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May 19, 2004

VIA FAX

William H. Donaldson
Chairman
Securities & Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

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MAY 25 2004
OFFICE OF THE SECRETARY

Re: Regulation NMS Proposal – File No. S7-10-04

Dear Chairman Donaldson:

I am an attorney engaged in the practice of corporate and securities law and through this letter am submitting my comments on the proposed rules and amendments to Regulation NMS, particularly with respect to the proposed amendment to the trade-through rule adopted under Section 11A of the Securities Exchange Act of 1934 ("Exchange Act").

The Security & Exchange Commission's (SEC) original trade-through rule was, at its inception, designed to protect investors by insuring that investor orders be executed on the market with the "best price". The current rule requires only that trade orders be sent to the best-advertised (or posted) price, not the best guaranteed price. In practice, this rule forces investors to risk losing the best certain price so that the investor can seek a potentially better price in another market. As a result, markets that are slower to update their prices when new information enters the market (such as the manual marketplace of the New York Stock Exchange) see an inordinate amount of orders routed to their market.

Among the apparent benefits of the proposed amendment is that it supplants the prior provision that required customers to return to the exchange floor. Under the trade-through rule, an order must be sent to the exchange floor if the specialist (broker) can meet or beat the best price available elsewhere. However, because this process requires human intervention, the system is inefficient, and many traders would prefer to sacrifice a few cents a share in order to get their trades executed more expeditiously. This proposed amendment would allow investors to bypass a slower human-run market in favour of a faster and more efficient electronic trading system.

Unfortunately, the "best price" definition has not included certain factors that modern investors, particularly large institutional investors, choose to consider when trading, i.e., certainty of execution, speed of execution, and low market impact. Furthermore, the trade-through rule does not bind stocks listed on the NASDAQ and investors have benefited from this flexibility through tighter spreads and lower transaction costs.

Under the proposed revisions to the trade-through rule, the SEC is considering an opt-out exception, which would allow investors to op-out of the rule. Under the currently proposed opt-out exception brokers would have to ensure that the decision by the investor to opt-out was an informed choice for the investor. This proposal would cause brokers to implement time consuming procedures to ensure the investor was making an informed decision to opt-out. Requiring such procedures could defeat the entire purpose of the opt-out exception.

The value of the opt-out exception is that it is only as effective as its ease of use and implementation. The more difficult it is to opt-out of the rule, the fewer times the exception will be utilized and the less valuable it is to the investor. Therefore, it is important that the final rule must:

- Clarify that sophisticated investors can opt-out simply by including an opt-out instruction when submitting their order or by using an order type specifically created for this purpose.

- Confirm that a broker is considered to have obtained informed consent from a sophisticated investor if that broker receives an opt-out instruction when the order is submitted or an opt-out order type is used. Without such confirmation, brokers will need to create time-consuming processes to ensure informed consent, introducing delays that would compromise the value of the exception.

- Allow sophisticated investors with the ability to enter into individual agreements with their brokers to opt-out on a global basis, that is, to instruct their broker that all of their trades are to be opted-out.

In addition, the SEC must allow markets to publicly display opted out orders that lock or cross the displayed quotes of others markets. Allowing the display of these orders will increase market transparency, enable competition among markets, narrow spreads, and enhance order interaction among markets. Prohibiting their display would reduce market transparency, impede competition among markets, wide spreads, and decrease order interaction among markets.

The current Regulation NMS proposal also requires brokers to provide investors that opt-out with the best-advertised price at the time their order is executed. Providing such information after the fact is unlikely to have any value to most, if not all, sophisticated investors who make the decision to employ the opt-out exception. Consequently, sophisticated investors should have the ability to choose not to receive this information.

Clearly, investors will not have true choice if the final regulations are too complicated or burdensome. Thank you for giving consideration to my comments on the proposed Regulation NMS.

Sincerely yours,

Karen J. Arthur

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