

**TESTIMONY OF KIM BANG,
PRESIDENT AND CHIEF EXECUTIVE OFFICER
BLOOMBERG TRADEBOOK LLC,
BEFORE THE COMMITTEE ON BANKING, HOUSING, AND URBAN
AFFAIRS
UNITED STATES SENATE
REGARDING
“REGULATION NMS AND RECENT MARKET DEVELOPMENTS”
MAY 18, 2005**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS KIM BANG, AND I AM PLEASED TO TESTIFY ON BEHALF OF BLOOMBERG TRADEBOOK REGARDING “REGULATION NMS AND RECENT MARKET DEVELOPMENTS”.

BLOOMBERG TRADEBOOK IS OWNED BY BLOOMBERG L.P. AND IS LOCATED IN NEW YORK CITY. BLOOMBERG L.P. PROVIDES MULTIMEDIA, ANALYTICAL AND NEWS SERVICES TO MORE THAN 200,000 TERMINALS USED BY 250,000 FINANCIAL PROFESSIONALS IN 100 COUNTRIES WORLDWIDE. BLOOMBERG TRACKS MORE THAN 135,000 EQUITY SECURITIES IN 85 COUNTRIES, MORE THAN 50,000 COMPANIES TRADING ON 82 EXCHANGES AND MORE THAN 406,000 CORPORATE BONDS. BLOOMBERG NEWS IS SYNDICATED IN OVER 350 NEWSPAPERS, AND ON 550 RADIO AND TELEVISION STATIONS WORLDWIDE. BLOOMBERG

PUBLISHES MAGAZINES AND BOOKS ON FINANCIAL SUBJECTS FOR THE INVESTMENT PROFESSIONAL AND NON-PROFESSIONAL READER.

BLOOMBERG TRADEBOOK IS A GLOBAL ELECTRONIC AGENCY BROKER SERVING INSTITUTIONS AND OTHER BROKER-DEALERS. WE COUNT AMONG OUR CLIENTS MANY OF THE NATION'S LARGEST INSTITUTIONAL INVESTORS REPRESENTING — THROUGH PENSION FUNDS, MUTUAL FUNDS AND OTHER VEHICLES — THE SAVINGS OF MILLIONS OF ORDINARY AMERICANS.

WE'VE BEEN ASKED TO PROVIDE OUR TAKE ON THE PROPOSED MERGERS AND ON REGULATION NMS. WE ARE DELIGHTED TO DO SO, WITH TWO CAVEATS. FIRST, AS TO THE MERGERS, IT'S EARLY IN THE PROCESS AND CLEARLY WE'LL BE INTERESTED IN GATHERING MORE INFORMATION BEFORE REACHING A CONCLUSIVE ASSESSMENT. SECOND, AS TO REG NMS, AS YOU KNOW THE FINAL RULE ITSELF HAS NOT BEEN MADE PUBLIC YET. WE MAY HAVE A DIFFERENT REACTION TO REG NMS ONCE WE HAVE AN OPPORTUNITY TO ANALYZE THE TEXT OF THE RULE AND THE COMMISSION'S DISCUSSION OF IT IN THE ACCOMPANYING RELEASE.

**I. THE UNDERLYING ISSUE DRIVING REG NMS IS THE NEAR
MONOPOLY THE NYSE ENJOYS OVER THE TRADING VOLUME IN
ITS LISTED SECURITIES**

THE NYSE HAS AN 80% MARKET SHARE IN ORDER FLOW AND COMPLETE CONTROL OF THE FUNDAMENTAL RAW MATERIAL OF TRADING, MARKET DATA. THAT MARKET SHARE AND CONTROL ARE THE RESULT OF GOVERNMENTALLY CONFERRED PRIVILEGES, NOT THE RESULT OF COMPETITIVE EXCELLENCE.

NOW, INVESTORS ARE BEING CONFRONTED WITH A PROPOSED MERGER THAT WOULD TRANSFORM THE NYSE INTO A FOR-PROFIT ENTITY. WHILE SUCH A TRANSFORMATION WILL BE A BOON FOR NYSE SEAT-HOLDERS, IT IS FAIR TO ASK — WILL IT BE A BOON FOR THE INVESTING PUBLIC? DOES REG NMS CONSTITUTE ENOUGH OF A REGULATORY OVERHAUL OF THE NYSE THAT THE PROPOSED TRANSFORMATION TO A FOR-PROFIT ENTITY WILL RESULT IN A SUPERIOR NATIONAL MARKET STRUCTURE?

**II. THE OTC MARKET AS A MODEL FOR A SUPERIOR NATIONAL
MARKET SYSTEM**

THE NASDAQ MARKET SINCE 1996 PRESENTS THE OPPOSITE PICTURE — IT IS A MARKET INTO WHICH REGULATION INTRODUCED AND ENCOURAGED COMPETITION AND INNOVATION. THE NASDAQ PRICE-FIXING SCANDAL OF THE MID-1990S RESULTED IN THE SEC'S 1996

ISSUANCE OF THE ORDER-HANDLING RULES. THOSE RULES ENHANCED TRANSPARENCY AND COMPETITION IN THE NASDAQ MARKET AND PERMITTED ELECTRONIC COMMUNICATIONS NETWORKS — ECNS — TO LEVEL THE PLAYING FIELD BETWEEN INVESTORS AND INTERMEDIARIES BY GRANTING INVESTORS THE ABILITY TO DRIVE THE QUOTE AND ACCESS LIQUIDITY DIRECTLY. THIS IMPROVED OUR NATIONAL MARKET SYSTEM.

INDEED, THE INCREASED TRANSPARENCY PROMOTED BY THE SEC'S ORDER-HANDLING RULES AND THE SUBSEQUENT INTEGRATION OF ECNS INTO THE NATIONAL QUOTATION MONTAGE NARROWED NASDAQ SPREADS BY NEARLY 30%. THESE, AND SUBSEQUENT REDUCTIONS IN TRANSACTIONAL COSTS, CONSTITUTE SIGNIFICANT SAVINGS THAT ARE NOW AVAILABLE FOR INVESTMENT THAT FUELS BUSINESS EXPANSION AND JOB CREATION.

IN THE RECENT SCANDALS INVOLVING THE NYSE SPECIALISTS, THE SEC HIT A GRAND SLAM FOR INVESTOR PROTECTION — ALL SEVEN SPECIALIST FIRMS WERE FOUND TO HAVE DAMAGED INVESTORS BY TRADING AHEAD OF THEIR ORDERS AND ENGAGING IN OTHER ILLEGAL CONDUCT AS A ROUTINE COURSE OF BUSINESS. THE SPECIALISTS WERE FINED 250 MILLION DOLLARS AND FACE ADDITIONAL REGULATORY SANCTIONS. THE NYSE ITSELF WAS CENSURED FOR FAILURE TO ENFORCE THE LAW — WHICH IS REMINISCENT OF THE

SANCTIONS IMPOSED ON THE NASD IN 1996. THAT ILLEGAL BEHAVIOR UNDERSCORED THE WEAKNESS OF THE NYSE'S SELF-REGULATORY SYSTEM AND DEMONSTRATED THE NEED FOR SUBSTANTIAL REFORM. AS WAS THE CASE IN THE NASDAQ MARKET, THE PROBLEM IN THE NYSE WAS SYSTEMIC. WHEN WE GET THE NATIONAL MARKET STRUCTURE RIGHT, THERE WILL BE MORE TRANSPARENCY, MORE DIRECT ACCESS FOR INVESTORS, AND HENCE SIMPLY LESS OPPORTUNITY FOR ABUSE MOVING FORWARD.

III. HISTORICAL BACKGROUND — THE INTERMARKET TRADING SYSTEM (ITS) TRADE-THROUGH RULE HAS FUNCTIONED AS PROTECTIONIST REGULATION

THE EXISTING INTERMARKET TRADING SYSTEM TRADE-THROUGH RULE HAS BEEN AMONG THE FOREMOST IMPEDIMENTS TO COMPETITION AND MARKET EFFICIENCY. IN THEORY, THE EXISTING INTERMARKET TRADE-THROUGH RULE IS SUPPOSED TO RESULT IN INVESTORS' RECEIVING THE "BEST PRICE". IN REALITY, THE EXISTING RULE HAS PROTECTED THE NYSE WHILE FRUSTRATING INVESTOR EFFORTS TO OBTAIN THE "BEST PRICE".

THE MECHANISM OF THIS PROTECTIONIST PROP IS SIMPLE. WHILE ELECTRONIC VENUES OFFER FIRM QUOTES, THE NYSE OFFERS INDICATIVE QUOTES — QUOTES THAT MAY OR MAY NOT BE REAL.

ELECTRONIC VENUES ARE REQUIRED TO TAKE WHAT MAY BE A 30-SECOND DETOUR TO THE NYSE — OFTEN CHASING ILLUSORY QUOTES. WHILE SOMETIMES PRICE IMPROVEMENT OCCURS, OFTEN THE ORDER IS HELD OR REJECTED AS THE MARKET MOVES AWAY OR THE ORDER IS FILLED AT A PRICE INFERIOR TO THE ONE ADVERTISED.

IV. A NEW TRADE-THROUGH RULE

THE SEC'S REG NMS WAS DESIGNED TO REFORM THE NYSE BY FIRING UP THE NYSE'S QUOTES, IMPROVING TRANSPARENCY, AND ENCOURAGING DIRECT ACCESS TO THE NATIONAL MARKET SYSTEM. TO THE SEC'S CREDIT, ITS SUSTAINED EFFORTS ARE FORCING MOVEMENT TOWARD REFORM.

LET'S LOOK AT THE NEW TRADE-THROUGH RULE RECENTLY APPROVED BY THE SEC (AT LEAST BASED ON WHAT WE HEARD IN THE OPEN MEETING). FIRST, IT ELIMINATES THE OLD INTERMARKET TRADING SYSTEM TRADE-THROUGH RULE, WHICH HAS BEEN A BAR TO COMPETITION AND A PROTECTIONIST PROP FOR THE NYSE. SECOND, BY PROVIDING PROTECTION ONLY TO "FAST" QUOTES, IT OFFERS THE POTENTIAL THAT INVESTORS WON'T HAVE THEIR ORDERS HELD ON THE FLOOR. THESE ARE ENORMOUS BENEFITS.

WHILE A NEW TRADE-THROUGH RULE ISN'T BLOOMBERG'S PREFERRED APPROACH, IT IS ONE POTENTIALLY EFFECTIVE PATHWAY TO

THE GOAL OF PROMOTING A SUPERIOR NATIONAL MARKET SYSTEM. EFFECTIVELY IMPLEMENTED, THE SEC-APPROVED REG NMS COULD BE A LARGE NET PLUS FOR THE MARKET.

V. **PART OF THE PUZZLE—TRADE-THROUGH**
INTERACTION WITH THE HYBRID

WHAT DO WE MEAN BY “EFFECTIVELY IMPLEMENTED”? THERE ARE MANY PIECES TO THE MARKET STRUCTURE PUZZLE — REG NMS, THE NYSE’S “OPEN BOOK” MARKET DATA PROPOSAL, PROPOSED MERGERS AND THE NYSE HYBRID PROPOSAL. WE NEED TO GET ALL OF THEM RIGHT. AS PRESENTLY PROPOSED, SEVERAL ASPECTS OF THE HYBRID PROPOSAL CUT AGAINST THE COMMISSION’S GOALS OF TRANSPARENCY AND FAIRNESS.

THE HYBRID MARKET PROPOSAL IS DESIGNED AT LEAST IN PART TO PROTECT AND PRESERVE THE SPECIAL TIME-AND-PLACE ADVANTAGES THE NYSE FLOOR CURRENTLY ENJOYS. UNLESS REINED IN BY THE SEC, THIS HYBRID SCHEME COULD WELL UNDERMINE THE GOOD INTENTIONS OF THE SEC EMBODIED IN REG NMS.

HOW MIGHT THE HYBRID UNDERMINE REG NMS? THE NYSE HAS PROPOSED A “CLEAN UP” PRICE — THAT IS, THE PRICE AT WHICH INCOMING ORDERS WILL BE FILLED AGAINST ORDERS ON THE SPECIALIST’S BOOK — WHICH UNFAIRLY PENALIZES INCOMING MARKET

AND MARKETABLE LIMIT ORDERS. IT DOES SO BY CHOOSING ARBITRARILY TO GIVE LIMIT ORDERS ALREADY ON THE SPECIALIST'S BOOK A BETTER DEAL THAN THEY HAD BARGAINED FOR IN SETTING THEIR LIMIT PRICES, AT THE EXPENSE OF THE INCOMING PUBLIC INVESTOR'S ORDER.

IF ALL ORDER GIVERS WERE BEING TREATED EQUALLY, THAT REGULATORY SUBSIDY FOR LIMIT ORDERS MIGHT BE DEFENSIBLE ON THE THEORY THAT INVESTORS SHOULD BE FAIRLY REWARDED FOR STEPPING UP AND GIVING THE MARKET WHAT IS IN ESSENCE A FREE OPTION. BUT ALL ORDER GIVERS AREN'T BEING TREATED EQUALLY. UNDER THE PROPOSED "BROKER AGENCY INTEREST FILE" AND "SPECIALIST INTEREST FILE", FLOOR BROKERS AND SPECIALISTS WILL BE PERMITTED TO PLACE HIDDEN ORDERS INTO THE MARKET THAT WOULD BE PERMITTED TO JUMP AHEAD OF PUBLIC, DISCLOSED ORDERS. FLOOR MEMBERS SHOULD NOT BE ALLOWED TO JUMP AHEAD OF THE PUBLIC.

VI. WHAT IS THE IMPACT OF THE RECENTLY-ANNOUNCED MERGERS AMONG MAJOR MARKET PARTICIPANTS?

THE CURRENT ROUND OF MERGERS TAKES PLACE ON TOP OF AN ALREADY SIGNIFICANT ROUND OF CONSOLIDATIONS, INCLUDING NASDAQ'S PURCHASE OF BRUT. ARE THESE DEVELOPMENTS GOOD OR BAD FOR INVESTORS AND THE MARKETS? THAT DEPENDS ON THE STEPS

TAKEN BY POLICY MAKERS HERE ON THE HILL, AT THE SEC, AND ELSEWHERE.

IN MANY WAYS, THE MAJOR CONSEQUENCE OF THE PROPOSED NYSE/ARCHIPELAGO MERGER IS THE FACT THAT THE NYSE WILL NOW BECOME A FOR-PROFIT ENTITY. WHILE THE CONTROVERSY OVER FORMER CHAIRMAN GRASSO'S PAY PACKAGE SUGGESTS THAT THE NYSE WASN'T FUNCTIONING AS A TRADITIONAL NOT-FOR-PROFIT, THIS CHANGE IN THE NYSE'S STATUS AND INCENTIVES IS STILL ENORMOUS.

THE NYSE WILL NOW FUNCTION AS A FOR-PROFIT ENTITY, ONE THAT STARTS WITH MORE THAN 80% MARKET SHARE, AS WELL AS BEING THE REGULATOR, THE MARKETPLACE, AND THE BENEFICIARY OF A GOVERNMENT-SPONSORED INFORMATION MONOPOLY. THE NYSE IS WEARING A LOT OF HATS, MANY OF THEM CONFLICTING. AS A FOR-PROFIT ENTITY, THE NYSE WILL HAVE A FIDUCIARY OBLIGATION TO EXTRACT MAXIMAL BENEFIT FOR SHAREHOLDERS. WHAT ARE THE REAL-WORLD IMPLICATIONS OF AN ENTITY THAT ENJOYS MONOPOLY POWERS SUDDENLY BEING CHARGED WITH MAXIMIZING BENEFIT FOR SHAREHOLDERS? THE POLICY RAMIFICATIONS ARE SUBSTANTIAL AND THE NEED FOR VIGILANCE WILL BE AS WELL.

LET'S LOOK AT JUST TWO ISSUES — THE COST OF, AND ACCESS TO, INFORMATION.

**VII. CONFLICTS INHERENT IN A FOR-PROFIT EXCHANGE ENJOYING A
GOVERNMENT-SPONSORED INFORMATION MONOPOLY — COST
OF INFORMATION**

MARKET DATA IS THE “OXYGEN” OF THE FINANCIAL MARKETS. ENSURING THAT MARKET DATA IS AVAILABLE IN A FASHION WHERE IT IS AFFORDABLE TO INVESTORS AND WHERE MARKET PARTICIPANTS HAVE THE WIDEST POSSIBLE LATITUDE TO OBTAIN AND ADD VALUE ON A LEVEL PLAYING FIELD MUST BE CRITICAL PRIORITIES.

BEFORE THE 1970S, NO STATUTE OR RULE REQUIRED SELF-REGULATORY ORGANIZATIONS (SROS) TO DISSEMINATE MARKET INFORMATION TO THE PUBLIC OR TO CONSOLIDATE INFORMATION WITH INFORMATION FROM OTHER MARKET CENTERS. INDEED, THE NYSE, WHICH OPERATED THE LARGEST STOCK MARKET, CLAIMED AN OWNERSHIP INTEREST IN MARKET DATA, SEVERELY RESTRICTING ACCESS TO MARKET INFORMATION. MARKETS AND INVESTORS SUFFERED FROM THIS LACK OF TRANSPARENCY.

AT THE URGING OF THE SEC, CONGRESS RESPONDED BY ENACTING THE SECURITIES ACTS AMENDMENTS OF 1975. THESE AMENDMENTS EMPOWERED THE SEC TO FACILITATE THE CREATION OF A NATIONAL MARKET SYSTEM FOR SECURITIES, WITH MARKET PARTICIPANTS REQUIRED TO PROVIDE — IMMEDIATELY AND WITHOUT

COMPENSATION — INFORMATION FOR EACH SECURITY THAT WOULD THEN BE CONSOLIDATED INTO A SINGLE STREAM OF INFORMATION.

AT THE TIME, CONGRESS CLEARLY RECOGNIZED THE DANGERS OF DATA-PROCESSING MONOPOLIES. THE REPORT ACCOMPANYING THE 1975 AMENDMENTS EXPRESSLY WARNS THAT:

“PROVISION MUST BE MADE TO INSURE THAT THIS CENTRAL PROCESSOR IS NOT UNDER THE CONTROL OR DOMINION OF ANY PARTICULAR MARKET CENTER. ANY EXCLUSIVE PROCESSOR IS, IN EFFECT, A PUBLIC UTILITY, AND THUS IT MUST FUNCTION IN A MANNER WHICH IS ABSOLUTELY NEUTRAL WITH RESPECT TO ALL MARKET CENTERS, ALL MARKET MAKERS, AND ALL PRIVATE FIRMS.” REPORT OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS TO ACCOMPANY S.249, S. REP. NO. 94-75, 94TH CONG., 1ST SESS. 11 (1975).

UNDER REG NMS, THE SAME CONCERNS THAT ANIMATED THE CONGRESSIONAL WARNINGS ABOUT A CENTRAL PROCESSOR APPLY TO EXCLUSIVE SECURITIES INFORMATION PROCESSORS, SUCH AS THE NYSE, THAT COLLECT AND DISTRIBUTE INFORMATION ON AN EXCLUSIVE BASIS. THE COMMISSION SHOULD BE NO LESS VIGILANT IN POLICING THE CONDUCT OF SUCH EXCLUSIVE PROCESSORS THAN THE COMMISSION WOULD BE IN GUARDING AGAINST THE CENTRAL PROCESSOR ABUSES OF WHICH CONGRESS WARNED.

EVEN AS NOT-FOR-PROFIT ENTITIES, SROS HISTORICALLY HAVE EXPLOITED THE OPPORTUNITY TO SUBSIDIZE OTHER COSTS (E.G., EXECUTIVE COMPENSATION, COST OF MARKET OPERATION, MARKET REGULATION, MARKET SURVEILLANCE, MEMBER REGULATION) THROUGH THEIR GOVERNMENT-SPONSORED MONOPOLY ON MARKET INFORMATION FEES. THIS SUBSIDY IS TROUBLING ENOUGH BY ITSELF — IT'S NOT CLEAR WHY THE INVESTOR SHOULD BE SUBSIDIZING MARKET OPERATIONS THAT GENERATE ENORMOUS BENEFITS AND REVENUE FOR LARGE EXCHANGE MEMBERS. THE INCENTIVE TO EXPLOIT THIS MONOPOLY POSITION WILL BE EVEN STRONGER AS SROS CONTEMPLATE FOR-PROFIT FUTURES AND NEW LINES OF BUSINESS.

BEFORE THE MERGER WAS ANNOUNCED, THE SEC LAUNCHED A PUBLIC DISCUSSION OF MARKET DATA REVENUES AND WHETHER THEY SHOULD BE COST-BASED. BLOOMBERG STRONGLY SUPPORTS COST-BASED LIMITS ON MARKET INFORMATION FEES AND BELIEVES THE IMPENDING FOR-PROFIT STATUS OF THE NYSE LENDS GREATER URGENCY TO THIS INITIATIVE.

IN ITS 1999 CONCEPT RELEASE ON MARKET DATA, THE COMMISSION NOTED THAT MARKET DATA SHOULD BE FOR THE BENEFIT OF THE INVESTING PUBLIC. INDEED, MARKET DATA ORIGINATES WITH SPECIALISTS, MARKET MAKERS, BROKER-DEALERS AND INVESTORS. THE EXCHANGES AND THE NASDAQ MARKETPLACE ARE NOT THE SOURCES OF

MARKET DATA, BUT RATHER THE FACILITIES THROUGH WHICH MARKET DATA ARE COLLECTED AND DISSEMINATED. IN ITS 1999 RELEASE, THE SEC PROPOSED A COST-BASED LIMIT TO MARKET DATA REVENUES.

THAT COST-BASED APPROACH WOULD NOT REQUIRE THE NYSE AND NASDAQ TO SELL THE DATA AT COST. INSTEAD, IT WOULD REQUIRE THE CHARGES TO BE REASONABLY RELATED TO THE COST OF COLLECTING AND DISSEMINATING THE DATA. TODAY, AS *NOT-FOR-PROFIT ENTITIES* THE SRO NETWORKS SPEND ABOUT \$40 MILLION ON COLLECTION AND DISSEMINATION AND RECEIVE OVER TEN TIMES THAT MUCH — \$424 MILLION — IN REVENUES.¹ THOSE REVENUES COME FROM INVESTORS. FOR MONOPOLISTS SUCH AS THE NYSE AND NASDAQ TO CONTINUE TO RIDE ON THAT GRAVY TRAIN IS SIMPLY WRONG. IF INVESTORS ARE PAYING ROUGHLY TEN TIMES THE COST OF AGGREGATION AND DISSEMINATION OF MARKET DATA WHEN DEALING WITH NOT-FOR-PROFIT ENTITIES, WHAT WILL INVESTORS BE PAYING WHEN THE NYSE AND NASDAQ ARE FOR-PROFIT ENTITIES CHARGED WITH MAXIMIZING SHAREHOLDER INTEREST?

¹ See, Regulation NMS, Securities Exchange Act Release No. 50870 (December 16, 2004) in text accompanying n. 286:

In 2003, the Networks collected \$424 million in revenues derived from market data fees and, after deduction of Network expenses, distribute \$386 million to their individual SRO participants. [footnote omitted].

THE SEC WILL BE REVIEWING MARKET DATA FEES AS PART OF THE SRO STRUCTURE CONCEPT RELEASE. WE URGE THE SEC TO MOVE EXPEDITIOUSLY TO ADDRESS THIS IMPORTANT ISSUE, AND WE EMBRACE THE SECURITIES INDUSTRY ASSOCIATION'S CALL FOR A COST-BASED APPROACH TO MARKET DATA FEES. INDEED, IT IS POWERFUL TESTIMONY WHEN AN ORGANIZATION LIKE THE SIA NOT ONLY OPPOSES THE EXPENDITURE OF MARKET DATA FEES FOR REGULATION BUT ALSO FAVORS THE IMPOSITION OF SEPARATELY CHARGED AND TRANSPARENTLY ACCOUNTED-FOR REGULATORY FEES, TO COVER THE REGULATORY COSTS.² IT SPEAKS VOLUMES ABOUT THE FEARS THAT INFORMED MARKET PARTICIPANTS HAVE ABOUT THE CURRENT MARKET DATA FEE STRUCTURE THAT THEY WOULD PREFER TO HAVE A SEPARATE FEE LEVIED ON THEM THAN TO CONTINUE WITH THE STATUS QUO.

EVERY INVESTOR WHO BUYS AND SELLS STOCKS HAS A LEGITIMATE CLAIM TO THE OWNERSHIP OF THE DATA AND LIQUIDITY HE OR SHE PROVIDES TO MARKET CENTERS. FUNNELING EXCLUSIVE LIQUIDITY INFORMATION TO EXCHANGE MEMBERS AND FUNNELING MARKET DATA REVENUES TO EXCHANGES AND NASDAQ AND NOT TO INVESTORS SHIFTS THE REWARDS FROM THOSE WHO TRADE TO THOSE WHO FACILITATE TRADING. THAT IS WRONG IN OUR VIEW — THE BENEFITS OUGHT TO BE CONFERRED UPON THE PUBLIC.

² SIA letter to SEC (June 30, 2004) in SEC File No. S7-10-04, at page 23.

IN 2002, BLOOMBERG L.P., IN CONSULTATION WITH TWO DISTINGUISHED ECONOMISTS — DR. GEORGE HAY, THE FORMER DIRECTOR OF ECONOMICS OF THE ECONOMIC POLICY OFFICE OF THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AND DR. ERIK SIRRI, THE FORMER CHIEF ECONOMIST OF THE SEC — SUBMITTED TO THE SEC A DISCUSSION PAPER ENTITLED “COMPETITION, TRANSPARENCY, AND EQUAL ACCESS TO FINANCIAL MARKET DATA”. THE PAPER DELINEATED THE WAYS IN WHICH THE EXCHANGES, IN THE ABSENCE OF STRUCTURAL PROTECTIONS, MAY ABUSE THEIR MONOPOLY POWER OVER THE COLLECTION OF MARKET INFORMATION TO THE DETRIMENT OF CONSUMERS, COMPETITORS AND THE NATIONAL MARKET SYSTEM. THE PAPER PROPOSED STRUCTURAL CHANGES TO ADDRESS THESE POSSIBLE ABUSES. THE ISSUES RAISED IN THE PAPER ARE SQUARELY BEFORE US WITH THE NYSE’S PROPOSED MERGER. INDEED, THESE ISSUES HAVE BEEN ILLUSTRATED BY BLOOMBERG L.P.’S THREE YEAR-LONG CONFLICT WITH THE NYSE OVER RESTRICTIONS THE NYSE HAD HOPED TO IMPOSE ON THE DISSEMINATION OF DECIMALIZED INFORMATION TO INVESTORS.

**VIII. CONFLICTS INHERENT IN A FOR-PROFIT EXCHANGE ENJOYING A
GOVERNMENT-SPONSORED INFORMATION MONOPOLY—ACCESS
TO INFORMATION**

DECIMALIZATION HAS BEEN A BOON TO INVESTORS, DRAMATICALLY REDUCING SPREADS, AND AN ENORMOUS SPUR TO MARKET EFFICIENCY. HOWEVER, THE RULES GOVERNING THE DISPLAY OF MARKET DATA — RULES CRAFTED IN AN ERA OF EIGHTHS AND SIXTEENTHS — HAVE NEVER BEEN UPDATED TO REFLECT DECIMALIZATION.

SINCE DECIMALIZATION INTRODUCED 100 PRICE POINTS TO THE DOLLAR AND QUOTING IN A PENNY -- IN PLACE OF THE PREVIOUS PRACTICE OF QUOTING IN FRACTIONS OF A DOLLAR AT SIX AND ¼ CENTS OR 12 AND ½ CENTS -- THE AMOUNT OF TRANSPARENCY AND LIQUIDITY AVAILABLE AT THE NATIONAL BEST BID AND OFFER IS MUCH SMALLER THAN BEFORE. THE SIA, IN COMMENTING ON REG NMS, ACCURATELY OBSERVED: “THE VALUE OF THE NBBO — THE CORNERSTONE OF THE MARKET DATA SYSTEM — IS LESS THAN IT WAS PRIOR TO DECIMALIZATION. WE BELIEVE THAT THE SEC HAS A RESPONSIBILITY TO ADDRESS THIS ISSUE IN LIGHT OF THE OPERATION OF ITS QUOTE AND

DISPLAY RULES (RULES 11Ac1-1 AND 11Ac1-4 UNDER THE EXCHANGE ACT)....”³

BLOOMBERG L.P. PUBLISHES DATA ON EQUITY SECURITIES MARKETS THROUGHOUT THE WORLD. EVERY SIGNIFICANT MARKET OTHER THAN THE NYSE AND THE MEXICAN MARKET CURRENTLY PUBLISHES REAL-TIME QUOTATIONS AT A MINIMUM OF FIVE LEVELS DEEP FOR ALL INVESTORS TO SEE AND IMMEDIATELY ACCESS ELECTRONICALLY. AS THE LARGEST EQUITY MARKET IN THE WORLD, THE NYSE SHOULD NOT CONTINUE TO DENY INVESTORS AND FIDUCIARIES THE SAME TRANSPARENCY AND ACCESS TO LIQUIDITY BEYOND THE NATIONAL BEST BID AND OFFER.

THUS, BLOOMBERG L.P. WAS ENCOURAGED WHEN, LATE IN 2002, THE NYSE FILED WITH THE SEC A PROPOSED RULE CHANGE THAT WOULD PERMIT THE DISPLAY AND USE OF QUOTATIONS IN STOCKS TRADED ON THE NYSE TO SHOW ADDITIONAL DEPTH IN THE MARKET FOR THOSE STOCKS.

THE GOOD NEWS — THE NYSE’S “LIQUIDITY QUOTE” PROPOSAL COULD RESULT IN THE DISPLAY OF ADDITIONAL DEPTH. THE BAD NEWS — THE NYSE HAD PROPOSED TO EXPLOIT ITS STATUS AS A

³ Securities Industry Association, Comment letter on Regulation NMS (February 1, 2005) at p. 24, in SEC File No. S7-10-04.

GOVERNMENT-SPONSORED MONOPOLY TO REQUIRE CERTAIN VENDORS TO SIGN CONTRACTS THAT WOULD PLACE SEVERE RESTRICTIONS ON THE USE OF LIQUIDITY QUOTE DATA. THOSE RESTRICTIONS WOULD HAVE REQUIRED VENDORS TO ADVANTAGE THE NYSE OVER COMPETING MARKET CENTERS WHEN IT CAME TO THE DISPLAY OF DECIMALIZED DATA WHILE ALSO PRECLUDING BLOOMBERG FROM ADDING VALUE TO THIS DATA IN A WAY THAT BENEFITS INVESTORS AND THE MARKETS. THE NYSE'S ORIGINAL PROPOSAL WOULD HAVE PROHIBITED DATA VENDORS FROM INTEGRATING NYSE LIQUIDITY QUOTE DATA WITH DATA FROM OTHER MARKET CENTERS.

IN SHORT, THE PROMISE OF ENHANCED TRANSPARENCY AT THE HEART OF DECIMALIZATION WOULD HAVE BEEN THWARTED. INSTEAD, THE NYSE PROPOSED TO LEVERAGE ITS GOVERNMENT-SPONSORED MONOPOLY OVER MARKET DATA DOWNSTREAM TO UNFAIRLY DISADVANTAGE NOT ONLY COMPETITORS IN THE TRADING MARKET, BUT ALSO COMPETITORS IN THE INFORMATION MARKET.

WHEN FACED WITH COMPARABLE TERMS IN THE CONTEXT OF THE NYSE'S OPEN BOOK PROPOSAL, THE SEC STATED THAT "THE NYSE'S PROPOSED RESTRICTIONS ON VENDOR RE-DISSEMINATION OF OPEN BOOK DATA, INCLUDING THE PROHIBITION ON PROVIDING THE FULL DATA FEED AND PROVIDING ENHANCED, INTEGRATED, OR CONSOLIDATED DATA FOUND IN THESE AGREEMENTS ARE ON THEIR FACE DISCRIMINATORY,

AND MAY RAISE FAIR ACCESS ISSUES UNDER THE ACT.” Securities Exchange Act Release 44138 (December 7, 2001).

IN LIGHT OF THIS ADMONITION, IT IS UNFORTUNATE THAT THE NYSE OPTED TO ATTEMPT TO IMPOSE IN THE LIQUIDITY QUOTE CONTEXT THE SAME ILLEGAL AND ANTICOMPETITIVE CONDITIONS THAT SO TROUBLED THE SEC IN THE OPEN BOOK CONTEXT. AFTER EXTENSIVE REVIEW AND ANALYSIS, THE SEC ON APRIL 2, 2003 UNANIMOUSLY STRUCK DOWN THE NYSE’S RESTRICTIVE CONTRACTS. THE COMMISSION HELD THE NYSE’S BARRIERS TO INTEGRATED MARKET DISPLAYS WOULD: “IMPOSE ON USERS INTEGRATION COSTS WITH RESPECT TO IMMEDIATELY EXECUTABLE, MARKET-WIDE QUOTATIONS IN A MANNER THAT WOULD: (1) BE INCONSISTENT WITH FOSTERING “COOPERATION AND COORDINATION WITH PERSONS ENGAGED IN PROCESSING INFORMATION WITH RESPECT TO SECURITIES”; (2) “BE DESIGNED TO PERMIT UNFAIR DISCRIMINATION BETWEEN CUSTOMERS”; AND (3) IMPEDE, RATHER THAN REMOVE IMPEDIMENTS TO, A “FREE AND OPEN MARKET AND A NATIONAL MARKET SYSTEM.” Securities Exchange Act Release No. 47614 (April 2, 2003), SEC File No. SR-NYSE-2002-55.

EVEN AS A NOT-FOR-PROFIT ENTITY, IN THE CONTEXT OF LIQUIDITY QUOTE AND OPEN BOOK THE NYSE’S IDEA OF COMPETITION HAS BEEN TO TRY TO USE ITS MONOPOLY TO BAN OTHERS FROM COMPETING. IF THE NYSE BECOMES A FOR-PROFIT ENTITY AS A RESULT

OF THE PROPOSED MERGER, THE INCENTIVES FOR ABUSIVE MONOPOLY BEHAVIOR THAT UNDERMINES THE GOALS OF THE NATIONAL MARKET SYSTEM WILL BE FAR GREATER. IF THERE IS CONSOLIDATION IN THE MARKET BECAUSE THE MARKET DEMANDS IT, THAT IS A GOOD THING, BUT SUCH CONSOLIDATION ARGUES FOR GREATER REGULATORY VIGILANCE.

FOR EXAMPLE, THE FEES THE NYSE PROPOSES TO CHARGE FOR ACCESS TO LIQUIDITY QUOTE DATA ON A REAL-TIME BASIS ARE APPROXIMATELY EQUAL TO THE FEES THE NYSE CURRENTLY CHARGES FOR ACCESS TO ALL OTHER NYSE MARKET DATA ON A REAL-TIME BASIS — ABOUT \$50 A MONTH PER USER. THESE FEES WOULD EFFECTIVELY **DOUBLE** THE AVERAGE FEES INVESTORS PAY TODAY FOR NYSE REAL-TIME DATA. SINCE DECIMALIZATION HAS REDUCED THE VALUE OF THE EXISTING BBO DATA, THE INVESTORS WOULD EFFECTIVELY BE PAYING TWICE TO RECEIVE INFORMATION EQUIVALENT IN ECONOMIC VALUE TO WHAT THEY USED TO RECEIVE BEFORE DECIMALIZATION. THE NYSE SHOULD NOT BE ABLE TO EXTRACT THESE KINDS OF MONOPOLY RENTS FROM THE MARKETS AND INVESTORS WITHOUT JUSTIFICATION AND WITHOUT EVEN A CURSORY SHOWING OF THE COSTS INVOLVED IN PRODUCING THIS DATA.

THESE FEES AND RESTRICTIONS ON USE OF INFORMATION LED NUMEROUS MARKET PARTICIPANTS — INCLUDING THE UNITED

STATES CHAMBER OF COMMERCE, THE SECURITIES INDUSTRY ASSOCIATION, THE SECURITY TRADERS ASSOCIATION OF NEW YORK, AND OTHERS — TO EXPRESS SERIOUS CONCERNS REGARDING THE NYSE'S ACTIONS.⁴

THE SEC IS TO BE COMMENDED FOR ITS EXTRAORDINARY COMMITMENT OF TIME AND EFFORT ALREADY IN ANALYZING THE ONGOING LIQUIDITY QUOTE/OPEN BOOK ISSUE. THAT KIND OF OVERSIGHT WILL NEED TO BE THE MODEL IF WE ARE TO ADDRESS CONFLICTS IN AN INCREASINGLY CONCENTRATED MARKET.

IX. TRANSPARENCY IS GOOD FOR INVESTORS AND THE NATIONAL MARKET SYSTEM

CONGRESS AND THE COMMISSION SHOULD GIVE CONSIDERATION TO UPDATING AND EXPANDING THE VENDOR DISPLAY RULE TO REFLECT THE REALITIES OF DECIMALIZED TRADING. THE VENDOR DISPLAY RULE WAS ADOPTED WHEN THERE WERE EIGHT PRICE POINTS TO THE DOLLAR AND IT REQUIRES CONSOLIDATED INFORMATION ONLY WITH RESPECT TO

⁴ The Commission appropriately blocked the NYSE's efforts to impose via contracts with market vendors improper limits on Liquidity Quote, which is substantially similar in operation to Open Book. These improper limits would have diminished the opportunity for competing market centers to offer comparable transparency. *Matter of Bloomberg*, Securities Exchange Act Release No. 49076 (January 14, 2004), avail. at: <http://www.sec.gov/litigation/opinions/34-49076.htm>. The NYSE has refiled its Liquidity Quote proposal with the Commission. There still are imperfections and shortcomings in Open Book. This issue continues to be under review at the Commission.

THE BEST BID AND OFFER. UNLESS THE VENDOR DISPLAY RULE IS UPDATED AND EXPANDED, INVESTORS RISK HAVING LESS TRANSPARENCY AND ACCESS THAN EXISTED BEFORE DECIMALIZATION. SPECIFICALLY, THE SEC SHOULD:

- AMEND THE LIMIT ORDER DISPLAY RULE, EXCHANGE ACT RULE 11Ac1-4, TO REQUIRE EXCHANGES, MARKET MAKERS AND OTHER MARKET CENTERS (INCLUDING ECNS) TO PUBLISH ANY CUSTOMER LIMIT ORDERS RECEIVED OR COMMUNICATED TO OTHERS WITHIN FIVE CENTS OF THEIR BEST PUBLISHED QUOTATIONS (THAT IS TO SAY, FIVE CENTS ABOVE THE BEST OFFER AND FIVE CENTS BELOW THE BEST BID).
- AMEND THE VENDOR DISPLAY RULE, EXCHANGE ACT 11Ac1-2, TO REQUIRE VENDORS, SUCH AS BLOOMBERG L.P., TO CARRY ON THE SAME TERMS AS TOP-OF-FILE QUOTATIONS ALL DEPTH-OF-BOOK QUOTATIONS PUBLISHED BY ANY MARKET CENTER AS THAT TERM WOULD BE DEFINED IN RULE 600 OF PROPOSED REGULATION NMS, WITH THE POSSIBLE EXCEPTION OF MARKET CENTERS WHOSE SHARE OF VOLUME IS INSIGNIFICANT.

THIS IS A MODEST PROPOSAL. THE IMPACT OF THESE STEPS WOULD BE TO RESTORE THE TRANSPARENCY THAT HAS BEEN LOST AS AN UNINTENDED AND UNFORESEEN RESULT OF DECIMALIZATION. AS A POLICY MATTER IT IS HARD TO ARGUE THAT DECIMALIZATION SHOULD LEAVE THE PUBLIC WITH *LESS* TRANSPARENCY.

X. ACCESS FEES

I'D LIKE TO TOUCH BRIEFLY ON ACCESS FEES AS WELL. REG NMS IS NOT ENTIRELY CLEAR ON WHETHER THE NYSE CAN CHARGE ACCESS FEES. I'D NOTE THAT A FOR-PROFIT ENTITY THAT STARTS WITH A BETTER THAN 80% MARKET SHARE WOULD BE IN A POSITION TO ENJOY AN ENORMOUS UNEARNED WINDFALL AT THE EXPENSE OF INVESTORS IF ACCESS FEE CHARGES WERE PERMITTED.

XII. CONCLUSION

THIS IS A TIME OF ENORMOUS MARKET EVOLUTION. WILL REG NMS AND THE MAJOR CONSOLIDATIONS CURRENTLY UNDER REGULATORY REVIEW PROVE TO BE IN THE PUBLIC INTEREST?

THAT ANSWER IS UP TO POLICYMAKERS HERE, AT THE SEC AND AT THE DEPARTMENT OF JUSTICE. THERE IS ENORMOUS POTENTIAL FOR ANTI-COMPETITIVE ABUSE, PARTICULARLY IN THE NYSE MARKET WHERE ONE ENTITY STANDS AS UMPIRE, REFEREE, AND HOME TEAM. THE

CHANGE TO FOR-PROFIT STATUS — WHICH IS THE MAJOR CONSEQUENCE OF THE PROPOSED MERGER WITH ARCHIPELAGO — RADICALLY ESCALATES THE POTENTIAL FOR ANTI-COMPETITIVE ACTIVITY.

THE SEC ROSE TO THAT CHALLENGE IN ADDRESSING THE NASDAQ SCANDALS OF THE MID-90S. TO ITS CREDIT, THE SEC HAS TAKEN STRIDES TOWARD ADDRESSING THAT CHALLENGE IN THE CONTEXT OF THE RECENT LIQUIDITY QUOTE/OPEN BOOK CONTROVERSY, AND INDEED IN ENDING THE ARCHAIC INTERMARKET TRADING SYSTEM TRADE THROUGH RULE.

ENCOURAGING AN ENVIRONMENT CHARACTERIZED BY COMPETITION AND INNOVATION WILL POSE A SIMILAR CHALLENGE AS FIVE INVESTOR ALTERNATIVES (NYSE, ARCA, NASDAQ, BRUT, INSTINET) ARE CONSOLIDATED INTO TWO (NYSE AND NASDAQ).

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