



May 24, 2004

Johnathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Via email: rule-comments@sec.gov

RE: No. S7-10-04

Dear Mr. Katz,

Oppenheimer & Co. Inc. is pleased to comment upon Proposed Regulation NMS (“NMS”), and hopes that the Securities and Exchange Commission (“Commission”) considers our comments in determining the final scope of NMS. Oppenheimer is a leading integrated financial service firm with over 1,600 Financial Advisors and nearly 100 branch offices. As an active market maker, Oppenheimer makes markets in approximately 650 Nasdaq stocks, and trades 170 million shares per month in Nasdaq stocks. During the last several years, ECN access fees incurred by Oppenheimer have increased from an average of \$90,000 per month to \$250,000 per month. We are particularly concerned with the negative impact that ECN access fees have on the current market structure. We heartily welcome the Commission’s efforts in addressing this issue.

Access fees are an unfair tax on market makers. As more trading is executed through the major ECNs, the charges have become an increasingly significant component of a desk’s cost structure. We believe that even the \$0.001 per share rate proposed in NMS is still too high. The fees impede transparency of quotes and hinder market makers’ ability to provide best execution. All access fees should be eliminated as they present a hidden and unnecessary barrier to trading. We agree with the Commission that including access fees in ECNs’ quotes would cause sub-penny quoting, which in our opinion would be a development that would cause other issues.

Access fees charged to market makers subsidize ECN customers, and more importantly, encourage locked and crossed markets. We concur with the view that the increase in locked and crossed markets is in part attributable to the access fees charged to market makers and the rebates from these fees given to ECN customers. Our traders have noticed patterns and practices of ECNs locking traders quotes in order to “force” traders to access the ECNs’ quotes fees in order to provide best execution to our customers. Locked and crossed markets further hinder traders’ best execution obligations since trading systems will not display limit orders or automatically execute market and marketable limit orders during locked and crossed markets. Thus, fees should be eliminated since they encourage locking of markets.

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Allowing all market participants to charge access fees provides an element of fairness that the current structure lacks. However, Oppenheimer and other market makers would be forced to spend resources to develop invoicing interfaces with trading systems. In addition, monthly effort by Oppenheimer would be required to collect, pay and reconcile access fees to and from hundreds and possibly thousands of market participants. We believe that this effort would be an additional and unnecessary layer of fixed costs.

While the business models of ECNs may depend upon charging market makers access fees, regulatory protection should not be given to a practice that has a negative impact on the market structure. Nor should other participants be compelled to waste resources in order to collect and pay a *de minimis* fee that in the aggregate may not be *de minimis*. For these reasons, we believe that the best alternative would be the complete elimination of all access fees, even if *de minimis*.

Again, we are encouraged that the Commission is addressing the effect of access fees upon the market as part of the market structure proposals under NMS.

Respectfully,

Allan R. Cox
Vice President
Nasdaq Trading