

May 11, 2015

Mr. Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: SEC Equity Market Structure Advisory Committee; File No. 265-29

Dear Mr. Fields:

We appreciate the opportunity to comment on Rule 611 of Regulation NMS, known as the “Order Protection Rule” or “Trade-through Rule” in anticipation of the May 13, 2015 meeting of the Equity Market Structure Advisory Committee formed by the U.S. Securities and Exchange Commission (“SEC”).<sup>1</sup> First and foremost, we commend the SEC’s initiative to reevaluate the efficacy of Regulation NMS in light of the substantial technological and structural changes that have transpired since the implementation of this pivotal regulatory measure in 2007.

Rule 611 has been an integral part of the successful evolution of the modern electronic marketplace. In order to continue this successful evolution, we propose further modernization of the mechanisms through which this rule protects market participants against trade-throughs. Specifically, we propose the following:

- Reallocating the responsibility for Rule 611 compliance from trading centers to the broker-dealer originating the order, ensuring consistent and uniform application of the Rule;
- Adjusting timeframes for Rule 611 compliance and trade reporting to align with the increased speed of today’s markets, ensuring enhanced compliance with Rule 611 and enabling more precise surveillance.

We believe that these updates to Rule 611 will further enhance the SEC’s efforts to meet the objectives of the National Market System, especially with regard to fair competition among broker-dealers and best execution of investor orders.

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<sup>1</sup> The co-authors have extensive experience in the electronic trading space, having both managed broker-dealers engaged in market making and high-frequency trading during both the pre- and post-Regulation NMS eras. Mr. Bodek is currently the Managing Principal of Decimus Capital Markets, LLC, a market structure consultancy firm, as well as the former CEO of Trading Machines, LLC, a registered broker-dealer and high-frequency options trading firm. Mr. Kovac is the Managing Member of Ozone Park Partners, a private investment firm, and the former COO of EWT, LLC, a registered broker-dealer and electronic market-maker in over fifty markets throughout the world.

## **Reallocation of Rule 611 compliance obligations**

At the time Regulation NMS was adopted in 2005, trading centers were the natural and logical choice for enforcing Rule 611 compliance. In addition to their significant in-house compliance and regulatory expertise, their substantial technology resources and pre-existing order routing networks ensured their ability to implement the requisite changes. Broker-dealers unable to integrate Rule 611-specific behavior into their trading platforms could therefore rely upon the exchanges as a “backstop” when Rule 611 went into effect in July 2007.

Today, many years later, the electronic marketplace has evolved to a point where exchanges are no longer the natural last line of defense for ensuring that trade-throughs are prevented in an accurate manner.<sup>2</sup> Geography and network latency were minor concerns eight years ago when trade executions were measured in hundreds of milliseconds (or seconds), and the snapshot of the market on which the broker based his routing decisions was likely identical to the snapshot of the market each of the routed-to exchanges used for ensuring Rule 611 compliance. However, in today’s markets where quotations update hundreds of times faster it is extremely unlikely that a broker and the multiple exchanges to which they have routed orders, each separated by miles of fiber-optic cable, will have an identical and consistent view of the market.<sup>3</sup>

Today, a broker who decides to simultaneously route orders to exchanges A, B, and C based on his snapshot of the market will have his orders subjected to the distinct and unique snapshots of the market at each of exchange A, B, and C – none of which necessarily corresponds to the snapshot originally used to determine the optimal routing strategy for fulfilling the duty of best execution. These inconsistencies, difficult to foresee in 2005, are commonplace in 2015.<sup>4</sup> Thus, to avoid multiple layers of inconsistent application of Rule 611 in today’s markets, it is logical to allocate the responsibility for Rule 611 compliance to only the entity which has a consistent view of market data on which the order-routing decisions are being made (and additionally has primary oversight responsibility for fulfilling the duty of best execution): the routing broker-dealer.

Not only is a typical broker better positioned than a trading center to determine the most accurate and consistent view of market prices accessible from its own particular geographic location, that broker is also better positioned to focus exclusively on optimizing the execution across multiple market destinations in a way that is impossible

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<sup>2</sup> While the Rule 611 compliance obligations extend to different types of trading venues, including wholesalers and dark pools, the main burden is carried by exchanges.

<sup>3</sup> The Commission has recognized the reality of differing views of market data by noting that Rule 611 compliance will be assessed on each brokers’ individual and unique Firm-Specific Quotation Data, “which will have time stamps that vary to some extent from Firm to Firm.” See Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS, U.S. Sec. & Exch. Comm’n, <https://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm> (last modified Apr. 4, 2008).

<sup>4</sup> The difficulties with trading venue-based enforcement of the trade-through rule in a world of high-speed trading and geographic dispersion of market activity have been previously outlined by other commentators. See, e.g., James J. Angel, *When Finance Meets Physics: The Impact of the Speed of Light on Financial Markets and Their Regulation*, 49 FIN. REV. 271 (2014).

for exchanges to achieve through the order-protection and routing functions implemented in their matching engines.<sup>5</sup>

### **Implementation by broker-dealers and enhanced executions**

The reallocation of Rule 611 responsibility solely to routing brokers would enhance the fulfillment of best execution obligations. Many brokers have invested heavily in information technology in order to accurately assess the “best” price, and the best practices of such firms typically include the use of the intermarket sweep order (“ISO”) exception of Regulation NMS<sup>6</sup> and self-determination of the National Best Bid and Offer (“NBBO”) to accurately assess tradable markets. For firms employing such best practices, the redundant enforcement of Rule 611 within exchange matching engines only leads to lower execution quality and liquidity when exchanges erroneously reject orders due to delayed or differing views of the marketplace, and thereby creates additional uncertainty in the marketplace.<sup>7</sup>

We expect this proposed change in the mechanism of implementing the Trade-Through Rule to improve market quality through a lower incidence of orders that exchanges reject as “unfilled” due to Rule 611 restrictions that were calculated incorrectly (i.e. false rejects), typically during fast market conditions, and trade-throughs that should have been prohibited (i.e. false acceptances), both resulting from inconsistent views across market venues.

Brokers who do not employ such best practices (e.g. the use of ISOs and “self determination” of the NBBO) and instead rely solely on Rule 611 compliance provided by exchanges suffer the same problems, only less visibly. They are, in fact, implicitly subjecting their orders to inconsistent views of the market across venues, and therefore the same or worse execution quality. Were such brokers obligated to assume full

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<sup>5</sup> One issue that can be frustrating to sophisticated brokers is assessing the differences between venues in how the consolidated feed from the Security Information Processor (“SIP”) and direct feeds from exchanges are used to comply with Regulation NMS, as well as assessing the impact on execution performance between venues employing different approaches. In such cases, a broker does not have the requisite transparency to determine if their orders are handled appropriately by such processes. Note, however, that recent rule filings by every single equities exchange in response to Chairman White’s calls for increased transparency of order-handling practices have improved the disclosure of the functional area of compliance with Rule 611 within matching engines. *See* Mary Jo White, Chairman, U.S. Sec. & Exch. Comm’n, Enhancing Our Equity Market Structure: Remarks at Sandler O’Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370542004312#.U99FBGN5WEc>. As an illustration of one of such filings, see Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by New York Stock Exchange LLC Clarifying the Exchange’s Use of Certain Data Feeds for Order Handling and Execution, Order Routing, and Regulatory Compliance, Exchange Act Release No. 72,710, 79 Fed. Reg. 45,511 (July 29, 2014).

<sup>6</sup> The ISO exception is described in Rule 611(b)(5) and (6).

<sup>7</sup> Consider for example that a sophisticated broker-dealer that utilizes ISO orders in a compliant manner is better positioned to determine an optimal routing strategy for the parent order based on incoming feedback from confirmations or rejections of child orders sent to multiple venues and is thus able to more accurately assess which prices are stale at market venues and no longer accessible.

responsibility for Rule 611 compliance, they would inevitably adopt the best practices noted above (in some shape or form), and thereby better serve their clients' interests.

Given the many years that have passed since the implementation of Regulation NMS and the steady improvements in custom and off-the-shelf trading technology, many broker-dealers are already well-positioned to comply with the reallocation of Rule 611 obligations. Brokers that are not as well-positioned to assume this responsibility would have the choice of upgrading their systems (which, as noted above, would likely improve execution quality and better serve their customers), or outsourcing their execution to brokers that could perform this task adequately, including the routing broker-dealers currently operated by exchanges themselves.

On the other hand, removing the requirement of trading centers to enforce Rule 611 would greatly simplify the functionality of their systems, substantially enhancing the stability and reliability of the marketplace.<sup>8</sup> While many market participants have expressed frustration at the complexity and number of exchange order types, a portion of these order types are related to Rule 611 compliance. Once the requirement for Rule 611 compliance is reallocated from the trading centers to the broker-dealers, trading centers will be able to eliminate certain advanced order types that are designed to assist sophisticated users in achieving execution goals while complying with Rule 611. The simplification of market structure achieved by relieving exchanges from the responsibility to enforce Rule 611 compliance hopefully will reduce the internal complexity of exchange matching systems and advanced order types – and the risk that results from such added complexity.<sup>9</sup>

### **Clarification of the ISO designation**

The reallocation of Rule 611 responsibilities to routing broker-dealers would enable a more limited and accurate usage of the ISO designation of orders, consistent with the original rationale of Regulation NMS.

When adopted, Regulation NMS provided a limited exemption to the order protection requirements under Rule 611(b)(5) and (b)(6) for “an order identified as an intermarket sweep order.” Exchanges receiving ISOs automatically permit such orders to execute,

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<sup>8</sup> The reliability and stability of exchange order matching engines will be improved by removing the burden imposed on exchanges in processing vast amounts of market data from away-markets within their own order matching facilities in order to comply with Rule 611. Interestingly, NYSE, a major market data provider itself, made the following observation: “Continued growth and maintenance requires significant investment in IT infrastructure and people. Explosion in market data volumes adds considerably to expense, while ongoing database and software updates to keep up with symbology and data feed specification changes are a money pit.” SuperFeed, NYSE Technologies (2012), [www.nyxdata.com/doc/45375](http://www.nyxdata.com/doc/45375).

<sup>9</sup> Should trading centers still desire to offer Rule 611 compliance functionality as a feature for subscribers, we would suggest that it be offered through a separate broker-dealer connecting to the exchange in question on an equal basis with other subscribers; retaining such functionality in the exchange matching facilities would eliminate the benefits outlined above.

even if they appear to trade-through other quotations in the market, since they have been identified as exempt from Rule 611.

With the increase in the market's speed and responsiveness since the implementation of Regulation NMS, participants saw an increase in exchange rejections of orders that were fully compliant with Rule 611 – due to the race conditions inherent in any geographically distributed system, the market data on which the participants had based their self-determination was not the same data that the exchanges used to enforce Rule 611. To solve this unforeseen problem of “false negative” rejections, SEC staff provided guidance that, subject to proper supervision, the ISO designation could also be used to indicate that an order should be exempt from automatic exchange Rule 611 enforcement because the originating broker had already performed self-determination of compliance.<sup>10</sup>

The reallocation of Rule 611 compliance to brokers from the exchanges would render the expanded use of the “self-determination” ISO designation unnecessary. Thus, the ISO designation could again solely be indicative of multi-level sweeps of the market, the main intended scenario behind the trade-through rule. Aside from substantially improving data collection of market quality statistics for ISOs, this limited usage would also reduce the volume associated with advanced order types incorporating logic to comply with Rule 611<sup>11</sup> and contribute to a reduction in the complexity level of the marketplace.

### **Elimination of single-points-of-failure**

The reallocation of Rule 611 responsibilities to routing broker-dealers will eliminate single-points-of-failure in an otherwise highly distributed yet robust marketplace.

The competition between market centers bound in a single National Market System is one of the major successes resulting from Regulation ATS and Regulation NMS. Not only have these rules provided new entrants the opportunity to compete effectively through innovation and technology, but they have forced market venues across the board to provide a service level that satisfies the evolving market expectations for stability, reliability, and latency. The concept of a binding NBBO that represents timely, automated, and accessible quotations has been instrumental in ensuring that all market venues contribute to the quality and integrity of the NBBO.

However, the reliance on trading centers for Rule 611 compliance creates a single-point-of-failure risk for the marketplace as a whole when one (or more) venues disseminate delayed information to the SIP (or over direct feeds) that must be honored by competing venues. While exchanges do have a process of self-help provided by Rule 611(b)(1), many delays occur during sudden movements in the marketplace for a brief period of

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<sup>10</sup> Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS, U.S. Sec. & Exch. Comm'n, <https://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm> (last modified Apr. 4, 2008).

<sup>11</sup> As an illustration, the recent share of ISO orders of total volume at NYSE Arca is in the neighborhood of 30%. See NYSE Arca - Order Type Usage (Percentage of Matched Volume), [https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE\\_Arca\\_Order\\_Type\\_Usage.pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Order_Type_Usage.pdf) (last visited May 7, 2015).

time and therefore do not result in any self-help action by exchanges. While admittedly brief, such disruptions often occur during moments of price volatility and thereby have an outsized impact on market participants.

As this perspective demonstrates, the impact of delayed data sent to the SIP (or direct feeds) not only causes investors harm by interfering with executions falsely rejected as trade-throughs, but the requirement for all exchanges to enforce trade-through compliance exposes the market to the greater systemic risk of having a single market adversely impact the execution quality of *all* market centers. An extreme example occurred on May 6, 2010, when delayed reporting to the SIP contributed to the instability and lack of perceived liquidity in the market.<sup>12</sup> Since then, numerous improvements, technological and regulatory, have been taken to address these symptoms.<sup>13</sup> However, the underlying problem of systemic risk as a result of exchange-enforced Rule 611 compliance continues to be an important concern that remains unaddressed. Reallocation of this responsibility to the routing broker-dealers would permit a much more robust and distributed system – there will be no risk of Rule 611 compliance facility failures at the exchanges, because such facilities will not exist.

Further, once exchanges have removed Rule 611 compliance there is little need for the exchanges to rely upon the SIP, which, as noted above is a single point of failure. Fairly or not, the SIP has an outsized profile in public perceptions of the stock market. Persistent problems with SIP reliability and latency, coupled with misunderstandings of the basic matching process in a limit order book, have lessened some participants' trust in the markets. Should the exchanges eliminate reliance on the SIP, we believe that would result in superior execution quality for investors and contribute to a material boost in investor confidence in the electronic marketplace.

### **Broker policies and procedures for Rule 611 Compliance**

The reallocating of Rule 611 responsibility to routing broker-dealers must be accompanied by the requirement to establish robust and well-documented policies and procedures for compliance.

Brokers will implement Rule 611 compliance in a wide variety of methods, dependent upon their business needs and the cost-benefit analyses particular to their situation. In light of these varying needs, broker-dealers should be required to document their policies for consistent determination of market data (including details of the usage of direct

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<sup>12</sup> See Letter from Peter Kovac, Chief Operating Officer & Fin. & Operations Principal, EWT, LLC, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 4-8 (Aug. 27, 2010), *available at* <http://www.sec.gov/comments/s7-02-10/s70210-279.pdf>.

<sup>13</sup> For some examples, see Regulation Systems Compliance and Integrity, Exchange Act Release No. 73,639, 79 Fed. Reg. 72,252 (Nov. 19, 2014) (to be codified at 17 C.F.R. pts. 240, 242 & 249); Order Approving Proposed Rule Changes by National Securities Exchange and FINRA Relating to Trading Halts Due to Extraordinary Market Volatility, Exchange Act Release No. 67,090, 77 Fed. Reg. 33,531 (May 31, 2012).

feeds), accessing depth-of-book on sweep orders, the use of “Day ISOs”, and other advanced order types impacted by Rule 611.<sup>14</sup>

Many important issues related to executing in today’s electronic marketplace can be adequately addressed through the written supervisory procedures process of broker-dealers. For example, a routing broker-dealer should have written supervisory procedures through which appropriate price feeds are selected and employed in providing routing services in an effective and compliant manner that protects against trade-throughs. Routing brokers should also define the exact mechanisms through which it is appropriate to “sweep” multiple levels of the order book for large trades that demand immediate liquidity. Routing broker-dealers should dictate the conditions in which it is appropriate to outsource the best execution function to third-party providers (including dark pools) that may in fact dictate execution time and price outside of their direct control. The topic of pegged and midpoint orders is particularly interesting given the sensitivity of such order types to direct price feeds and a trading venue’s current view of the marketplace. Routing broker-dealers should have firm policies on what trading venues should be used for pegged and midpoint orders, and how the execution quality of such venues will be monitored. Off-exchange dark pools and wholesalers / internalizers should have similar policies that justify the use of selected price feeds for midpoint and pegging order types.

Such policies should be available to all clients of the broker-dealer, providing the transparency necessary for such clients to collaborate with their broker on choosing among the trade-offs inherent in any best execution strategy.

### **Aligning timeframes in Rule 611 with the modern marketplace’s speed**

The effectiveness of the prohibition against trade-throughs can be strengthened by aligning timeframes in Rule 611 to conform to the increased speed of today’s marketplace and monitoring appropriate indicators. The following recommendations are, in our opinion, the most straight-forward incremental changes and measurements to consider for improving trade-through policies and procedures.

### **Repeal the one-second exemption provided by Rule 611(b)(8)**

In its recent memorandum on Rule 611, the SEC’s Division of Trading and Markets observed that no exchange has a specific mechanism implementing the one-second exemption provided by Rule 611(b)(8).<sup>15</sup> We are of the opinion that this exemption has little value. This exemption permits a transaction if the trading venue displaying the protected quotation that was traded through had displayed, within one second prior to execution of the trade-through, a best bid or best offer, as applicable, with a price that

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<sup>14</sup> In light of the varying compliance interpretations of advanced order types employing the ISO exemptions, including Day ISOs and variants thereof, among market participants today, we would strongly recommend that the Commission provide guidance on the compliant usage of such order types and/or what aspects of their usage should be documented in a broker-dealers policies and procedures.

<sup>15</sup> Memorandum from the SEC Division of Trading and Markets to the SEC Market Structure Advisory Committee 18 (Apr. 30, 2015), <https://www.sec.gov/spotlight/emsac/memo-rule-611-regulation-nms.pdf>.

was equal or inferior to the price of the trade-through transaction. This exception thereby provides a “window” to address false indications of trade-throughs that in actuality are attributable to rapidly moving / “flickering” quotations. It also potentially reduces the number of instances in which a trading center must alter its normal trading procedures and route orders to other trading centers to comply with Rule 611. The exception is thereby intended to promote more workable intermarket price protection.<sup>16</sup>

While this was an appropriately narrowly-tailored exemption when the SEC adopted Regulation NMS, the unprecedented technological improvements in speed in the equities markets in recent years have effectively changed the meaning of this rule: “one second” in 2005 is far different than “one second” in 2015. As the SEC has noted, this perspective has prompted concerns “based on the possibility that exchanges or other trading centers may execute trades at prices that were bettered by a quotation displayed for less than a few milliseconds at another venue,”<sup>17</sup> concerns that we feel are exacerbated by a lack of visibility into the pricing processes of certain off-exchange activity. Eliminating this exemption will preclude such activity and alleviate such concerns.

Moreover, we are concerned that the exemption could be used to justify behavior outside of its intended scope, such as providing executions at inferior prices during price moves that would be considered impermissible trade-throughs otherwise. More specifically, we are concerned that some problems may materialize on off-exchange trading venues, such as wholesalers / internalizers and dark pools, which by their nature have limited transparency.

### **Strengthen reporting requirements for off-exchange executions**

An essential component of monitoring compliance with Rule 611 obligations is accurate and precise reporting of trades. For the exchanges this is achieved automatically through the real-time dissemination of quotation and trade data. For off-exchange activity, we would suggest strengthening the current reporting requirements to require reporting all trade execution times with millisecond precision. Currently, trade reports to FINRA’s ADF are required to be reported with millisecond precision only if the reporting firm already possesses that capability.<sup>18</sup> We recommend that all firms be required to report with millisecond precision, and that firms without that capability be required to upgrade their technology as soon as possible. We would further recommend that the Commission consider requiring microsecond-level granularity in the near future, in anticipation of the marketplace’s continued technological advancement. This change will provide market participants (and clients of the off-exchange facilities) with the necessary detail to evaluate whether or not their quotations were traded-through and empower clients to self-police fulfillment of best execution obligations on their behalf.

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<sup>16</sup> In particular, at the time Rule 611(b)(8) was introduced the state of electronic trading systems technology illustrated the infeasibility of implementing sub-second trade-through protection across the equities marketplace as a whole.

<sup>17</sup> Memorandum from the SEC Division of Trading and Markets to the SEC Market Structure Advisory Committee, at 18.

<sup>18</sup> See FINRA Regulatory Notice 14-21 (May 2014), <http://www.finra.org/sites/default/files/NoticeDocument/p506337.pdf>.

## Suggestions for future data-driven analysis of Regulation NMS

The success of Rule 611 is illustrated by a substantial decline in transactions that are being “traded through,” with hundreds of millions of dollars of cost savings due to the inferior executions prevented by “more than [a] 95% decline in trade-through rates” over the period from 2003 to 2014.<sup>19</sup> Importantly, this success has been achieved with a significant proportion of orders executing without Rule 611 obligations being applied by exchanges, but instead by brokers who have already assumed Rule 611 compliance obligations through their use of the ISO designation for self-determination.<sup>20</sup>

When looking at exchange performance with regard to enforcing Rule 611, another important metric relates to the incidence of false positives, i.e., transactions that would not be traded through but still rejected by exchanges. In both authors’ experiences, the phenomenon of unfilled executions due to inaccurate market data used by trading venues to assess trade-through compliance can result in *significant* incidence of rejected fills with a “regulatory restriction” reason code indicating that the desired execution was erroneously deemed not compliant with Rule 611. Especially during fast market conditions, orders marketable against the NBBO, including immediate-or-cancel orders, are frequently rejected for that reason. Indeed, the relevant data is likely to be available from major exchanges, which would show the extent of potential harm / friction caused by unexecuted orders that would otherwise be filled if proper practices was used by brokers (i.e. ISOs with self-determination) or improved Rule 611 compliance within exchange matching engines.

Regardless of how the trade-through rule is ultimately addressed, we strongly encourage the SEC to analyze the statistics of orders that have been rejected by exchanges due to application of Rule 611. We also believe statistics on orders that have been routed by exchanges that have been returned unfilled by the away exchange are essential to any analysis of Rule 611.<sup>21</sup> In our opinion, the data will show some of the inefficiencies that burden sophisticated traders that access these markets, and the bulk of evidence will show that brokers are better positioned to manage Rule 611 compliance.<sup>22</sup>

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<sup>19</sup> See Memorandum from the SEC Division of Trading and Markets to the SEC Market Structure Advisory Committee, at 14-15.

<sup>20</sup> As noted previously, if Rule 611 obligations are reallocated solely to brokers, the ISO designation will return to a more limited scope of only intermarket sweep orders. As this measure would change the definitions of the underlying data used to compute trade-through rates above, we would urge caution in any subsequent time-series analysis to avoid comparing “apples to oranges”.

<sup>21</sup> For a similar observation in the context of MIDAS, see *The Role of Regulation in Shaping Equity Market Structure and Electronic Trading: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 91-92 (2015) (prepared statement of David Lauer, President and Managing Partner, KOR Group LLC).

<sup>22</sup> Another more technically nuanced issue involves the interleaved and contradictory treatment of ISOs and non-ISOs arriving at an exchange which are collectively marketable at the same price. Exchanges have no choice but to accept and fill ISOs at the same price at which traditional orders are rejected as not being compliant with Rule 611 (due to the exchange’s view of the market), even if such orders arrive near-simultaneously. This contradictory order handling treatment is an artifact of regulatory regime of Rule 611 itself, which provides evidence of customer harm that the exchanges cannot address due to regulation itself.

## **Concluding Observations**

A systemic unintended consequence of the Order Protection Rule is a two-tier system that has evolved due to a broad bifurcation in the marketplace between firms that leverage the modern electronic marketplace's features and those who have been challenged by its inherent complexity. Whereas sophisticated firms have leveraged Rule 611 ISO exemptions in conjunction with exchange innovations to enhance low-latency execution performance in ways that go beyond the original anticipated scope of Rule 611, many traditional brokers have not invested in the requisite technology and legal/compliance processes to provide a comparable level of access and have relied on exchanges and other trading venues to ensure a bare minimum level of compliant order protection.<sup>23</sup> The net impact is frustration by both parties in the "levelness of the playing field" with the exchanges forced to play a seemingly contradictory role in the marketplace, permitting firms using ISOs to execute freely at prices that at times would be simultaneously denied to other participants using traditional order types. Rather than pass judgement on one segment or the other, we recommend normalizing the trade-through rule so that the mechanism employed to prevent trade-throughs are instantiated in the most logical place for execution quality to be achieved - within the brokerage community.

Moving such compliance to brokers is a battle-tested concept, as sophisticated firms employing ISOs already take on the duty of complying with the trade-through rule for the bulk of their orders. By releasing the exchanges from Rule 611 compliance, the duty of best execution and the responsibility for investing in appropriate technology will be once again centered within the brokerage community (and not split between brokers and trading venues in the current inconsistent arrangements). We see the proposal provided above as incremental, and consistent with how most advanced trading firms would manage their execution activities (or how they would desire the market to evolve to assist in improving their control in the execution process).

Our proposal is an attempt to come to terms with the natural pressure upon the regulation that is implicit in the evolution of ISO usage to play an increasingly important role in performing a best execution function for low-latency trading firms. The evolution of ISO usage and exemptions attests to our claim that the trade-through rule is best satisfied within the executing broker's systems. What we seek to emphasize is that the natural evolution of sophisticated firms to use ISOs for achieving best execution should be normalized across the marketplace as a whole, with all brokers performing this function as a part of their best execution obligations. Furthermore, we see relieving exchanges of this function as improving the marketplace as a whole, eliminating the two-tier system, and minimizing dangerous interdependencies between exchanges. Lastly, as suggested,

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Interestingly, with Day ISO orders that "light up" a new market, customers that have been price-slid due to the ban on locked and crossed market stipulated by Rule 610 of Regulation NMS can "piggyback" on the self-determination of the original incoming Day ISO order in order to be displayed at the intended price. No such harmonization exists between marketable ISO and non-ISO orders.

<sup>23</sup> In fact, many brokers often represent to their clients that they will not provide access to ISOs due to perceived compliance risks.

adjustments to the one-second exemption and trade reporting requirements, as well as improving the collection of appropriate metrics, would assist the SEC and the marketplace itself in better policing for trade-throughs.

The question of investor confidence is an ongoing concern for the electronic marketplace given the frequent and often heated national media coverage of high-frequency trading and market structure. Many of the concerns of retail investors are based on the perception that their position in the market is disadvantageous as a result of an uneven playing field. However, as we have clearly indicated in this letter, the advantages historically available to sophisticated trading firms can be provided to retail customers by leveraging the same execution technology that is currently employed by sophisticated participants.<sup>24</sup> By implementing the recommendations proposed in the letter, routing brokers will necessarily improve their trading and execution systems and ability to navigate the complexity of the marketplace. This in turn will provide more opportunities for free market solutions and competition between brokers to the benefit of retail consumers, naturally contributing to improved consumer confidence in the modern electronic marketplace.

We appreciate your consideration of our comments. We will make ourselves available at your convenience to discuss the issues raised.

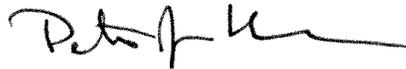
Sincerely,



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Haim Bodek  
Managing Principal,  
Decimus Capital Markets, LLC

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Peter Kovac  
Managing Member,  
Ozone Park Partners

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<sup>24</sup> For examples of such sophisticated technology, including routing services provided by market centers, such as IEX, and brokers, such as Morgan Stanley, see Memorandum from the SEC Division of Trading and Markets to the SEC Market Structure Advisory Committee, at 20 & n.32.