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NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 00420040450-01

To: Department of Enforcement
NASD

Re: Ameritrade, Inc., Member
(BD No. 5633)

Pursuant to Rule 9216 of NASD Code of Procedure Ameritrade, Inc. (Ameritrade)¹ 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 Ameritrade alleging violations based on the same factual findings.

Ameritrade 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 Enforcement and National Adjudicatory Council (NAC) Review Subcommittee or Office of Disciplinary Affairs (ODA), pursuant to NASD Procedural Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against Ameritrade; and
3. If accepted:
 - a. this AWC will become part of Ameritrade's permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against Ameritrade;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about Ameritrade's disciplinary records;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Procedural Rule 8310 and IM-8310-2; and
 - d. Ameritrade 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 Ameritrade's testimonial obligations or rights to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

¹At the time of the misconduct alleged herein, the firm was known as Ameritrade, Inc. On April 24, 2006, Ameritrade Inc.'s introducing broker functions and introduced accounts were transferred to TD Waterhouse Investor Services, Inc. which was renamed "TD Ameritrade, Inc." Because of the timing of the misconduct and for the sake of clarity, the firm will be identified simply as "Ameritrade" herein.

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Ameritrade 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 history are as follows:

Ameritrade became a registered broker-dealer with the U.S. Securities and Exchange Commission (SEC), and a member of NASD in February 1971. Ameritrade conducts an on-line discount brokerage securities business from its main office located in Omaha, Nebraska. Ameritrade has been the subject of one formal disciplinary action by NASD relevant to this matter. See AWC No. C04040011.

I. WAIVER OF PROCEDURAL RIGHTS

Ameritrade 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 Ameritrade;
- 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 SEC and a U.S. Court of Appeals.

Further, Ameritrade 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.

Ameritrade further specifically and voluntarily waives any right to claim that a person violated the *ex parte* prohibitions of NASD Procedural Rule 9143 or the separation of functions prohibitions of NASD Procedural 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

Ameritrade hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or in 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:

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1. At some point before February 1998, Ameritrade began offering its customers cash management services through an independent service provider. The service was offered by Ameritrade through Reserve Management Corporation (R.M.C.), a cash management provider for institutions such as banks and broker-dealers.² R.M.C. operates, among other things, cash sweep programs, FDIC-insured deposit programs, and money-market funds. Broker-dealers can offer these programs and services to its customers by contracting with R.M.C. Customers can elect to have "free cash" held in their securities accounts swept into money-market funds or an FDIC-insured product, and R.M.C. provides the service to consummate these transactions.
2. Ameritrade entered into a business relationship with R.M.C. during the 1990s. At some point before February 1998, Ameritrade set up a sweep program through R.M.C., and an Ameritrade customer could elect to have "free cash" in his or her securities account swept into a money-market fund of the customer's choosing, also offered by registered investment companies managed by R.M.C. After the Ameritrade customer made the election, the "free cash" would automatically be swept into the selected fund.
3. By at least February 1998, R.M.C. had added an FDIC-insured product to its cash-management products. Ameritrade began offering this product to its customers, in addition to the money-market funds option. As with the money-market funds, an Ameritrade customer could select the FDIC-insured product from a network of program banks offered by R.M.C., and the customer's "free cash" would thereafter be swept into the selected product. The FDIC-insured product was a deposit account carried at federally-regulated banks and was not a mutual fund registered under the Investment Company Act of 1940. Thus, it was not a security as defined by the Securities Act of 1933 or the Securities Exchange Act of 1934.
4. The sweep transactions occurred in the following manner. Upon electing to have their "free cash" swept into the FDIC product, the Ameritrade customer's "free cash" would be electronically transferred from their Ameritrade securities account to a bank account in the name of "The Reserve Fund Primary Fund." The Reserve Fund Primary Fund is an SEC registered investment company for whom the registered investment advisor is R.M.C. From there, the customer's funds would be wired to federally-regulated banks participating in R.M.C.'s FDIC program (Program Banks). The customer's funds at the Program Banks were then held in accounts entitled "[R.M.C.] as Agent for Customers." The Program Banks were not aware of the Ameritrade customer's identity. Rather, R.M.C., as record-keeper for the banks, maintained records reflecting the bank accounts in which each Ameritrade customer's funds were held.
5. In the month of February 1998, Ameritrade customers invested approximately \$14,004 in 16 accounts through this FDIC-insured product with R.M.C. In the ensuing years, participation in the FDIC program increased significantly. By April 30, 2004,

²R.M.C. is not a member of NASD, and was not then, and is not now, a registered broker-dealer.

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Ameritrade customers had invested \$47,545,481 in 5,026 accounts through this program with R.M.C.

6. In May 2004, Ameritrade completed the acquisition of Bidwell & Co. (Bidwell), a broker-dealer. Individual retirement account (IRA) customers of Bidwell who held free-credit balances had their balances converted to the FDIC-insured product with R.M.C. This involved approximately \$200,000,000 in assets. Consequently, by the end of May 2004, Ameritrade customers had invested \$243,251,023 through this program with R.M.C.
7. In October 2004, Ameritrade completed the acquisition of the customer accounts held by JB Oxford Company (JB Oxford), a broker-dealer. IRA customers of JB Oxford who held free-credit balances had their balances converted to an FDIC-insured product with R.M.C. Approximately \$26,000,000 in assets was converted to the FDIC-insured product offered through R.M.C. Consequently, by November 5, 2004, Ameritrade customers had invested \$273,808,973 in the FDIC products offered through R.M.C.
8. Ameritrade's supervisory system and written supervisory procedures were deficient at the time that it first began offering customers the ~~FDIC-insured product~~ through R.M.C. Under NASD Conduct Rule 3010(a), regardless of its size or complexity, each member must adopt and implement a supervisory system that is tailored specifically to the member's business. Further, to fulfill its obligations to establish and maintain a supervisory system, a member must determine the types of business it conducts, how the firm is organized and operated, and the current regulatory requirements. See NASD Notice to Members 99-45. Once a firm designs its supervisory system, it is required to memorialize this system through written supervisory procedures, and implement and enforce these written procedures. A firm is also required to periodically evaluate its system and procedures, to ensure that both accurately reflect current regulatory requirements and the firm's business.
9. Ameritrade cannot ascertain, with any certainty, the process pursuant to which the FDIC-insured product was first offered to Ameritrade's customers. Ameritrade cannot ascertain what, if any, due diligence was done to ensure that the FDIC-insured product complied with federal securities laws and regulations. Ameritrade also cannot ascertain, with any certainty, when the product was first offered to Ameritrade customers. In fact, Ameritrade was unable to provide a contract entered into between it and R.M.C., which might have shown how the transactions were to occur and the rights of all parties. Moreover, the availability of the FDIC-insured product was not widely known within Ameritrade management. For instance, in or about January 2003, Ameritrade senior management began formulating an initiative to form an industrial bank, as an additional means to permit their customers to invest in an FDIC-insured product. In the course of pursuing and developing this initiative, a number of Ameritrade senior managers learned, for the first time, that Ameritrade was already offering an FDIC-insured product through R.M.C.

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10. Ameritrade's supervisory system was also deficient because, from the time that it first began offering the FDIC-insured products through R.M.C. through at least November 2004, it did not conduct any periodic detailed evaluation of the R.M.C.-sponsored FDIC-insured product to ensure that it complied with federal securities laws and regulations. In fact, as noted above, until discussions about the industrial-bank initiative were underway in 2003, a number of Ameritrade senior managers were unaware that the R.M.C.-sponsored FDIC-insured product was even offered to Ameritrade's customers.
11. Further, Ameritrade failed to establish written supervisory procedures relating to the FDIC-insured product. Under NASD Conduct Rule 3010(b), each member shall establish, maintain and enforce written procedures to supervise the types of business in which it engages. See NASD Notice to Members 99-45. Ameritrade did not have adequate written procedures relating to the FDIC-insured product. Among other things, Ameritrade lacked written supervisory procedures describing in detail how customers' funds would be transferred to unaffiliated third parties such as R.M.C. as agent for its customers and the FDIC-insured Program Banks, entities that were not registered broker-dealers and not members of NASD. Ameritrade also lacked adequate written procedures describing in detail how funds would be monitored while in the possession of unaffiliated third parties such as R.M.C. and the Program Banks.
12. By failing to establish and maintain a supervisory system and written procedures designed to ensure that the FDIC-insured product, offered and utilized by Ameritrade through unregistered, non-member third party entities, was in compliance with applicable securities laws and regulations, and with the applicable NASD Conduct Rules, as described more fully above, Ameritrade committed separate and distinct violations of NASD Conduct Rules 2110 and 3010.

SANCTIONS

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

1. A censure; and
2. A fine of \$150,000.

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

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III. OTHER MATTERS

- A. Ameritrade understands that it may attach a Statement of Corrective Action to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Ameritrade understands that it may not deny the charges 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. Ameritrade 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 has attached an Election of Payment form showing the method by which it proposes to pay any fine imposed.
- C. Ameritrade specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

Ameritrade certifies that it has read and understands 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 Ameritrade to submit it.

AMERITRADE, INC.

12-27-06
Date

By:

Bryce B. Engel
Bryce B. Engel, President

Reviewed by:

Robert W. Mandelbaum
Counsel for Ameritrade, Inc. (amw)

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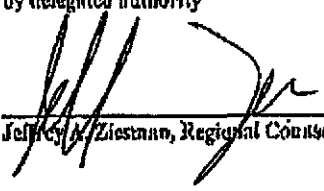
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Accepted by NASD:

1229-06
Date

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


Jeffrey A. Ziestman, Regional Counsel

NASD District Director

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