure of the TRF and argues that it is a facility of Nasdaq and thereby would include Non-System Trades under the exchange registration that NASDAQ LLC seeks. Unfortunately, Arca Holdings must distort the facts in order to make its case. For example, Arca Holdings states that "Nasdaq controls the board, directs all business decisions, provides the technology, and reaps the economic benefit of the facility." However, the limited liability company agreement for the TRF clearly assigns the NASD sole responsibility for all duties or responsibilities of an SRO with respect to the TRF, granting the NASD direct authority with regard to TRF rules and rule filings and regulation of the TRF's activities and regulatory budget, and requiring consent of the NASD-appointed member of the TRF's Board of Directors with respect a range of activities, including pricing decisions, fundamental market structure changes, and entry into new lines of business. It is true that Nasdaq would receive the revenues associated with the TRF, because it would provide its connectivity and reporting technology and bear all costs associated with the facility. NASD, however, will provide the TRF its state-of-the-art surveillance technology and the expertise of its personnel. Thus, control is clearly shared between NASD and Nasdaq, and Nasdaq's authority with respect to business decisions is constrained by significant NASD regulatory prerogatives. The TRF limited liability company agreement further provides that, to the extent directly related to the TRF's activities, the books, records, premises, officers, directors, agents and employees of Nasdaq shall be deemed to be the books, records, premises, officers, directors, agents and employees of NASD for purposes of the Act, and that all such persons submit to the jurisdiction of the U.S. federal courts, the SEC, and the NASD for purposes of the federal securities laws and rules and regulations thereunder.

Having advanced the faulty premise that the TRF would be a facility of the NASDAQ LLC exchange, Arca Holdings then argues that the TRF is inconsistent with the concept of an exchange. The argument is simply a strawman, since NASDAQ LLC is not proposing to include the TRF within its market structure. Users of the TRF will be subject to NASD rules and will be required to be NASD members,[23] but will not be

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22 Cf. Press Release, United States Department of Justice, Department Of Justice Antitrust Division Statement On The Closing Of Its Two Stock Exchange Investigations (November 16, 2005) (available at www.usdoj.gov/atr/public/press_releases/2005/213062.htm).

23 A limited exception that exists for Canadian clearing organizations under NASD Rule 6120 would likely continue in effect.

required to be members of NASDAQ LLC and will not be subject to its regulatory authority with respect to their TRF trades. Moreover, TRF trades will be disseminated to the media with a modifier indicating the source of such transactions that would distinguish them from transactions executed on or through NASDAQ LLC, thereby avoiding any confusion in the marketplace as to the source of the trades. Thus, the TRF will not, as Arca Holdings asserts, "undermine the value and purpose of an exchange," since it will not be part of the exchange. The fact that Nasdaq may (or may not, depending on revenues) receive an economic benefit from operating a trade reporting system for the NASD is no more relevant than the fact that Arca Holdings received an economic benefit from operating a trading facility for PCX.

Comments on Matters Not Directly Related to Exchange Registration

Two comment letters raise concerns that are tangentially related to Nasdaq's application, but do not directly call into question the merits of Nasdaq's application. First, counsel for Nissan Motor Co., Ltd. ("Nissan"),[24] a Nasdaq-listed issuer whose securities are exempt from registration under Section 12 of the Act by virtue of Rule 12g3-2(b) under the Act, argues that Nasdaq's registration as an exchange, which will require Nasdaq-listed issuers to become registered under Section 12(b) of the Act, should not result in the loss by Nissan and a handful of similarly situated issuers of the "grandfathered" status that currently allows them to remain listed on Nasdaq without registration under Section 12. Alternatively, Nissan argues that these issuers should be accorded a transition period during which to determine whether to register under Section 12 or terminate their listings.

Nasdaq has discussed with Commission staff a process by which Nasdaq-listed issuers whose securities are registered under Section 12(g) of the Act may become registered under Section 12(b) without hardship to the issuers. Such a process would not benefit issuers such as Nissan, however, that have been exempted from registration under Section 12(g). Accordingly, Nasdaq has discussed with Commission staff the possibility of a continued exemption, but has also recognized that such an exemption may be inconsistent with Commission policy with respect to disclosure by exchange-listed issuers, and that in such event, unregistered issuers should be accorded a transition period during which to become registered. Nasdaq expects that in connection with exchange registration, it will submit a formal request to the Commission pursuant to which Nasdaq will seek a three-year exemption period for issuers such as Nissan to determine whether to register under Section 12(b) or delist. Nasdaq believes that such an exemption period is adequate to allow such issuers to weigh the benefits of continued listing and to undertake the work necessary to register under Section 12. Nasdaq also expects that its letter will allow Nasdaq to request registration under Section 12(b) for issuers that are currently registered under Section 12(g) (unless a particular issuers opts not to allow Nasdaq to submit such a request on its behalf).

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[24] Letter from Jeffrey W. Rubin, Partner, Hogan & Hartson, to Jonathan G. Katz, Secretary, SEC (November 9, 2005).

Second, several individuals associated with the International Association of Small Broker Dealers and Advisors express a concern that the NASD's recent revocation of its delegation to Nasdaq of regulatory responsibility for the Over-the-Counter Bulletin Board ("OTCBB") facility may diminish the quality of its market structure.[25] Although Nasdaq agrees with the commenters' remarks about the economic importance of issuers whose securities are quoted on the OTCBB and the need to promote policies and market structures that promote fairness and economic efficiency in this market tier, we believe that the submission of these comments in the context of Nasdaq's exchange application is misplaced. The NASD's revocation of its delegation to Nasdaq was submitted for public notice and comment by the National Association of Securities Dealers, Inc. ("NASD") in July 2005 and approved by the Commission in September.[26] Accordingly, the propriety of this revocation has already been determined by the Commission and is therefore not at issue in Nasdaq's exchange registration application. Indeed, it should be recognized that the NASD has always been responsible for the operation of the OTCBB; the change approved by the Commission diminishes Nasdaq's role in its operation by removing the regulatory authority that Nasdaq formerly exercised with regard to the facility, but Nasdaq continues to serve as technology provider for the facility. Moreover, although Nasdaq agrees with the commenters' contention that a national securities exchange could operate an automated quotation facility for penny stocks in accordance with Section 17B of the Act, there is clearly no obligation that any particular exchange do so, nor is there any legal basis for the commenters' view that exchange registration should be deferred until NASD provides a detailed plan with regard to its operation of the OTCBB.

Comments by A Litigant Against Nasdaq

Finally, comments were filed by Steven I. Weissman, an individual who has sued Nasdaq and NASD in a civil lawsuit that is pending in the United States District Court for the Southern District of Florida,[27] and that is currently on interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit.[28] Because Mr. Weissman's comments largely reiterate the arguments that he has presented in that litigation, we refer the Commission and its staff to the filed pleadings in the case, which Nasdaq would be happy to make available for review upon request.[29] We note, however, that

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25 Letter from Brad Smith, Peter Chepucavage, Stephen Boyko, Frank McAuliffe, and Steven Brock, to Jonathan G. Katz, Secretary, SEC (October 12, 2005).

26 Securities Exchange Act Release No. 52508 (September 26, 2005), 70 FR 57346 (September 30, 2005) (SR-NASD-2005-089).

27 Case No. 03-61107-CIV-ZLOCH (filed June 9, 2003).

28 Case No. 04-13575-EE.

29 Mr. Weissman's contention that Nasdaq violated Section 17(b) of the Securities Act of 1933 by allegedly "touting" Nasdaq-listed companies in an April 2002 Wall Street Journal advertisement was not squarely presented, as a federal question, on the face of his complaint. His other causes of action, however, do rely on the same underlying conduct that Mr. Weissman alleges constituted

Mr. Weissman's primary assertion in his comment letter – that an SRO may not operate as a for-profit corporation – has been rejected by the Commission on numerous occasions.[30] We also note that the letter reflects a misunderstanding of the NASDAQ LLC's proposed ROC. Under Article III, Section 5 of the proposed By-Laws of NASDAQ LLC, the ROC would be composed of three directors, each of whom must be a Public Director (as defined in the By-Laws) and an independent director (as defined by Nasdaq's listing standards for public companies). Thus, under those dual requirements, a director would be eligible to serve on the ROC only if he or she has no material business relationship with Nasdaq, a Nasdaq Member, NASD, or an issuer whose securities are listed on Nasdaq. As stated in the Form 1, Nasdaq expects that some of the members of the Nasdaq's audit committee may serve on NASDAQ LLC's ROC, but this would not alter the compositional requirements of the ROC. Thus, contrary to Mr. Weissman's assertions, a director employed by a broker-dealer in any capacity would not be eligible to serve on the ROC.[31]

* * *

Nasdaq filed its first submission seeking to become an exchange more than five years ago. Since that time, all interested parties have had an ample opportunity to examine and comment on Nasdaq's filings during two formal comment periods and an informal comment period that has spanned more than four years. The issues presented by the application have been debated by SEC Commissioners and SEC staff, in Congressional hearings, and in the press. Nasdaq has adapted its operations and its proposal to respond to comments and to keep pace with the rapidly changing regulatory and competitive landscape. At the end of this exhaustive process, we believe that we have

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"touting" of Nasdaq-listed companies. Nasdaq disputes that it has engaged in any such "touting;" moreover, the elements of 17(b) are not satisfied by the actions Mr. Weissman describes.

30 Securities Exchange Act Release No. 42983 (June 26, 2000), 65 FR 41116 (July 3, 2000) (SR-NASD-00-27) (approving amendments to Nasdaq's certificate of incorporation and by-laws necessary for private placement of Nasdaq's common stock). See also Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (adopting Regulation ATS and expressing the Commission's "view that registered exchanges may structure themselves as for-profit organizations"); Securities Exchange Act Release No. 51149 (February 2, 2005), 70 FR 7531 (February 14, 2000) (SR-CHX-2004-26); Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08); Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-PHLX-2003-73).

31 With regard to the director and former director mentioned in Mr. Weissman's filing, it should be noted that Mr. E. Stanley O'Neal is not, in any event, one of Nasdaq's current directors, and as a broker-dealer employee, he would not be eligible to serve on the ROC if he were. Dr. John D. Markese is the President and CEO of the American Association of Individual Investors, a not-for-profit organization providing investment education to individual investors. Because he satisfies the independence criteria for the ROC, he would be eligible for service on it, and nothing in Mr. Weissman letter calls into question his qualifications to serve in that capacity.

fully demonstrated NASDAQ LLC's qualifications to be registered as a national securities exchange, and respectfully request that the Commission conclude the process through the issuance of an order to approve the application.

We thank the Commission for providing this opportunity to provide our views. If you have any question, please do not hesitate to call me at (301) 978-8480.

Sincerely,

Edward S. Knight

Edward S. Knight
Executive Vice President and
General Counsel

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

Attachment: Letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, SEC (October 13, 2005)

THE NASDAQ STOCK MARKET
ONE LIBERTY PLAZA, 50TH FLOOR
NEW YORK, NY 10006

October 13, 2005

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Securities Exchange Act Release No. 52049 (SR-NASD-2005-087)

Dear Mr. Katz:

Although the comment period on the above-captioned filing has closed, staff of the Division of Market Regulation of the Securities and Exchange Commission (the "Commission" or the "SEC") have indicated that it would be appropriate for The Nasdaq Stock Market, Inc. ("Nasdaq") to file a comment letter for the purpose of providing Nasdaq's views to the Commission regarding the filing and the New York Stock Exchange's (the "NYSE") comment letter on it.[1] Nasdaq welcomes the opportunity to do so.

In SR-NASD-2005-087,[2] the National Association of Securities Dealers, Inc. ("NASD") proposed the establishment of a new limited liability company, tentatively named The Trade Reporting Facility LLC (the "LLC"), that would operate for the purpose of collecting reports of trades in securities subject to SEC-approved transaction reporting plans (i.e., securities listed on Nasdaq, the NYSE, the American Stock Exchange, or a regional exchange). The LLC would be regulated by the NASD in accordance with rules approved by the NASD Board of Governors and filed with the SEC. Nasdaq or a subsidiary of Nasdaq would serve as technology provider and business manager of the LLC, and as consideration for its services, would receive the revenues associated with its operation (net of all associated costs, including costs incurred by NASD in connection with the regulation of the LLC and NASD members' use of it). As discussed in more detail below, this proposed structure relies upon the precedent established by the operation of the Archipelago Exchange ("ArcaEx") as a facility of the Pacific Exchange, Inc. ("PCX"), a precedent from which the NYSE itself expects to gain

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1 See Letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (August 12, 2005) (the "2005 Letter").

2 Securities Exchange Act Release No. 52049 (July 15, 2005), 70 FR 42398 (July 22, 2005) (SR-NASD-2005-087).

substantial benefits through its acquisition of ArcaEx, its parent, Archipelago Holdings, Inc. ("Arca Holdings"), and PCX.

For nearly five years, the NYSE has lobbied tirelessly against the efforts of Nasdaq, its primary competitor, to register as a national securities exchange. Through exchange registration, Nasdaq seeks to complete its transition from a wholly owned subsidiary of the NASD to an independent public company, thereby, among other things, eliminating any remaining perception of a conflict of interest between Nasdaq's business and the regulatory functions performed by the NASD and achieving greater flexibility in its business operations. The focus of the NYSE's challenge to exchange registration has been on Nasdaq's view that Congress and the SEC have defined the term "exchange" with sufficient breadth to allow a variety of market models,[3] including one in which an exchange may regulate the collection of reports of trades executed by its members. The NYSE, by contrast, has contended that an electronic exchange may regulate only transactions executed directly through the systems operated by the exchange ("System Trades"), and that only the NASD, by virtue of its status as the sole national securities association, may regulate the collection of trade reports for transactions executed through other means ("Non-System Trades").

Although Nasdaq continues to question the legal basis for the NYSE's conclusions with regard to allocation of regulatory responsibility, it is clear that the NASD's LLC filing, and an amended exchange registration filing published for comment in the Federal Register on October 11, 2005,[4] fully accommodate the NYSE's views with regard to appropriate regulation of Non-System Trades. As a result, the NYSE must resort to unsupported assertions and factual misstatements in its ongoing effort to prevent Nasdaq from achieving exchange status. The NYSE's central assertion with regard to the LLC is that it violates various provisions of law. Rather than explain its views in the context of the NASD's actual proposal, however, the NYSE attaches 24 pages of stale comment letters on Nasdaq's original exchange registration filing.[5] The NYSE appears to believe the following points from these letters to be relevant:

Regulation of Non-System Trades: In the 2001 and 2002 Letters, the NYSE argued that as an exchange, Nasdaq may not adopt rules that regulate the reporting of Non-System Trades, because they allege that there is not an adequate nexus between the rules and the exchange. This argument is entirely irrelevant to the NASD proposal and

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[3] See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70852 (December 22, 1998) ("Nasdaq's use of established, non-discretionary methods bring it within the revised interpretation of "exchange" in Rule 3b-16.").

[4] Securities Exchange Act Release No. 52559 (October 4, 2005), 70 FR 59097 (October 11, 2005) (File No. 101-131).

[5] See Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (August 27, 2001) (the "2001 Letter"); Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (February 15, 2002) (the "2002 Letter") (collectively, the "2001 and 2002 Letters").

Nasdaq's amended exchange registration application. All rules relating to the reporting of Non-System Trades will be NASD rules. The only trade reporting rules to be adopted by Nasdaq as an exchange will be rules to provide for the automated reporting of transactions executed through Nasdaq's automated transaction execution facilities.

Nevertheless, in its 2005 Letter, the NYSE distorts the facts in an effort to preserve this argument. The NYSE states that the LLC "in reality, … is a Nasdaq facility", that "Nasdaq controls the entity", and that "Nasdaq administers the rules regulating the [LLC and] regulates the [LLC's] activities." However, the limited liability company agreement for the LLC clearly assigns the NASD sole responsibility for all duties or responsibilities of a self-regulatory organization with respect to the LLC, granting the NASD direct authority with regard to LLC rules and rule filings and regulation of the LLC's activities and regulatory budget, and requiring consent of the NASD-appointed member of the LLC's Board of Directors with respect a range of activities, including pricing decisions, fundamental market structure changes, and entry into new lines of business. The agreement further provides that, to the extent directly related to the LLC's activities, the books, records, premises, officers, directors, agents and employees of Nasdaq shall be deemed to be the books, records, premises, officers, directors, agents and employees of NASD for purposes of the Act, and that all such persons submit to the jurisdiction of the U.S. federal courts, the SEC, and the NASD for purposes of the federal securities laws and rules and regulations thereunder.

Transaction Reporting Plans: In the 2001 and 2002 Letters, the NYSE argued that under SEC Rule 11Aa3-1(b)(1) and the terms of the Consolidated Tape Association Plan (the "CTA Plan"), Non-System Trades must be reported through the NASD and must be clearly identified as Non-System Trades when disseminated to investors. The NYSE further argued that Nasdaq's proposal to allow reporting of Non-System Trades through Nasdaq would be misleading and cause confusion. Again, the NYSE's four-year old argument has no relevance to the proposal on which the NYSE is commenting. Trades reported to the LLC will be reported pursuant to NASD rules. Moreover, as SR-NASD-2005-087 clearly states: "Based on discussions with SEC staff, NASD is also noting that it intends to work with the appropriate parties to ensure that Trade Reporting Facility and [Alternative Display Facility ("ADF")] transactions are disseminated to the media with a modifier indicating the source of such transactions that would distinguish them from transactions executed on or through the Nasdaq Stock Market."[6]

Rather than accept the fact that the plain meaning of this statement is entirely consistent with the arguments made by the NYSE in the 2001 and 2002 Letters, the 2005 Letter asserts that the proposal "seems designed to permit Nasdaq to publicly claim credit for off-exchange trades and thereby inflate its trading share", and to compromise "the transparency and utility of market data." In other words, in the NYSE's view, distinguishing LLC trades from trades executed through Nasdaq's electronic systems will

[6] 70 FR at 42402.

allow Nasdaq to conflate the two types of trades, while clearer disclosure will result in less transparency. The logic of these conclusions is elusive, to say the least.

LLC trades will be reported using technology provided by Nasdaq. Nasdaq accepts the fact that it cannot claim that these trades are executed through its exchange systems, however. The separate identification of these trades will make their regulatory status abundantly clear to all investors. Accordingly, it is time for the NYSE to abandon this line of argument and recognize that the proposal achieves the result that it has long advocated.

Fair Competition. In the 2001 and 2002 Letters, the NYSE argued that Nasdaq's receipt of market data revenues associated with Non-System Trades would be inconsistent with principles of fair competition and equal regulation enshrined in the Securities Exchange Act of 1934 (the "Act"). The NYSE reiterates this argument in the 2005 Letter, contending that the NASD may not "divert" revenue that might otherwise be used by NASD or its members and asserting that no effort has been made to explain why Nasdaq should receive economic benefits from trades reported to the LLC. It is surprising that the NYSE should continue this line of argument in 2005 after entering into a merger agreement with Arca Holdings, the entity that has made the most effective use of the Commission precedent that the NASD and Nasdaq are proposing to follow; specifically, this precedent permits a self-regulatory organization to use a third party to provide services, and, in return for services provided, the third party may receive the related revenues. Since 2002, Arca Holdings has operated ArcaEx as the exclusive equities trading facility of PCX. The Commission found that "the PCX's proposal to establish ArcaEx as an exchange facility is consistent with the Act, as well as with previous proposals of national securities exchanges … to use the personnel and equipment of third parties to operate trading platforms."[7] Thus, although neither Arca Holdings nor any of its subsidiaries are registered with the SEC as a self-regulatory organization, according to Arca Holdings' most recent annual report on Form 10-K, ArcaEx has "the right to receive all transaction fees, all market data fees and all listing fees from the operation of ArcaEx." Arca Holdings has, in turn used these fees to enhance its electronic trading platform and to enter into an agreement to acquire the PCX's regulatory license to operate an options exchange, thereby making itself an attractive merger partner for the NYSE.

Nevertheless, the NYSE contends that the NASD may not enter into an arrangement with a third party to operate the LLC, even if the third party is itself an SRO. The NYSE's only basis for this conclusion appears to be a belief that the NASD, as a national securities association, should be treated differently from all other SROs. The NYSE's argument, however, finds no support in the Act and is belied by the ArcaEx order itself, which cited approval of the Nasdaq's operation of the OptiMark System as a

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[7] Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225, 55229 (November 1, 2001) (SR-PCX-00-25).

facility of the NASD in support of its determination regarding ArcaEx's operation as a facility of PCX.[8] The conclusion also lacks a policy justification, since it would deprive NASD of the flexibility enjoyed by exchanges in using their revenues to contract with third parties to provide technology solutions that meet the needs of their members and fulfill their regulatory obligations. Nevertheless, the NYSE goes so far as to suggest that unless the NASD uses all tape revenue to fund regulation or reduce fees, the Commission should adopt punitive amendments to the national market system plans that would bar it from receiving any market data revenue. The NYSE makes no effort to supply the Commission with a legal basis for the arbitrary rulemaking that it proposes, but it is difficult to see how the Commission could earmark all NASD market data dollars for regulation or fee reductions, thereby leaving none for procurement or development of the systems being regulated. It is equally difficult to understand how the Commission could impose such a restraint upon one SRO without also imposing it on the NYSE.

The NYSE claims to be troubled at once by the fact that the LLC reflects an arrangement with only "one of several competing exchanges" and that it is "totally redundant with the NASD's existing ADF." The NYSE also proposes that the Commission enact a ban on internalization. Read together, these arguments seem to suggest that the NYSE feels at once that market participants have too much and too little choice with regard to executing and reporting Non-System Trades. First, neither the NASD's LLC filing nor Nasdaq's exchange registration application provide an appropriate forum for debating the merits of internalization. Despite the NYSE's urgings, the Commission has not seen fit to propose limits on the practice; if it seeks to propose such limits, it must conduct a rulemaking in accordance with the requirements of the Administrative Procedure Act. Continued inaction on Nasdaq's exchange registration may serve the NYSE's competitive interests, but it will not affect the extent to which broker-dealers opt to internalize order flow. Second, the NASD operates ADF because the Commission directed it to provide broker-dealers with more options for quoting and reporting Non-System Trades in Nasdaq-listed stocks. Because we defer to the Commission's judgment with regard to the need for the NASD to provide this choice, we likewise do not believe that market participants would benefit from a forced denial of access to the systems that most of them currently use for reporting Non-System Trades. The operation of the LLC in the manner proposed will preserve the choice that the Commission mandated.[9] Third, and most important, the availability of the arrangement

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[8] Id. at 55229 & n.61.

[9] In this regard, it should be noted that market participants are not required to quote on the ADF to report trades there, and that the rules of the LLC will allow market participants to allocate trade reporting between the LLC and the ADF on a trade-by-trade basis. The NYSE asserts, however, that market participants entering into Non-System Trades will not have a meaningful choice between the LLC and the ADF, because "Nasdaq's practice of rebating tape revenue leaves little doubt where firms will choose to report their trades." It is true that Nasdaq currently shares a portion of the revenues associated with Non-System Trades with the market participants that report them. Whether revenue associated with the trades will continue to be shared by the LLC, however, is a question for the NASD as well as Nasdaq, since any fees and rebates associated with the LLC must be approved by the NASD and filed by the NASD with the Commission. If the

reflected in the LLC is not limited to only one exchange. Section 9(e) of the proposed LLC Agreement clearly contemplates that the NASD may enter into a similar agreement with another exchange to operate a facility for Non-System Trading (provided it does so on terms that are no more favorable to the other exchange than to Nasdaq). Thus, in contrast with PCX's relationship with ArcaEx, the LLC is not exclusive to Nasdaq.

In fact, Nasdaq would welcome other exchanges making similar arrangements with the NASD, because the NASD would undoubtedly require new entrants to pay a share of the fixed regulatory costs that Nasdaq alone must pay at present. Notwithstanding the retention by Nasdaq of net revenues associated with the operation of the LLC, the LLC's prospects for long-term profitability are by no means assured. The percentages of trades executed through exchanges or exchange-like electronic facilities has steadily increased in recent years, while internalization has decreased. Moreover, although the NYSE characterizes the regulatory costs associated with operating the LLC as "moderate," in fact a significant portion of Nasdaq's $41 million regulatory budget is attributable to regulation of Non-System Trades. Thus, we expect that the "subsidy" that the NYSE decries will represent at best a modest return on Nasdaq's continued investment in the systems that process and surveil reports of Non-System Trades.

* * *

It is notable that the NYSE filed the only comment letter on the NASD proposal, and notable also that the NYSE recycles its old arguments against Nasdaq's independence rather than reacting to the proposal that the NASD has actually filed. We believe that most market participants view Nasdaq's exchange registration as a positive step and would be reluctant to see their options for Non-System Trade reporting diminished. The NYSE, by contrast, benefits greatly from perpetuating the uncertainty and inefficiencies associated with Nasdaq's current status as an NASD subsidiary. As a result, the NYSE cannot abandon its solitary opposition even when the proposal has been modified to accommodate its arguments. We urge the Commission to recognize the narrow self-interest that underlies the NYSE's letter and move forward with prompt approval of the NASD's filing and Nasdaq's application for exchange registration.

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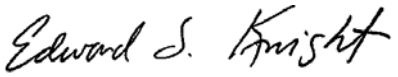
NASD opts to continue Nasdaq's modest revenue sharing programs for Non-System Trades, however, the decision would be entirely consistent with Regulation NMS, in which the Commission determined that it would be appropriate to evaluate the merits of particular revenue sharing proposals through the notice and comment process of Section 19(b). See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37567 n. 645 (June 29, 2005).

We thank the Commission for providing this opportunity to comment. If you have any question, please do not hesitate to contact me.

Sincerely,



Edward S. Knight
Executive Vice President and
General Counsel

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