



WILMER CUTLER PICKERING LLP

# Securities Law Developments

 NEWSLETTER

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## Regulation NMS: A New Round in the Market Structure Debate

On February 26, 2004, the Securities and Exchange Commission (“SEC” or “the Commission”) proposed Regulation NMS, which addresses several major market structure reforms concerning trade-throughs, intermarket access, sub-penny quotes and market data.<sup>1/</sup> In addition, Regulation NMS would update and consolidate the existing national market system (“NMS”) rules adopted under Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”) into a single regulation. *The comment period expires May 24, 2004.*

The Commission will hold public hearings on proposed Regulation NMS on Thursday, April 1, 2004, and Wednesday, April 21, 2004 in Washington D.C. and New York, respectively. Requests for participation in the hearings must be received by Monday, March 22, 2004, and copies of oral statements or summaries of intended testimony must

be submitted by Friday, March 26, 2004. Details on format, participants and testimony presentation are available at <http://www.sec.gov/rules/other/34-49408.htm>

### I. Overview

The U.S. cash equity markets are about to undergo yet another round of intense market structure debate.<sup>2/</sup> Significant technological innovation within the last decade has led to fierce competition in the trading of NMS securities, and Nasdaq securities in particular, among traditional exchanges, market makers, electronic communications networks (“ECNs”) and other electronic trading platforms. Newer entrants into the securities markets in particular have become increasingly vocal in their criticism of the existing NMS regime as unduly rigid, outdated and unresponsive to the needs of their customers.

<sup>1/</sup> *Regulation NMS*, Securities Exchange Act Release No. 49,325 (Feb. 26, 2004), 69 Fed. Reg. 11,126 (Mar. 9, 2004) (“Proposing Release”).

<sup>2/</sup> Over the last several years, both the SEC and Congress have held numerous hearings and roundtables to debate market structure issues. *See, e.g., Testimony Concerning Market Structure Issues*, Hearing before the Subcomm. on Capital Mkts., Ins., and Gov’t. Sponsored Enter. of the House Fin. Serv. Comm., 108th Cong. (Oct. 30, 2003); *The Future of the Securities Markets*, Hearing Before the Sec. and Inv. Subcomm. of the Senate Banking, Housing, and Urban Affairs Comm., 108th Cong. (Oct. 15, 2003) (information on the both hearings available at <http://banking.senate.gov>); SEC’s 2002 Market Structure Hearings; and SEC’s Roundtable on Decimalization (Dec. 11, 2000) (information on the hearings and roundtable available at <http://www.sec.gov>).

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In response, the Commission is seeking ways to enhance the NMS to accommodate various market models and achieve the benefits of competition, while countering the effects of market fragmentation. Specifically, proposed Regulation NMS is intended to address some of the thorniest structural problems faced by the securities industry today, such as the need for (1) equal regulation of all markets that trade NMS stocks; (2) nondiscriminatory access among competing markets; and (3) ways to encourage greater order interaction, higher quality quotations, and enhanced displayed market depth. If adopted, the proposal would radically transform many aspects of the equity markets and, in a related manner, heighten the associated regulatory burdens.

## II. Trade-Through Proposal

The Trade-Through Proposal, set forth in proposed new Rule 611, would create a uniform trade-through rule for both exchange-listed and Nasdaq securities. Currently, under the Intermarket Trading Systems (“ITS”) Plan, which applies to securities listed on the New York Stock Exchange (“NYSE”) and the American Stock Exchange (“Amex”), a member of a participating self-regulatory organization (“SRO”) generally may not trade-through another market’s quote.<sup>3/</sup> In contrast, currently there are no intermarket price protection rules that apply to the trading of Nasdaq securities.

The ITS trade-through provisions were designed both to encourage market participants to display their trading interest and to help achieve best execution for customer orders in exchange-

listed securities. The SEC has recognized, however, that, with the introduction of decimal pricing and technology changes that have enabled vastly reduced execution times, the trade-through provisions of the ITS Plan have increasingly limited the ability of a market participant to provide an automated execution when a better price is displayed by another participant that does not offer automated execution. In recent Congressional testimony, these constraints led some market participants to once again call for major reforms to, or the end of, the trade-through provisions on the grounds that they hinder market speed, create unfair advantages for certain participants, and disadvantage customers who value immediate automatic execution.<sup>4/</sup>

Over the last few years, the SEC has examined a variety of proposed solutions that would address trade-through issues for both the listed and Nasdaq markets, including elimination of the trade-through rules. The Proposing Release notes, however, that the SEC believes there is value in having a rule that provides a measure of price protection for limit orders across markets – if the rule is designed to accommodate the current NMS structure. The SEC believes that the proposed uniform trade-through rule would encourage the use of limit orders, aggressive quoting, and order interaction and help preserve investors’ expectation that their orders will be executed at the best displayed price.

### A. Proposed Rule

The proposed rule would require an order execution facility,<sup>5/</sup> a national securities exchange, and a national securities association to “establish,

<sup>3/</sup> Generally, a “trade-through” occurs when a customer’s order is executed at a price inferior to a price displayed by another market.

<sup>4/</sup> *Reviewing U.S. Capital Market Structure, Market Structure III: The Role of the Specialist in the Evolving Modern Marketplace, Hearing before the Subcomm. on Capital Mkts., Ins., and Govt. Sponsored Enter. of the House Fin. Serv. Comm.*, 108th Congress (Feb. 20, 2004) (See, e.g., statement of Robert Greifeld, President and Chief Executive, The Nasdaq Stock Market, Inc.; statement of Edward J. Nicoll, Chief Executive Officer, Instinet Group Incorporated; and written statement of Gerald D. Putnam, Chairman and Chief Executive Officer, Archipelago Holdings, L.L.C. ).

<sup>5/</sup> An order execution facility is defined to include national securities exchanges, national securities associations, exchange specialists and market makers, alternative trading systems (“ATs”), over-the-counter (“OTC”) market makers, block positioners, and any other broker-dealer that executes orders internally by trading as principal or crossing orders as agent that operates a facility that executes orders. See Proposed Rule 600.

maintain, and enforce policies and procedures reasonably designed to prevent the execution of a trade-through in its market,” unless one of the exceptions set forth in proposed Rule 611(b) applies. If a covered entity cannot or chooses not to comply with the rule, that entity may only accept orders that meet the parameters of the opt-out exception discussed below.

The proposed rule generally applies to both customer and broker-dealer proprietary orders in Nasdaq, NYSE and Amex stocks executed during regular trading hours. Any order that is covered by the rule generally may not be executed at a price that is lower than the best bid or higher than the best offer of any order execution facility.

While the rule permits each market to design the appropriate policies and procedures to comply with the rule, they must be “designed to forestall trade-throughs” from occurring. Thus, the policies and procedures should, at a minimum, include:

- Provisions for monitoring quotations in other markets and prevention of a trade being effected at a price inferior to a bid or offer that was apparent to the order execution facility in another market; and
- A reasonable process for specifically identifying and handling “false positive” and “false negative” trade-throughs.

The Proposing Release notes that proposed trade-through rule, including the automated market exception discussed below, does not alter a broker-dealer’s duty of best execution. Thus, a broker-dealer cannot assume that because the market to which it sends a customer order is subject to the proposed rule, the broker-dealer can abdicate its responsibility to evaluate the execution quality of that market. In addition, broker-dealers that internalize customer orders would continue to be evaluated against the best bid and best offer for best execution purposes, regardless of whether these orders were executed automatically or manually.

## **B. Exceptions to the Proposed Rule**

In addition to retaining the current exceptions to the trade-through provisions, the proposed rule would include two new exceptions: customers may “opt-out,” and an automated market may trade through a non-automated market in limited circumstances. These exceptions are intended to give investors more control over how their orders would be executed, and provide flexibility for market centers with different market structures.

### **1. Opt-Out Orders**

Under the opt-out exception in proposed Rule 611(b)(8), an order execution facility may trade through a better priced bid or offer displayed on another market if the person for whose account the order is entered makes an informed decision to affirmatively opt out of the trade-through rule’s protections with respect to that order. The exception applies to all types of customers, including institutional customers, and the election must be made on an order-by-order basis.

Although the rule does not prescribe a specific means for ensuring that a customer’s consent is informed, the Proposing Release notes that a broker-dealer must, at a minimum, explain in clear and concise terms that:

- the customer’s order would be executed in the market to which it is sent without regard to prices displayed in other markets, even if those prices are better;
- the customer affirmatively would be agreeing to forego the possibility of obtaining a better price that may be available in another market at the time its order is executed; and
- this could result in the customer’s order receiving an execution at a price that is inferior to the best bid or offer displayed at the time his or her order is executed.

For each opt-out order executed, the broker-dealer must disclose the national best bid or best offer (“NBBO”) at the time of execution. The disclosure may be made on the trade confirmation, the customer’s monthly account statement, or another form of disclosure document.

## **2. Automated Order Execution Facility Exception**

Under proposed Rule 611(b)(9), an automated order execution facility may execute orders within its market without regard to a better price displayed on a non-automated market, within certain price parameters. An automated order execution facility is defined as one that “provides for an immediate automated response to all incoming subject orders for up to the full size of its best bid and best offer disseminated pursuant to an effective national market system plan without any restriction on execution.”<sup>6/</sup> The automated facility would be allowed to trade-through the non-automated facility up to the “trade-through limit amount”:

- for a bid or offer up to \$10, the allowable amount would be one cent;
- for a bid or offer between \$10.01 to \$30, the allowable amount would be two cents;
- for a bid or offer between \$30.01 and \$50, the allowable amount would be three cents;
- for a bid or offer between \$50.01 and \$100, the allowable amount would be four cents; and
- for a bid or offer above \$100, the allowable amount would be five cents.

## **C. Request for Comment on Alternatives**

The Proposing Release requests comment on the proposed rule, including whether it would impede the efficient execution of orders and raise opportunity costs, and whether current access between markets is, or the proposed market access rule (discussed below) would be, sufficient to support a trade-through rule. In addition, the Proposing Release requests comment on the costs, benefits and viability of alternative regulatory approaches to intermarket price protection, including:

- A proposed trade-through rule with the automated market exception, but without the opt-out exception;
- A proposed trade-through rule with a three-cent de minimis exemption for all securities covered by the proposed rule, without the automated market exception, and either with or without the proposed opt-out exception;
- Maintenance of the existing ITS trade-through rule with no de minimis exception, but with the addition of the opt-out exception; and
- Elimination of the existing ITS trade-through rule, with reliance solely upon the principles of best execution.

## **III. Market Access Proposal**

To foster efficiency, enhance competition, and help broker-dealers fulfill their best execution obligations, the SEC proposed new Rule 610, governing access to quotations and the execution of orders for equity NMS securities.

<sup>6/</sup> See Proposed Rule 600(b)(3). The Proposing Release noted that a restriction on execution would include a limit on the number of orders for the account of the same individual that could be sent to the market for execution within a certain time frame, or a limit on the size for which an automated response is available, other than the full size of the best bid or offer displayed by the market.



## **A. Proposed Access Standards Under Regulation NMS**

### **1. Access to Published Bids and Offers**

Under the proposed rule, “quoting market centers” and “quoting market participants”<sup>7/</sup> would be prohibited from imposing unfairly discriminatory terms that prevent or inhibit any person from obtaining access to quotations and the execution of orders through their members, subscribers, or customers. Moreover, a quoting market participant would be required to make its quotations accessible, for the purposes of order execution, to all quoting market centers and other quoting market participants on terms as favorable as those it grants to its most preferred member, customer, or subscriber.

### **2. Access Fees**

The Proposing Release notes that access fees can impede access between competing markets, raise trading costs, create confusion about the true quoted prices, and increase the occurrence of locked and crossed markets. The SEC considered various regulatory responses to these growing problems, including reflecting the access fees in the displayed quote; rounding access fees to full-penny trading increments in the displayed quote; and banning access fees outright. The SEC settled on establishing a de minimis fee standard, which is designed to promote a common quoting convention that would harmonize quotations and facilitate the ready comparison of quotes across the NMS.

Under the proposed rule, all quoting market centers, quoting market participants, and broker-

dealers that display attributable quotes<sup>8/</sup> through SROs would be permitted to impose fees for the execution of orders, but access fees would be limited to a de minimis amount. The proposed rule would permit an SRO’s order interaction facility to charge a maximum fee of \$ 0.001 per share for access to its market. In addition to this fee, market makers, specialists, ATSS, and other broker-dealers that display attributable quotes through SROs would be permitted to charge a maximum fee of \$ 0.001 per share for access to their quotes. Thus, the accumulation of access fees would be limited to no more than \$0.002 per share in any single transaction.<sup>9/</sup>

The proposed rule also would prohibit a quoting market center or quoting market participant from charging a non-member, non-subscriber, or non-customer a fee for indirect access through a member, subscriber, or customer, although the member, subscriber, or customer could be charged the standard access fee.

### **3. Locked and Crossed Markets**

The Commission also believes that repeated or continual locking or crossing of a market may raise concerns about the orderliness and efficiency of the markets. Accordingly, the proposed rule would require every SRO to establish and enforce rules requiring its members to avoid locking or crossing the quotations of quoting market centers and quoting market participants. Under the proposal, each SRO would be required to promulgate rules prohibiting members from engaging in a pattern or practice of locking or crossing the quotations in any security.

<sup>7/</sup> A “quoting market center” would be defined as an order execution facility of any exchange or association that is required to make available to a quotation vendor its best bid or best offer in a security pursuant to Exchange Act Rule 11Ac1-1 (“Quote Rule”) (proposed to be redesignated as Rule 602). A “quoting market participant” would be defined as any broker-dealer that provides its best bid or best offer in a security to an exchange or association pursuant to the Quote Rule or Regulation ATS, and whose best bid or best offer is not otherwise available through a quoting market center. See Proposed Rule 600. Accordingly, a market center such as an exchange that offers execution functionality would be considered a quoting market center, while a market participant that enters quotations on a facility that does not offer order execution functionality, such as the NASD’s Alternative Display Facility, would be considered a quoting market participant.

<sup>8/</sup> The Proposing Release notes that an attributable quote would disclose the identity of the quoting market center, quoting market participant, or broker-dealer that publishes the quote.

<sup>9/</sup> For securities priced at less than \$1.00, a fee standard of .1% of the share price would apply, with aggregate fees of no more than .2% of the share price. See Proposed Rule 610.

## **B. Proposed Amendments to the Fair Access Standard under Regulation ATS**

Currently, Regulation ATS requires that ATSS with at least 20% of the trading volume in a security maintain standards ensuring that they will not unfairly discriminate or unreasonably deny access to their systems.<sup>10/</sup> In conjunction with the proposed new standards governing intermarket access, the Commission proposed lowering this “fair access” threshold in Regulation ATS from 20% to 5%, in order to ensure that the quotes of all significant market participants would be accessible throughout the NMS.

## **C. Request for Comment**

The Proposing Release requests comment on, among other things, whether (1) reliance upon private, negotiated agreements between members and nonmembers is adequate to ensure intermarket access; and (2) the proposed limitation on disparate treatment of indirect access provides sufficient access to all quoting market centers through broker-dealers and routing systems. In addition, the Proposing Release requests comment on whether “quoting market centers” or “quoting market participants” should be required to execute orders at their quotes automatically. The SEC notes, however, that, if it were to require automatic execution, execution functions would need to be designed so as to not unfairly discriminate by permitting members to execute faster than non-members.

## **IV. Sub-Penny Quoting Proposal**

The full conversion to decimals in April 2001 resulted in narrower spreads and simplified pricing. Decimalization, however, raised issues involving

the quoting and trading of securities in sub-pennies. The SEC has undertaken a review of these issues in a variety of contexts: (1) in July 2001, the SEC issued a Concept Release to assist in the determination of the optimal minimum price increment at which securities should be quoted and traded;<sup>11/</sup> (2) the SEC’s Office of Economic Analysis conducted a study of sub-penny trading for one week in April 2003, and concluded that the use of sub-penny pricing for most stocks is more likely related to traders’ attempts to gain precedence over competing orders than legitimate price discovery;<sup>12/</sup> and (3) in August 2003, after undertaking its own study, Nasdaq simultaneously filed a rule change proposing a minimum quotation increment of \$ 0.001 for Nasdaq-listed securities and a rulemaking petition for the adoption of a uniform rule requiring market participants to quote and trade Nasdaq-listed securities in a “consistent monetary increment.”<sup>13/</sup>

The SEC’s review revealed a growing trend among ECNs to display quotations in their proprietary systems in sub-pennies, which are then excluded from the disseminated quotation data, thereby effectively creating “hidden markets.” These hidden markets allow more sophisticated traders to view and access better prices than those available to the general public. In addition, the SEC believes that sub-penny quoting is likely to further decrease market depth, increase the incidence of market participants stepping ahead of standing limit orders for an economically insignificant amount, and make it more difficult for broker-dealers to meet certain regulatory obligations (e.g., best execution and short selling restrictions) by increasing the incidence of so-called “flickering” quotes. The Commission believes that these costs outweigh any potential marginal benefits gained by sub-penny quotes. Accordingly, the SEC proposed new Rule 612.

<sup>10/</sup> See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40,760 (Dec. 8, 1998), 63 Fed. Reg. 70,844 (Dec. 22, 1998).

<sup>11/</sup> See Exchange Act Release No. 44,568 (July 18, 2001), 66 Fed. Reg. 38,390 (July 24, 2001).

<sup>12/</sup> This study can be accessed in the Commission’s public reference room.

<sup>13/</sup> See File No. SR-NASD-2003-121 and Letter from Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission (August 4, 2003).

## A. Proposed Rule

The proposed rule would prohibit every national securities exchange, national securities association, ATS, vendor, broker or dealer from ranking, displaying, or accepting from any person a bid or offer, an order, or an indication of interest in any NMS stock with a share price \$1.00 or above in an increment less than \$0.01. For example, the rule would prohibit a market maker or specialist from accepting a customer limit order or displaying its proprietary quote in an increment below one cent.

Proposed Rule 612 would not prohibit an exchange or association from reporting or “printing” a trade in a sub-penny increment, as most markets currently permit. Therefore, a broker-dealer could, consistent with the proposed rule, provide price improvement to a customer order in an amount that resulted in an execution in an increment below a penny, so long as the broker-dealer did not accept orders already priced in increments below a penny. Similarly, a system operated by a market participant covered by the rule that accepted unpriced orders that were then executed on a VWAP basis or matched at the midpoint of the NBBO would not violate the proposed rule, although resulting executions could occur in share prices of less than one cent. If, however, a system that accepted orders priced in sub-penny increments matches those orders, the system operator would have violated the proposed rule by accepting and possibly ranking orders in prices below a penny.

## B. Request for Comment

The Proposing Release requests comment on, among other things, whether: (1) there are

differences in Nasdaq-listed and exchange-listed securities that might warrant different treatment in terms of permissible quotations; (2) the proposed rule addresses the SEC’s primary concerns; (3) the rule should be expanded to prohibit, under certain circumstances, trades to be executed in sub-penny increments; (4) the exclusion for securities priced under \$1.00 per share is correct and whether there are other types of securities that should be excluded (e.g., ETFs); and (5) the proposal should be extended to options.

## V. Market Data Proposal

The current model for collecting and disseminating consolidated market information to market participants is governed by Exchange Act rules and joint SRO NMS plans.<sup>14/</sup> A number of significant market structure changes in the last several years have led the SEC to reexamine the existing model’s utility, including the growth in market data rebates, the emergence of for-profit SROs, and the implementation of decimalization. Following the issuance of its Concept Release on the Regulation of Market Information Fees and Revenues,<sup>15/</sup> the SEC established an Advisory Committee on Market Information in 2000 to help with the re-examination. The Advisory Committee’s report made a number of recommendations, including (1) permitting market centers to distribute certain information, such as depth of limit order book, free from mandatory consolidation requirements, and (2) broadening governance of the Plans through a non-voting advisory committee.<sup>16/</sup>

The proposed amendments to the Exchange Act rules and Plans discussed below would implement these Advisory Committee recommendations. In addition, in order to encourage and reward those

<sup>14/</sup> The three Plans that are subject to the proposed rules are the Consolidated Tape Plan, the Consolidated Quote Plan, and the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (collectively, the “Plans”). These Plans govern the three networks developed by the SROs to disseminate market information for different categories of securities: (1) Network A for securities listed on the NYSE; (2) Network B for securities listed on the Amex and other national securities exchanges; and (3) Network C for securities traded on Nasdaq (collectively, the “Networks”).

<sup>15/</sup> See Exchange Act Release No. 42,208 (Dec. 9, 1999), 64 Fed. Reg. 70,613 (Dec. 17, 1999).

<sup>16/</sup> See Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (Sept. 14, 2001), available at <http://www.sec.gov>.

market centers that generate the highest quality quotes, the proposed amendments would revise Plan formulas for allocating net income to their SRO participants.

#### **A. Allocation of Network Net Income**

Currently, net income generated pursuant to a Plan with respect to trades involving exchange-listed securities and Nasdaq securities is allocated based on the number of trades reported by an SRO and on an average of a participant's number of trades and its share volume, respectively. The SEC believes that by focusing exclusively on the number of trades and the share volume of trading, the allocation formulas have caused a variety of economic and regulatory distortions, including (1) lack of recognition for quotes that have the best prices and the largest sizes; (2) creation of an incentive for SROs to operate as "print facilities" by awarding percentage rebates (e.g., 50% and higher) of their data revenues to ATSS and market makers that agree to report their trades through the SRO; and (3) creation of an incentive for fraudulent or distortive practices by market participants, such as illegal wash trades and "shredding" of their total trading volume into the smallest possible trade sizes, to maximize market data rebates.

To combat these distortions, the Proposing Release sets out a new two-step formula. First, each Network's distributable net income would be allocated among the individual securities included in the Network's data stream. Each individual security's net income then would be allocated among the SROs based on three measures of the utility of their trades and quotes in that security – Trading Shares, Quoting Shares, and NBBO Improvement Shares in each Network security for the year.<sup>17/</sup> The Trading, Quoting, and NBBO

Improvement Shares then would be added together to determine an SRO's total allocation of net income for the year. The SEC requests comment on this new allocation formula, which is set forth in detail in the Proposing Release.

#### **B. Plan Governance**

Based on the Advisory Committee's recommendation, the SEC proposed broadening participation in the governance of each Plan to include non-voting advisory committees. Currently, the Plans are governed by operating committees composed of one representative from each SRO participant. Under the proposed amendments, the operating committee of a Plan would select, by majority vote, at least one representative from each of the following five categories for the advisory committee: (1) a broker-dealer with a substantial retail investor customer base; (2) a broker-dealer with a substantial institutional investor customer base; (3) an ATS; (4) a data vendor; and (5) an investor.

The function of an advisory committee would be to assure that its members have an opportunity to submit their views to the operating committee on Plan matters, prior to any decision by the operating committee. Such Plan matters would include, but not be limited to, new or modified products, fees, procedures for fee administration, and pilot programs.

The SEC requests comment on, among other things, whether (1) the proposed advisory committees would achieve the goal of broadening participation in Plan matters in a useful way; and (2) the types of Plan matters on which an advisory committee is entitled to submit views should be more specifically enumerated.

<sup>17/</sup> The Proposing Release notes that a "Trading Share" is the SRO's proportion of trading in each Network security, a "Quoting Share" is the SRO's proportion of quotes with prices that equal the NBBO in each Network security, and a "NBBO Improvement Share" is the SRO's proportion of quotes that improve the price of the NBBO in each Network security. The formulas for deriving Trading, Quoting and NBBO Improvement Shares are set forth in detail in the Proposing Release.



## C. Proposed Amendments to Rules 11Aa3-1 and 11Ac1-2

To implement the Advisory Committee's recommendations that individual market centers (including SROs, ATSS, and market makers) should have the freedom to distribute their own market data independently and the consolidated display requirement should be more flexible, the SEC proposed amending Exchange Act Rules 11Aa3-1 (proposed to be redesignated as Rule 601) and 11Ac1-2 (proposed to be redesignated as Rule 603).

### 1. Independent Distribution of Information

Rule 11Aa3-1 currently prohibits SROs and their members from disseminating their trade reports independently. These restrictions would be rescinded under Proposed Rule 601. The distribution of both quotes and trades, however, will be subject to uniform standards under proposed amendments to Rule 603. First, any market information distributed by an exclusive processor, or by a broker or dealer (including ATSS and market makers) that would be the exclusive source of the information, must be made available to securities information processors on terms that would be fair and reasonable. Second, any SRO, broker, or dealer that distributes market information must do so on terms that would not be unreasonably discriminatory. These requirements would prohibit, for example, a market center from distributing its data independently on a timelier basis than it makes available the data that is required to be disseminated through a Network processor. The Proposing Release requests comment on, among other things, the standards that should apply to independent distributions of information by market centers.

### 2. Display of Consolidated Information

Proposed Rule 603 would substantially revise the consolidated display requirement. In general, Rule 11Ac1-2 currently requires that vendors

and broker-dealers, if they provide any display of market information for a covered security, must provide a consolidated display that encompasses information from all the market centers that trade the security. The proposed amendment would retain this core requirement, but would (1) reduce the information that must be included in a consolidated display, and (2) narrow the range of contexts that trigger the consolidated display requirement.

First, Proposed Rule 600 revises the definition of "consolidated display" to include only the prices, sizes, and market center identifications of the NBBO, along with the most recent last sale information. Second, a consolidated display would be required only in the situation where a trading or order-routing decision could be implemented. For example, the consolidated display requirement would continue to cover broker-dealers who provide on-line data to their customers in software programs from which trading decisions can be implemented. It would not, however, apply when market data is provided on a purely informational website that does not offer any trading or order-routing capability.

The Commission specifically requests comment on, among other things, whether the proposal achieves its goal of giving investors, particularly retail investors, the information they need to make informed trading decisions and evaluate whether their brokers attain best execution of their orders.

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If you would like a copy of the Proposing Release or if you have any questions, please contact:

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