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original document : C:\MY DOCUMENTS\SHARON'S DOCS\TRACE PARTICIPATION V. 2.DOC  
and revised document: C:\MY DOCUMENTS\SHARON'S DOCS\TRACE PARTICIPATION V. 3.DOC

CompareRite found 19 change(s) in the text

Deletions appear as Overstrike text surrounded by {}  
Additions appear as Bold text surrounded by []

## TRACE PARTICIPATION AGREEMENT v. {2} [3]

This Trade Reporting and Compliance Engine (**TRACE**) Participation Agreement (**Agreement**) is made by and between the National Association of Securities Dealers, Inc. (**NASD**), a Delaware nonprofit corporation that is a securities self-regulatory organization, registered with the United States Securities and Exchange Commission (**SEC**) and subject to the Securities Exchange Act of 1934 (**Act**) (NASD and its subsidiaries, and affiliated entities, are collectively referred to herein as the **NASD**) whose principal place of business is located at 1735 K Street, N.W., Washington, D.C. and the Participant.

**WHEREAS**, NASD has developed the TRACE system (**System**) that enables eligible individuals or entities to submit trade reports, captures data and other information relating to eligible corporate debt securities, financial instruments, products, vehicles or devices and persons regulated by the NASD (**Information and Data**). Such Information and Data, which may be generated by the NASD or gathered by the NASD from other sources, is collected, consolidated, manipulated, aggregated, validated, processed, and recorded by the System and made available to eligible individuals or entities (**Service**); and

**WHEREAS**, Participant, representing that it is eligible to do so, is desirous of gaining access to the Service;

**NOW THEREFORE**, in consideration of the premises and the mutual covenants and conditions herein contained, the parties, intending to be legally bound, agree as follows:

**Section 1. Agreement to Provide Service; Compliance with NASD Rules; Participant Warranty.** For the Term of this Agreement, NASD agrees to provide to Participant, on the terms and conditions set forth herein, the Service, which Participant hereby requests and for which Participant is eligible under the NASD Rules (as defined below). Participant warrants that it is, will continue to be during the term of this Agreement, and will only use the Service, in compliance with this Agreement and the NASD Rules. Participant further warrants that it shall provide NASD with prompt Notice (as defined in *Section 33*) of any change in the name of the Participant, the address of the Participant, Participant's security administrator or any other relevant information. Participant agrees that: (i) the Service is provided when NASD provides a server or other provider through which Participant may access the Service, whether or not Participant actually accesses the Service; (ii) there are no standards of performance for the Service except any that are expressly set forth in this Agreement; and (iii) Participant will comply with all procedures and technical requirements set forth in the attachments hereto (the **Attachments**) and made a part hereof. The term "**NASD Rules**" shall mean all applicable laws (including intellectual property, communications, and securities laws), statutes and regulations, the rules and regulations of the SEC, the rules and regulations of NASD, including those requirements established by NASD's rule filings (with such SEC approval as may be required), NASD's decisions and interpretations and any user guides (to be provided in the future) (**User Guides**), or other guidelines, or successors of the components of the NASD Rules, as they may exist at the time.

**Section 2. Access to Service.** Access to the Service may be accomplished through one of three ways: (i) through the World Wide Web; (ii) through a third party Service Bureau or Executing Broker; or (iii) through a computer-to-computer connection. Participant must contact the National Association of Securities Dealers, Inc. c/o The Nasdaq Stock Market, Inc., Subscriber Services, 80 Merritt Boulevard, Trumbull, CT 06611, Attn: TRACE Administrator, Phone: (800) 777-5606, Fax: (203) 385-5879.

**Section 3. Changes to Service.** Participant acknowledges and agrees that nothing in this Agreement constitutes an undertaking by NASD to continue providing the Service, or any aspect of the Service, in its present form or under the current NASD Rules. NASD, in its sole discretion, may from time to time make additions to, deletions from, or modifications to the Service, the NASD Rules and the terms of this Agreement (including the Attachments) **[to reflect and conform to any changes to the Service]**. NASD shall undertake reasonable efforts to provide notice to Participant of any material change to the Service, this Agreement and the NASD Rules. NASD may provide notice to Participant by **[both]** (i) electronic mail and (ii) through a posting to the Internet at <http://www.nasdr.com/trace.asp> or such other URL to which Participant may be automatically forwarded, each of which may be updated by NASD from time-to-time (the *Web Site*). ~~{Accessing}~~ **[Continued accessing]**, receipt or use of the Service after notice of any change is received ~~{or}~~ **[and]** posted on the Web Site shall constitute acceptance of the Service, the NASD Rules and this Agreement as changed. Nothing in this paragraph shall be interpreted to limit or restrict the NASD's ability to change the Service, NASD Rules, and terms of this Agreement or any other agreement pursuant to the Securities and Exchange Commission (*SEC*) or any other regulatory body with authority over the NASD.

**Section 4. License to Use.** (a) NASD grants to Participant a non-exclusive, non-transferable, non-assignable license during the Term of this Agreement to access, receive and use the Service as made accessible by NASD, and thereafter to access, receive and use the Information and Data for any purpose not inconsistent with the terms of this Agreement or with the NASD Rules. The foregoing license is conditioned upon Participant's, and its appointed security administrator's, current and continued compliance with the terms and conditions set forth in this Agreement, all relevant Attachments and the NASD Rules.

(b) *Parameters of Use.* The Service and all Information and Data are licensed only for use by Participant and Participant's users for internal business purposes only. **[The license granted by this Agreement to Participant for the use of Information and Data is not intended to be and shall not be used by Participant as a substitute for the execution of a Bond Trade Dissemination Service Vendor Agreement (BTDS Agreement) and the payment of the applicable fees thereunder. Furthermore, Participant shall not use any manual or electronic means to extract Information and Data from the System to simulate a datafeed of the Information and Data, in an attempt to circumvent execution of a BTDS Vendor Agreement by Participant, or in a manner which would in fact result in Participant receiving a datafeed of the Information and Data without executing the proper agreements and paying the appropriate market data fees to NASD for such product.]** Participant will promptly give Notice to NASD of any change in the name or place of business at which the Service or Information and Data are accessed, received or used. Nothing in this Section shall be interpreted as limiting or restricting a Participant's right to use its own data or information, including but not limited to, distributing the data to its employees or incorporating the data into

research and analysis. Participant may not sell, lease, furnish or otherwise permit or provide access to or receipt or use of the Service or Information and Data to any third parties unless it is authorized to do so in writing by NASD. Participant will not engage in the operation of any illegal business; access or knowingly or negligently permit anyone else to access the Service or the Information and Data, or any part thereof, for any illegal purpose; receive or permit anyone else to receive the Service or the Information and Data, or any part thereof, for any illegal purpose; use or permit anyone else to use the Service or the Information and Data, or any part thereof, for any illegal purpose; or violate any NASD Rule. Except for any NASD Confidential Information (as defined in *Section 15.1* below), Participant may on a non-continuous basis, furnish limited amounts of Information and Data obtained through the Service to customers; in written advertisements, correspondence, or other literature; or during voice telephonic conversations not entailing computerized voice, automated information inquiry services, or similar technologies. Participant shall not present such Information and Data in an unfair, misleading or discriminatory manner.

**Section 5. Proprietary Rights.** (a) Participant acknowledges and agrees that NASD has (i) proprietary rights, in the System, Information and Data that originates on, derives from or relates to the System and all markets that are regulated, operated or administered by NASD, in Information and Data that relates to individuals and entities that are regulated by the NASD, and in Information and Data that relates to the activities that are regulated or operated by the NASD or its agents, and (ii) compilation or other rights in Information and Data gathered from other sources. Participant acknowledges and agrees that third party providers have exclusive proprietary rights in their respective information and data. NASD reserves any right to the System and Information and Data not explicitly granted herein. In the event of any misappropriation or misuse, NASD or its third party providers shall have the right to obtain injunctive relief and Participant agrees that each of NASD's third party providers shall be a third party beneficiary of this Agreement for such purpose. Participant will attribute source of any Information and Data or other proprietary data as appropriate under all circumstances.

**Section 6. Data Rights.** As consideration for receiving authorization to use the System and to enable NASD to regulate the Services and the System, Participant does hereby deliver, transfer, and convey to NASD all right, title, and interest, including, without limitation, all rights of copyright, in the Information and Data entered into the System or distributed by the Service. The delivery of such Information and Data into the System shall be conclusively deemed to affect the transfer of all such right, title and interest to such Information and Data without further action by NASD or Participant. Participant shall not, by act or omission, diminish or impair in any manner the acquisition, maintenance, and full enjoyment by NASD, its licensees, transferees and assignees, of the property rights of NASD in the Information and Data and System. Notwithstanding ~~(the foregoing)~~ **[anything in this Agreement to the contrary]**, nothing herein shall affect Participant's intellectual property rights in the Information and Data inputted by Participant outside the System and Service **[and Participant shall be free to use and distribute the Information and Data inputted by Participant for any purpose in its sole discretion]**.

**Section 7. Participant Obligations.** Participant shall not reverse engineer, decode, decompile, attempt to tamper with or evade, or discover the method of operations or defeat any security device designed to protect the integrity of the Service or the Information and Data. If applicable law authorizes Participant to perform certain types of reverse engineering or the like

and declares unenforceable contractual restrictions that conflict with that law, then Participant may perform only such reverse engineering or the like as is expressly allowed by, and in strict compliance with, such law. Participant shall comply, at Participant's expense, with all reasonable security specifications or instructions of NASD made available to Participant in order to prevent the Service or the Information and Data from being improperly accessed, received or used from Participant or its place(s) of business/residence. NASD or its agents shall have the right, without Notice or liability, to suspend Participant's access to or receipt or use of the Service or the Information and Data if the failure on the part of the Participant to comply with this Agreement has, or Participant's access, receipt or use of the Service or the Information and Data may have, an adverse impact on the operation or performance of the Service or on NASD. Participant will maintain such accurate and verifiable records regarding the access, receipt and use of the Service and the Information and Data including the names and addresses of all users that access, receive and use the Service and the Information and Data, and will make these records available for a period of ~~five (5)~~ **three (3)** years in a form acceptable to NASD or its designated agents for inspection by NASD, its representatives and auditors (collectively the **NASD Group**) upon reasonable notice. Participant shall make its premises and personnel available to the NASD Group for review of said records and for physical inspection of Participant's access, receipt and use of the Service and the Information and Data, all at reasonable times, upon reasonable Notice, to ensure Participant's and its users are in compliance with this Agreement.

**Section 8. Requirements of Self-Regulatory Organization.** Participant acknowledges that: (a) NASD is registered with the SEC as a registered national securities association pursuant to Section 15A of the Act; (b) NASD has a statutory obligation to protect investors and the public interest and to ensure the integrity of the Service and Information and Data (including the Information and Data supplied to investors and the public); (c) Section 19(g)(1) of the Act mandates that NASD, as a self-regulatory organization, comply with the provisions of the Act, the rules and regulations there under, and the NASD Rules; and (d) NASD has jurisdiction to enforce compliance with the Act, the rules and regulations promulgated there under, and the NASD Rules over its members, Participant and those who access, receive or use the Service or the Information and Data by virtue of this Agreement. Accordingly, Participant agrees that (i) NASD may, by Notice to Participant unilaterally, limit or terminate the right of any and all persons to receive or use the Service or the Information and Data in accordance with the obligations set forth in this Section; and (ii) NASD may control the manner in which the Service and Information and Data are accessed, received or used. In any such case, Participant will immediately comply with any such Notice and will terminate or limit its access, receipt and use of the Service and Information and Data, and confirm such compliance by Notice to NASD. Any affected person will have available to it such procedural protections as are provided by the Act and applicable rules there under.

**Section 9. Charges; Payment; Taxes.** Participant agrees to pay to NASD the then effective charges as set forth either in the NASD Rules or in a Notice to Participant, including all applicable deposits, and installation, deinstallation, equipment, communications, facilities, training, interest and late fees and/or charges (other than amounts due under this Agreement which are the subject of a bona fide dispute between Participant and NASD) without set-off, offset or recoupment. Participant will also be responsible for paying NASD for any cost or expense incurred by NASD when: (i) visiting Participant's facilities for training, support or other

services if NASD determines, in good faith and in its reasonable judgment, that such visit was unnecessary; or (ii) the cost or expense of any scheduled service calls by NASD personnel to Participant's facilities where NASD's personnel are unable to gain entrance to Participant's facilities or unable to gain reasonable cooperation from Participant's personnel. Participant shall assume full and complete responsibility for the payment of any taxes, charges or assessments imposed on Participant or NASD by any foreign or domestic national, state, provincial or local government bodies, or subdivisions thereof, and any penalties or interest, (except for U.S. federal, state or local income taxes, if any, imposed on NASD) relating to the provision of the Service and Information and Data to Participant. In addition, if Participant is required by applicable law to deduct or withhold any such tax, charge or assessment from the amounts due NASD, then such amounts due shall be increased so that the net amount actually received by NASD after the deduction or withholding of any such tax, charge or assessment, will equal one hundred percent (100%) of the charges that are owed. Payment is due within 30 days of the receipt of the invoice. Interest at a rate of one percent (1%) per month on any outstanding balance shall be due from thirty (30) days from the date of the invoice to the time that the amount(s) that are due have been paid. Payment shall be made in immediately available United States funds by check or electronic fund transfer drawn against a United States bank or other institution acceptable to NASD or by any other means mutually acceptable to the parties.

**Section 10. Default.** (a) Participant has specifically induced NASD to enter into this Agreement based on the representations and undertakings of Participant contained herein. Strict compliance with the provisions of this Agreement is and shall be a condition precedent to Participant's right hereunder to continue to access, receive or use the Service and Information and Data. Participant expressly acknowledges and agrees that NASD shall have the rights set forth in this *Section 10* if NASD shall determine, in its sole discretion, that one or more of the following events or conditions occurs or is continuing:

(i) Participant fails to pay any amounts due NASD under this Agreement within thirty (30) days after the applicable due date for such amounts specified in this Agreement, other than amounts owed by Participant to NASD which are the subject of a bona fide dispute;

(ii) Any representation, warranty or certification, which is material to NASD for regulatory, commercial or other reasons, made by Participant in this Agreement or in any other document furnished by Participant in connection herewith was false or misleading, as of the time made or furnished;

(iii) Participant defaults in the performance of any of its obligations or covenants under this Agreement, or any representation, warranty or certification described in clause (ii) above becomes false or misleading, and such default, falsity or misstatement (if curable) continues unremedied for a period of fifteen (15) days after NASD provides Notice to Participant thereof, *provided, however*, that if such default, falsity or misstatement cannot be remedied by Participant in good faith and with due diligence within fifteen (15) days and the failure to so remedy within fifteen (15) days does not cause NASD to be in violation of applicable law or regulations or to otherwise materially injure NASD, then an event or condition of default under this clause will not be considered to exist or have occurred for so long as Participant commences such actions as are necessary to remedy such default, falsity or

misstatement within such fifteen (15) day period and thereafter diligently pursues such actions to remedy such default, truth or inaccuracy;

(iv) Participant proceeds with a proposed action in default of its obligations or covenants under this Agreement, or in breach of any representation, warranty or certification, that is material to NASD for regulatory, commercial or other reasons, made by Participant in connection herewith, after NASD has provided Notice to Participant that such proposed action would constitute a default hereunder;

(v) Participant: (A) applies for or consents to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property, (B) makes a general assignment for the benefit of its creditors, (C) institutes proceedings under the United States Bankruptcy Code, (D) files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts, (E) fails to controvert in a timely and appropriate manner, or acquiesces in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code, or the board of directors of Participant takes any action for the purpose of effecting any of the foregoing;

(vi) a proceeding or case of the type described in clause (v) above is commenced, without the application or consent of Participant, in any court of competent jurisdiction, and such proceeding or case is entered and continues unstayed and in effect for a period of sixty (60) days, or an order for relief against Participant is entered in an involuntary case under the Bankruptcy Code; or

(vii) Participant admits in writing its inability to pay its debts as they become due.

(b) Upon the occurrence of any of the events or conditions described in *Section 10(a)* herein, NASD will have the immediate right, in its sole discretion, to take one or more of the following actions: (i) to terminate this Agreement and Participant's right to access, receive or use the Service and the Information and Data hereunder; (ii) to demand arbitration under ~~{Section 24}~~ **[Section 23.1]**; or (iii) to pursue such other remedies ~~{consistent with Section 26}~~ as it may be entitled by virtue of or under this Agreement, before regulatory authorities, or at law or in equity.

(c) If NASD has breached or is in default under this Agreement, and such breach or default continues unremedied for fifteen (15) days after Notice to NASD by Participant, then Participant shall have the immediate right to take one or more of the following actions; *provided, however,* that if such breach cannot be remedied by NASD in good faith and with due diligence within fifteen (15) days and the failure to so remedy within fifteen (15) days does not cause Participant (or its users) to be in violation of applicable laws or regulations or to otherwise materially injure Participant or its users, then NASD shall not be considered to be in default for so long as NASD commences such actions as are necessary to remedy such breach within such fifteen (15) day period and thereafter diligently pursues such actions to remedy such breach or default: (i) to terminate this Agreement; (ii) to demand arbitration under ~~{Section 24}~~ **[Section 23.1]**; or (iii) to pursue such other remedies ~~{consistent with Section 26 herein}~~ as it

may be entitled by virtue of or under this Agreement, before regulatory authorities, or at law or in equity.

(d) To the extent permitted by applicable law, Participant acknowledges and agrees that the exercise by NASD of the remedies to which it is entitled under *Section 10(b)* as a result of the occurrence of a default by Participant as described in *Section 10(b)* shall not be deemed or considered to be, and Participant waives any right to represent or assert that any such exercise constitutes, an act or omission or an improper denial or limitation of access to any service or facility operated by NASD as contemplated in Section 11A of the Act, or any other provision of the Act, or any rule or regulation adopted hereunder.

**Section 11. Term and Termination.** The original term of this Agreement will commence on the date of execution by NASD or its agent and will continue until January 1st of the year immediately following execution (**Initial Term**). Thereafter this Agreement will automatically renew for one-year terms on January 1st of each successive year (**Renewal Term**), unless terminated by written notice by a party hereto given at least ninety (90) days prior to the expiration of the original term of this Agreement or any successor term (the Initial Term and any Renewal Term shall be referred to as the **Term**). Notwithstanding the foregoing, this Agreement may be terminated as expressly provided herein any may also be terminated by NASD, upon not less than ninety (90) days prior Notice to the Participant, that NASD will cease providing the same class of Service to all other eligible individuals or entities that were receiving the same class of Service as Participant.

(b) **Termination or Expiration Charges.** Upon termination or expiration of this Agreement, Participant shall cease any and all access, receipt and use of the Service and all Information and Data. Participant shall immediately pay the following charges upon the termination or expiration of this Agreement, other than any amounts due hereunder which are the subject of a bona fide dispute between NASD and Participant: (i) all amounts incurred by NASD for installation of the Service that Participant has not previously paid to NASD; (ii) all amounts incurred by NASD for disconnection of the Service; and (iii) all other fees and charges due to NASD under this Agreement. Participant acknowledges and agrees that the exercise by NASD of the remedies set forth herein for failure of Participant to pay all fees, charges and taxes related to its access, receipt and use of the Service shall not be deemed or considered to be, and, to the extent permitted by applicable law, Participant waives any right to represent or assert that any such exercise constitutes, an act or omission or any improper denial or limitation of access to any service or facility operated by NASD as contemplated in Section 11A of the Act or any other provision of such Act, or any rule or regulation adopted thereunder. The right of termination set forth herein is in addition to any other remedy at law or in equity that is available to one party with respect to a breach by the other.

(c) **Survival.** Sections 11(b) and (c), 12, 13, 15.1, 16-19, 20(h), 21-29 and 31-35 shall survive any termination or expiration of this Agreement.

**Section 12. Litigation Related to Unauthorized Access, Receipt or Use.** Participant shall not oppose any suit or proceeding that is instituted by NASD to enjoin any individual or entity that is not authorized to access, receive or use the Service or any Information and Data in accordance with the terms of this Agreement, from accessing, receiving or using the Service or



Information and Data, or to enjoin any individual or entity that is accessing or assisting in accessing, receiving or assisting in receiving, using or assisting in using, the Service or Information and Data outside the authorized channels of communication set forth in this Agreement. Participant agrees to reasonably cooperate with and assist NASD in any such suit or proceeding. If such an NASD request for cooperation and assistance imposes substantial burdens upon Participant, then NASD agrees to reimburse Participant for Participant's reasonable direct expenses incurred in connection with such request. If Participant furnishes, or permits to be furnished, the Service or Information and Data to any individual or entity other than in accordance with this Agreement and without the prior written approval of NASD, then NASD, in addition to exercising any other rights it may have under this Agreement, may take any action against such individual or entity in order to prevent the access, receipt or use of the Service or Information and Data by such other individual or entity, either with or without making Participant a party to such action.

**Section 13. Notice of Breach or Default.** Participant shall promptly, but in no event later than two (2) Business Days after Participant knows that a breach of or default under this Agreement, including any Attachments hereto, by Participant or any user has occurred, deliver to NASD Notice describing the same in reasonable detail. For purposes of this Agreement, a "Business Day" means any day when the System is collecting trade reports from Participants.

**Section 14. Integrity of Service.** Participant agrees not to format, display, or alter the Service or Information and Data in violation of the NASD Rules or NASD specifications and requirements made available to Participant, as they may be modified from time to time; not to affect materially the integrity of the Service or Information and Data; or render the Service or Information and Data inaccurate, unfair, uninformative, fictitious, misleading, or discriminatory. Participant represents and warrants that it will not knowingly or negligently misuse, interfere with or adversely affect the System, any NASD provided software, or the operation of the System or the Service, or any of the component parts or processes of the Service, or any use thereof by any other authorized individuals or entities.

**Section 15. Security. Prevention of Unauthorized Use.** Participant agrees that it will comply, and agrees to require any applicable third party to comply, with all reasonable security specifications or requirements of NASD including, if applicable, the installation of digital certificates for each of Participant's users, in order to prevent the Service or Information and Data from being improperly accessed, received, used or improperly taken from any of Participant's, or any applicable third party's, place(s) of business or residence. NASD shall give Participant prior Notice of any such specifications or requirements. For the purpose of determining compliance with this subsection, at any and all times, any and all individuals designated by NASD shall have (i) access to the place(s) of business or residence where the Service and Information and Data are accessed, received or used and (ii) the right to observe the access, receipt and use of the Service and the Information and Data.

**Section 15.1 Confidentiality.** NASD and Participant acknowledge that in the course of their performance of this Agreement each may obtain confidential data, information or techniques from the other (**Confidential Information**). The recipient shall use such Confidential Information only in fulfillment of its obligations under this Agreement; shall hold such Confidential Information in confidence; and shall not use, disclose, copy, or publish any such

Confidential Information without the prior written approval of the other party. Notwithstanding the foregoing, NASD or Participant may disclose Confidential Information to the extent demanded by a court, or required to be revealed to a government agency with regulatory jurisdiction over NASD or Participant or in its regulatory responsibilities under the Act. The duties in this section do not apply to data, information or techniques that can be shown to be: (1) lawfully within recipient's possession prior to the date of this Agreement and not subject to a duty of confidentiality; (2) voluntarily disclosed by a third-party so long as that third-party does not breach any obligation of confidentiality with respect to such data, information or techniques; (3) is generally known or revealed to the public through no act or omission of the recipient; or (4) independently developed by the recipient without use of or reference to the Confidential Information of the other party. The obligations under this *Section 15(b)* shall continue until such time as the Confidential Information is publicly known and made generally available through no action or inaction of the recipient of the Confidential Information.

***Section 16. WARRANTIES; DISCLAIMERS OF WARRANTIES.*** (a) EACH PARTY REPRESENTS AND WARRANTS THAT IT SHALL OBTAIN, MAINTAIN AND COMPLY WITH ALL PERMITS, CONSENTS AND APPROVALS NECESSARY FOR SUCH PARTY TO ENTER INTO AND FULFILL ITS OBLIGATIONS UNDER THIS AGREEMENT. IN THE EVENT THAT THE SERVICE OR INFORMATION AND DATA ARE NOT AVAILABLE, INTERRUPTED, DELAYED, INCOMPLETE, INACCURATE, OR ARE OTHERWISE MATERIALLY AFFECTED AS A RESULT OF A FAILURE BY NASD TO PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT, NASD WILL ENDEAVOR, GIVING DUE REGARD FOR THE COST, TIME, AND EFFECT ON OTHER USERS, TO CORRECT ANY SUCH FAILURE. IN THE EVENT THAT THE SERVICE OR INFORMATION AND DATA ARE NOT AVAILABLE, ARE DELAYED, ARE INTERRUPTED, ARE INCOMPLETE OR ARE NOT ACCURATE OR ARE OTHERWISE MATERIALLY AFFECTED FOR AN ENTIRE BUSINESS DAY AND REMAIN AFFECTED AT THE COMMENCEMENT OF THE IMMEDIATELY SUCCEEDING BUSINESS DAY DUE TO THE FAULT OF NASD (EXCEPT FOR A REASON PERMITTED IN THIS AGREEMENT), PARTICIPANT'S EXCLUSIVE REMEDY AGAINST NASD SHALL BE, (A) IF PARTICIPANT CONTINUES TO RECEIVE THE SERVICE OR ANY OTHER DATA AND/OR INFORMATION OFFERED BY NASD, A PRORATED MONTH'S CREDIT OF ANY MONIES DUE FOR AND DIRECTLY ATTRIBUTABLE TO THE AFFECTED SERVICE TO NASD FROM PARTICIPANT FOR THE PERIOD AT ISSUE OR, (B) IF PARTICIPANT NO LONGER RECEIVES EITHER THE SERVICE OR ANY OTHER DATA AND/OR INFORMATION OFFERED BY NASD, A PRORATED MONTH'S REFUND OF ANY MONIES DUE FOR THE AFFECTED SERVICE TO NASD FROM PARTICIPANT FOR THE PERIOD AT ISSUE. SUCH CREDIT OR REFUND SHALL BE REQUESTED BY NOTICE TO NASD WITH ALL PERTINENT DETAILS. BEYOND THE WARRANTIES STATED IN THIS SECTION, THERE ARE NO OTHER WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY (INCLUDING TITLE, OWNERSHIP, INTELLECTUAL PROPERTY INFRINGEMENT, TIMELINESS, TRUTHFULNESS, SEQUENCE, COMPLETENESS, ACCURACY, AVAILABILITY, FREEDOM FROM INTERRUPTION, ANY IMPLIED WARRANTIES ARISING FROM TRADE USAGE, COURSE OF DEALING, OR COURSE OF

**PERFORMANCE, OR THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE OR PURPOSE).**

**(b) WITH RESPECT TO PARTICIPANT, NASD'S SYSTEM ADMINISTRATOR DISCLAIMS ALL WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY (INCLUDING TITLE, OWNERSHIP, INTELLECTUAL PROPERTY INFRINGEMENT, TIMELINESS, TRUTHFULNESS, SEQUENCE, COMPLETENESS, ACCURACY, AVAILABILITY, FREEDOM FROM INTERRUPTION, ANY IMPLIED WARRANTIES ARISING FROM TRADE USAGE, COURSE OF DEALING, OR COURSE OF PERFORMANCE, OR THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE OR PURPOSE).**

***Section 17. LIMITATION OF LIABILITY.* (a) EXCEPT AS MAY OTHERWISE BE SET FORTH HEREIN, NASD SHALL NOT BE LIABLE TO PARTICIPANT OR TO ANY OTHER INDIVIDUAL OR ENTITY CLAIMING THROUGH PARTICIPANT, OR TO ANY OTHER INDIVIDUAL OR ENTITY FOR INDIRECT, SPECIAL, PUNITIVE, CONSEQUENTIAL, OR INCIDENTAL LOSS OR DAMAGE (INCLUDING TRADING LOSSES, LOSS OF OPPORTUNITY, LOSS OF ANTICIPATED REVENUES, LOSS OF ANTICIPATED PROFITS, LOSS BY REASON OF SHUTDOWN IN OPERATION OR INCREASED EXPENSES OF OPERATION, OR OTHER LOSS OR DAMAGE) OF ANY NATURE ARISING FROM ANY CAUSE WHATSOEVER, EVEN IF THE NASD HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES. PARTICIPANT SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS NASD FROM ANY SUCH CLAIMS MADE AGAINST NASD BY ANY INDIVIDUAL OR ENTITY ACCESSING, RECEIVING, OR USING THE SERVICE FROM OR THROUGH PARTICIPANT.**

**(b) NASD SHALL NOT BE LIABLE TO PARTICIPANT, OR ANY OTHER INDIVIDUAL OR ENTITY FOR ANY UNAVAILABILITY, INTERRUPTION, DELAY, INCOMPLETENESS, OR INACCURACY OF THE SERVICE OR THE INFORMATION AND DATA UNLESS SUCH UNAVAILABILITY, INTERRUPTION, DELAY, INCOMPLETENESS, OR INACCURACY OF THE SERVICE OR INFORMATION AND DATA LASTS FOR AN ENTIRE BUSINESS DAY AND CONTINUES AT THE COMMENCEMENT OF THE IMMEDIATELY SUCCEEDING BUSINESS DAY.**

**(c) IF NASD IS FOR ANY REASON HELD LIABLE, WHETHER IN TORT, CONTRACT OR OTHERWISE ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT THE SYSTEM, SERVICE OR INFORMATION AND DATA PROVIDED PURSUANT HERETO, THE AGGREGATE LIABILITY OF NASD FOR ALL REASONS WITHIN A SINGLE YEAR FROM THE EFFECTIVE DATE OF THIS AGREEMENT IS LIMITED TO THE LOWER OF: (1) IF PARTICIPANT CONTINUES TO RECEIVE THE SERVICE OR ANY OTHER DATA AND/OR INFORMATION OFFERED BY NASD, A PRORATED MONTH'S CREDIT OF ANY MONIES DUE TO NASD FROM PARTICIPANT FOR THE PERIOD AT ISSUE OR, IF PARTICIPANT NO LONGER RECEIVES EITHER THE SERVICE OR ANY OTHER DATA AND/OR INFORMATION OFFERED BY NASD, A REFUND OF ANY MONIES DUE TO NASD FROM PARTICIPANT FOR THE PERIOD AT ISSUE; OR (2) U.S. \$5000.00.**

**[NOTWITHSTANDING THE FOREGOING, NASD'S LIABILITY FOR INTELLECTUAL PROPERTY INDEMNIFICATION SHALL NOT EXCEED THE AMOUNTS ACTUALLY PAID BY PARTICIPANT DURING THE TERM OF THIS AGREEMENT.]**

**(d) THIS SECTION SHALL NOT RELIEVE OR LIMIT NASD OR PARTICIPANT FROM LIABILITY FOR DAMAGES THAT RESULT FROM THEIR OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, OR FROM PERSONAL INJURY OR WRONGFUL DEATH CLAIMS.**

**(e) PARTICIPANT AND NASD UNDERSTAND AND AGREE THAT THE TERMS OF THIS SECTION REFLECT A REASONABLE ALLOCATION OF RISK AND LIMITATION OF LIABILITY.**

**(f) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, NASD SHALL NOT BE RESPONSIBLE FOR OR LIABLE TO PARTICIPANT, ANYONE CLAIMING THROUGH PARTICIPANT, OR ANY OTHER INDIVIDUAL OR ENTITY FOR ANY UNAVAILABILITY, INTERRUPTION, DELAY, INCOMPLETENESS, OR INACCURACY OF THE SERVICE OR THE INFORMATION AND DATA THAT IS NOT CAUSED BY NASD.**

**(g) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, NASD SHALL NOT BE LIABLE TO PARTICIPANT, ANYONE CLAIMING THROUGH PARTICIPANT, OR ANY OTHER INDIVIDUAL OR ENTITY FOR THE UNAVAILABILITY, INTERRUPTION, DELAY, INCOMPLETENESS OR INACCURACY OF INFORMATION AND DATA FROM NASD'S THIRD PARTY INFORMATION AND DATA PROVIDERS, OR FOR THE INFRINGEMENT OF ANY INDIVIDUAL OR ENTITY'S INTELLECTUAL PROPERTY OR OTHER RIGHTS BY THE INFORMATION AND DATA PROVIDED TO NASD BY THIRD PARTY INFORMATION AND DATA PROVIDERS.**

***Section 18. SYSTEM ADMINISTRATOR AND THIRD PARTY INFORMATION AND DATA PROVIDERS' LIMITATIONS OF LIABILITIES.* (a) NASD'S SYSTEM ADMINISTRATOR AND THIRD PARTY INFORMATION AND DATA PROVIDERS SHALL HAVE NO LIABILITY FOR THE INACCURACY, UNAVAILABILITY, INCOMPLETENESS OR INTERRUPTION OF, OR FOR DELAYS OR OMISSIONS IN, ANY OF THE INFORMATION AND DATA PROVIDED BY THEM. NASD'S SYSTEM ADMINISTRATOR [NOR ITS] THIRD PARTY INFORMATION AND DATA PROVIDERS SHALL HAVE NO LIABILITY FOR ANY INDIRECT, SPECIAL, PUNITIVE, CONSEQUENTIAL, OR INCIDENTAL LOSS OR DAMAGE (INCLUDING TRADING LOSSES, LOSS OF OPPORTUNITY, LOSS OF ANTICIPATED REVENUES, LOSS OF ANTICIPATED PROFITS, LOSS BY REASON OF SHUTDOWN IN OPERATION OR INCREASED EXPENSES OF OPERATION, OR OTHER LOSS OR DAMAGE) OF ANY NATURE ARISING FROM ANY CAUSE WHATSOEVER, EVEN IF THE THIRD PARTY INFORMATION AND DATA PROVIDERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES. [THIS SECTION SHALL NOT RELIEVE OR LIMIT NASD'S SYSTEM ADMINISTRATOR**

**NOR IS THIRD PARTY INFORMATION AND DATA PROVIDERS FROM LIABILITY FOR DAMAGES THAT RESULT FROM THEIR OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.]**

**(b) PARTICIPANT ACKNOWLEDGES AND AGREES THAT NASD'S THIRD PARTY INFORMATION AND DATA PROVIDERS HAVE EXCLUSIVE PROPRIETARY RIGHTS IN THEIR RESPECTIVE INFORMATION AND DATA.**

**(c) PARTICIPANT ACKNOWLEDGES AND AGREES THAT ACCESS TO THE INFORMATION AND DATA OF NASD'S THIRD PARTY INFORMATION AND DATA PROVIDERS IS SUBJECT TO NASD'S RECEIPT OF THE INFORMATION AND DATA FROM SUCH THIRD PARTY INFORMATION AND DATA PROVIDERS PURSUANT TO THE AGREEMENTS BETWEEN NASD AND SUCH THIRD PARTY INFORMATION AND DATA PROVIDERS AND THAT NASD'S ACCESS TO AND RECEIPT OF SUCH INFORMATION AND DATA MAY BE DELAYED, TERMINATED OR OTHERWISE AFFECTED.**

**(d) PARTICIPANT AGREES THAT ACCESS TO THE SYSTEMS AND SERVICES OF NASD'S SYSTEM ADMINISTRATOR IS SUBJECT TO NASD'S ACCESS TO THE SYSTEMS AND SERVICES FROM THE RESPECTIVE SYSTEM ADMINISTRATOR PURSUANT TO THE AGREEMENTS BETWEEN NASD AND ITS SYSTEM ADMINISTRATOR AND THAT NASD'S ACCESS TO SUCH SYSTEMS AND SERVICES MAY BE DELAYED, TERMINATED OR OTHERWISE AFFECTED.**

*Section 19. Indemnification.* (a) **[Indemnification by Participant.]** Participant shall be liable to, indemnify and defend NASD against, and hold NASD harmless from, any and all Claims or Losses imposed on, incurred by or asserted against NASD arising out of or in connection with this Agreement the System, Service or Information and Data provided pursuant hereto to the extent that the Claims and Losses result from (i) acts or omissions of the Participant or its users, (ii) breach of this Agreement by Participant or its users, (iii) Participant's or its users' access, receipt or use of the Service or Information and Data (including representations about the Service or Information and Data) or (iv) any defense of or participation by NASD in any action, suit, arbitration, mediation, judicial or administrative proceeding, or any other proceeding involving any Claims or Losses described in this Agreement caused by or related to any act or omission by Participant or any party obtaining access to the System, Service or Information and Data **[intentionally, knowingly or negligently from or]** through Participant.

(b) *Indemnification By NASD.* Subject to *Section 17(g)*, NASD shall indemnify, defend, and hold Participant harmless from any and all Claims and Losses imposed on, incurred by or asserted against Participant that the Service or Information and Data infringe or misappropriate any third parties' U.S. registered intellectual property rights, provided that the Service and Information and Data have been used only in accordance with this Agreement, and excluding any infringement or misappropriation relating to or resulting from any modification or alteration to the Service or Information and Data **[up to and including the amounts specified in Section 17(c)]**.

(c) *Infringement.* In the event of a claim of infringement or if, in NASD's opinion, such a claim is likely to occur or if the use of the Service or Information and Data are enjoined because of infringement, NASD may, at its sole option and expense, procure for Participant the right to continue using the Service or Information and Data, replace or modify the Service or Information and Data to be non-infringing, or require the Participant to cease its use of the Service or Information and Data.

(d) *Claims and Losses.* Unless otherwise stated herein, "Claims or Losses" means any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, judgments, and expenses of whatever nature, whether incurred by or issued against an indemnified party, including (i) indirect, special, punitive, consequential, or incidental losses or damage (including trading losses, loss of opportunities, loss of anticipated revenues, loss of anticipated profits, loss by reason of shutdown in operation or increased expenses of operation, or other indirect loss or damage) and (ii) administrative costs, litigation costs, and auditors' and attorneys' fees, both in-house and outside advisor costs and expenses, and related disbursements. The provisions of this *subsection 19(d)*, however, should not be construed as authorizing or as providing any basis for the recovery by third parties of indirect, punitive, special, consequential or incidental loss or damages, including trading losses, loss of opportunities, loss of anticipated revenues and loss of anticipated profits, from the party being indemnified.

(e) *Indemnified Party's Obligations.* The party claiming indemnification under this *Section 19* agrees that its indemnification by the other party is subject to compliance with this *Section 19(e)*. The party claiming indemnification agrees to promptly provide Notice to the other party in a time frame that does not prejudice the rights of such other party (and, in the case of any action, suit, arbitration, mediation, judicial or administrative proceeding, or any other proceeding, shall so notify no later than fifteen (15) days after the party claiming indemnification has received Notice thereof or has been served with a complaint or other process) when it has knowledge of circumstances or the occurrence of any events which are likely to result in an indemnification obligation under this Agreement or when any action, suit, arbitration, mediation, judicial or administrative proceeding, or any other proceeding is pending or threatened that is covered by this *Section 19*; and further agrees that, upon request and to the extent permitted by applicable law, the other party shall have the sole right to control, defend, settle, and negotiate any such suit or proceeding, at such other party's expense, *provided* that: (i) such other party demonstrates to the satisfaction of the party claiming indemnification that it is financially able to defend such action and to pay any settlement or judgment; and (ii) counsel retained by such other party are reasonably satisfactory to the party claiming indemnification. The party claiming indemnification agrees to cooperate with the other party in the defense of any such suit or proceeding, and the other party agrees to reimburse the party claiming indemnification for its expenses with respect thereto. Failure by the party claiming indemnification to promptly notify the other party as required by this *Section 19(e)* shall not invalidate the claim for indemnification, unless such failure has a material adverse effect on the settlement, defense, or compromise of the matter that is the subject of the claim for indemnification. In addition, the party claiming indemnification shall be responsible for any Claims or Losses that could have been avoided or mitigated by prompt Notice as required by this *Section 19(e)*. The indemnifying party's obligations as set out in this *Section 19(e)* are limited by and to the extent they are a result of the party requesting indemnification's gross negligence or willful misconduct.

**Section 20. CUSIP Numbers.** If NASD disseminates a CUSIP Database to Participant, the following language shall be applicable:

(a) Participant acknowledges and agrees that it must execute the appropriate license or agreement with CUSIP Service Bureau that is operated by Standard & Poor's ("S&P") for the American Bankers Association ("ABA") before it will be authorized to access CUSIP information through the TRACE System.

(b) Participant acknowledges and agrees that the CUSIP Database is and shall remain valuable intellectual property owned by, or licensed to CUSIP Service Bureau, S&P and the ABA, and that no proprietary rights are being transferred to Participant in such materials or in any of the information contained therein. Participant agrees that misappropriation or misuse of such materials will cause immediate, irreparable and serious damage to S&P and ABA and that in such event monetary damages may not constitute sufficient compensation to S&P and ABA; consequently, Participant agrees that in the event of any misappropriation or misuse, S&P and ABA shall have the right to obtain injunctive relief. This remedy is in addition to and not in place of any other remedy S&P and ABA may have as a matter of law.

(c) Participant agrees that it shall not publish or distribute in any medium the CUSIP Database or any information contained therein or summaries or subsets thereof to any person or entity except in connection with the normal internal processing of security transactions unless done pursuant to and in accordance with any other agreements Participant has in place with CUSIP. Participant further agrees that the use of CUSIP numbers and descriptions is not intended to create or maintain, and does not serve the purpose of the creation or maintenance of, a file of CUSIP descriptions or numbers for any other third party recipient of such service and is not intended to create and does not serve in any way and shall not be used in any way as a substitute for the CUSIP MASTER TAPE, PRINT ELECTRONIC and/or CD-ROM Services

(d) NEITHER S&P, ABA NOR ANY OF THEIR AFFILIATES MAKE ANY WARRANTIES, EXPRESS OR IMPLIED, AS TO THE ACCURACY, ADEQUACY OR COMPLETENESS OF ANY OF THE INFORMATION CONTAINED IN THE CUSIP DATABASE. ALL SUCH MATERIALS ARE PROVIDED TO PARTICIPANT ON AN "AS IS" BASIS, WITHOUT ANY WARRANTIES AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE NOR WITH RESPECT TO THE RESULTS WHICH MAY BE OBTAINED FROM THE USE OF SUCH MATERIALS.

(e) NEITHER S&P, ABA NOR THEIR AFFILIATES SHALL HAVE ANY RESPONSIBILITY OR LIABILITY FOR ANY ERRORS OR OMISSIONS NOR SHALL THEY BE LIABLE FOR ANY DAMAGES, WHETHER DIRECT OR INDIRECT, SPECIAL OR CONSEQUENTIAL EVEN IF THEY HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

(f) HOWEVER, IN THE EVENT THAT S&P, ABA OR ANY OF THEIR AFFILIATES ARE FOUND LIABLE, THE LIABILITY OF S&P, ABA OR ANY OF THEIR AFFILIATES, PURSUANT TO ANY CAUSE OF ACTION, WHETHER IN CONTRACT, TORT, OR OTHERWISE, SHALL NOT EXCEED THE FEE PAID BY PARTICIPANT FOR

ACCESS TO SUCH MATERIALS IN THE MONTH IN WHICH THE CAUSE OF ACTION IS ALLEGED TO HAVE RISEN.

(g) FURTHERMORE, S&P AND ABA SHALL HAVE NO RESPONSIBILITY OR LIABILITY FOR DELAYS OR FAILURES DUE TO CIRCUMSTANCES BEYOND THEIR CONTROL.

(h) Participant agrees that the foregoing terms and conditions shall survive any termination of its rights of access to the materials identified above.

**Section 21. *Virus Notification/Assumption of the Risk.*** Participant acknowledges that it is possible to contract a virus or similar “disease” by accessing or using the Internet or accessing, receiving or using material downloaded from the Internet directly or through a third party. In addition, web sites are inherently not as secure or reliable an environment as computers connected by dedicated lines and have been in the past vulnerable to attack by hackers and other third parties. Participant should obtain, use and update, and cause all applicable third parties to obtain, use and update, virus-checking software routinely when Participant is accessing, receiving or using information or data obtained from the Internet. NASD cannot assure Participant that the Service and the Information and Data will be virus or problem free. By using the Service or the Information and Data, Participant agrees to assume the risk of any unavailability, interruption, delay, incompleteness, or inaccuracy of the Service or Information and Data.

**Section 22. *No Endorsement; Proprietary Rights; Corporate Names; Trademarks; Service marks.*** Neither Party to this Agreement, including third party beneficiaries, , nor any of its users, affiliates, employees, contractors, representatives or agents shall represent, or shall cause or permit any other individual or entity to represent, either directly or indirectly, that either party is sponsored or endorsed by the other. The Parties agree not to use any trade or service mark that belongs to the other or any of their subsidiaries or affiliates, registered or unregistered, without the prior written permission of the party who owns such marks, and even after receiving written permission, in any way that would infringe upon such marks under applicable law. Participant shall not remove or modify any proprietary notices contained within the Service or Information and Data.

**Section 23. *Assignment; Third-Party Rights.*** This Agreement shall be binding upon and inure to the benefit of the parties and their permitted successors and assigns. Participant shall not assign this Agreement (including by operation of law) without the prior written consent of NASD, which consent may not be unreasonably withheld, *provided*, that in no event shall consent be granted where such assignment would adversely affect NASD and would cause NASD or any of its affiliated entities to be in violation of applicable laws or regulations, including the NASD Rules. In the event that consent to assign is granted, Participant unconditionally guarantees the payment and performance by such assignee entity of all obligations under this Agreement. NASD or its assigns may assign this Agreement upon notice to Participant. Except as otherwise provided in this Agreement, nothing in this Agreement shall entitle any individual or entity to any rights as a third-party beneficiary under this Agreement. Nothing in this Agreement shall constitute the parties as partners or participants in a joint venture, and neither party is appointed the agent of the other.



**Section 23.1. Arbitration.** Any claim, dispute, controversy or other matter in question with regard to the Agreement that cannot be resolved by negotiation between the parties shall be submitted to arbitration in accordance with the rules and regulations of the American Arbitration Association; *provided, however*, that (1) submission of any such claim, dispute, controversy or other matter in question to the American Arbitration Association shall not be required if the parties agree upon another arbitration forum, (2) the foregoing shall not preclude either party from pursuing all available administrative, judicial or other remedies for infringement of a registered patent, trademark, service mark or copyright, (3) the parties shall not submit claims for punitive damages, and do hereby waive any right to the same, and (4) the arbitrators shall not be authorized to award punitive damages. The arbitrator(s) shall award attorneys fees to the prevailing party. A prevailing party shall be one that brings or defends an action and receives substantially the relief sought.

**Section 24. Amendment.** Except as may be otherwise set forth herein, NASD may modify any part of this Agreement (including any Attachment) on 90 days prior Notice. Participant's failure to reject by Notice the modification within 30 days of the effective date of the modification shall be deemed to be an acceptance of the modification. Any rejection by Participant of any amendment made by NASD in accordance with this *Section 24* may, at NASD's sole discretion, result in termination of this Agreement by NASD. Except as otherwise provided herein, no provision of this Agreement, or the attachments which are a part hereof, may be amended, modified or waived unless by an instrument in writing executed on behalf of each of the parties by their respective duly-authorized officers.

**Section 25. Governing Law.** This Agreement shall be deemed to have been made in the State of New York and shall be construed and enforced in accordance with the laws of the State of New York, without reference to principles of conflicts of laws thereof. Unless otherwise set forth in this Agreement, each party irrevocably agrees that any legal or equitable action, suit or proceeding (other than entry or enforcement of an arbitration award or decision) in any way arising out of this Agreement which, under the terms of this Agreement, may be brought by it in a court of law, must be brought solely and exclusively in the United States District Court for the Southern District of New York or in the state courts of the State of New York in New York County and irrevocably accepts and submits to the sole and exclusive jurisdiction of each of the aforesaid courts in personam, generally and unconditionally with respect to any action, suit or proceeding brought by it or against it by the other party; *provided, however*, that this *Section 25* shall not prevent a party against whom any legal action, suit or proceeding is brought by the other party in the state courts of the State of New York in New York County from seeking to remove such legal action, suit or proceeding, pursuant to applicable Federal Law, to the district court of the United States for the district and division embracing New York County, and in the event an action is so removed each party irrevocably accepts and submits to the jurisdiction of the aforesaid district court. Each party hereto further irrevocably consents to the service of process from any of the aforesaid courts by mailing copies thereof by registered or certified mail, postage prepaid, to such party at its address designated pursuant to this Agreement, with such service of process to become effective thirty (30) days after such mailing. Each party hereby irrevocably waives their right to a jury trial.

**Section 26. Waiver.** No failure on the part of NASD or Participant to exercise, no delay in exercising, and no course of dealing with respect to any right, power or privilege under this

Agreement or at law or equity shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege under this Agreement or at law or equity.

**Section 27. Severability.** If any of the provisions of this Agreement, or the application thereof to any individual, entity or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such terms or provisions to individuals or entities or circumstances other than those as to which they are invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

**Section 28. Captions; Interpretation.** The section headings used in this Agreement are intended solely for convenience of reference and shall not in any way or manner amplify, limit, modify or otherwise be used in the interpretation of this Agreement. The Attachments referred to and appended to this Agreement are made an integral part of this Agreement. All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all other genders, if and where applicable. The use of the singular in this Agreement shall include the plural, and vice versa. The words “including”, “includes” or “include” shall mean “including, without limitation”.

**Section 29. Force Majeure.** Neither party will be liable for delay or failure in performance of any of the acts required by this Agreement when such delay or failure arises from circumstances beyond its reasonable control (including acts of God, fire, flood, war, explosion, sabotage, terrorism, embargo, civil commotion, acts or omissions of any government entity, supplier delays, communications or power failure, equipment or software malfunction, or labor disputes), and without the gross negligence or willful misconduct, of the party. If the period of non-performance exceeds ten (10) calendar days, then the party to whom the performance is due will have the right to terminate this Agreement by giving Notice five (5) calendar days before such date of termination.

**Section 30. Authorization.** This Agreement will not be binding upon either party unless it is executed by an authorized representative of each party. Participant, NASD, and the individuals executing this Agreement for the respective parties represent that such individuals are duly authorized by all necessary and appropriate corporate or other action to execute this Agreement on behalf of NASD or Participant.

**Section 31. Effective Date.** This Agreement will become effective on July 1, 2002 (**Effective Date**).

**Section 32. Entire Agreement.** This Agreement, including the Attachments which are an integral part hereof and materials referenced herein and the NASD Rules, as any of these items may be added to, deleted from, or amended from time to time, constitutes the entire Agreement between the parties with respect to the subject matter hereof, and supersedes all prior negotiations, communications, writings and understandings with respect to the subject matter of this Agreement. In the event of any conflict between the provisions of this Agreement, the Attachments or the NASD Rules, the order of preference shall be the NASD Rules, the Attachments and this Agreement.

**Section 33. Notices.** All notices, invoices, and other communications (**Notice**) (except for Notices of changes related to payments, fees or charges under this Agreement) to be given under this Agreement shall be in writing, and shall be directed to the signatories or, in the alternative, to the individuals identified in subsections (a) and (b) below and shall be deemed to have been duly given upon actual receipt by the parties, or upon constructive receipt if sent by certified mail, return receipt requested, or any other delivery method that actually obtains a signed delivery receipt, to the following addresses or to such other address as any party hereto shall hereafter specify by prior Notice to the other party or parties hereto:

(a) if to Participant:

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone #: \_\_\_\_\_  
Fax #: \_\_\_\_\_

(b) If to NASD:

NASD c/o  
The Nasdaq Stock Market, Inc.  
Subscriber Services  
80 Merritt Boulevard  
Trumbull, CT 06611  
Attention: TRACE Administrator  
Telephone #: (800) 777-5606  
Fax #: (203) 385-5879

With, in the event of Notices of default or dispute or personal service of process, a required copy by U.S. certified mail, return receipt requested to:

National Association of Securities Dealers, Inc.  
1735 K Street, N.W.  
10th Floor  
Washington, D.C. 20006-1500  
Attn: NASD Office of General Counsel - Contracts Group  
Telephone #: (202) 728-8294  
Fax #: (202) 728-8894

(c) If to System Administrator:

National Association of Securities Dealers, Inc  
c/o The Nasdaq Stock Market, Inc.  
Subscriber Services  
80 Merritt Boulevard

Trumbull, CT 06611  
Attention: TRACE Administrator  
Telephone #: (800) 777-5606  
Fax #: (203) 385-5879

NASD reserves the right to change its System Administrator, in its sole discretion, without Participant's prior approval and/or consent. NASD shall notify Participant of any change in System Administrator.

**Section 34. Counterparts.** This Agreement may be executed in one or more counterparts, which shall each be considered an original, but all of which together shall constitute one and the same Agreement.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by their duly authorized officers.

National Association of Securities  
Dealers, Inc. (NASD)

\_\_\_\_\_  
(Participant)

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**ATTACHMENT A**

**TRADE REPORTING AND COMPLIANCE ENGINE (TRACE)  
WEB ACCESS ADDENDUM**

**PART I.**

**TRACE Web Access Addendum Checklist**

\_\_\_\_\_ Please carefully review the attached documents (including this Web Access Addendum Checklist, Entitlement Overview and TRACE Web Access Supplement).

\_\_\_\_\_ Make two copies of the full TRACE WEB ACCESS ADDENDUM (Including ALL documents). You must complete both pages of each cover sheet. Please ensure that an authorized officer signs and dates the cover sheets. Incomplete agreements will be returned and will delay you in receiving service.

\_\_\_\_\_ When you have completed the agreements, please return both copies of the entire agreement and appropriate attachments to the following address:

National Association of Securities Dealers, Inc.  
c/o The Nasdaq Stock Market, Inc.  
Participant Services  
80 Merritt Boulevard  
Trumbull, CT 06611  
Attention: Agreements Administrator

NASD will execute and date your agreements with an Effective Date and return one copy to the address you deem the "Participant's Principal Place of Business" on the agreement cover sheet. We will retain the second copy of your agreement for our records. If you have any questions concerning the terms of these agreements, please contact:

**PARTICIPANT SERVICES AT (800) 777-5606**

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by their duly authorized officers. Signature on this cover sheet is in lieu of, and has the same effect as, signature on each document initialed or noted with an Effective Date. This cover sheet supersedes all prior cover sheets.

*Signatures on following page*

Participant Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Participant NASD Broker/Dealer Number,  
If applicable: \_\_\_\_\_

Participant's Principal Place of Business:

\_\_\_\_\_  
\_\_\_\_\_

Identification of Participant: Type of entity, i.e., corporation, limited partnership, general partnership, sole proprietorship, etc.: \_\_\_\_\_

State of incorporation or registration, if applicable:

\_\_\_\_\_

Participant is responsible for providing NASD's Agreements Administrator with the name, telephone number, fax number and email address for Participant's Security Administrator(s). Participant has an affirmative obligation to keep this information contained herein accurate and will update it by providing NASD with prompt notice of any changes.

Participant's Security  
Administrator:

Participant's Alternate Security Administrator:

**Primary Location**

**Primary Location**

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone #: \_\_\_\_\_

Telephone #: \_\_\_\_\_

Fax #: \_\_\_\_\_

Fax #: \_\_\_\_\_

Email: \_\_\_\_\_

Email: \_\_\_\_\_

Participant's Security Administrator:

Participant's Alternate Security Administrator:

**Branch Location**

**Branch Location**

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone #: \_\_\_\_\_

Telephone # \_\_\_\_\_

Fax #: \_\_\_\_\_

Fax #: \_\_\_\_\_

Email: \_\_\_\_\_

Email: \_\_\_\_\_

**NASD Use only:**

Executed this \_\_\_\_ day of \_\_\_\_\_, 200 , (*Effective Date*) for and on behalf of:

National Association of Securities Dealers, Inc.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **PART II.**

### **TRACE Entitlement Overview**

The new Trade Reporting and Compliance Engine (TRACE) will contain a secure Web site that will serve as a restricted access gateway for NASD member firms or their representatives to enter trading information about transactions in fixed income securities and other data and receive appropriate feedback on the accuracy and completeness of their submission. Only authorized individuals will have access to the features of the web site and the system. We have taken all reasonable measures to ensure the security of the web site.

#### **What** is entitlement?

The privilege to gain access to the secure Web site and the process by which that access is obtained is called entitlement. The terms “entitlement” and “security” are often used in the same context by NASD in TRACE and other services.

#### **What** will be secure?

All of the trade data that is entered and updated through the Service and the System will be secure.

#### **Why** does the site need to be secure?

Due to the confidential nature of the data being transmitted over the Internet, NASD has designed a multi-pronged approach to provide a secure path between you and the NASD host computer. This path will ensure that other individuals are not able to access or alter your trade reports. Only those who are entitled to use the Service will be able to update the prices and view the securities that are being traded.

#### **How** will entitlements to the site work?

NASD will assign Service users IDs and passwords as well as “certificates,” which are files that reside on their PCs and allow them to transmit bond data securely via the WebSite. Additionally, the data will be encrypted when it is sent from firms to NASD. This provides a triple layer of security. To further ensure security, NASD has set forth a number of requirements:

- The user must change initial passwords immediately after the first successful login. The password must be at least eight characters long and may not constitute a recognizable word.
- After five consecutive failed logon attempts, your ID and user account will be rendered inoperable.
- Passwords expire every 60 days.
- Certificates expire every two years.



- You must exit out of your PC after ending a secure session and at the end of each day.
- It is recommended that you do not leave your PC unattended while you are logged onto the site.
- You should use password-enabled screen savers.

**Who** will be responsible for handling security at my firm? Does each user handle his/her own entitlement?

Your firm will need to designate a specific individual (and an alternate) as its Security Administrator for the entire firm or each branch location. This individual(s) will be listed on the TRACE Web Access Addendum Checklist as the “Participant’s Security Administrator”. Please note that there is a space for e-mail address; the Participant Security Administrator is required to have an e-mail account.

The Participant Security Administrator at your firm will be your point person for questions, and he/she will give you the original information you need to set up your entitlement. However, each user must follow the instructions, establish his/her entitlement to the system, and select his/her password on his/her own. The NASD security administration team will be in touch with your firm’s Security Administrator once you send the signed TRACE Web Access Addendum.

**How** do I get my certificate and user ID?

By executing the TRACE Participant Agreement and all applicable Attachments, you will have taken the first step to receiving a certificate and password. Once NASD receives your signed contract, in which you must provide all relevant user information, NASD will enter your firm name and users’ names into a security database. NASD will send the Security Administrator that you have designated on the contract a URL and PIN from which to download a certificate. NASD will also send each user designated on the contract a unique user ID and password. The Security Administrator must then provide each user with his/her URL and PIN. Each user will then navigate to the URL to begin the process of downloading the certificate. NASD will send a launch kit to each user that will include a TRACE user guide with detailed instructions on downloading and activating the certificate.

**What** should I do now?

Please have an officer or principal of your firm (i) sign the enclosed NASD Web Access Supplement, (ii) complete, execute and attach any other appropriate Attachment, and (iii) provide the name of your firm’s Security Administrator, an alternate security contact, and the names and e-mail addresses of all Service users.

## PART III.

### TRACE Web Access Supplement

This Web Access Supplement (*Web Access Supplement*) to the TRACE Participant Agreement (*Agreement*) applies to Participants and Service Bureaus or Executing Brokers who utilize the Service for reporting.

1. **Participant Responsibilities.** Participant is liable, under regulation, contract, tort or otherwise, for all actions taken or omitted and all information submitted by Participant or on Participant's behalf from or to the Service or submitted by authorized or unauthorized individuals or entities who access, receive or use the Service through Participant, including any actions performed, or information submitted or retrieved, using Participant's designated security device (e.g., digital certificates). When accessing, receiving or using the Service or a security device, Participant agrees to comply with the Agreement, the NASD Rules and the requirements set forth below:

(a) Participants will use the security device, solely for Service-specific communications and interactions directly with NASD. Participant will not use the security device to communicate or interact with, or to provide any form of identity, assurance, or reliance to any other parties.

(b) Participant will not access, receive or use the Service or the Information and Data, or use any security device, when Participant does not meet the requirements for Service or Information and Data access, receipt or use due to a change in Participant's role, responsibilities, or employer. Participant will not access, receive or use the Service or Information and Data or any portion of the Service or Information and Data when Participant does not meet the then current requirements for the Service.

(c) Participant will not share, loan, sell, or transfer Participant's assigned security device, or allow its access, receipt or use by any other individuals or entities.

(d) Participant will change passwords and perform other actions that are necessary to keep the security device operating correctly and prevent its compromise. The actions, such as criteria for choosing and changing passwords, are specified in the NASD Rules. Participant agrees to abide by all requirements.

2. **Participant Security Administrator Responsibilities.** A Participant security administrator (*SSA*) will comply with the Agreement, the NASD Rules and the requirements as set forth below:

(a) SSAs will receive and secure all pin numbers needed for each security device, and will assign only one unique security device per eligible Participant user.

(b) SSAs will notify NASD on the same Business Day when a Participant is assigned a security device, has their security device revoked, or is no longer eligible to receive the Service. Notice will be through telephonic means to NASD to Participant Services, at (800) 777-5606 or by sending email to: [traderfeedback@nasdaq.com](mailto:traderfeedback@nasdaq.com).

(c) SSA is responsible for providing NASD with the name, telephone number, fax number and email address for each user on the same Business Day that the Participant is assigned a security device.

**IN WITNESS WHEREOF**, the parties hereto have caused this Web Access Supplement to be executed by their duly authorized officers effective as of the date fully executed as set forth below.

PARTICIPANT

PARTICIPANT SECURITY  
ADMINISTRATOR

Signature \_\_\_\_\_

Signature \_\_\_\_\_

Name \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

Name of Firm \_\_\_\_\_

Name of Firm \_\_\_\_\_

MMID or Executing Broker Symbol \_\_\_\_\_

MMID or Executing Broker Symbol \_\_\_\_\_

**ATTACHMENT B**

**TRACE Service Bureau/Executing Broker Supplement**

This Service Bureau/Executing Broker Supplement (*Service Bureau/Executing Broker Supplement*) to the Agreement applies to Participants and Service Bureaus (*Service Bureaus*) or Executing Brokers (*Executing Brokers*) who utilize the Service for reporting.

1. By executing this Service Bureau/Executing Broker Supplement, the undersigned Participant hereby accepts and approves of all trade reports submitted to the Service on the Participant's behalf by the Service Bureau/Executing Broker identified below, or such other Service Bureau/Executing Brokers as the Participant may identify in writing to the NASD.

2. By executing this Service Bureau/Executing Broker Supplement, the undersigned Service Bureau/Executing Broker agrees to submit to the Service all give-up or other trades executed and/or reported by the Service Bureau/Executing Broker for the Participant. The Service Bureau/Executing Broker will observe and comply with the provisions of the Agreement, this Service Bureau/Executing Broker Supplement, and the NASD Rules in submitting trade information to the Service on the Participant's behalf.

3. The Service Bureau/Executing Broker will not provide access to the System or Service to any individual or entity that has not executed the appropriate NASD documentation for such access.

**IN WITNESS WHEREOF**, the parties hereto have caused this TRACE Service Bureau/Executing Broker Supplement to be executed by their duly authorized officers effective as of the date fully executed as set forth below.

SERVICE BUREAU/EXECUTING  
BROKER

PARTICIPANT

Signature \_\_\_\_\_

Signature \_\_\_\_\_

Name \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

Name of Firm \_\_\_\_\_

Name of Firm \_\_\_\_\_

MMID or Executing Broker Symbol \_\_\_\_\_

MMID or Executing Broker Symbol \_\_\_\_\_

----- REVISION LIST -----

The bracketed numbers refer to the Page and Paragraph for the start of the paragraph in both the old and the new documents.

- [1:1 1:1] Changed "2" to "3"
- [1:8 1:8] Changed "Attachments)." to "Attachments) ... the Service."
- [1:8 1:8] Changed "by (i)" to "by both (i)"
- [1:8 1:8] Changed "Accessing" to "Continued accessing"
- [1:8 1:8] Changed "received or posted" to "received and posted"
- [1:11 1:11] Changed "only. Participant" to "only. The ... Participant"
- [1:13 1:13] Changed "the foregoing" to "anything in ... the contrary"
- [1:13 1:13] Changed "and Service." to "and Service ... discretion."
- [1:14 1:14] Changed "five (5) " to "three (3) "
- [1:25 1:25] Changed "Section24" to "Section23.1"
- [1:25 1:25] Changed "remedies, ... Section26 as" to "remedies as"
- [1:26 1:26] Changed "Section24" to "Section23.1"
- [1:26 1:26] Changed "remedies, ... herein, as" to "remedies as"
- [1:41 1:41] Changed "\$5000.00." to "\$5000.00. ... AGREEMENT."
- [1:46 1:46] Changed "ADMINISTRATOR THIRD" to "ADMINISTRATOR NOR ITS THIRD"
- [1:46 1:46] Changed "DAMAGES. " to "DAMAGES. THIS ... MISCONDUCT."
- [1:50 1:50] Changed "(a) Participant" to "(a) Indemnification ... Participant"
- [1:50 1:50] Changed "Data through" to "Data intentionally, ... or through"
- [1:51 1:51] Changed "Data." to "Data up to ... Section 17(c)."