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Via Electronic Submission

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

COMMENT LETTER ON THE DISCLOSURE OF ORDER HANDLING INFORMATION

Re: **Disclosure of Order Handling Information (RIN 3235-Al67);**
Notice of Proposed Rulemaking (Release No. 34-78309; File No. S7-14-16)

Dear Mr. Fields,

Bloomberg, LP ("BLP") and Bloomberg Tradebook LLC appreciate the opportunity to comment on the above-captioned notice of proposed rulemaking (the "Proposal"), under which the U.S. Securities and Exchange Commission ("SEC" or "Commission") proposes to require new order handling disclosures by broker-dealers related to the routing of their customer orders.

BLP, the global business and financial information and news leader, gives influential decision makers a critical edge by connecting them to a dynamic network of information, people and ideas. The company's strength - delivering data, news and analytics through innovative technology quickly and accurately - is at the core of the Bloomberg Professional® service, which provides real time financial information to more than 325,000 subscribers globally. The comments on the Proposal set forth herein are based on BLP's deep expertise in transaction reporting and analytics, with substantial input from BLP's wholly-owned broker-dealer subsidiary, Bloomberg Tradebook ("Tradebook") whose customers are qualified institutional investors, hedge funds and broker-dealers. Tradebook is an SEC registered broker-dealer and a member of the Financial Industry Regulatory Authority, Inc. ("FINRA").

The Proposal notes that broker-dealers now have access to a variety of venues to choose from in routing and executing customer orders, and broker-dealers will frequently employ sophisticated order execution algorithms and order routing systems to fill customer orders. The Proposal also points out that broker-dealers face a number of potential conflicts of interest that may influence their order routing practices, including payment for order flow arrangements, profit-sharing relationships, transaction rebates, and the potential for leakage of customer order information.

We are highly supportive of the SEC's efforts to provide investors with standardized baseline

information and greater transparency in this area. We see one area where we believe additional disclosure would be valuable in furthering the SEC's goal. We see one area where an initial decision by an Administrative Law Judge ("ALJ") runs counter to this Proposal and to the SEC's basic market structure and investor protection regimes. We also believe that several definitions need to be clarified further. Finally, we believe the Proposal's definitions of retail and institutional orders, which are the linchpin for these new disclosure requirements, are unworkable in their current form and require further consideration by the SEC.

I. Executive Summary

Our comments are organized into the following three sections:

A. Order and Execution Management System Disclosures

An order management system ("OMS") is an electronic platform that automates an institution's front and middle office functions. The execution management system ("EMS") is an electronic platform that automates front office traders' processes. Both the OMS and EMS also provide connectivity services and trading software used to transmit orders to an institution's brokers.[1] For purposes of simplicity and clarity herein, the term "OMS" refers to both OMS and EMS disclosures.

An institutional customer may retain the services of an OMS to interface with its broker-dealer. In turn, the OMS may enter into a separate agreement with the customer's broker-dealer under which the broker-dealer agrees to share commissions with the OMS based on order flow from the customer. We believe the Proposal should be expanded to include disclosure by the broker-dealer of this transaction-based compensation paid to the OMS. Although fee arrangements are based on the customer's executions, most institutional customers have little to no transparency or insight into these agreements between their OMS and their broker-dealer. These arrangements are a form of commission sharing and customers have a right to understand how their commissions are being allocated and the potential impact it could have on their broker's order routing decisions. Moreover, these arrangements between the OMS and the broker-dealer create a similar potential for conflicts of interest as those noted in the Proposal.

B. Market Data

The Proposal requires all broker-dealers to disclose to their customers order handling and execution quality information, which detail, among other metrics, the total number of shares sent to the broker-dealer, total shares executed by the broker-dealer as principal, order routing information, execution information broken down by venue and execution strategy, and an assessment of liquidity at each venue ("fill rate").[2] Using this information, an institutional customer would be able to

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[1] BLP operates the Asset and Investment Manager ("AIM") institutional order management system and the Sell Side Equity Order Management System ("SSEOMS") for broker-dealers. BLP also operates an Execution Management System ("EMSX") platform and FIX Network connectivity business.

[2] See Proposed Rule 606(b)(3).

evaluate the order routing strategies employed by the broker-dealer and the quality of resulting executions. The Proposal notes that this data is essential to institutional customers to evaluate whether a broker-dealer is achieving best execution for the orders it receives. The Proposal also notes that broker-dealers are legally required to obtain best execution for all customer orders.[3]

According to FINRA, depth of book data is necessary for a broker-dealer to fulfill its duty of best execution. Likewise, as discussed further herein, this Proposal strongly encourages that a broker-dealer utilize depth of book data for order routing purposes. The Proposal recognizes that trading centers have unique liquidity, pricing, and depth of book, all of which may have a material effect on order execution quality. Since a broker is legally required to obtain the best execution for all customer orders, broker-dealers are encouraged to conduct assessments of the unique characteristics of each venue prior to making routing decisions. Consequently, a broker-dealer's duty of best execution includes obtaining and reviewing multiple venues' depth of book.

These positions are directly at odds with the recent initial decision of the SEC's Chief ALJ in the matter of the Application of the Securities Industry and Financial Markets Association ("SIFMA") for review of action taken by NYSE Arca and Nasdaq.[4] In the context of this Proposal the SEC should be mindful of the need to resolve the conflicting policy produced by the ALJ's decision, which is in contravention of foundational policy of the Commission, SEC staff and FINRA, as well as contrary to the holdings of the U.S. Court of Appeals for the D.C. Circuit.

C. Additional Issues on which the Proposal Solicits Public Comment

Tradebook and BLP provide general responses to other issues raised in the Proposal that are critical to the development of the rules. These responses are focused on issues surrounding the retail versus institutional definition, the actionable indications of interest definition, and reporting.

II. Comments

A. Order Management System Disclosures

The Proposal notes that broker-dealers play a critical role in deciding where to route a customer's orders.[5] A trading center may offer economic incentives to broker-dealers to induce the routing of order flow to that trading center. The Proposal notes that these economic incentives may create a conflict of interest for the broker-dealer. BLP agrees with the SEC that these potential conflicts of interest should be disclosed to provide customers with a clearer understanding of a broker-dealer's order routing practices. In fact, we believe that additional disclosure of a broker-dealer's order handling economic incentives are necessary.

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[3] See Proposal fn 46.

[4] See ALJ Initial Decision (June 1, 2016) available at https://www.sec.gov/alj/aljdec/2016/id1015bpm.pdf.

[5] See Proposal at 28. Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10577, 10582 (February 28, 2000).

The Proposal focuses only on the economic incentives and fees incurred by the broker-dealer after the broker-dealer has received an order from a customer. The Proposal does not address the economic pressures or transaction-based costs incurred by the broker-dealer prior to receiving the order. As noted above, the OMS may play a role in each transaction by interfacing between the customer and the broker-dealer, and may be compensated for that order flow by the broker-dealer. As these economic incentives, which are frequently unknown to the customer, create the same potential for conflicts of interest for the broker-dealer as those incentives noted in the Proposal, the final rules should require broker-dealers to disclose these fees and relationships to their customers.

Order Management System Overview

An OMS is an electronic platform that automates an institution's front and middle office functions. The OMS provides the customer with connectivity services and trading software to transmit orders directly to its broker-dealer in an efficient and cost-effective manner. The OMS essentially streamlines the investment process from portfolio management, order generation, and fund compliance to trading and operations. The institutional customer will typically pay the OMS a licensing and maintenance fee for its services.

The OMS may enter into a separate agreement with each customer's broker-dealer in which the broker-dealer pays a connectivity fee to the OMS. These fees may be assessed either as a flat per-month connectivity fee or a variable transaction-based fee (i.e., a broker-dealer will pay the OMS a fee per share for orders routed through the OMS to the broker-dealer).

"Net Profitability Model"

Broker profitability is clearly being challenged by market conditions and regulatory changes. The sell side response is a new "net profitability" model that drives the buy side/sell side relationship. This was noted in a recent TABB Group report: "The focus on costs is relentless, resulting in the sell side evaluating client relationships in terms of net profitability. Services are now rationed based on a client's current profitability rather than on their 'expected future revenue.'"[6] All costs – including those stemming from receipt of institutional orders – are now being factored into "net profitability" and determining the services that brokers can provide. The "…conflict of interest may exist between the broker-dealer's duty of best execution and its own direct economic interest."[7] In exactly the same way that the Proposal recognizes that third party agreements between brokers and execution venues "…where a broker-dealer can earn a rebate or pay a lesser fee for routing its customer's orders to a particular venue…"[8] can pose conflicts of interests in execution, the "net profitability" model requires that the SEC ensure that there is adequate disclosure and transparency into the commercial relationship between brokers and the institution's OMS. Institutions need to be able to understand the "net profitability" conditions for brokers before the execution process and the effects they may have on the availability of other brokerage services at the conclusion of the execution process.

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6 See TABB Group, "European Equity Trading 2016," April 2016.
7 See Proposal at 30.
8 Id.

Lack of Transparency and Disclosure

In many cases, the broker-dealer is held captive by the transaction-based OMS fee; yet the size of the fee that a broker-dealer must pay to the OMS and how the payment is structured are largely unknown to the institutional customer. The precise contours of these contractual agreements are difficult to determine because the agreements are often governed by a nondisclosure agreement preventing either party from publicly disclosing the economic terms of the agreement. As a result, the true costs incurred by the broker-dealer for any trade, and any impact on the broker-customer relationship or potential conflicts of interest resulting from these costs, are hidden from the customer.

The Importance of Disclosing the Connectivity Fees for Identification of Potential Conflicts of Interest

We believe it is very important that these connectivity fees be disclosed to customers for two reasons. First, the rule should seek to provide information about order delivery (OMS to broker); customers need the data to evaluate if these order delivery agreements create a potential source of conflict. Second, some customers have a fiduciary obligation to understand how the customer's commissions are allocated at their broker. In the past, these fees may have been considered indirect, but, these fees now have a direct impact (because the broker-dealer pays transaction-based compensation to third parties without the customer's knowledge). In a commission sharing arrangement, the institutional customer must be able to understand the true costs of the services provided by the OMS and evaluate whether the costs are reasonable in light of the value of the service provided.

To the first point, the SEC has previously noted that providing quantitative data to customers would provide them with a clearer understanding of a broker-dealer's order routing practices.[9] The Proposal notes that this applies not only for retail customers, but also for institutional customers.[10] As discussed above, the broker-dealer's economic incentives regarding routing and execution have the potential to create a conflict of interest between the broker-dealer and the customer. "Understanding how a broker-dealer manages this conflict of interest to ensure that its own self-interest does not compromise its best execution obligations is pertinent to institutional customers in evaluating execution quality."[11] The connectivity fees, such as those charged by an OMS to a broker-dealer, have the same potential to create a conflict of interest for the broker-dealer. For example, the customer has the right to see the economic relationships in order to assess whether the connectivity fee is putting price pressure on the broker-dealer to seek a less expensive trading center

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[9] Disclosure of Order Execution and Routing Practices, Securities Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414, 75427 (December 1, 2000).

[10] "Public information on a broker-dealer's institutional order handling practices could both assist institutional customers in selecting one or more broker-dealers for order routing services and foster increased competition among broker-dealers to provide order routing services." Proposal at 35.

[11] See Proposal at 30-31.

to execute the customer's order, in order to balance revenue and cost, even if this venue is likely to have less liquidity or an otherwise suboptimal execution.

Second, an investment adviser or other fiduciary must seek to obtain executions with a good faith determination that commissions paid are reasonable in relation to the value of the products and services provided by broker-dealers in connection with the managers' responsibilities to the advisory accounts for which the mangers exercise investment discretion.[12] In particular, when seeking best execution, an adviser should consider the full range and quality of a broker's services when selecting broker-dealers to execute client trades, including, among other things, the broker's execution capability, commission rate, financial responsibility, responsiveness to the adviser, and the value of any research provided.[13]

The Commission has previously recognized that the communications services between a customer and the broker-dealer are functions incidental to effecting securities transactions and are eligible brokerage services for the purposes of sharing commissions.[14] Therefore, investment advisers and managers must make a good faith determination that the commissions paid are reasonable in relation to the value of the products and services provided by the broker-dealer.

In order for a manager to make a good faith determination that the amount of commission paid is reasonable in light of the value of products and services obtained from the broker-dealer, a manager would need to know how the OMS is compensated by the broker-dealer for its services, how this compensation arrangement may influence routing decisions, and what the relationship has on

[12] Conduct not protected by Section 28(e) may constitute a breach of fiduciary duty as well as a violation of the federal securities laws particularly the Advisers Act and the Investment Company Act of 1940, and the Employee Retirement Income Security Act of 1974.

[13] Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Securities Exchange Act Release No. 23170 (April 23, 1986).

[14] Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Release No. 34-54165 (July 18, 2006); 71 Fed. Reg. 41978 (July 24, 2006). Under Section 28(e)(3)(C) of the Act, a person provides "brokerage…services" insofar as he or she effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody). Under the Commission's interpretation of services eligible for the 28(e) safe harbor, communications services related to the execution, clearing and settlement of securities transactions and other functions incidental to effecting securities transactions, such as connectivity service between the money manager and the broker-dealer, including dedicated lines between the broker-dealer and the money manager's order management system, are eligible under Section 28(e)(3)(C). "Unlike research, brokerage services can include connectivity services and trading software where they are used to transmit orders to the broker, because this transmission of orders has traditionally been considered a core part of the brokerage service. We believe that mechanisms to deliver research on the other hand, are separable from the research and the decision-making process. We understand that OMS may include trading software used to route orders, provide algorithmic trading strategies, or transmit orders to DMA systems or provide connectivity to this software. Accordingly, these aspects of the OMS may be eligible brokerage." Id. fn 124.

execution quality. Since the institutional customer does not typically know how the OMS is compensated by the broker-dealer, the customer would not be able to make this determination.

By consulting with 24 of BLP's institutional investor customers representing about $2.1 trillion of assets under management, we discovered that although 70% knew that there were compensation arrangements between their OMS or execution management system and their brokers, only 37% believed that they had adequate transparency into the fees. Additionally, 37% believed that that the fee arrangement may have an impact on the relationship with their broker and 42% were unsure whether there was an impact. This Proposal is based on disclosure and transparency for customers to understand where there are potential conflicts of interest in orders going to the market to be executed, with a focus on the potential conflicts between the broker and trading venues. The SEC should consider widening the scope of disclosure to include the linkages connecting institutional customers to their brokers.

B. Market Data

Background

The Proposal's position with regard to depth of book data and a broker-dealer's duty of best execution is directly at odds with the Initial Decision of the SEC's ALJ.[15]

The Proposal is predicated on the accurate understanding that depth of book data from one exchange is not substitutable for depth of book data from another exchange. If this were not true, there would be no need to search different liquidity sources prior to routing or executing orders, no need for protected quotes, and significantly less need for a best execution requirement in this space. Indeed, one of the few things that economists for both SIFMA and the exchanges have agreed upon is that one exchange's depth of book product is not a "substitute" for another exchange's depth of book product. The ALJ's finding to the contrary – without support in the record – is contrary to the underpinnings of this Proposal, as well as contrary to the most significant market structure and investor protection initiatives advanced by the Commission in recent years. There is an enormous cost in terms of investor protection to the Commission continuing to support two totally contradictory foundational premises underlying all of our market structure deliberations.

By way of background pertinent to the Proposal, market data fees, the fees charged by exclusive processors of certain basic market data, are required by the Exchange Act to be fair and reasonable, represent an equitable allocation of fees, and be nondiscriminatory. In 2010 and 2013, the U.S. Court of Appeals for the D.C. Circuit held in favor of SIFMA (and NetCoalition as co-petitioner) finding critical flaws in the SEC's analysis of whether competition constrains the price of NYSE depth-of-book market data, and could not support the SEC's approval of the NYSE's proposed market data fees. In the first decision, known as NetCoalition I, the D.C. Circuit vacated the SEC's approval order and remanded for further proceedings. The SEC had argued that two factors – competition among exchanges for order flow and the availability of alternatives to depth-of-book data – constrained NYSE Arca's prices. The Court held that the SEC had failed to support either

[15] See Admin. Proc. File No. 3-15350. See also fn 4 supra. (June 1, 2016).

theory. NetCoalition II reaffirmed this position, stating that NetCoalition I "remains a controlling statement of the law." The SEC's order was vacated and remanded to the SEC's ALJ for further proceedings because the D.C. Circuit found, based on the record before it, that no reasonable person could conclude that depth of book market data was a substitutable product, and hence the fees were not "fair and reasonable" under the Exchange Act. However, despite lack of evidence to show that the exchanges are restrained by competitive forces (in fact, the evidence demonstrated the contrary), the SEC's ALJ Initial Decision held in favor of the SEC.

The fact that each venue has unique orders and therefore unique market depth data was the SEC's official position as communicated by Regulation NMS as one of the reasons for Regulation NMS Rule 611 in 2005. The SEC further reiterated the position that each venue is a unique market with unique data in the Concept Release on Market Structure in 2010. In July 2015, the Division of Trading and Markets reached the same position when it noted that a broker-dealer under the Vendor Display Rule may not rely solely on the BATS One feed, which only "aggregates approximately 20% of the daily volume" in NMS securities, to provide quotations to a customer.[16] In March 2015, FINRA's Head of Market Regulation made clear the importance of depth of book data in best execution analysis. This foreshadowing ripened into a formal notice regarding best execution and depth of book data in November 2015. In order to be in compliance with FINRA rules, and an enhanced competitive environment due to additional order handling disclosure, brokers will be: (1) required to have a complete and accurate "picture" of the market when handling customer orders lest they be in violation of their best execution duties; and (2) brokers that do not have such a complete and accurate picture that only the direct feeds and market depth can provide would be at a competitive disadvantage and it would be revealed in the new Rule 606 reports. The SEC and FINRA have on several occasions both explicitly and implicitly required that brokers subscribe to these direct feed and market depth products, and the SEC must resolve this conflicting policy stance and address whether these market data fees are "fair and reasonable" (as directed by the D.C. Circuit Court's two holdings).

Direct Feeds and Market Depth are Necessary for Competition and Compliance

To accomplish its goals, the Proposal would effectively require brokers to purchase multiple venues' proprietary direct feeds. The Proposal notes that "(1) Trading volume is dispersed among many highly automated trading centers that compete for order flow in the same stocks; and (2) trading centers offer a wide range of services that are designed to attract different types of market participants with varying trading needs."[17] Although each venue competes for liquidity and trading in the same stocks, each venue has a unique set of participants and a completely unique set of quotes.

Additionally, the Proposal notes that, "A venue that pays a significant rebate for shares of orders providing liquidity would most likely have a deep book as many liquidity providing orders would

[16] Division of Trading and Markets, Denial of No-Action Request under Rule 603(c) of Regulation NMS (July 22, 2015).
[17] See Proposal at 9.

post on that venue's book in order to receive the rebate."[18] The Proposal states further, "Due to the depth of book, the likelihood of receiving an execution for a liquidity providing order on that venue could be low and the average time between order entry and execution or cancellation for orders that provided liquidity could be relatively long." The Proposal then goes on to note that "customers could use [the information] to assess how their broker-dealers are implementing order routing strategies or whether their broker-dealers may be influenced by the high rebate at such venue in conflict with the customer's interests." First, it would be inappropriate for a broker-dealer to assume that a high rebate means a deep book without actually analyzing the market data available. Additionally, inherent in this statement – and consistent with numerous SEC policies – is an acknowledgement that each venue's depth of book is different and not substitutable, contrary to the ALJ's findings.

The Proposal also states that "[p]roviding greater public transparency between the routing practices of marketable and non-marketable limit orders could increase competition among broker-dealers and minimize the potential conflicts of interest between maximizing revenue and the duty of best execution."[19] The Proposal seeks to further solidify a broker's obligation to seek best execution by providing measures of fill rates, price improvement, passive and aggressive executions.

For example, an analysis of Tradebook's marketable limit orders from January 1, 2016 through August 31, 2016 revealed that 47% of the orders had to either: (1) sweep the depth of book; or (2) have the smart order router consider the market depth when determining an optimal routing strategy. This was because the order size was either greater than the liquidity available at the National Best Bid and Offer ("NBBO"), or the limit price was beyond the NBBO.

Thus, Tradebook's data affirms that nearly half of its institutional marketable limit orders require an "aggressive" order routing strategy pursuant to the definition set forth in the Proposal and would require at least some knowledge of the market depth in order to know whether the particular order should be routed to a particular trading center. Both from a practical best execution standpoint, as well as from a regulatory compliance standpoint, direct feeds and depth of book data are essential to a broker in discharging its duty of best execution and critical for order routing. How else can a broker know if the limit order is marketable without depth of book information? The NBBO as indicated by the definitions in the Proposal, is not enough – particularly for large aggressive orders.

Further, with respect to speed, the SEC's assessment that an aggressive order routing strategy "… emphasize[s] the speed of execution of the entire institutional order over the minimization of price impact"[20] is accurate. The SEC appears to have deep and justified concerns about securities information processor ("SIP") market data latency. However, the SEC's sole emphasis on speed in aggressive order handling omits a key component in efficient order routing – liquidity aggregation. The act of aggressively taking liquidity includes speed *plus* maximizing liquidity capture in the market depth. The type of data used by the broker in routing and order handling strategies materially affects the outcome – the quality of execution and the SEC's proposed measures – such

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18 See Proposal at 101.
19 See Proposal at 120.
20 See Proposal at 143.

as the fill rate. It's difficult to see how the data sought by this Proposal can be obtained without depth of book feeds.

The practical compliance and commercial reality of the Proposal effectively makes the subscription to these feeds mandatory. What good broker or compliance officer would say, "There is no need to purchase direct feeds or depth of book for order handling purposes?" The Proposal is also clear that one of the goals of the public disclosure or order handling statistics is to force competition among brokers competing for institutional and retail order flow. The only way a broker can be assured that it will rank highly in order routing efficiency is to demonstrate that it has the best (fastest) sources of market data and complete transparency (market depth) that can only come from direct feeds. It is imperative that brokers consume direct and proprietary depth feeds that offer the most transparency in order to compete in order routing execution quality. Subscription to these feeds is effectively a mandatory cost of doing business because they directly influence order handling outcomes.

FINRA's Mandate to Purchase Proprietary Feeds for Best Execution Purposes

FINRA notes that "[t]he duty of best execution must evolve as changes occur in the market that give rise to improved executions for customer orders."[21] FINRA has now made expressly clear that "[t]he exercise of reasonable diligence to ascertain the best market under prevailing market conditions can be affected by the market data, including specific data feeds, used by a firm," and that "a firm that regularly accesses proprietary data feeds, in addition to the consolidated SIP feed, for its proprietary trading, would be expected to also be using these data feeds to determine the best market under prevailing market conditions when handling customer orders to meet its best execution obligations."[22] FINRA's statements confirm that the SIP feed is not a substitute for the trading centers' proprietary depth-of-book data products. In fact, FINRA has made explicit the connection between depth of book data and best execution: FINRA's Head of Market Regulation announced at a compliance conference for broker-dealers in 2015 that if a member is "not looking at depth of book type activity at other markets before [it] fill[s] a customer['s order], that's another area where we're going to start to focus a little bit more on" in assessing best execution.[23] Thus, according to FINRA, broker-dealers face significant regulatory risk if they do not use depth of book data.[24]

Consequences

These market and regulatory realities empower for-profit exchanges to require that regulated broker-dealers purchase sole-source data products at exorbitant fees in violation of Exchange Act requirements. The market data feeds are not substitutable and there is a complete lack of competition among the exchanges – indeed, no competition is needed when (1) there are regulatory mandates to purchase multiple unique market data feeds (best execution, order routing, and order

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[21] See FINRA Regulatory Notice 15-46, November 2015.
[22] Id. at 13, note 2.
[23] SIFMA Legal and Compliance Meeting, March 2015.
[24] This of course is without even speaking to state fiduciary laws, which may mandate depth of book data.

protection, to name a few) and (2) competition among brokers is so fierce that a broker who fails to look at these feeds is at a fatal competitive disadvantage.

Even if a broker-dealer were to be considered to have a choice in purchasing the feed, the fees charged by the exchanges are not "fair and reasonable" pursuant to the Exchange Act. This Proposal, like many of the SEC's and FINRA's regulatory initiatives described above, encourage, if not mandate, that broker-dealers must purchase products from a sole-source provider. The combination of sole-source plus effectively mandatory purchase creates extraordinarily excessive fees. The Commission should weigh the serious costs involved, as depth of book fees increase trading costs, resulting in lower investment returns for millions of ordinary Americans who invest to save for retirement, college or to buy a home. These fees are inconsistent with the Exchange Act and with the investor protection prongs of the SEC and FINRA's mission statements. In the context of this Proposal the SEC should be mindful of the need to resolve the conflicting policy produced by the ALJ's decision, which is in contravention of foundational policy of the Commission, SEC staff and FINRA, as well as the holdings of the U.S. Court of Appeals for the D.C. Circuit. We hope the Commission will resolve this conflict by ensuring that sole-source data is available on terms that are not prohibitive and consistent with the Exchange Act. That is an outcome which would advance many beneficial initiatives, including this Proposal.

C. Additional Issues on which the Proposal Solicits Public Comment

Institutional and Retail Order Definitions

Dollar Value and Share Volume of the Order Do Not Indicate the Identity of the Customer

BLP believes it is appropriate to require broker-dealers to disclose order routing and execution quality information to institutional customers as well as to retail customers. In light of the complex order execution algorithms and order routing systems employed across a wide variety of venues on behalf of institutional customers, it is essential that institutional customers have access to execution and routing data to evaluate a broker-dealer's order routing strategies and execution quality.[25]

Although BLP acknowledges the need for greater transparency and disclosure in this area, BLP believes that differentiating institutional and retail orders based on the dollar value of the order is an inappropriate method of accomplishing this goal. BLP also believes that the number of shares of the order would be an inappropriate method of drawing a distinction. In today's electronic markets, institutional customers frequently place orders below the proposed institutional order threshold. Institutions often split their orders to manage information leakage and maximize their ability to expose their orders to various sources of liquidity.

To underscore this point, Tradebook, analyzed its order flow from January 2016 through August 2016. It is important to note that all of Tradebook's customers would generally be considered to be institutional investors or broker-dealers. We found that 96% of all orders were below the $200,000 threshold. When we reviewed orders by geographic origin (US, Canada, Europe, Latin America,

[25] See Proposal at 22.

Asia), in each region with the exception of Asia, over 90% of the orders were below the threshold. The clear majority of orders originating from Asia (80%) were also below the proposed institutional order threshold. In BLP's view, dollar value and share total are no longer meaningful indicators as to whether the customer placing the order is an institutional or retail customer.

Institutional and Customer Order Handling Reports Overlap

Under the Proposal, customers have the ability to request reports from their broker-dealer which contain information related to the broker-dealer's handling, routing, and execution of the customer's order. The content of the report will differ based on whether the customer has placed retail or institutional orders with the broker-dealer. Customers that submit retail orders to a broker-dealer would be provided with a report containing the information outlined in proposed rule 606(b)(1), and customers that submit institutional orders would be provided with a report containing the information outlined in proposed rule 606(b)(3). If a customer submitted both retail orders and institutional orders, the broker-dealer would be required to provide two reports to the customer.

Consequently, the Proposal contemplates that a broker-dealer provide two kinds of reports, one report for retail orders and a different report with different data points for institutional orders. If a customer submitted both retail orders and institutional orders during any reporting period, a scenario very likely for institutional investors based on the analysis of Tradebook's orders previously discussed, a broker-dealer would need to provide the same customer with two separate reports containing differing data sets. Not only would this increase the burden on the broker-dealer in having to provide multiple reports to the same customer, but the information provided would be of lesser utility to the customer seeking order routing and execution information since each report contains different information. We do not believe the SEC intended such an outcome.

Alternative Options to the Order Size Approach

In our view, the SEC has a choice between two approaches. First, the SEC can rewrite the definition to differentiate retail and institutional orders based on the identity of the customer. Second, the SEC could differentiate the reporting requirements based on the type of order rather than the share volume or value. BLP believes that a distinction between order types could be made based on the level of order handling discretion (e.g. not-held) versus orders submitted that have no discretion (e.g., held orders).

Looking to the Identity of the Customer

If the SEC were to rewrite the rule to differentiate retail and institutional orders based on the identity of the customer, the SEC could allow the customer to elect to be treated as an institutional or retail customer for the purposes of the Proposal. BLP believes that this would ensure that customers receive consistent information from their broker-dealer for all orders. This would, however, potentially cause confusion where the SEC and FINRA rules and guidelines categorize the customer differently than the manner in which the customer categorizes its own identity for the purposes of the Proposal. BLP would favor an approach that treats a customer's identity consistently across the framework of rules.

It is BLP's position that, if the SEC seeks to segment flow based on institution and retail, it should be consistent with FINRA's "customer account type" definition under the current guidelines set out in FINRA Rule 4512.[26] FINRA Rule 4512 is the underpinning of FINRA Suitability Rule 2111.[27] Additionally, this designation travels downstream to FINRA's Order Audit Trail System ("OATS") "Account Type Code."[28] Moreover, this account type designation appears to be the same definition that will be employed under Commission's Consolidated Audit Trail ("CAT") Data Recording and Reporting requirements.[29] The SEC should also consider segmenting orders based on whether the customer has given the broker order handling discretion (e.g. not-held/non-directed versus held/directed orders). By segmenting orders based on whether the broker has discretion, orders also need to be grouped accurately so that comparisons can be made across brokers. For example, Immediate or Cancel ("IOC") orders need to be segmented from "day" and "market" orders need to be segmented from "marketable" orders. Additionally, to understand the effect of dark and lit order handling, "non-marketable" orders need to be categorized as displayed or non-displayed.

Actionable Indications of Interest

The Proposal defines an "actionable Indication of Interest" ("actionable IOI") as "any indication of interest that explicitly or implicitly conveys all of the following information with respect to any order available at the venue sending the indication of interest: (i) symbol; (ii) side (buy or sell); (iii) a price that is equal to or better than the national best bid for buy orders and the national best offer for sell orders; and (iv) a size that is at least equal to one round lot."[30] We believe the proposed definition is written in a manner that: (i) lacks sufficient clarity to define the underlying conduct that would constitute an actionable IOI; and (ii) departs from the Commission's prior guidance related to actionable IOIs in a manner that would include activity previously considered and excluded.

The Definition of "Actionable"

In the Regulation of Non-Public Trading Interest Proposing Release, the SEC made the distinction that ATSs and venues send IOIs to attract order flow. In this way, they function like quotations. Broker-dealer order routers respond to these IOIs, they do not send IOIs. For these reasons, the inclusion of IOIs in the Proposal appears out of context with order routing transparency.

With regard to the clarity of the definition, "actionable" is not defined in the Proposal. The Proposal suggests that the SEC is concerned about immediately and electronically accessible IOIs that function like displayed quotations. The proposed definition for actionable IOI contains no such

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[26] See Customer Account Information, FINRA Rule 4512(c).

[27] See Suitability obligation for an institutional account, FINRA Rule 2111(b).

[28] See OATS Technical Specifications, Appendix A-1, Data Dictionary and Order Report Formats C-24, available at http://www.finra.org/industry/oats/oats-technical-specifications.

[29] See SEC Rule 613(c)(7)(viii) and 613(j)(4).

[30] Proposed Rule 600(b)(1).

limitation that an actionable IOI be immediately or electronically accessible.[31] The Proposal notes that the facts and circumstances should be considered in determining whether an IOI is actionable. However, there are many kinds of IOIs that are used in varying ways. For example, IOIs may be communicated electronically or manually. To the extent that a manual IOI is not immediately accessible, it does not share the same characteristics as an electronic IOI. We believe the rule should provide greater clarity by defining an actionable IOI as an IOI that is immediately and electronically accessible from those that are manually actionable. This would bring the proposed definition in line with the Proposal's description of "actionable" and provide greater clarity to broker-dealers and their customers.

The Commission's Previous Guidance

With regard to the SEC departing from previous guidance related to actionable IOIs, the SEC has previously indicated that an actionable IOI is a privately transmitted message by certain trading centers, such as an ATS or an internalizing broker-dealer, to selected market participants to attract immediately executable order flow to such trading centers, and functions in some respects similarly to a displayed order or a quotation.[32]

Some IOIs are automated, immediately and electronically accessible, and some are manually accessible in nature. Regulation NMS in 2005 distinguished between such quotations. Automated quotations that were immediately and electronically accessible were protected under Rule 611; quotations that were subject to an acceptance delay of over a second were considered manual and could be traded around.[33] The same principles should be applied in determining whether an IOI is actionable. An IOI that is subject to price negotiation or reserves the right to manually accept or reject a response to an IOI should not be considered actionable for the purpose of the rule.

The SEC has previously taken the position that certain other IOIs should be excluded from the definition of actionable IOIs. Specifically, the SEC has previously proposed to exempt from the definition of actionable IOIs any IOIs for a quantity of NMS stock having a market value of at least $200,000 that are communicated only to those who are reasonably believed to represent current contra-side trading interest of at least $200,000.[34] BLP believes the SEC should incorporate this position into the final rule. Block order IOIs, which are often manually negotiated, do not share the same characteristics of an actionable IOI under the Proposal. The block IOI is not immediately executable and the price is subject to negotiation.

Accordingly, for an IOI to be considered actionable in the context of the Proposal, it must also be electronically immediately executable and transmitted, (responded to) immediately and

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[31] See Proposal at 58.

[32] Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208, 61210 (November 23, 2009) ("Regulation of Non-Public Trading Interest Proposing Release").

[33] See Regulation NMS Adopting Release at 86.

[34] See Regulation of Non-Public Trading Interest Proposing Release at 8-9 (November 13, 2009).

electronically, and below a certain size or volume threshold. In order to be consistent with the discussion section of the Proposal, we suggest that the SEC amend the definition to:

"An actionable indication of interest means any indication of interest less than $200,000 in market value and immediately and electronically accessible between two electronic trading systems and that explicitly or implicitly conveys all of the following information with respect to any order available at the venue sending the indication of interest…"

The SEC Should Consider Who Typically Sends IOIs

The Proposal covers brokers sending actionable indications of interest. The scope should be similar to the Regulation of Non-Public Trading Interest Proposing Release and targeted toward venues such as ATSs. The SEC should also consider whether other market participants that send actionable IOIs, such as exchanges should be included in the scope of the rule.

Reporting

Reasonable Period of Time to Provide the Customer Report

BLP believes that the SEC should provide a reasonable period of time to phase in reporting under the final rule. BLP anticipates that generating portions of these reports and responding to customer requests will eventually be automated. Upon automation and implementation of the program, we believe that the proposed seven days may be a reasonable period of time to respond. However, until the automated program is in place, we do not believe seven days would be a sufficient amount of time to reasonably ensure that broker-dealers would be able to respond in a timely fashion to all customer requests. In a situation in which numerous customers request a report concurrently, the demands on time and resources may be such that the firm is unable to respond within the time period provided.

Initially, we believe that 20 business days would be a sufficient amount of time to reasonably ensure compliance with the final rule. We would suggest that the SEC provide a longer period of time to respond.

Annual Notice to Institutional Customers

BLP believes that broker-dealers should not be required to provide an annual notice of the availability of the report to institutional customers. Part of the evaluation process of this program is whether or not this information is valuable to clients in examining order routing decisions and execution quality. An institutional customer who does not request the report should be an indicator that the Proposal does not serve the customer's needs.

All Customers Should Have Access to a Report

The Proposal asks whether the rule should include a de minimis exemption for broker-dealers that receive in the aggregate less than a certain threshold number or dollar value of institutional orders.

The Proposal notes that one of the motivations for the Proposal was to require broker-dealers to provide a standardized baseline level of information to all customers. The SEC noted that some smaller institutional customers may lack the bargaining power or the resources to demand relevant order handling information from their broker-dealers. The Proposal also noted that "larger institutional customers may be better able to leverage their market size and position to obtain more detailed and complete disclosures from their broker-dealers, whereas smaller institutional customers may lack sufficient bargaining power to do so."[35] Accordingly, BLP believes that de minimis reporting exemptions or other institutional thresholds should not be included in the final rule.

The Rule Should Only Cover Orders Placed Directly with a Broker-Dealer

For illustrative purposes, assume a customer sends an order to Broker A; Broker A leverages Broker B's smart order router or algorithmic trading strategy. This is commonly referred to as "white-labeling" or leveraging outsourced technology. Broker B knows Broker A as its counterparty. Broker A knows the customer. Here, Broker A is a customer of Broker B.

In the above illustration, the customer relationship is between Broker A and the customer. The broker that has decided to outsource technology (to Broker B) should be evaluating the effectiveness of that technology. Brokers that use outsourced technology should fulfill the obligation of being able to provide aggregate and institutional clients' reports on request. This is one of the reasons we believe that the period of time to report initially needs to be 20 days in order to provide brokers that outsource or "white-label" time to get their data and assemble their own reports.

Frequency of Responding to Customers

With regard to whether a rule should specify the number of times a broker-dealer is required to respond to a customer request for a report on the handling of its institutional orders, BLP believes the SEC should not specify this information in the final rule. The SEC may conduct a review as previously suggested at a later date to determine whether the rule should be supplemented.

Our view is to let the competitive dynamics of customer service in the free market determine whether this information is important to customers. If the SEC finds that area becomes a problem, the SEC can evaluate whether to act at a later date. Moreover, as we expressed previously, an evaluation of the value of this program should include whether or not customers use the information available to them. We favor a data-driven approach, informed by customers' use of the information, to determine whether the rules in this Proposal are no longer functioning as anticipated or no longer serving a need, and should be reevaluated or discontinued altogether.

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[35] See Proposal at 28.

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We appreciate the opportunity to provide BLP's views to the Commission on these important issues. If you have any questions or would like to discuss this matter further, please do not hesitate to contact us.

Respectfully submitted,

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