

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
DEPARTMENT OF MARKET REGULATION
20050017333-01

TO: Department of Market Regulation
NASD

RE: E*Trade Capital Markets, LLC, Respondent
Broker/Dealer
CRD Number 111528

Pursuant to Rule 9216 of NASD Code of Procedure, E*Trade Capital Markets, LLC ("ETRD" or "the firm") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against ETRD alleging violations based on the same factual findings.

ETRD understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Market Regulation and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs, pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against ETRD; and
3. If accepted:
 - a. this AWC will become part of ETRD's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against the firm;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about ETRD's disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and

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- d. ETRD may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects ETRD's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

ETRD also understands that its experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and relevant history are as follows:

ETRD and its predecessors have been members of NASD since March 1993, and the firm's registration remains in effect. ETRD has the following relevant disciplinary history:

- On June 3, 2005, an AWC became final in which ETRD was censured and fined \$35,000 for violations of NASD Rules 2110 and 3010, and SEC Rule 11Ac1-4.
- On December 2, 2004, an AWC became final in which ETRD was censured and fined \$25,000 for violations of NASD Rules 2110, 3010 and 6955(a).
- On August 19, 2004, an AWC became final in which ETRD was censured and fined \$7,500 for violations of NASD Rules 2110 and 6955(a).
- On March 19, 2003, an AWC became final in which ETRD was censured and fined \$100,000 for violations of NASD Rules 4613, 6541 and 6620, and SEC Rule 11Ac1-4.
- On August 5, 2002, an AWC became final in which ETRD was censured and fined \$75,000 for violations of NASD Rules 2110, 2320, 3010, 4613, 4632, 4642, 6130, and 6620, and SEC Rule 11Ac1-4.

I.

WAIVER OF PROCEDURAL RIGHTS

ETRD specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against ETRD;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;

- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, ETRD specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

ETRD further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

II.

ACCEPTANCE AND CONSENT

In connection with the 2005 Trading and Market Making Surveillance Examination of ETRD, 20050017333, the staff reviewed the following items from trade dates May 11 and 12, 2005:

- 61 sale transactions for compliance with SEC Rules 200(g) and/or 203(b);
- 297 sale transactions for compliance with NASD Rule 6130;
- 50 limit orders executed as principal for compliance with NASD Rules 2110 (IM-2110-2), 2320, 6440 and 6541;
- 25 limit orders for compliance with SEC Rules 11Ac1-1 and 11Ac1-4, now known as SEC Rules 602 and 604, respectively;
- 21 "non-displayed" limit orders to price improve marketable orders received for compliance with NASD Rule 2320;
- 54 limit and market orders executed in a principal or riskless principal capacity for compliance with capacity reporting under NASD Trade Reporting and Nasdaq Market Center rules;
- 13 open buy limit orders and stop sell limit orders in securities traded ex-dividend for compliance with NASD Rule 3220;
- 24 trades reported in market making securities for compliance with SEC Rule 11Ac1-5, now known as SEC Rule 605;
- Security/size/order data statistics published on the firm's monthly order execution report for compliance with SEC Rule 11Ac1-5, now known as SEC Rule 605;
- The data published on the firm's quarterly order routing report for compliance with SEC Rule 11Ac1-6, now known as SEC Rule 606;

- The registration status of 70 persons engaged in the firm's trading and market making activities for compliance with NASD Registration rules;
- 50 orders in Nasdaq National Market ("NNM") and Nasdaq SmallCap ("SC") securities for compliance with NASD Rule 6955;
- 25 customer trade confirmations for compliance with SEC Rule 10b-10;
- The firm's establishment and implementation of "regular and rigorous" reviews of the execution quality of orders sent to other market centers and internalized for compliance with NASD Rules 2320 and 3010;
- The firm's establishment and implementation of a supervisory system and written supervisory procedures for compliance with NASD Rule 3010;
- 244 transactions for preparation and maintenance of books and records in accordance with NASD Rule 3110 and SEC Rules 17a-3 and 17a-4; and
- 241 transactions reported to the Nasdaq Market Center or Trade Reporting and Comparison Services ("TRACS") for compliance with NASD Trade Reporting and Nasdaq Market Center rules.

In connection with the 2005 Limit Order Protection review, 20050021705, the staff reviewed the following items from trade date May 12, 2005:

- 178 limit orders executed as principal for compliance with NASD Rules 2110 (and IM-2110-2), 6440, and 6541;
- 200 transactions for preparation and maintenance of books and records in accordance with NASD Rule 3100 and SEC Rules 17a-3 and 17a-4;
- 139 transactions reported to the Nasdaq Market Center or TRACS for compliance with NASD Trade Reporting and Nasdaq Market Center rules; and
- The firm's establishment and implementation of a supervisory system and written supervisory procedures for compliance with NASD Rule 3010.

A. ETRD hereby accepts and consents, without admitting or denying the findings, solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by NASD:

20050017333

1. ETRD transmitted to OATS 50 reports that contained inaccurate, incomplete, or improperly formatted data. Specifically, the reports contained inaccurate Routed Order IDs and, therefore, failed to link with reportable order events submitted by an affiliate, E*Trade Clearing, LLC ("ETRS").
2. The conduct described in paragraph one above constitutes separate and distinct violations of NASD Marketplace Rule 6955(a).

3. On 27 occasions on May 12, 2005, ETRD failed to display immediately 24 customer limit orders in Nasdaq securities in its public quotation, when each such order was at a price that would have improved ETRD's bid or offer in each such security; or when the order was priced equal to ETRD's bid or offer and the national best bid or offer for each such security, and the size of the order represented more than a *de minimis* change in relation to the size associated with ETRD's bid or offer in each such security.
4. The conduct described in paragraph three constitutes separate and distinct violations of SEC Rule 604.
5. ETRD failed on 15 occasions to provide written notification disclosing to its customer that the transaction was executed at an average price.
6. The conduct described in paragraph five constitutes separate and distinct violations of SEC Rule 10b-10.

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7. On 11 occasions on May 12, 2005, ETRD failed to contemporaneously or partially execute 11 customer limit orders in 11 OTC Bulletin Board securities after it traded each subject security for its own market-making account at a price that would have satisfied each customer's limit order, as reflected on Exhibit 1, which is attached hereto and incorporated herein by reference.
8. The conduct described in paragraph seven constitutes separate and distinct violations of NASD Marketplace Rule 6541.

B. ETRD also consents to the imposition, at a maximum, of the following sanctions:

A censure and a fine of \$65,000 (comprised of a \$10,000 fine for the OATS violations, a \$40,000 fine for the Display Rule violations, and a \$5,000 fine for the SEC Rule 10b-10 violations identified in 20050017333, and a \$10,000 fine for the limit order protection violations identified in 2005002105).

The sanctions imposed herein shall be effective on a date set by NASD staff.

III.

OTHER MATTERS

- A. **ETRD understands that it may attach a Corrective Action Statement to this AWC, which is a statement by the Respondent of demonstrable corrective steps taken to prevent future misconduct. Respondent may not deny the findings or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by NASD nor does it reflect the views of NASD or its staff.**
- B. **ETRD agrees to pay any monetary sanctions imposed on it upon notice that this AWC has been accepted and that such payments are due and payable, and have attached the election of payment form showing the method by which it proposes to pay any fine imposed.**
- C. **ETRD specifically and voluntarily waives any right to claim that ETRD is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.**

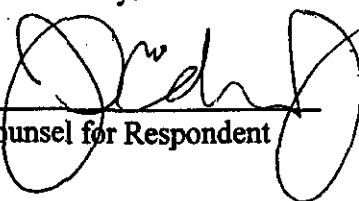
E*Trade Capital Markets, LLC certifies that a duly authorized officer has read and understood all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce ETRD to submit it.

E*Trade Capital Markets, LLC

Date: 9-5-06

By: 
Name: DAVID GROVE
Title: S.V.P.

Reviewed by:


Counsel for Respondent

Accepted by NASD:

11/3/06
Date

Thomas R. Gira
Thomas R. Gira
Executive Vice President & Deputy
Market Regulation

Signed on behalf of the Director of ODA,
by delegated authority.

Attachments:
Standard Election of Payment Form

E*Trade Capital Markets, LLC
20050021705

Exhibit 1

<u>Item #</u>	<u>Cust Order Entry Date</u>	<u>Cust Order Entry Time</u>	<u>Trade Date</u>	<u>Cust Order Exec or Cxl Time</u>	<u>Symbol</u>	<u>Market Class</u>	<u>Cust B/S</u>	<u>Vol.</u>	<u>Order Result</u>
1	05/12/05	11:18:57	05/12/05	12:01:29	COPY	OTCBB	S	6820	CXL
2	05/12/05	11:00:03	05/12/05	11:28:21	GSCP	OTCBB	B	4000	CXL
3	05/12/05	9:31:19	05/12/05	9:45:48	HOFD	OTCBB	B	200	EXE
4	05/12/05	12:18:20	05/12/05	12:27:24	JSDA	OTCBB	S	3000	EXE
5	5/12/2005	9:51:21	5/12/2005	12:44:28	SEHO	OTCBB	S	17700	EXE
6	5/12/2005	11:01:01	5/12/2005	13:31:29	SEVT	OTCBB	S	24500	EXE
7	5/12/2005	10:06:43	5/12/2005	15:17:48	NSOLE	OTCBB	S	20000	EXE
8	5/12/2005	13:51:36	5/12/2005	14:03:18	MXLOE	OTCBB	S	20000	PTL
9	5/12/2005	10:17:48	5/12/2005	10:29:53	MOBL	OTCBB	S	35000	EXE
10	5/12/2005	13:01:35	5/12/2005	14:05:52	SSVC	OTCBB	S	3000	EXE
11	5/12/2005	14:10:02	5/12/2005	15:19:27	OPLOE	OTCBB	B	15000	EXE