By E-mail

Date: April 23, 2004
To: rule-comments@sec.gov
From: Junius W. Peake

Subject: S7-10-04, Release No. 34-49325 Comments

My Background

I am the Monfort Distinguished Professor of Finance of the Kenneth W. Monfort College of Business at the University of Northern Colorado, and have taught there for more than 11 years. I was a senior officer and director of a large New York Stock Exchange firm, a founding Director of the National Clearing Corporation, and Governor and Vice-Chairman of the National Association of Securities Dealers, as well as a domestic and international consultant on securities market structure.

In April 1976, together with two colleagues, I presented to the National Market Advisory Board of the Commission a proposal for using computers and telecommunications to trade stocks in a "visual" auction market, rather than a manual, "auditory" market, such as a traditional stock exchange. This proposal, which we called "The National Book System," had the following characteristics:

- Screen-based auction trading;
- Consolidation of market makers' bids and offers with customers' bids and offers into a "book" of all orders;
- An accessible display of the aggregate quantities of all bids and offers at each price;
- Anonymity for all orders entered;
- Minimum price increments in decimals;
- Price-time priority for execution of all bids and offers;
- Multilateral price negotiation; and
- Equal and instant global access by qualified participants

We believed this proposal, which was made 28 years ago, met all the congressional mandates of Section 11A of the Securities Exchange Act of 1934. This market system would also have provided an instant, fully-electronic audit trail, tracking every bid and offer entered, executed and/or cancelled, thus ensuring low-cost and timely regulation.

In the early 1980s, I was a founder and president of the first electronic futures exchange, Intex, located in Bermuda. I have consulted domestically and internationally on market structure, design and operations, and have given many academic and industry papers and speeches on the issues surrounding the use of electronic execution in the trading process.

I have commented for many years on the Commission's Releases on the national market system, and my comments have been cited frequently in later Commission Releases.

I have often been asked to give my opinions in testimony on market structure before committees of both Houses of the Congress, starting in 1971.

I would like to comment on this important Release.

Comments

On February 26, 2004, the United States Securities & Exchange Commission published for comment Release No. 34-49325,[1] **"**Regulation NMS," which, in addition to routine matters:

"…would incorporate four substantive proposals that are designed to enhance and modernize the regulatory structure of the U.S. equity markets. First, ***the Commission is proposing a uniform rule for all NMS market centers that, subject to certain exceptions, would require a market center to establish, maintain, and enforce policies and procedures reasonably designed to prevent "trade-throughs"—the execution of an order in its market at a price that is inferior to a price displayed in another market.*** [2] [Emphasis added.]

Proposed Regulation NMS is very complex, and will be very costly to implement, if adopted as planned. For example, in the Release, the Commission makes the following cost estimates merely for implementing the trade through provision (Page 41-42):

"The Commission staff estimates that there would be an initial one-time burden of 200 burden hours per SRO or 1,800 hours, and 150 burden hours per non-SRO order execution facility or 1,015,200 hours, for a total of 1,017,000 burden hours to establish policies and procedures designed to prevent the execution of a trade-through for an estimated one-time initial cost of ***$145,469,475****. The Commission estimates a capital cost of approximately* ***$101,655,000*** *for both SROs and non-SROs resulting from outsourced legal work."* [Emphasis added.]

And again, the estimated cost merely for disclosure of the proposed opt-out provision (Page 43):

[1] Release, No. 34-49325, is 247 pages in length, has 105,804 words and contains 377 footnotes.
[2] Ibid., Summary,

"...(T)he Commission staff estimates that there would be a one-time burden of 893,376 hours for broker-dealers to make changes to their systems necessary to provide disclosure to investors regarding the impact of opting out of the protections offered by the proposed rule for a total onetime cost of approximately ***$83,923,200****, plus a one-time capital cost of approximately* ***$16,243,200*** *resulting from outsourced legal work."* [Emphasis added.]

I focus most of my comments on the first proposal in Regulation NMS. The Commission seems to believe it must decide between the equivalent of Scylla and Charybdis: Either give up its long-standing protection against "trade-throughs," or continue to let slow and fast market centers coexist, with all the problems that entails.

I believe this choice to be unnecessary. The correct solution would require that all market centers operate at the same electronic speed. If any market center cannot receive, process and execute orders using modern technology, it has not earned a place in the market structure for the 21st Century.

A trade-through is the execution of an order in a market at a price that is inferior to a price displayed in another market.

The proposed "opt-out" provision in Regulation NMS would permit informed investors to elect to "opt-out" of the trade-through rule on an order-by-order basis. Depending on the price of the stock, the opt-out provision would allow trades to be made from one cent to five cents worse than the best displayed bid or offer.

The "trade-through rule," and its proposed "opt-out" exceptions, is by far the most controversial piece of proposed Regulation NMS.

The Commission noted that it *"... believes that these changes (opt-out exceptions to the trade-through rule) require it to revisit the issue of trading at inferior prices across markets. Clearly,* ***in a fully efficient market with frictionless access and instantaneous executions, trading through a better-displayed bid or offer should not occur."*** [3] [Emphasis added.]

In the Release (Page 27), the Commission notes: "*As discussed in Section IV below, the Commission historically has not dictated the means of execution provided by competing market centers."*

The Release goes on to state (Page 63): *"The Commission has been reluctant to mandate automatic execution, in part because of a concern that doing so might be incompatible with the business models of individual market centers and interfere with the ability of individual market centers to compete. Given the changes that have occurred in the markets in recent years, however, and particularly the widespread use of electronic execution in some markets, the Commission requests comment on whether its proposed*

[3] Ibid., p.16

access standards should require a "quoting market center" or a "quoting market participant," as defined in the rule, to execute orders at its quote automatically."

The answer is a resounding "Yes!"

But let me propose a hypothetical question: "If a market center still used the abacus and tom-toms in their trading system, would the Commission propose writing rules that keep it as a part of the 21st Century "national market system?"

And again (Page 63): *"...the Commission requests comment as to whether it should promulgate performance standards to ensure that the quotes of all market participants are available for automatic execution. Such performance standards would be designed to ensure that all automatic execution systems satisfy minimum standards that would assure that market participant orders are executed in substantially equivalent timeframes across markets."*

To that, I also answer, "Yes!"

And, finally on this point, let me quote the Release once again (Page 64):

"The Commission also believes that, if quoting market centers and quoting market participants were required to offer automatic execution, it would be critical that the automatic execution functions of quoting market centers and quoting market participants not unfairly discriminate by offering their members faster automatic execution than they offer to non-members. In the Commission's view, such discrimination would be inconsistent with the standard of equivalent access and would thwart the goals of Section 11A of the Exchange Act."

I agree.

<u>The "Market Order"</u>

A major defect of the present market structure is the ability to enter "market orders" into the trading arena. A market order is defined as an unpriced buy or sell order delivered to the trading arena to be executed as quickly as possible upon arrival. It is never included as part of the NBBO[4], since it contains no bid or offer price. Market orders force execution at any price, because they give a free, unpriced option to the person who chooses to execute them. Market orders exacerbate volatility.

[4] The "NBBO," is the "National Best Bid and Offer, a term applying to the SEC requirement that brokers must guarantee customers the best available ask price when they buy securities and the best available bid price when they sell securities. NBBO is the bid and ask the average person will see. The NBBO is updated throughout the day to show the highest and lowest offers for a security amount at all market centers.

The "market order" was needed only when order entry personnel could not know what was going on in the trading arena. That was true in 1950, when I arrived on Wall Street. Then, it could take 10 minutes to get an order delivered to the trading post, since it had to be done manually, and could take 10 more minutes before the report was delivered back from the floor to the investor. The only people who knew what the real bids and offers were the specialist and the few brokers who were in the trading crowd.

Today, market orders are no longer needed, because in a properly designed and operated electronic market system all participants would be able to see and interact with the very best prices at all times.

A true national market system would require that all orders be entered into the trading arena with a mathematically-calculable price or algorithm for execution at the time it is entered. In other words, no "market" orders are needed, which is the way specialists get their 30-second, free, unpriced valuable options.

Not only traditional limit orders could be entered. Orders to trade at the opening price, at the closing price, at the volume weighted average price ("VWAP"), the median price of the day, Immediate or Cancel ("IOC"), Fill or Kill ("FOK"), best bid or offer when received at the trading arena, or similar type orders, would also be able to be entered.

Short sale execution restrictions could still be met, and other regulatory restrictions, such as buy "minus" or sell "plus" could also be continued, with the present "market order" condition replaced with either highest bid or lowest offer.

But all orders should contain a predeterminable, mathematically calculable price or algorithm at the time of entry. Unexecuted orders or portions of orders should be cancelable either by direction or by the previously entered algorithm. Execution should occur on a strict price-time priority basis. First, disclosed bids or offers would trade, and next, reserve orders (undisclosed, but entered orders) at the same prices as disclosed executed orders.

Bids and offers entered into the market should be able, if designated to do so, to "walk up or down" the "books" of displayed bids or offers that have been sent to the market through various market centers. Merely permitting immediate electronic executions only at the best bid or offer price would be anticompetitive and unnecessary.

<u>The New York Stock Exchange's Proposal</u>

More than two months ago, on February 6, the New York Stock Exchange ("NYSE") filed a proposed rule change (SR-NYSE-2004-05) with the Commission. This proposed rule change has not yet been published in the Federal Register, so the timetable for its approval or disapproval by the Commission has not commenced.

However, it should be obvious that the NYSE's proposed rule changes, since they would not handle orders to be executed under present or proposed short sale rules, would not permit it to be used if the bid or offer were for 100 shares, would not allow "immediate or cancel" or "fill or kill" orders, would transfer any remaining balance of unexecuted orders to the specialist, and otherwise would not meet any rudimentary test that would lead a reasonable person to consider the NYSE using its proposed structure to be a "fast" market.

The New York Stock Exchange, which has been the principal beneficiary of the trade-through rule, not surprisingly, is fighting tooth and nail to maintain the *status quo* as closely as possible.

Its competitors (and would-be competitors), believe the present iteration of the trade-through rule to be old fashioned because it frequently requires manual intervention before an order can be executed, and gives an unfair advantage to NYSE specialists, who have time to make up their minds whether or not to participate in a trade.

They would like to see an opt-out rule permitting them to trade as much as five cents away from the NBBO, depending on the price of the stock. This is a bad idea, since it emasculates the notion of "best execution." Fix the trade-through rule, and opt-out becomes unnecessary.

The Intermarket Trading System

The Intermarket Trading System, ("ITS") is also a major part of the problem in enabling "best execution." ITS is a system linking certain market centers that slows down executions. A quarter of a century ago, the then president of Merrill Lynch, William A. Schreyer, derided ITS in sworn testimony before two congressional subcommittees as follows: *"It is as far from the concept of an automated, efficient marketplace as a tom-tom is from a communications satellite."*[5] ITS has not changed very much since then, except cosmetically. Even John Thain, CEO of the New York Stock Exchange, conceded that ITS needs a massive overhaul (or elimination?) in testimony before the Commission on April 21, 2004. The Commission also recognizes this fact.

Transactions, Executions and Orders

I would like to comment on the implications of the differences among the terms "Transactions," "Executions" and "Orders," and how the appropriate use of the terms will affect the decisions made by the Commission with regard to proposed Regulation NMS, and whether the Nation will finally achieve the national market system the Congress ordered the Commission to "facilitate" in 1975. (Note: "Facilitate" is defined as "to make easy.")

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[5] "Progress Toward the Development of a National Market System," Joint hearings before the Subcommittee on Oversight and Investigations and the Subcommittee on Consumer Protection and Finance, 96th Congress, Serial 96-89, U.S. Government Printing Office, Washington DC, p.70.

In the 1963 Special Study of the Securities Industry, the Securities & Exchange Commission wrote:

"The Report concludes that the factors contributing to or detracting from the public's ready access to all markets and its assurance of obtaining the best execution of ***any particular transaction*** requires the continuous attention of the Commission and the Policy and Planning Unit."[6] [Emphasis added.]

41 years later, in 2004, the Commission wrote in Proposed Regulation NMS:

"*c. Opt-Out - Provision of National Best Bid or Offer*

"The Commission also is proposing to require a broker-dealer to disclose to its customers that have opted-out the national best bid or offer, as applicable, at the time of execution ***for each execution for which a customer opted out.***"[7] [Emphasis added.]

Notice the proposed regulation uses the term **"execution,"** rather than **"order,"** even though the proposed opt-out exemption is required for each "**order**." In reality, however, the exemption is required for each execution within an order, since the proposed regulation requires the broker-dealer choosing the opt-out provision to certify to the investor the NBBO at the time each execution occurs, and report back to the investor the amount of any possible loss that might have occurred.

Section 11A of the Securities Exchange Act also contains these words:

"…it is in the public interest and appropriate for the protection of investors and the maintenance of a fair and orderly market to assure:

- *the economically efficient* ***execution of securities transactions"*** [Emphasis added.]

It is interesting to note the words chosen: "execution" and "transactions." More recently the Commission has defined the word "order" as a synonym for "transaction" or "execution." That is often incomplete, because every order which is filled (in whole or in part) must have at least one execution or transaction. Many orders, however, have multiple executions or transactions.

In 1968, the Commission directly addressed the definition of the term "transaction":

"One of the basic duties of a fiduciary is the duty to execute securities transactions for clients ***in such a manner that the client's total cost or proceeds in each transaction*** is the most favorable under the circumstances…"[8] [Emphasis added.]

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[6]Special Market Study, Release No. 32, July 17, 1963
[7] Release No. 34-49325, p.36.
[8] Investor Advisors Act of 1940, Release No. 232; Securities Exchange Act of 19344, Release No. 8426, October 16, 1968.

The reality is that investors and other traders want only one thing: buyers want to pay the smallest total amount for each execution; sellers want to receive the greatest total proceeds for each execution. When an order requires execution by more than a single transaction, the investor would like to receive the highest aggregated proceeds for each sale transaction and the total lowest cost for each purchase transaction. The Commission has the ability precisely to define the term "best execution" for each transaction in a national market system, but ***it is impossible precisely to define "best execution" for any specific order requiring multiple transactions to fulfill***[9]

Orders requiring more than a single transaction to complete have but one thing in common: They almost always need the professional skill and judgment of the person or persons responsible for fulfilling the order. ***There is no single way to assure best execution of a complex and large order, any more than there is a single way for a competent and skilled attorney to try a case.***

Many orders—especially large orders for hundreds of thousands or millions of shares entered by institutional investors—require multiple trade executions, sometimes taking one or more days. This may be required to achieve what is believed to be the lowest overall cost or the highest proceeds. But if each and every trade execution at the time it is made is made at the highest bid (for a purchase) or the lowest offer (for a sale), the total cost or proceeds of the entire order will assure "best execution," ***provided reasonable judgment and care is taken with the order.***

The Commission defines "best bid" and "best offer," as follows: "The terms *best bid* and *best offer* shall mean the highest priced bid and the lowest price offer."[10]

If there is any spread at all between best bid and best offer, there cannot be an execution. ***At the moment of execution, the spread must always be zero.*** There can be no "price improvement," since the bid must be hit or the offer taken. The true issue is: Who gets to see and trade with the best bid or offer? "Price improvement" is only possible if the market system hides either bid or offer (or both) from some market participants. "***Price improvement" is an oxymoron if the market system is properly designed and implemented.*** And I would add that "price improvement" for a buyer is always a worse price for the seller and *vice versa.*

Price Continuity

In the year 2004, information technology advances allow disclosed supply and demand to be made instantly available in the electronic trading arena. There is no longer any need to pay a monopolist for "price continuity." If the best bid is lower than the best offer by any amount, no trading can occur. As noted above, only when bid and offer are equal can there be a trade. If there is a spread, and no trading occurs, there is no need for a

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[10] Rule 11Ac1-1 Dissemination of Quotations (Definitions). (Securities Exchange Act of 1934 as amended.)

mandated "circuit breaker" when there is an order imbalance, and as a result, each stock would have its own natural circuit breaker.

Once again, the issue is whether any market participant has immediate and full access to all bids and offers when they are entered. If so, price continuity will become irrelevant, since whenever there is a spread, no executions could occur.

Market makers would be free to enter any bids or offers they wished to narrow spreads. There would be no need for “affirmative” or “negative” trading obligations. Regulatory halts would, of course, also be able to continue.

The idea of maintaining subsidized "price continuity" in an electronic age is unnecessary and anticompetitive. If market conditions create an imbalance between bids and offers, and there is a spread between the highest bid and the lowest offer, there should be no forced trading. Traders should only trade at the price at which buyers and sellers voluntarily agree (other than for a regulatory trading halt, which is very different from a market imbalance halt). If no trading takes place, it is solely because no buyer is willing to meet the seller’s offer and *vice-versa*.

If news occurs that should result in a significant price change, it should move to the new equilibrium price as quickly as possible. To move a stock slowly up or down to the new equilibrium price is a fraud on the market.

Professor Hans Stoll noted the lack of need for specialists’ affirmative obligations as long ago as 1997, as follows:

“It is time to reconsider the affirmative obligation, certainly as a regulatory obligation. It is not evident that an affirmative obligation reduces volatility or makes markets more efficient. The cost to the public of the privileges granted to market makers—such as a quasi monopoly position and access to trading information—are likely to outweigh any benefits. Finally the cross subsidization between easy trades and hard trades implicit in the affirmative obligation is increasingly impractical in today’s more competitive markets.”[11]

Fragmentation

The Commission is seeking to facilitate a national market system. There are multiple market centers in which the same securities are being traded at the same time, and in which various “pools” of liquidity (bids and offers) are collected and shown. There is no capability for any investor to be able to see and access the entire “ocean” of liquidity resulting from integrating all the pools of liquidity.

[11] Hans Stoll, 1997, “Affirmative Obligation of Market Makers: An Idea Whose Time Has Passed?”, Financial Markets Research Center, Owen Graduate School of Management, Vanderbilt University, Working Paper 97-14. p. 17.

The reasons for this inability are many, but start by a failure of the present market structure to aggregate all bids and offers for each security into a single, instantly-accessible whole. However, if all market centers operated at the same speed, making instantly accessible all separate "pools" of liquidity, this would create an "ocean" of liquidity.

The Commission earlier wrote:

"The Commission anticipates that the proposed rule (11Ac1-5) will help broker-dealers fulfill their duty of best execution. That duty requires a broker-dealer to seek the most favorable terms reasonably available under the circumstances for a customer's order. ***Routing orders to a market center that merely guarantees an execution at the best published quote does not necessarily satisfy that duty****…"*[12] [Emphasis added.]
The definition of best execution goes on to state:

"*A broker-dealer must consider several other factors* [besides best price] *affecting the quality of execution, including, for example, the opportunity for price improvement*[13]*, the likelihood of execution (which is particularly important for customer limit orders), the speed of execution, the trading characteristics of the security, and any guaranteed minimum size of execution."*

In a properly-designed national market system, routing orders to an integrated set of market centers operating at the same speed would satisfy the duty of best execution, and a modified trade-through rule could be maintained. Under such a system, there would be no difference in "execution quality." In the proposed Regulation NMS Release the Commission makes this point:

"In short, Section 11A of the Exchange Act envisions a market structure characterized by full transparency where competing markets are linked together to provide the ability to effectively and efficiently execute customer orders in the best available market. It is these core principles that have shaped the Commission's actions to foster the development of a true NMS".[14]

The problem with the Commission's approach is that "the best bid and offer" is seldom, if ever, made up of ***all*** the bids and offers available at a moment in time. There are often better undisclosed bids and offers (which could have been and should have been published), but there is no practical or economical way for all orders to interact with them, since they are not known to exist. In addition, even under Regulation NMS's proposed rules, locked and crossed markets would still be possible. Any trading system that permits locked and/or crossed markets should not be allowed to exist as a part of a national market system.

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[12] Release No. 34-43084; File No. S7-16-00 Disclosure of Order Routing and Execution Practices

[13] See discussion of "price improvement" above.
[14] Regulation NMS, Page 19.

The only way for "best execution" of each transaction to be guaranteed is for all bids and offers in any particular security to be able to interact, preferably on a price-time priority basis. "Best execution" of a multiple transaction order will still require skill and judgment, as it should. But the cost of such a system would probably be at least one order of magnitude less than the present multiple, cobbled-together systems that are the result of the Commission's actions since 1975.

Let me postulate the execution of a large order as follows under the "opt-out" proposal: An order is entered under the proposed opt-out provision to buy 100,000 shares. The NBBO in hypothetical stock XYZ is 20.15 bid for 15,000 shares, 10,000 shares offered at 20.23. The last sale was 20.20.

The buyer bids 20.24 for 50,000 shares, and buys the 50,000 shares at that price, bypassing the 10,000 shares at 20.23. There are now 110,000 shares remaining to be bought, which are may be completed in several transactions with or without employing the opt-out provision.

In this scenario, the presumptive reason the buyer is willing to buy above the best offer price is because of foreknowledge there is a specific quantity of stock available to be bought at that price, and the seller does not want to have to deal with 10,000 shares being bought away. That information is concealed from the rest of the market.

In addition, the buyer does not wish to allow a "slow" market center to be able to delay execution for some period of time.

This would appear to fly in the face of the congressional edict that:

"It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure--

> *the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities*"[15]

The law certainly suggests that the same information about bids, offers and executions of securities transactions, as well as executions ("transactions") be made available to all brokers, dealers and investors at the same time, and not just to a subset.

In 1996, Jonathan R. Macey and Maureen O'Hara of Cornell University, wrote "The Law and Economics of Best Execution," in which they stated:

"Despite the seeming simplicity of this concept, *few issues in today's securities markets are more contentious than the debate surrounding best execution.* ***Does clearing a trade in one market at the best available current quote constitute best execution if trades frequently clear between the quotes in another market?***

[15] Securities Exchange Act of 1934, § 11A (1) C iii.

Does the mechanism that provides best execution change when trade size is considered?

Can investment professionals comply with their legal best execution obligation if their trade price implicitly provides a rebate to the broker rather than a better price to the trader?

How can exchanges, investment professionals, and regulators guarantee the provision of best execution? Is best execution an achievable (or even definable) goal, or is it a more amorphous concept akin to market efficiency?

These questions represent just a part of what is becoming an issue of increasing complexity".

Clearly, proposed Regulation NMS's ability to describe "Best Execution" today is even more complicated than it was in 1996.

<u>Access Fees</u>

According to the Release, *"…the Commission is proposing a market access rule that would modernize the terms of access to quotations and execution of orders in the NMS."*[16]

The Commission has proposed a standard access fee described as "*de minimis."*[17]

However, it does not appear to be based on costs, since it is proposed to be charged per share, rather than per transaction. The $.001 charge per share would be the same, regardless of whether the stock traded at $2 per share or $1,000 per share.

It costs no more to send a quote or execution report electronically for one share or 1,000,000 shares. It does not matter whether the stock is priced at $2 per share or $1,000 per share. The cost is the same.

Any charges should be based on the actual cost of sending the electronic message to its recipient, and the cost of storing it while it is extant.

The Commission should go back to the drawing boards on this one. This proposal reminds me of the days before negotiated commissions. In those days there was a "fixed minimum commission," based on number of shares and their price. The commission for executing 10,000 shares would be 100 times greater than executing 100 shares. There was no "volume discount." The Commission should begin to "think outside the box," and use a more rational cost structure.

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[16] Release, No. 34-49325, Summary
[17] Ibid., p.69.

Sub-Penny Trading

The Release states:

"The third proposal would prohibit market participants from accepting, ranking, or displaying orders, quotes, or indications of interest in a pricing increment finer than a penny, except for securities with a share price of below $1.00."

I agree with the Commission's recommendations on this issue.

A simple solution for any investor wishing to trade in sub-pennies would be to employ "ginzy trading," defined as follows:
"Ginzy Trading is a trade practice in which a floor broker, in executing an order—particularly a large order—will fill a portion of the order at one price and the remainder of the order at another price to avoid an exchange's rule against trading at fractional increments or "split ticks."[18]

While Ginzy trading was found by the Commodity Futures Trading Commission to be a noncompetitive practice in futures trading,[19] there is no similar restriction in the trading of securities, and I do not believe it to be anticompetitive.

Conclusion

The Commission is at an historical crossroads. A true "national market system" is now within its reach. However, to attain that congressional goal put forth nearly three decades ago, requires an all-electronic market structure. The largest exchange in the United States, the NYSE, is not an all-electronic market. Writing rules that leave the NYSE still using obsolescent technology to maintain their present structure is strictly a political decision, not a regulatory one.

Given the traditionally glacially-paced time frame for the writing and implementing of Commission rules, the NYSE should have plenty of time to properly automate its execution systems, as have so many of its competitors, both domestically and worldwide.

In 2004 there is no reason a properly-modified trade-through rule should not be maintained. If that were to occur, would be no need for any opt-out provisions.

As noted above, the access fee proposal also should be modified, and the sub-penny proposal accepted.

A good vision of what the national market system should become was stated by Professor Charles Jones of Columbia University in an article in a recent newspaper column, as follows:

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18 http://law.freeadvice.com/financial_law/investment_terms/security_terms.htm
19 In re Murphy, [1984-86 Transfer Binder] Comm. Fut L. Rep. (CCH) at pp. 31,353-4 (Sept. 25, 1985).

"Nobody would complain about the trade-through rule if all the markets got back to one another instantly and everyone was guaranteed that so-called best price when an order was sent someplace else," Jones said.[20]

It is long past the time the Commission should have enabled a market structure which met Professor Jones' wish. We are nearly halfway through 2004, and the Commission has had nearly three decades to get it right. Now is its best chance, and the Commission should finally get it right.

It will be very important to see the result of the Commission's deliberations, and how the politics of economics plays out. The stakes for the market centers and investors are huge; the biggest challenge to market centers is to the New York Stock Exchange, since their market structure is old, cumbersome, and people-intensive.

The Commission's Chairman stated at the April 21st hearings that Commission decisions will be made strictly on a public policy basis. If good public policy results in a major modification to one or more market centers, the Commission should not give that a second thought, but should do what is best for those the securities laws are written: investors and issuers.

It's been nearly three decades since the Congress ordered the Commission to "facilitate" the establishment of a national market system. It's time to finish the job.

If there are further hearings on Regulation NMS, I request to testify.

Very truly yours,

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Regulation NMS comments 4-23-04

[20] Newark Star Ledger April 18, 2004, "Test by SEC supports 'trade-through' critics"