AMERITRADE
Holding Corporation

May 23, 2005

VIA ELECTRONIC MAIL

Barbara Z. Sweeney
Office of Corporate Secretary
NASD
1735 K Street, NW
Washington, D.C. 20006-1500

Re: *New Product Sales Material and Television, Video, and Radio Advertisements*, Notice to Members 05-25 (April 2005)

Dear Ms. Sweeney:

Ameritrade, Inc.[1] ("Ameritrade" or "the Firm") appreciates the opportunity to comment on NASD's proposed amendments to its advertising rules to require members to pre-file certain additional categories of advertisements with NASD. Although Ameritrade fully supports NASD's goal of preventing the dissemination of advertisements that raise potential regulatory concerns, Ameritrade strongly opposes NASD's review of *all* television, video and radio advertisements as such a requirement would overwhelm NASD resources and result in significant delays for member firms who use such media. Moreover, NASD's proposals would completely eviscerate member firms' ability to create and advertise products and services in a timely, economical and competitive fashion. Ultimately, Ameritrade believes that NASD's proposal will harm retail investors because of the inability of member firms to rollout new products, services and pricing changes in a timely manner. As a result, Ameritrade respectfully requests that NASD rely on enforcing existing advertising rules and withdraw or significantly restructure its proposal.

<u>Television, Video and Radio Advertisements</u>

NASD's proposed amendment would require members to file all television, video (including Web site video), radio, or similar broadcast of 15 seconds or longer at least 10 business days prior to

1 Ameritrade Holding Corporation ("Ameritrade Holding") has a 30-year history of providing financial services to self-directed investors. Ameritrade Holding's wholly owned subsidiary, Ameritrade, Inc., acts as a self-directed broker serving an investor base comprised of over 3.6 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 the individual investor 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 or other alternative market for execution. Ameritrade does not trade for its own account or make a market in any security.

the date of first use or broadcast and withhold from distribution or publication until affirmative approval has been granted.

Ameritrade strongly opposes NASD's proposal because it fails to take into account the impact on NASD resources and likely delays in approval, the financial and competitive impact on member firms, the nature of the advertising industry, and the upcoming increased use of Web videos.

First, Ameritrade believes that NASD has greatly underestimated the additional burden that the proposal will impose on NASD resources. By way of example, during 2004 Ameritrade was required to file four television/video advertisements (post-use) with NASD. NASD response time for the four items ranged from a minimum of 27 business days to a maximum of 70 business days, with an average of 46 business days. If, however, during 2004 Ameritrade had been required to pre-file *all* television, video and radio advertisements with NASD, Ameritrade would have filed at least 59 television/video advertisements. This represents a 1375% increase in NASD advertising review workload attributable to *one* member firm. Although we recognize that not all 5200 member firms will have the same percentage increase, Ameritrade submits that there is little doubt that NASD Advertising Regulation Department will be overwhelmed with nation-wide advertisement campaigns from large firms, radio advertisements from small firms, and Web videos from online firms. Clearly, unless NASD intends to increase significantly the size of the NASD Advertising Regulation Department, the average review times will increase dramatically, with firms waiting months for NASD approval.

Second, Ameritrade believes that NASD's proposal also will impose significant costs on member firms with little overall benefit to the investing public. Member firms will need to devote additional staff resources in securing NASD approval for all television, video and radio advertisements. In addition, because of the way television advertising is procured, the proposed NASD changes will significantly increase member firms' external advertising costs. Specifically, television up front purchase commitments are made in the summer for the entire broadcast year (September through August). While most commitments are highly discounted, they are still very costly and advertisers can cancel only a certain amount of commitment in any given quarter. Member firms will be unable to make such commitments if they do not know which advertisements will receive timely approval by NASD. As a result, member firms will be forced to purchase "Network and Cable Scatter," which is far more expensive and of limited value and availability.

NASD justifies its proposal by reference to television advertisements for day trading or electronic brokerage that occurred "several years ago." Ameritrade believes that NASD Advertising Regulation Department is very effective in policing and enforcing its rules. In fact, its effectiveness is demonstrated by the fact that the conduct identified by NASD in the late 1990s[2] as support for its proposal has not appeared recently as an area of regulatory concern. As such, Ameritrade believes current rules are adequately enforced and the proposed pre-filing of all television, video and radio advertisements is unnecessary at this time.

[2] *See* Testimony of Mary L. Schapiro, President NASD Regulation, Inc., Before the Permanent Subcommittee on Investigations Senate Committee on Governmental Affairs on the Securities Day Trading Industry (Sept. 16, 1999).

Third, Ameritrade submits that NASD's proposal fails to take into account how the advertising industry operates. Although NASD would require submission "10 business days prior to date of first use or broadcast," as discussed above media commitments must be made ahead of time; anywhere from two weeks to three months. As a result, firms would be required to pre-file advertisements with NASD well before they paid for such commitments; likely months ahead of first use to ensure the advertisements are approved in time.

Although earlier submission may appear to be an insignificant burden, Ameritrade believes that member firms will be significantly harmed in their ability to roll out new products and services. Products will be delayed to market resulting in brokers being at a competitive disadvantage to banks, insurance companies and investment advisers, who will not be subject to the same pre-filing requirements. In addition, member firms will be unable to respond effectively to competitors' offerings. Clearly, NASD's proposal will have the unintended consequence of harming the brokerage industry as a whole and delaying retail investor access to new products and services.

The advertising industry also is seasonal in nature, meaning that certain communications are relevant during specific times of the year. For instance, many member firms advertise their IRA offerings during the months leading up to tax season. Firms would need to submit IRA commercials at least six months ahead of time to ensure that they are approved by tax season. In addition, any delay on NASD's part in reviewing such commercials may adversely affect a broker vis á vis competitors from other industries, or a brokerage competitor whose commercials are approved first.

Fourth, Ameritrade believes that NASD's proposal also will have a discriminatory impact on firms that rely heavily on electronic media advertising for business growth. For example, while full service firms that recommend securities primarily drive new business by directly contacting investors, discount firms that appeal to self-directed investors rely heavily on obtaining new accounts using electronic media. As a result, the pre-filing requirement will competitively disadvantage discount brokerage firms in offering their services, as compared to traditional full service firms.

While certainly the overall goal of the Ameritrade advertising is to position Ameritrade as an attractive brokerage for independent self-directed individual investors, it is done primarily by promoting our tools and services to help investors become more informed and learned about the risks and rewards of self-directed investing. Advertising messages over the last year have included Level II Streamer (to view real-time market data and trends), Advanced Analyzer (to research and analyze securities), Trader Triggers (pre-set orders to be entered in an account when select conditions occur) and Quotescope (to help view the liquidity in a chosen security).

The advertising model for Ameritrade is based on direct response advertising. That is, based on tracked responses from specific advertising properties within media channels (Internet, broadcast, print, and direct mail), creative testing and messaging, the advertising is adjusted to optimize efficiency and effectiveness. Moreover, with the rate of change happening in the online brokerage industry, and the brokerage category in general, the competition is fierce. New technologies, products and services are being introduced daily and for any brokerage to stay competitive, timely response is a necessity. Adding additional time for review and approval by NASD will have a negative impact on members firms and their ability to adjust advertising in a timely manner.

Fifth, Ameritrade believes that NASD's proposal will have a significant adverse effect on member firms' use of Web videos to educate clients about investing or financial products and services. With the increase in broadband penetration, and the increased ability to broadcast streaming video, there will be more video enabled messaging placed online. Simply put, it is extremely effective and much more efficient than television. Ameritrade is part of this trend as it has begun offering educational webcasts and other videos to clients. For example, the firm sponsored a six-part webcast by William J. O'Neil, investment strategist and founder of Investor Business Daily. These webcasts have proven popular with our clients.[3] Overall, Ameritrade believes that NASD review and approval of Web videos will significantly delay the roll out of this information technology to retail investors.

As stated above, Ameritrade commends NASD for seeking to review proactively all television, video and radio advertisements to protect retail investors from potentially problematic ads. While well intentioned, Ameritrade believes that retail investors will be harmed because member firms' ability to roll out timely, competitive products, services and education materials will be severely impacted. Given all of the above, Ameritrade believes that NASD should rely on existing advertising rules and withdraw its proposal. As an alternative, Ameritrade proposes that NASD adopt a post-filing requirement. Ameritrade believes that a post-filing requirement would allow NASD to keep current with the substance of member firm advertising without creating significant burdens for both NASD and member firms. A post-filing requirement also would allow NASD to contact firms and request that firms cease using certain advertising if a regulatory concern is noted.

If NASD adopts its proposal, another option is for NASD to establish a period by which NASD approval is required. For instance, NASD rule filings with the Securities and Exchange Commission generally are subject to a 21-day comment period. Ameritrade recommends that if NASD does adopt its proposal, it include the requirement that NASD provide comments to member firms within 21 days of submission. Under this approach, a member firm could proceed with the advertising if NASD does not contact the firm in such a timeframe.

Sales Material Concerning New Types of Securities

NASD also would expand the pre-filing requirement to include "advertisements and sales literature for new types of securities that a member firm has not previously offered."

Ameritrade agrees with the Securities Industry Association ("SIA") that NASD's proposal in this area is premature in that NASD should allow member firms time to react to the recent NASD

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[3] We also note that a pre-filing requirement for Web videos also will prevent member firms from posting CEO interviews and video news clips, as they will be old news by the time they are approved.

Notice to Members concerning Best Practices for Reviewing New Products.[4] Ameritrade submits that member firms are on notice of these issues and should be allowed the opportunity to review and react to this Notice.

As for the proposal, Ameritrade agrees that NASD needs to clarify the pre-filing requirements regarding new types of securities. Ameritrade proposes that NASD clearly define that new types of securities do not include securities that retail investors currently trade (*e.g.*, equities, bonds, ETFs, mutual funds, or single stock futures). In addition, Ameritrade also suggests that the pre-filing requirement not apply to securities currently traded by retail investors regardless whether the individual firm previously has offered them.

<u>Conclusion</u>

As noted above, Ameritrade fully supports NASD's efforts to take proactive measures to protect retail investors from potentially problematic advertisements. Ameritrade, however, believes that NASD's proposal will severely burden NASD resources resulting in the significant delay of new products and services, which ultimately will harm the investing public. Ameritrade believes that NASD's enforcement of existing rules is more than adequate to address the concerns it has noted. If NASD believes the amendments are necessary, Ameritrade suggests that NASD consider either adopting a post-filing requirement or agreeing to a deadline for responding to filings.

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Ameritrade thanks NASD for considering its comments. Please contact me at 201-761-5570 if you would like to discuss our comments further.

Sincerely,

Phylis M. Esposito

Phylis M. Esposito
Executive Vice President, Chief Strategy Officer

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[4] NASD Notice to Members 05-26, "New Products: NASD Recommends Best Practices for Reviewing New Products" (April 2005).