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Darla C. Stuckey  
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Via email to [www.rule-comments@sec.gov](mailto:www.rule-comments@sec.gov)

September 4, 2003

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

Re: Nasdaq Revenue Sharing Program  
Release No. 34-48303; File No. SR-NASD-2003-120

Dear Mr. Katz:

In the captioned proposed rule change, which purports to have become effective on filing, Nasdaq establishes a program that shares net operating revenues -- including market data revenues -- with market makers and ECNs.

Under the program, market makers and ECNs receive a pro rata portion of a specified percentage of Nasdaq's net operating revenues. The sharing includes, among others, revenues from market data fees attributable to activity in "Tape C" securities. Nasdaq may change the specified percentage without further SEC filings.

To justify its use of "Tape C" data revenue to pay for order flow notwithstanding the Commission's policy prohibiting sharing of "Tape C" revenues set out in its July 2002 abrogation order,<sup>1</sup> Nasdaq points to the similar program of the Cincinnati Stock Exchange ("CSE"). In a comment letter dated November 18, 2002,<sup>2</sup> we urged the Commission not to permit the CSE to rebate data fees under the guise of pooling data revenue with other revenues and then rebating the pooled revenue. The same criticism applies to the Nasdaq proposal. However, the Nasdaq program is broader: the CSE pays its designated dealers (market makers) for order flow, but not ECNs that print off-board trades on the CSE.

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<sup>1</sup> Release No. 46159 (July 2, 2002).

<sup>2</sup> See letter from Darla Stuckey, Secretary, NYSE, to Jonathan G. Katz, Secretary, Securities and Exchange Commission; File No. SR-CSE-2002-14; Release No. 34-46688 (the "CSE Comment Letter").

NYSE opposes all market data revenue-sharing programs as inconsistent with the 1934 Act and the protection of investors.<sup>3</sup> The Commission invoked these inconsistencies in abrogating various market data revenue-sharing programs in July 2002. NYSE continues to urge the Commission to abolish them all.

The NYSE understands that, in the name of creating a level playing field, the Commission has permitted markets to adopt “me-too” data revenue-sharing programs while it grapples with broader, interrelated market structure issues such as payment for order flow, agency obligations and best execution; raffling tape prints, posting fraudulent volume and conveying phantom liquidity; and the intermarket data consortia that technology has made obsolete. However, Nasdaq’s program does more than permit Nasdaq to “catch-up” with its competitors. By sharing “Tape C” market data revenues with market makers and ECNs, Nasdaq’s program transgresses the borders of market data revenue sharing that the abrogation order prescribed.<sup>4</sup> Therefore, NYSE urges the Commission to abrogate Nasdaq’s proposed rule change.

We thank you for this opportunity to comment and would be pleased to respond to any questions that you may have.

Sincerely yours,



cc: Chairman William H. Donaldson  
Commissioner Paul S. Atkins  
Commissioner Roel C. Campos  
Commissioner Cynthia A. Glassman  
Commissioner Harvey J. Goldschmid  
Annette L. Nazareth  
Lawrence E. Harris  
Robert L. D. Colby  
Stephen Williams  
Gene Lopez, NASDAQ

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<sup>3</sup> See for example, letters from Darla Stuckey, Secretary, NYSE, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated October 21, 2002 (Boston Stock Exchange market data revenue-sharing program; File No. SR-BSE-2002-10; Release No. 34-46496), November 18, 2002 (the CSE Comment Letter), December 6, 2002 (NASD trading activity fee; File No. SR-NASD-2002-148; Release No. 34-46417), December 10, 2002 (Pacific Stock Exchange revenue-sharing program; File No. SR-PCX-2002-62; Release No. 34-46805), April 3, 2003 (Philadelphia Stock Exchange Network B market data revenue-sharing program; File No. SR-PHLX-2002-77; Release No. 34-47456); May 6, 2003 (Nasdaq deduction of capacity costs from revenue-sharing pools; File No. SR-Nasdaq-2003-63; Release No. 34-47635), and July 22, 2003 (Chicago Stock Exchange market data revenue sharing program File No. SR-CHX-2003-15; Release No. 34-48076).

<sup>4</sup> In addition, by asserting immediate effectiveness, Nasdaq’s filing seeks to evade the abrogation order, which specified that if Nasdaq proposed to re-file its abrogated programs, it must do so “regular way” pursuant to sections 19(b)(1) and 19(b)(2) of the Securities Exchange Act of 1934.