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U.S. Securities and Exchange Commission
450 5th Street, N.W.
Washington, DC 20549-0609

Attention: Mr. Jonathan G. Katz, Secretary

Re: File No. S7-10-04, Regulation NMS, Release No. 34-49325 (February 26, 2004) (the "NMS Release") and File No. SR-NYSE-2004-5, Release No. 34-50173 (August 10, 2004)

Ladies and Gentlemen:

I am writing on behalf of Fidelity Investments to urge the Commission closely to examine how the NYSE's hybrid market proposal would operate alongside the Commission's proposed trade-through rule.

In our comment letter of June 22, 2004, we urged the Commission not to adopt its proposed trade-through rule and instead to allow investors to choose the markets where their trades will be executed. Investor protection is best served by freeing markets vigorously to compete for order flow. Those who act as fiduciaries, including Fidelity as the investment manager of the Fidelity Funds, should be free to exercise their own judgment in seeking best execution (including best all-in pricing) for investment assets entrusted to their care.

Much of the NYSE's hybrid market proposal remains unclear. To advance understanding for all interested parties, we urge the Commission to direct the NYSE to clarify in concrete terms – based upon specific trading examples -- how the execution and pricing of investors' orders would take place in the NYSE's proposed hybrid market. Toward this end, we ask that the Commission obtain from the NYSE specific answers to four hypothetical trading examples set out below. These examples are designed to elicit explicit answers regarding:

(i) the extent to which readily accessible limit orders on markets competing with the NYSE will be protected in the NYSE's hybrid market,

(ii) the comparative treatment of publicly displayed orders on the NYSE and undisclosed orders of NYSE specialists or floor brokers, and

(iii) whether the NYSE hybrid market will cause "price disimprovement" for public investors sending auto-ex market orders to the NYSE.

The attachment at the end of this letter sets forth our preliminary conclusions concerning the questions raised in these examples.

TRADING EXAMPLES UNDER THE NYSE'S HYBRID MARKET PROPOSAL

For each trading example, assume that a broker has sent an investor's "auto-ex" market order to the NYSE to buy 3,000 shares of XYZ Corp. in the NYSE's hybrid market.

Trading Example No. 1

Assume the NYSE and a competing market, for example, the Archipelago Exchange ("ARCA"), display the following orders to sell XYZ Corp.'s shares:

NYSE Sell Orders		ARCA Sell Orders	
price	**shares**	**price**	**shares**
$15.01	500	$15.01	1000
15.02	-0-	15.02	2,000
15.03	300		
15.04	200		
15.05	200		
15.06	200		
15.07	200		
15.08	200		
15.09	1,200		

Questions:

1. Would the NYSE's hybrid market proposal require that 1000 shares of the order be sent to ARCA for execution at $15.01?

2. Would the NYSE be required to send the 1,500-share balance of the order to ARCA for execution at $15.02?

3. If the answer to (2) is "no," would the NYSE specialist be required to match ARCA's $15.02 price for any part of the order? If so, for how much of the order?

4. What is the "clean up" price for the order on the NYSE? How many shares will be sold at the clean up price on the NYSE?

Trading Example No. 2

NYSE Sell Orders		ARCA Sell Orders	
price	**shares**	**price**	**shares**
$15.01	500	$15.02	3,000
15.02	-0-		
15.03	300		
15.04	200		
15.05	200		
15.06	200		
15.07	200		
15.08	200		
15.09	1,200		

Questions:

1. Would the NYSE specialist be required to send 2,500 shares of its 3,000 share buy order to ARCA to be executed at $15.02?

2. Would the NYSE specialist be able to avoid sending any part of the order to ARCA by matching the ARCA offer for a smaller quantity?

Trading Example No. 3

NYSE Sell Orders		ARCA Sell Orders	
price	**shares**	**price**	**shares**
$15.01	500	$15.02	500
15.04	500	15.03	2,000
15.05	200		
15.06	200		
15.07	200		
15.08	200		
15.09	1,200		

Questions:

1. Would the NYSE specialist be required to fill 500 shares of the 3,000-share buy order at $15.01 and send 500 shares to ARCA at $15.02 and the remaining 2,000 shares to ARCA at $15.03?

2. Could the NYSE specialist avoid the ARCA $15.03 order and fill the remaining 2,000 shares on the NYSE? If so, what is the clean-up price for those shares?

Trading Example No. 4

NYSE Sell Orders		NYSE Sell Orders Specialist Interest File And/Or Broker Agency Interest File	
price	**shares**	**price**	**shares**
$15.01	500	$15.04	200
15.04	300	15.05	500
15.06	500	15.08	500
15.07	500		
15.09	1,200		

Questions:

1. Would anyone not on the NYSE floor be permitted to insert an order into the broker agency interest file or the specialist interest file?

2. Would the quotations of specialists or floor members that are interacting with the sweep function be disclosed to investors so that they could correctly gauge the extent of trading interest on the NYSE?

* * *

We appreciate the opportunity to raise these questions with the Commission. If members of the Commission or the staff wish to discuss these matters, please call either me (617-563-7000) or our counsel, Roger D. Blanc (212-728-8206).

Respectfully submitted,

Attachment

cc (w/att.): The Hon. William H. Donaldson, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Harvey J. Goldschmid, Commissioner
The Hon. Roel C. Campos, Commissioner
Annette L. Nazareth, Esq., Director,
Division of Market Regulation
Robert L. D. Colby, Esq., Deputy Director,
Division of Market Regulation
Heather Seidel, Esq., Attorney Fellow
Division of Market Regulation
Jennifer Colihan, Esq., Special Counsel
Division of Market Regulation
Paul Roye, Esq., Director
Division of Investment Management
Giovanni P. Prezioso, Esq., General Counsel
Mike Eisenberg, Esq., Deputy General Counsel

Analysis of Trading Examples

We understand that the proposed Reg NMS trade-through rule and the NYSE's Direct+ proposal disregard superior prices offered on a competing market center when those superior prices are below that market center's best bid or offer — that is, are below "top of book."

In the Reg NMS Release, the Commission explains its trade-through rule proposal as follows:

> The proposed rule would apply only to the best bid and best offer of any order execution facility that is disseminated pursuant to an effective national market system plan. It would not apply to other limit orders or quotes that are also priced better than the order being executed but are not disseminated pursuant to an effective national market system plan. To expand price protection beyond the best bid and best offer for each market would entail the Commission requiring quoting market centers to make available, and provide access to, their entire depth of book to other markets. Although the Commission believes that from a policy viewpoint it would make sense to provide protection to any better-priced quote or orders displayed in another quoting order execution facility, not just the top-of-book of each quoting order execution facility, the Commission questions whether protecting all displayed limit orders and quotes at this time would be feasible. . . .[1]

To be clear, Fidelity opposes any rule that would deprive investors of the ability to make their own choices about the markets in which their trades will be executed. Nonetheless, if the Commission were to decide to adopt its proposed trade-through rule, it is open to serious question whether the Commission will have achieved any meaningful "protection" of public limit orders if the NYSE is free, through its hybrid market proposal, to ignore prices offered by competing market centers that are better than prices offered on the NYSE, simply because the competing markets' prices happen to be below their "top of book."

The deficiencies in the NYSE's proposal are illustrated by *Trading Example No. 1*. We understand that the NYSE's proposal would allow the NYSE specialist to avoid sending any part of the order to ARCA to hit the $15.02 price and would not require him to match that price. Instead, the investor who placed the best offer on the NYSE, at $15.01, would sell at that price and investors who had placed limit orders on the NYSE to sell at inferior prices (ranging from $15.03 to $15.09) would each sell at a "clean up" price of $15.09, resulting in "price disimprovement" to the public investor sending the auto-ex market order to buy to the NYSE.

If the Commission does not require market centers to publish their limit order books to five or six price levels above and below the NBBO, the effect of the "clean up"

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[1] NMS Release in text before note 63.

provisions would be to promote market opacity, not market transparency, particularly if NBBO quotes, as we believe likely, will continue typically to be quoted in nominal amounts.

The disadvantageous treatment accorded the 3,000-share public market order in our trading example, where the specialist would be allowed to by-pass a better price on ARCA, is at odds with the NYSE's public position, that "every order, regardless into which market it is entered, should compete with every other order and receive the best price, period."[2]

With regard to *Trading Example No. 5*, the NYSE in its filing notes that either the Specialist Interest File or the Broker Agency Interest File "could improve a sweep price,"[3] but it appears that ***neither*** the specialist nor floor broker is ***required*** to do so. Rather, each can compete with customer limit orders without revealing his trading interest to the investing public. We understand that only floor members will be able to enter undisclosed orders into the Broker Agency Interest File. The result here would be, we understand, that the undisclosed orders placed by NYSE floor members — possibly in response to incoming order flow from public investors — would have full standing in the auction even though they remain hidden from public view. This undisclosed trading interest could compete with and take liquidity away from public orders on the specialist's book. While the trading floor of the NYSE has historically bestowed informational and trading advantages on its floor members, this, in our view, is no reason to perpetuate these privileges in a hybrid market.

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2 NYSE, Testimony of John A. Thain, Chief Executive Officer, and Robert G. Britz, Chief Operating Officer, at SEC Hearings on Regulation NMS (April 21, 2004), available at: http://www.sec.gov/spotlight/regnms.htm.

3 *See* Securities Exchange Act Release No. 50173 (August 10, 2004) in text following note 48.