U.S. Senate
Committee on Banking, Housing, and Urban Affairs

Hearing on
"Regulation NMS and Developments in the Equities Markets"

Written Statement of David F. Harris
Senior Vice President, Strategic Planning
American Stock Exchange LLC

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AMERICAN
STOCK EXCHANGE®
Equities Options ETFs

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I. Introduction

Good morning, Chairman Shelby, Senator Sarbanes, and members of the Committee. Thank you for inviting the American Stock Exchange LLC ("Amex") to appear before you to present our observations and comments on the important issues raised by the four interrelated proposals contained within proposed Regulation NMS.

After a brief description of the Amex and its unique role in the U.S. equity markets, we discuss our views on each of the four substantive topics that make up Regulation NMS: (1) trade-through protection, (2) inter-market access, (3) market data, and (4) sub-penny pricing.

II. Background

The Amex has had a long history not only as the premier auction-based market for small- and mid-cap companies, but also as the creator and nurturer of innovative financial products. Companies choose to list on the Amex because of the unique benefits offered by our market structure, which is designed to maximize price discovery and the potential for price improvement, while minimizing volatility caused by temporary order imbalances or the lack of natural liquidity. Our market offers dedicated liquidity providers that enhance liquidity and stability through affirmative obligations to ensure continuous and orderly trading. These liquidity providers are required to maintain a continuous two-sided market (i.e., a fair bid and offer). They are also required to moderate price changes between transactions and buy, using their own capital, when there are not enough buyers, and sell from their inventory when there are not enough sellers. Thus, these dedicated liquidity providers are traders of last resort that moderate price movements until natural price equilibrium is reached where, once again, buyers and sellers can meet directly without an intermediary.

For many of the same reasons that companies list on the Amex, our market structure creates an environment that nurtures the growth of new and innovative financial products. These innovative financial products range from a vast array of structured products to exchange-traded funds (commonly known as "ETFs"). Eleven years ago, Amex pioneered the ETF with the introduction of an ETF based on the Standard & Poor's 500® Index, known as the Spiders (Amex: SPY). Since then, ETFs have become a whole new class of securities growing to more than $166 billion in assets. More than ninety-percent of all ETFs are listed on the Amex, including the two most actively traded securities in the world: the Spiders and the ETF based on the Nasdaq 100® Index (Amex: QQQ)). Since the beginning of the year, the Spiders and QQQs on average have combined for daily trading volume in excess of 147 million shares. ETFs were not an instant, overnight success, but thrived, we believe, as a result of being listed and traded on a market with dedicated liquidity providers that have affirmative obligations to enhance liquidity.

III. Trade-Through Protection

A. Uniform Trade-Through Rule

In 1975, when Congress directed the Commission to facilitate the establishment of a national market system, Congress envisioned an eclectic, rather than single monolithic, system that would draw on the strengths of each type of market place.[1] Without specifying a structure, Congress articulated the basic tenets of the national

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[1] Securities Exchange Act of 1934, § 11A(a)(2), 15 U.S.C. § 78k-1(a)(2)(2004)(added by the Securities Act Amendments of 1975, Pub. L. No. 94-29, § 7, 89 Stat. 111 (1975)).

market system as fostering efficiency, enhancing fair competition, increasing price transparency, achieving best execution, and facilitating direct interaction of investor orders, when consistent with the other four principles.[2] Then in 1981, to facilitate best execution, provide nationwide price protection, and to increase quote competition, the first "trade-through" rules were adopted for securities listed on the Amex and New York Stock Exchange. These rules generally prohibit one market from executing a trade for a security at an inferior price when another market displays a better price for the same security.[3]

The Amex supports the proposal in Regulation NMS to extend trade-through protection beyond exchange-listed securities to all national market system ("NMS") stocks. For exchange-listed stocks, trade-through protection currently guarantees that investors—large and small, sophisticated and novice, trading for their own account or trading through a representative—all obtain the best price regardless of the market where those orders are sent. Equally important, trade-through protection encourages competitive price discovery across markets by ensuring that an investor that posts the national best-priced limit order does not have his or her order ignored. At its core, a trade-through rule provides essential customer protection by ensuring that investors always get the best price available for their trades. Such a rule also facilitates a fair and orderly market by decreasing the harmful effects of market fragmentation and the disorder caused by different groups of traders paying different prices for the same securities at the same, or virtually the same, time. Thus, we believe that a uniform trade-through rule, with the best-price assurance it affords, provides critical investor protection

2 15 U.S.C. §11A(a)(1)(2004).

3 E.g., Amex Rule 239, Amex Guide (CCH) ¶9359 (2004).

and enhances investors' confidence in the fairness and integrity of the U.S. equity markets. This is the heart of the national market system.

B. Proposed Exceptions to the Uniform Trade-Through Rule

In addition to establishing a uniform trade-through rule, the Securities and Exchange Commission ("SEC" or the "Commission") through Regulation NMS also proposes codifying a number of existing exceptions to the current trade-through rules as well as creating two new exceptions. One proposed new exception turns on whether a particular market or its quotes are automatically accessible. The other proposed new exception would allow "informed" investors to "opt-out" of the best-price protection of the trade-through rule.

1. Exception for Markets or Quotes that are Not Automatically Accessible

As to the exception related to whether a particular market or its quotes are automatically accessible, the SEC initially proposed allowing "automated execution facilities" (or so-called "fast" markets) to trade through, up to certain price limits, the better prices posted on non-automated execution facilities (or so-called "slow" markets). The SEC maintains that this "exception is designed to reflect the comparative difficulty of accessing market quotes from non-automated markets, and to adjust the trade through requirements to these differences."[4] In its supplemental release, the Commission also requested comment on whether the proposed exception should apply to individual quotes, rather than entire markets.[5]

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[4] Securities Exchange Act Release No. 49325, *Regulation NMS* (Feb. 26, 2004), 69 Fed. Reg. 11125, 11140 (Mar. 9, 2004).

[5] Securities Exchange Act Release No. 49749, *Regulation NMS: Supplemental Request for Comment* (May 20, 2004), 69 Fed. Reg. 30142, 30143 (May 26, 2004).

We oppose the version of the exception that would allow all "fast" markets to trade through better priced quotes of "slow" markets regardless of whether the particular quote at issue is, in fact, readily accessible. The "fast market-slow market" dichotomy is overbroad and not sufficiently tailored to address the Commission's articulated concern: inaccessible quotes. In contrast, the alternative version of the exception, which focuses on individual quotes (the "quote-by-quote" exception) appears more appropriately gauged to address concerns regarding the inaccessibility of quotes and the related impact of that inaccessibility on effective and efficient integration of pools of liquidity across different markets. Therefore, subject to an appropriate and responsible industry-wide rollout through a pilot program, we support a quote-by-quote exception that would require all markets to indicate whether a particular quote is immediately accessible through an automated execution facility. If a quote is not designated as immediately accessible, then the party routing the order could trade through, up to certain limits, the better priced but inaccessible quote of another market.[6] Of course, the party routing an

[6] For purposes of the quote-by-quote exception, we support defining an "automated execution facility" as one that provides an immediate, automated response (i.e., a response without any human or manual intervention) to the router of an incoming order. For purposes of this exception, we believe a "response" should include either (1) an order execution (in full or in part) or (2) a reply that the order was not executed. However, we oppose the SEC dictating performance standards as part of this exception. We believe that rule-based performance standards (1) would set a floor, not a ceiling, (2) would rapidly become antiquated, (3) would lead to endless disputes and litigation even if meticulously drafted, and (4) would remove competitive incentives to innovate and differentiate based on speed. In our view, while aspirational industry standards may initially provide useful rules of thumb, only as a last resort should the government mandate performance standards by rule. In any event, if the Commission determines to impose rule-based performance standards, we request the phasing in of such standards to give all market participants sufficient time to develop and implement technology to meet those standards.

order that trades through another market pursuant to the quote-by-quote exception would still have to otherwise fulfill his or her best execution obligations.[7]

We support a pilot program for the quote-by-quote exception not only for public policy reasons, but also for practical considerations. First, in addition to being more appropriately gauged to address concerns regarding the inaccessibility of quotes, the quote-by-quote approach implicitly recognizes that securities with different characteristics trade differently (e.g., actively-traded or derivatively-priced securities trade differently from inactively-traded securities). By focusing on quotes rather than entire markets, the SEC appropriately allows more flexibility for market centers to compete more fairly with one another notwithstanding different market structures that may cater to different types of listed companies and securities. Such an approach is also more consistent with Congress's mandate to the Commission to facilitate fair competition between and among markets.

Second, the quote-by-quote approach lends itself more easily to responsible industry-wide rollout. Requiring immediate, automatic accessibility of quotes as a pre-condition for trade-through protection is a dramatic industry-wide change. In some regards developing and implementing the relevant technology is the easy part. The more

[7] Any proposed exceptions to the trade-through rule would not provide a safe-harbor from broker-dealers otherwise fulfilling their fiduciary duty to obtain best execution for their customers. The duty of best execution predates the federal securities laws and stems from common law agency obligations whereby an agent owes his or her principal undivided loyalty and reasonable care. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998) ("Since it is understood by all that the client-principal seeks his own economic gain and the purpose of the agency is to help the client-principal achieve that objective, the broker-dealer, absent instructions to the contrary, is expected to use reasonable efforts to maximize the economic benefit to the client in each transaction."). Therefore, broker-dealers must continue to meet their basic best execution obligations to regularly and rigorously review the execution quality of markets to which they direct orders and must direct orders to the markets with the best execution quality. And, even with a quote-by-quote exception, we believe that broker-dealers would still have to regularly and rigorously assess the executions offered by markets whose quotes are not immediately accessible, in whole or in part.

difficult challenge is to create an effective hybrid model that responsibly integrates automatic execution functionality into market models, like the Amex, that are designed to maximize price discovery and improvement, while minimizing price volatility. Further, one type of hybrid model may not be optimal for all securities. For example, the appropriate hybrid model for the most actively-traded and derivatively-priced securities is unlikely to be the optimal model for less liquid securities, which rely more heavily on price discovery and stability offered by dedicated liquidity providers.

Therefore, we propose phasing in the quote-by-quote exception through a pilot program, starting with the most actively-traded securities and progressively expanding the exception, in traunches, to less actively-traded securities.[8] Sequencing the implementation of the quote-by-quote exception provides two benefits. First, sequencing allows all market participants to make required technological and business model changes. Second, of equal importance, industry-wide phasing in of the exception through a pilot program would provide empirical evidence on whether the exception creates unintended consequences, such as increased spreads for illiquid securities, decreased execution quality, or increased volatility and perceived disorder. Armed with empirical data while phasing in a pilot program for the exception, the SEC would have the opportunity to respond to, and adjust for, any unanticipated consequences that might undermine investor confidence, increase the cost of capital for small- and mid-cap companies, or discourage the development of new, innovative products.

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[8] We propose starting with the most actively-traded securities because they are generally less reliant on dedicated liquidity providers except at times of market stress; and, at least for actively-traded ETFs, may rely on price discovery in the futures, rather than the securities, markets.

2. Exception for "Informed" Investors to "Opt-Out"

As to the proposed exception for "informed" investors, we have serious concerns about, and oppose, the SEC's proposal to allow institutions and other traders to "opt out" trade-by-trade of the best-price protection provided by the trade-through rule. We believe that there is no justification to adopt this exception, especially if traders know (as they would with the adoption of the quote-by-quote exception) before an order is sent whether a displayed price is immediately accessible; and, once the order is sent would receive an immediate, automatic response as to whether the order was filled.

As the Commission concedes in its proposing release: "The price at which an order can be executed is of paramount importance for most investors…."[9] In fact, the American Association of Retired Persons recently conducted a survey of investors aged 50 and over and found that nearly two thirds said that price—not the balancing of price with speed—was the number one priority when conducting transactions.[10] However, under the current proposed opt-out exception, institutions and traders wanting to sacrifice the best price (for themselves or their ultimate customers) for idiosyncratic reasons could. And those trades would occur at the expense of other investors who, without their consent, would have their better-priced limit orders passed over.[11] Thus, in effect, the

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9 *Regulation NMS Release* at 11153.

10 AARP, *Investor Perceptions and Preferences Toward Selected Stock Market Conditions and Practices: An AARP Survey of Stock Owners Ages 50 and Older* (Mar. 2004).

11 For example, suppose that you owned 200 shares of ABC Inc., which was trading at $15.25. And, let us assume that if ABC's stock price increases to $16.00 per share, you want to sell your 200 shares, so you place a limit order to sell at $16.00. Now, let us further suppose that the market for ABC stock increases and your order becomes the national best offer, meaning that you are offering to sell ABC stock at the cheapest price nationwide. However, without a trade-through rule, your order to sell could be ignored and a trade could be executed at, for example, $16.02. Thus, not only have you not been able to sell when your limit order represented the national best offer, but the investor who bought paid more than necessary for the stock.

proposed opt-out provision allows the interests of a small group of traders who prefer speed to trump the interests of the vast majority of investors who expect to receive the best price.

We also believe that the opt-out exception would undermine market integrity and investor confidence by increasing disorder and confusion caused by disjoined groups of traders paying different prices for the same security at the same time. Thus, the opt-out exception would undermine one of the fundamental purposes of the trade-through rule: to ensure that buyers and sellers in one market compete head-to-head, based on price with buyers and sellers in other markets. The proposal also creates an economic incentive for an unscrupulous broker to convince an investor to opt out so that the broker can fill the investor's order internally at an inferior price, pocketing the difference. Finally, if the Commission adopts the quote-by-quote exception to the trade-through rule, we see no reason why anyone should be allowed to trade through an automatically accessible better price. Simply stated, we think the proposed opt-out is unnecessary if the quote-by-quote exception is adopted and wrong as a matter of public policy.

IV. Inter-Market Access

Amex agrees with the Commission that fair access to the best prices available across competing market centers is essential to achieve an efficient, transparent national market system where markets vigorously compete and, as a result, investors' orders have the opportunity to interact directly and receive best execution. Essential to that competition is the ability for one market to see and have fair and efficient access to another market's best bids and offers. Hidden markets with hidden prices or undisclosed fees undermine fair competition and access. Thus, we agree with the Commission that even when quoted prices are not hidden, published quotes do not necessarily reflect the true price available to investors because of access fees charged by electronic communication networks ("ECNs") to non-subscribers. These types of access fees not only undermine transparency, but also—when used to fund liquidity rebate programs—degrade market quality by encouraging the locking and crossing of markets. Such behavior undermines the basic tenets of the national market system.

However, we believe that the Commission's proposed solution of placing a "de minimis" cap on access fees fails to address the fundamental problem with access fees imposed on non-subscribers and is over-inclusive, as drafted. First, we question whether the Commission's proposed solution of fixing maximum rates for access to quotes moves us any closer to true fair access across markets. Instead, we believe that the proposal not only places the SEC in the unfamiliar role of rate maker, but also fails to directly address the fundamental problem: ECNs charging market participants, ***with whom they have no contractual or other relationship***, a surcharge to access the ECNs' quotes. Then, pursuant to what these market participants perceive as their best execution obligations to their customers, they believe that they are, in effect, forced to access the ECNs' prices and pay any additional charges that the ECNs wish to impose. This is akin to a private entity placing a tollbooth on a public highway.

Second, rather than focusing on the questionable activity—imposing a surcharge on parties unilaterally—the proposed rule also appears to reach transaction and other fees charged by self-regulatory organizations ("SROs") and other market centers to their members and subscribers. Transaction and other fees charged by SROs (or even access fees charged by ECNs to their subscribers) are fundamentally different from access fees

ECNs charge to non-subscribers. At the most basic level, transaction and other fees charged by SROs and other market centers to their members and subscribers are consented to (i.e., bi-lateral) and tied to services provided. For example, the Amex has a market structure and applicable rules designed to establish fair prices on open and close, facilitate single-priced auctions, manage market imbalances, reduce daily stock-price volatility, and provide dedicated liquidity. And unlike ECNs, SROs like the Amex have obligations not only to ensure that their members comply with the federal securities laws, but also to adopt and enforce rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest.

Thus, we believe it is fundamentally unfair to allow market centers to access the quotes of other market centers at prices set by the SEC—and not the marketplace itself—without commensurate obligations to provide dedicated liquidity and regulatory services. Such an approach fails to acknowledge that there are different levels of service and responsibilities (regulatory and otherwise) provided by market centers for which members, subscribers, and investors are willing to pay.

As to the SEC's proposal related to Regulation ATS, we oppose merely lowering the fair access standard of Regulation ATS from 20 to 5 percent of trading volume. Instead, we believe that the first step in true fair access is to mandate fair access by all alternative trading systems ("ATSs") regardless of the percentage of their trading volume. And, to minimize the cost to other market participants for obtaining access to ATSs with trading volume below 5 percent we propose requiring that those ATSs display and make available their quotes through an SRO. Finally, to facilitate fair access and enhance transparency, we urge the Commission to eliminate the loophole in Regulation ATS that allows an ATS to avoid disseminating its quotes into the national market system by "going dark" (i.e., not even displaying subscribers' quotes to other subscribers). We believe that the above-described steps would advance the goal of eliminating hidden markets with hidden prices, which undermines fair competition between market centers and fair and efficient access to all best bids and offers.

V. Market Data

A. Collecting, Consolidating, and Disseminating Market Data

One of the fundamental achievements of the national market system is wide-spread, public accessibility of reliable consolidated market information, including real-time access to the national best quotes for, and trades in, NMS stocks. Collecting, consolidating, and disseminating real-time market information across all market centers nationwide enhances transparency and competition. Of equal importance, real-time dissemination of market data arms investors with information essential to (1) make more informed decisions when placing limit orders, (2) monitor the quality of their trade executions, and (3) evaluate the performance of the market professionals executing trades on their behalf.

As such, we support codifying the requirement that all SROs must participate in, and act together through, joint-industry plans that ensure the collection and dissemination of real-time "core" consolidated market information—the national best bid and offer ("NBBO") and time and sale data—to the public through a single processor for each NMS stock. However, we oppose (1) reducing the type of information included in the consolidated display, (2) limiting the circumstances under which investors must receive consolidated market information, or (3) allowing market centers to sell duplicative core market data independent of the joint-industry plans. We believe that these three proposed changes will not enhance transparency for investors, but will increase the risk of disseminating incomplete, non-sequential market data that will confuse investors and complicate the management of market data for vendors and broker-dealers.

First, as to the proposed definition of "consolidated display," the SEC in Regulation NMS suggests eliminating the current requirement that the display must include a complete montage of quotes from all reporting market centers trading a particular security. We oppose this change because we believe that the complete montage provides valuable information to investors, especially in the era of decimalization. For example, two market centers could be quoting minimum depth at the NBBO, while a third market center is quoting substantial depth not at, but close to, the NBBO. An investor wanting to execute a large trade but only receiving information constituting the newly defined consolidated display would arguably lack the most significant piece of information to that investor: the substantial depth being offered close to the NBBO by the third market center. Thus, we believe that requiring the consolidated display to include a complete montage of quotes from all reporting market centers provides essential transparency to investors and should continue.

Second, the Commission appears to have potentially narrowed the circumstances under which investors must receive the consolidated display to only situations "in which a trading or order-routing decision can be implemented."[12] In our view, any display of market data can lead to a trading decision (including a decision not to trade), and we

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[12] *Regulation NMS Release* at 11209.

believe that investors should make all trading decisions based on market information that is as complete as possible. Therefore, we are concerned that broker-dealers or others could unintentionally provide incomplete or skewed market data to investors upon which those investors may make preliminary investment decisions. And only when those investors actually access a system to place or route an order (if they are able to do so at a reasonable cost under this new regime) would the complete picture of the market come to light through the consolidated display.

Third, we support fostering innovation and competition between markets by allowing market centers to develop and independently sell ancillary, non-core information (such as their depth of book) with as little regulation as possible and without requiring dissemination through a specific consolidator. However, we are concerned that allowing market centers to independently sell duplicative core market data will diminish transparency for investors. For example, notwithstanding best intentions to the contrary, a risk exists that independently disseminated, unconsolidated quotes would not reach vendors simultaneously with the consolidated NBBO. As a result of mismatches between the NBBO and independently disseminated quotes, we believe that the appearance of a disorderly, incongruent market will increase as will investor confusion.

In addition, combining the proposed independent sale of core data with the narrowing of the definition of the consolidated display creates the risk of anti-competitive practices with respect to the joint-industry plan for NASDAQ securities. Unlike the plans for exchange-listed securities, the joint-industry plan for securities traded on NASDAQ allows subscribers to either purchase (1) the last sale and the NBBO (so-called "Level 1" service) or (2) the quotes of each market maker and exchange with unlisted trading privileges in addition to Level 1 data ("Level 2" service). Thus, not requiring the quotes of other market centers as part of the consolidated display could lead to a scenario where NASDAQ charges little or nothing for the quotes of its market makers. This could create a strong economic incentive for subscribers to only purchase Level 1 data and obtain market maker quotes directly from NASDAQ. As a result, these subscribers would not obtain the quotes of exchanges with unlisted trading privileges. We believe that such an outcome would deprive investors of essential information from exchanges with unlisted trading privileges, such as substantial depth being offered close to the NBBO, and would lessen competition among markets in NASDAQ securities to the detriment of investors.[13]

B. Governance of Market Data Plans

The Amex supports the creation of non-voting advisory committees to participate in network operating committee meetings. We believe that advisory committees will give a formal voice to the key constituencies that have historically provided informal input: investors and their representatives, alternative trading venues, and data vendors. To make the advisory committees as effective as possible, we also support granting advisory committee members the ability to receive the same materials as operating committee members and to attend and participate in all operating committee meetings (with the exception of executive sessions).

C. Distribution of Market Data Revenue

As to the distribution of market data revenue, the Amex strongly endorses the Commission's goal of revising existing distribution formulas to remove or diminish

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[13] No similar problem exists for exchange-listed stocks because the joint-industry plans for these securities provide all subscribers with the same data (i.e., last sale and all quotation information together) and the current governance structure of these plans make changes unlikely because unanimity of plan participants is required.

economic incentives for trading practices that degrade the accuracy and usefulness of market data, confuse investors, and unnecessarily increase message traffic for all market participants. The current distribution formulas, with their myopic focus on trades alone, create incentives for "gaming" through fraudulent, deceptive, or market-distorting trading practices driven by the desire to capture data revenue.[14] Thus, we strongly support the Commission's proposed revisions to the distribution formula, with some minor adjustments, as a thoughtful, innovative mechanism to discourage deceptive and market-distorting trading practices while encouraging enhanced liquidity and price discovery.

We acknowledge that the proposed formula appears relatively complex. Nevertheless, the network processors already capture all of the essential data needed to implement the formula (except for the portion of the formula related to price improving quotes, which we recommend that the SEC not adopt). Likewise, the formula easily can be programmed into a computer without the component related to price improving quotes. And, regardless of its perceived complexity, the only parties that need to deal directly with the formula are the network processors and the professionals auditing the calculation and distribution of market data revenue. What must not be lost in the debate on the details of the proposed formula is its most compelling attribute: The formula

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[14] Such practices include: "wash trading," "tape shredding," and "print facilities." Wash trading occurs when traders purchase and sell the same security at the same time or within a short period of time in non bona-fide transactions to create the false or misleading appearance of active trading. Trade shredding occurs when a single order is divided into multiple, smaller orders to increase the allocation of market data revenue. And, a so-called print facility is an SRO that rebates a portion of its market data revenue to market makers and ATSs for reporting their trades through the SRO, but those entities otherwise have little or no relationship with the SRO and may even display quotes through a second SRO. Thus, print facilities not only confuse investors about the actual location of liquidity, but also complicate regulatory and surveillance efforts by obscuring where a trade actually occurred.

encourages market transparency and liquidity by rewarding quoting at the national best price.

VI. Sub-Penny Pricing

Amex believes that the proposal in Regulation NMS that would prohibit market participants from ranking, displaying, or accepting orders, quotes, or indications of interest in sub-pennies does not go far enough. Sub-penny quoting diminishes market transparency and depth and degrades price priority by allowing orders offering economically meaningless price improvement to step in front of resting limit orders. Therefore, we believe that the prohibition against sub-penny quoting should extend to all NMS stocks, including stock trading below $1.00. We also believe that the Commission should ban trading in sub-pennies except for the reporting or “printing” of trades resulting from pricing mid-point, volume-weighted average, or other similar trades, so long as the trades do not otherwise violate the prohibition against quoting in sub-pennies.

In addition to banning sub-penny quoting and allowing sub-penny trading only under limited circumstances, we believe that the Commission should take this opportunity to reassess whether “one-size-fits-all” with respect to minimum tick size. Professor William Christie who, along with Professor Paul Schultz, in 1994 suggested that NASDAQ market makers were maintaining artificially wide spreads, is now suggesting re-evaluating the penny tick size.[15] He contends, and we believe, that a penny creates such a small pricing increment that it destroys the critical roles played by price priority and limit orders. A penny tick size, like sub-penny quoting, encourages gaming whereby economically meaningless price improvement is used to step in front of existing

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[15] William G. Christie, *A Minimum Increment Solution*, TRADERS, Nov. 2003, at 40.

limit orders. Professor Christie has suggested considering a minimum tick size of $0.05.[16] We agree, especially for appropriate, high-priced securities.

VII. Conclusion

Thirty years ago when setting out the basic tenets of a national market system, Congress knew then—and it is equally applicable today—that when it comes to market structure "one-size-does-not-fit-all." In the coming weeks and months as the debate on market structure and Regulation NMS continues, we urge Congress and the Commission to turn back to these core principles and remember the important and unique role that auction markets and their dedicated liquidity providers play in facilitating capital formation for small- and mid-cap companies and in nurturing innovative financial products. Ultimately, investors, listed companies, and innovative financial products all benefit from vigorous but fair competition between diverse market centers offering value-added services.

Thank you again for providing the Amex with the opportunity to express our views on some of the key proposals contained within Regulation NMS. I would now be pleased to answer any questions you may have.

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16 *Id.*