

LINDA LERNER
OUTLINE OF TESTIMONY ON S7-10-04

Commission staff has done an excellent job in presenting these proposals. The comments herein are in no way meant to disparage the Staff's work, but merely to add the voice of a small but growing ECN on issues of concern to it regarding access fees.

1. Is non-transparency of ECN access fees a problem or a red herring?
 - A. Brokerage firms do not pass along ECN costs to end customer. That is the reason they complain about the fees of the ECNs, which are their competitors.
 - B. Only six ECNs - costs are well known to professional traders.
 - C. Nasdaq and exchange fees also well known to all professionals.
 - D. Commission structure can take fees into account.
2. How Access Fees Cause Distortion in the Markets

Title of section assumes access fees do cause distortion and assumes professionals do not know what fees are. Non-professionals are not paying ECN fees. There are only six ECNs.
3. Non-subscribers should not be forced to pay fee for execution of agency orders
 - A. Costs of obtaining, displaying and executing ECN liquidity can be borne by adders or takers of liquidity. To induce new liquidity, ECNs have paid adders. That cost and administrative costs are passed along to those who wish to benefit from the better price so displayed.
 - B. Even with fee, liquidity taker still receiving considerable price improvement for its customer.
4. Payment of rebates has led to proliferation of locked and crossed markets.
 - A. Locked markets are arguably a perfect economic world.
 - B. Prohibitions against locked and crossed markets provide resolution of this problem, if it is a problem.
5. No rate differentiation by quoting participant between market centers and market

participants. Everyone has most favored nation status.

- A. Unnecessarily anti-competitive without reasonable basis.
 - B. Removes ability to grant volume and other incentive discounts.
 - C. Amounts to rate fixing.
 - D. ECN fees are comparable to commissions; commission rates were unfixed long ago. Does the SEC now propose to resurrect rate fixing?
 - E. Varying rates arrived at through volume discounts or individual negotiation do not amount to per se discrimination, which should be defined narrowly.
 - F. Lack of clarity on how requirement on ECNs displaying quotes on ADF to offer direct access to all quoting market centers would work. Needs to be fleshed out before it can be adequately responded to.
6. Some ECNs are programmed to lock markets automatically.
- Since ECNs represent agency orders, it is unclear how this is possible.
7. In the Commission's view, impediments to access may lead to locked markets, create difficulty for market participants seeking best execution for customer orders, and call into question the efficiency of the marketplace.
- A. Access fees are not the equivalent of impediments to access, which is perjorative. Benefits have a price. Price improvement is not without some cost - the cost to have that price improvement in the first place.
 - B. The Commission should consider viewing rebates as a liquidity generator, a net benefit to the public investor which create a new opportunity for improved execution price, even with the cost of the access fee, rather than as an impediment to access.
 - C. The Commission's solution to deliberate locking of markets across market centers is the equivalent of killing a mosquito with a bazooka. The more appropriate solution would be to bar locked markets across any other fast market.
8. Subpennyng.
- A. Subpennyng and flickering quotes are problems that must be dealt with. However, the technology to display access fees in subpennies without at the same time allowing orders to be displayed in subpennies for any other reason is technologically feasible. If the Commission is concerned about transparency of access fees, have them shown in subpennies and limit subpennies to that purpose. The smart order routing systems already do

this, presumably without undue difficulty.

- B. Subpenny within an alternative trading system should not be prohibited. The subscribers are willing participants and should be permitted to trade this way if they choose to.

9. De Minimus Fees

Domestic believes that the Commission should not get into the rate setting business. Competitive forces have served the marketplace well and will continue to do so.

The author, on behalf of Domestic Securities, Inc., reserves the right to modify this outline and to comment briefly on other aspects of the NMS proposal.