SECURITIES AND EXCHANGE COMMISSION

Concept Release on Equity Market Structure
File No. S7-02-10

Comments of:

Jeffrey A. Blaker
(315) 794-0333
jeffrey.blaker@gmail.com

Submitted on April 17, 2010 via Regulations.gov

I am submitting this comment to address present and future regulation of Dark Pools of liquidity in response to the Concept Release on Equity Market Structure published by the Securities and Exchange Commission ("SEC"), Release No. 34-61358; File No. S7-02-10. I am currently a third year law student with a Bachelors of Science in Accountancy and a minor in Finance. Additionally, I am an ordinary individual market participant and observer. My professional interests are in financial services industry, the securities markets, and the laws and regulations that govern them. I submit these comments on the issues presented by the SEC on my own behalf.

I. Introduction

A. Security Regulation In The Post-Great Depression Era and the Development of Dark Pools of Liquidity

In the early 1930's, in the wake of the stock market crash of 1929, Congress determined it necessary to take a more hands-on approach to the regulation of the securities markets in this country. The legislative solution was the introduction and passage of the Securities Act of 1933 and the Securities Exchange Act of 1934. One of the net results from the enactment of these acts was the establishment of the SEC. The new agency was charged with both monitoring the domestic security markets and promulgating rules to ensure that they operated in an efficient and fair manner that protected all participants.

Over the last twenty years, the creation and use of off-market exchanges increased as technological capabilities of institution investors improved. The successful implementation of these technological developments led to the creation of the Dark Pools of Liquidity that exist today. The SEC attempted to maintain oversight of the technological innovations and evolving market landscape, as evidenced by the promulgation of the recent Regulation ATS in 1998 and Regulation NMS in 2005. Regulation ATS requires electronic trading systems to register with the SEC as either national exchanges or as broker-dealers.[1] The majority of Dark Pools chose to be classified as broker-dealers for purposes of this regulation. After registering under Reg. ATS, the platforms were required to "facilitate quotes for all stocks for which they handle an average daily trading volume of five percent or more."[2] Conversely, Regulation NMS "introduced detailed rules regarding the interaction of orders originating in multiple trading venues in the United States", but only apply to the national market exchanges.[3] Therefore, because many Dark Pools opted for broker-dealer status, they fell outside the scope of Regulation NMS, which allowed the platforms to avoid integration with the other national markets.

Despite Regulations ATS and NMS, the communication developments, the advances in computer system technology of the past fifteen years, and the absence of any additional laws or regulations limiting the proliferation of undisclosed trading platforms, the daily trading volume on these Dark Pools increased drastically. Today, because of the aggregate trading volumes on the Dark Pools, and the general consensus that this activity will continue to increase in the coming years, individual investors are put at disadvantage because of the lack of price transparency for market-traded securities and the unavailability of reliable volume figures from the Dark Pool trading activity of institutional investors.

B. The Current Regulatory Proposals Will Help To Increase Fairness And Restore Public Confidence In The Security Markets, But More Regulatory Actions Are Necessary

The SEC recently released several proposals that would impose both new reporting rules, as well as stricter reporting criterion on Dark Pool activity. The proposals would require disclosure to the public of general information about an investor's interest in a stock transaction, and would also require the identification of the pool where the transaction took place.[4]

Despite the improvement in transparency this proposal would foster, the SEC proposals to not go far enough. At a minimum, the SEC has the responsibility to enact rules that would lower the Alternative Trading Systems ("ATS") volume threshold for requiring disclosure of price and volume information to the national exchanges, and to create a uniform standard for calculating volume of transactions. This uniform volume standard, mandatory volume disclosure and complete price transparency, regardless of volume, are the keys to maintaining a fair and efficient marketplace for publicly traded securities. The increased transparency of these Dark Pools of liquidity – thereby transforming them into "Light" Pools of Liquidity - would improve the markets for investors of all financial resources and sophistication levels from a fairness perspective, and would also help to restore faith and confidence in the securities markets. In this

---

1 17 C.F.R. § 242.301(a)-(b) (2005).

2 Stavros Gadinis, Article, Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes, 3 Va. L. & Bus. Rev. 311, 323 (2008).

3 Id. at 314.

4 SEC Open Meeting Fact Sheet (2009), http://www.sec.gov/news/press/2009/2009-223-fs.htm.

comment, I intend to relate past SEC measures to the issues presented by the proliferation of Dark Pools of liquidity, provide general feedback on the current SEC proposals, and include suggestions for additional measures that should be taken from the perspective of an ordinary individual market participant.

C. The Security and Exchange Commission's Historical Focus On Mandatory Disclosure to Promote Fair Markets Should Be Extended To The Dark Pools

Taking the perspective of an ordinary investing citizen, participating in the securities markets can seem like a daunting endeavor. The average investor is required to put their faith and reliance in both the current securities laws enacted by Congress and the rules promulgated by the SEC. The hope is that these regulations not only ensure equal access to information pertaining to companies with securities available for purchase and sale in the public marketplace, but also to important information on the securities themselves (i.e. price, volume, institutional holdings, etc.).

One of the principle statutes investors rely on is the Securities Act of 1933. The act and its corresponding rules ensure that investors have access to a Registration Statement and proxy materials detailing a particular security offering. Specific steps are set forth that must be taken, waiting periods are imposed, and SEC approval is required before an offering is made to the public. Provisions including Rule 144 put limitations on the resale of securities until certain conditions are met, such as a certain period of time has lapsed, to prevent an uniformed investor from purchasing a security that they ordinarily would deem too risky for their portfolio. These restrictions are in place because the SEC has recognized that disclosure of information to investors is necessary to prevent abuses in the IPO market by corporations issuing worthless securities. By mandating the disclosures, average investors are provided the tools to make rational investing decisions.

Another primary concern of the SEC is ensuring that current information is disseminated to the market in a timely and orderly fashion. This includes the periodic reporting requirements of the 1934 Act, as well as the provisions that increase the speed in which pricing information is transmitted from the markets to investors. Executives and Directors of companies with securities traded in the marketplace are now required to attest to the accuracy of these disclosures, highlighting the Congressional and the SEC stance that accurate information needs to be routinely released to current and future investors. In almost all SEC initiatives, the goal has been to provide the greatest amount of accurate and current information to the market in the most economically efficient manner possible. It seems logical that this rational would extend to complete disclosure of pricing and trading-volume information about a particular security from not only the national exchanges, but also from the private exchanges where the security is simultaneously traded.

Even with the goal of increasing information and the regulatory steps already taken to achieve that goal, a common perception of the securities markets is that a different set of rules exists for the institutional investors (i.e. commercial and investment banks, hedge funds, mutual funds, pension funds, etc.), as opposed to rules ordinary investors are subject to. This belief fuels the notion that an unequal playing field eliminates the opportunity for individuals to participate and prosper in the securities markets, which ultimately could contribute to a reduced participation among inexperienced investors. A recent example is the market meltdown during the Fall of 2008 and the ensuing liquidity crisis. Although the cause of the meltdown cannot be pinpointed to a single contributing factor, it is incontestable that the off-market deals between institutional investors, including but not limited to credit-default swaps and other derivative products, were a major factor in bringing about the near-failure of the entire financial system. These derivative products fueled the over-leveraging and increased risk-taking behavior of the large institutional investors. While these instruments are not directly related to Dark Pool transactions involving publicly traded equity securities, or to the issue of whether institutional investors should be allowed to operate in a secret and opaque environment, the implications of their existence only contributes to the larger issue at hand; to the average investor, a separate set of rules exists for major market players, which puts them at a competitive disadvantage.

D. Past SEC Actions Which Illustrate When It Is Appropriate and Inappropriate For Institutional Investors To Operate Under A Separate Set Of Rules

Another issue that has historically received the attention of the SEC is the problems created by the existence of dual markets for securities. Past regulatory action has been based on the principle that all investors should have equal access to the market for a security, and that marketplace participants should have equal access to information about the security. In instances where it has not been practical to provide equal information to all investors, the SEC implemented rules to create controlled markets for certain securities. The unilateral availability of information is important because "market fragmentation… may prevent the market from assessing the underlying value of a stock accurately and efficiently."[5] Regulatory steps have been taken to limit the existence of dual markets for securities, while remaining sensitive to concerns over transaction costs and institutional investor access to liquidity.

i. Rule 144A And The Necessity For A Separate Market For Institutional Investors To Prevent Uninformed Investors From Taking On Excessive Risk

The promulgation of Rule 144A serves as a perfect example of the SEC creating a controlled market for institutional investors, as these parties are presumed to be able to fend for themselves in the marketplace. Allowing the purchase and sale of restricted securities among and between Qualified Institutional Buyers ("QIB's") creates a liquid market available to those institutions that choose to include restricted securities in their investment portfolios. The benefit of this government-imposed segregation is the general investing public does not bear the risk of insufficient or dated information about a restricted security, as they are unable to purchase these instruments without causing

---

[5] Stavros Gadinis, Article, Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes, 3 Va. L. & Bus. Rev. 311, 323 (2008).

serious repercussions for the issuer and the QIB that made the sale. The SEC indentified this potential risk to the general investing public, and took action by establishing a separate market to mitigate the exposure to securities that individuals are ill-equipped to purchase. By promulgating this rule, there was an effective balance between the need for corporations to raise capital in the equity markets without going through the SEC's registration process against concerns over unilateral access to current information and overall fairness to ordinary individual investors.

ii. Reforming The Selective Disclosure Practices Of Public Companies To Ensure Equal Access To Current Information For All Investors

Another example of an SEC regulation promulgated to address discrepancies between information available to institutional investors and ordinary individual investors is Regulation FD. The selective disclosure rules contained in this regulation were enacted because "issuers [were] disclosing important nonpublic information, such as advance warnings of earnings results, to securities analysts or selected institutional investors or both, before making full disclosure of the same information to the general public."[6] Based on this conduct, the SEC took the position that, the "practice of selective disclosure leads to a loss of investor confidence in the integrity of our capital markets."[7] The SEC pointed out that "technological developments have made it much easier for issuers to disseminate information broadly"[8], and they were willing to require companies to utilize these available communication technologies to release new information to the public. Regulation FD serves as another example of a past SEC action taken because the agency had a fundamental belief that institutional investors should not be able "to make a profit or avoid a loss at the expense of those kept in the dark."[9]

These two examples, taken together, illustrate the principle that all investors should have equal access to identical information about a publicly traded security before participating in a purchase or sale transaction involving the security. In instances when public information about a security is not readily available, as in the case of restricted securities, the purchase or sale should be limited to those investors who are able to fend for themselves in the marketplace. Rule 144A and Regulation FD both encompass these principles, and the SEC should apply these regulatory standards to Dark Pools of liquidity.

[6] Selective Disclsoure And Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599 (August 15, 2000).
[7] Id.
[8] Id.
[9] Id.

II. Dark Pools Of Liquidity In the Marketplace, The Negative Implications Of Their Existence, and Recommendations On How The SEC Should Impose Mandatory Disclosure On These Alternative Trading Systems

The fundamental principle that all investors should have equal access to information appears to have been violated when looking at the complete picture surrounding Dark Pools of liquidity. Between the introduction of the Dark Pools, the rapid growth in the trading volumes as a percentage of market-wide transactions and the lack of price transparency, it is obvious that regulators and investors lack the unilateral access to information which the securities laws typically ensure. The Commission's Notice highlights five Congressional objectives of the securities laws that indicate a regulatory change needs to occur:

(1) Economically efficient execution of securities transactions;
(2) Fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
(3) The availability to brokers, dealers, and investors of information with respect to quotations and transactions in securities;
(4) The practicability of brokers executing investors' orders in the best market; and
(5) An opportunity, consistent with efficiency and best execution, for investors' orders to be executed without the participation of a dealer.

By not requiring Dark Pools of Liquidity to disclose price and volume information to the public markets, the SEC is failing not only in their duty to create a marketplace that provides equal and up-to-date information to all investors regardless of sophistication or financial position, but is also failing to achieve each of the Congressional objectives stated above.

The unequal access to current market prices and volume information for security transactions negatively impacts the market in several ways. Primarily, it creates a fragmented market system, which the SEC has previously attempted to avoid unless it is necessary from a practicability standpoint. Secondly, besides creating this dual market system, the incredible volume of shares being traded in these Dark Pools creates discrepancies in pricing, which have the ability to materially affect the natural market for a given security. "While new trading venues provide healthy competition to traditional exchanges, they simultaneously absorb order flow from the exchanges, and [therefore impedes] the market's ability to assess the underlying value of each stock."[10] The third negative effect on the market is that as these Dark Pools grow in volume and the general public becomes more aware of their existence, the overall confidence in the securities markets will substantially decline. Since its inception, the SEC has maintained a constant awareness of the public involvement and confidence in the securities markets. As stated by then-Commissioner Hanrahan in a 1947 speech, "[P]eople in general will not invest in

---

[10] Stavros Gadinis, Article, Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes, 3 Va. L. & Bus. Rev. 311, 323 (2008).

a dishonest market. They will not enter the securities field unless the rules of the game are fair."[11]

The actions of the SEC should continue to reflect this viewpoint. At a time when individual investors have become disenchanted with the securities markets, and an overall sentiment exists that separate sets of rules exist for large institutional investors, the knowledge of a separate private marketplace where only institutions are trading stock will deter participation and hurt overall confidence in the system. Couple the existence of the private Dark Pools with the fact that they are allowed to operate in secrecy, and not required to report their transactions in a timely manner to the rest of the investing public, and public outcry about the inequalities in the rules will continue to increase.

A. <u>Mandatory, Uniform Trading Volume Disclosures Should Be Made By the Dark Pools To The Public To Ensure An Accurate Portrayal Of The Activity Involving A Particular Security Is Available</u>

The first rule that should be promulgated by the SEC is one that dictates a uniform standard for calculating volume of shares traded on Dark Pools. As estimated trading volumes in Dark Pools hover around nine percent (9%) of total market trading, it seems logical that a single standard for calculating the volume is necessary so that both the government and the investing public have an accurate picture of the trading activity on these platforms. An uncomplicated approach to implementing this metric is applying the current methodology for calculating volume on the national exchanges (i.e. NYSE, NASDAQ) to the Dark Pools. Applying these standards will save regulators and market participants the burden of reconciling volume figures from several different exchanges and will allow for the painless interpretation of volume data.

The second rule that would improve transparency is mandating the disclosure of Dark Pool volume figures directly to the market in real-time, which corresponds to uniform standard for calculating volume. There are several key arguments for the necessity of these disclosures. The first is that mandatory volume disclosures will allow the SEC to effectively regulate Dark Pools of liquidity and gain a better handle on the overall markets. By determining which Dark Pools are the most active and facilitate the transfer of the highest quantity of securities, the SEC will be able to more efficiently monitor off-exchange trading and allocate resources accordingly during the agency's budgeting process. A second rationale for disclosing the volume of shares is that average investors commonly use institutional trading activity in a given security as a metric for future price movement. This information is currently available on transactions executed by the institutional investors on the national exchanges. To promote fairness in the marketplace, the information surrounding transactions occurring on the Dark Pools should also be available. Because the amount of trading on the Dark Pools is estimated at approximately 9% of total market trading, investors who use this metric as part of their analysis of a security are receiving and using materially false information. In other words, an ordinary investor is only getting 91% of the necessary information to make an

---

[11] Edmond M. Hanrahan, Commissioner, Securities and Exchange Commission, Keynote Address at the National Security Traders Association, Inc. (August 14, 1947).

informed decision, and based on the rapid growth of Dark Pool trading volume over the last ten years, this percentage will likely only decline further.

The unequal distribution of information undermines the Congressional objective of fairness in the marketplace and contributes to the economically inefficient execution of security transactions. A rule that mandates the disclosure of volume information, regardless of surpassing necessary thresholds that the proposed rules impose, would reconcile the difference between market practice and the Congressional objectives set forth in the Commission's Concept Release.

B. Mandatory Pricing Information of Trades Executed on Dark Pools Should Be Disclosed to the Public Markets On A Real-Time Basis To Ensure Other Market Participants Have The Ability To Make Informed Decisions Before Executing a Trade

Aside from regulating the way in which Dark Pools account for and disclose the activity on their members-only trading platforms, the SEC should mandate the real-time disclosure of pricing data to the national markets on all trades executed. The current proposal from the SEC is that this information should only have to be disclosed if the volume of a particular stock traded crosses a threshold of .25% of total market activity.[12] This proposal does not truly encompass the spirit of the Congressional objective of promoting fairness and increasing investor protection. Although the proposed rule is an improvement over the current Rule 301(b)(3) of Regulation ATS, which mandates disclosure of price information if trading volume crosses a 5% threshold of national trading activity, I do not believe that a reduction of the threshold goes far enough. It is imperative that there be full disclose of prices so that individual investors are able to make an informed decision when participating in the market.

Additionally, by not requiring price disclosure on all Dark Pool activity, it is impossible to reconcile between the non-disclosure and the provision of Regulation NMS, "requiring marketplaces to prevent the execution of a trade of any size at a price inferior to a quote available elsewhere."[13] This rule is meant to ensure that ordinary market participants are transacting in stock in an economically efficient and fair manner. However, a market cannot prevent the execution of a trade if it does not have all the available quotes. In the interest of reconciling this provision of Reg. NMS, the new rules implemented by the SEC should mandate price disclosures to the national markets on a real-time basis as long as the trades are taking place on a Dark Pool Trading platform. The effect of this disclosure will not be the formation of "an ocean of liquidity formed by integrating all pools into a format wherein each and every bid in a security has the opportunity to interact with each and every offer in that security."[14] There should be no

---

[12] Annette Nazareth, SEC Proposes Additional Transparentcy for "Dark Pools", The Harvard Law School Forum on Corporate Governance and Financial Regulation (Dec. 2009).

[13] Stavros Gadinis, Article, Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes, 3 Va. L. & Bus. Rev. 311, 352 (2008).

[14] Junius Peake, Entropy And The National Market System, 1 Brook. J. Corp. Fin. & Com. L. 301, 309 (2007).

elimination of separate pools of liquidity for institutional investors, as the national markets and the alternative trading systems should remain separate and distinct trading venues. However, the information surrounding stock transactions that take place (i.e. price and volume data) must be disclosed publicly, to ensure ordinary investors are able to make the best possible financial decision.

The technological advances in securities trading platforms and exchanges have facilitated the incredible growth of the Dark Pools. These advances should be used to benefit all investors in the marketplace, not just the institutional investors. Over the past ten to fifteen years, individual investors have been given unprecedented resources and access to information, which has led to a more efficient market with more accurately priced securities. By allowing the institutional investors to trade in secret, the SEC is limiting the achievements in information technology to favor those large investors. This not only underutilizes the technology available, but also calls into question the fairness of the market as a whole. I am not an expert on information systems, or the different ways in which exchanges interact with each other and share information, but I am aware that many - if not all - of the institutional investors are connected in one way or another to the national exchanges. It seems entirely feasible that the price information of matched and executed trades on Dark Pool can be concurrently relayed to the national markets for all investors interpret, at a low initial set-up cost to the institutional investors.

III. Institutional Investor Arguments Against New Regulations Addressing Their Activity in Dark Pools And The Counterarguments Of An Ordinary Investor

The market-related advantages and policy benefits of disclosing price information for transactions occurring on the Dark Pool exchanges far outweigh the motivations and justifications of the institutional investors when they are defending the use of these alternative-trading systems to trade in secrecy. The appeal to the institutional investors involved is that the secret pools offer higher execution speeds, lower transaction fees, and less risk of front-running.[15] Dark Pool participants will argue that using the platforms is not detrimental to the efficiency or fairness of the market, and will likely contend that mandating the disclosure of this information will be costly from a trading perspective and from a direct technology cost perspective. In the paragraphs above, I discussed my belief that the direct costs of integrating the systems would not be material to the institutional investors profits derived from trading operations on the Dark Pools. Again, I am commenting only as an observer, but the technology to relay this information to the public marketplace seems to be available to every participating institution at a relatively low price, and with few – if any – communication hurdles.

Another likely argument from the institutional investors is that by knocking down the information barriers and allowing the market to see the prices and volumes of the security transactions taking place in the Dark Pools, they will lose the ability to execute trades without leaving a market footprint. This argument is troubling, because it is

[15] Stavros Gadinis, Article, Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes, 3 Va. L. & Bus. Rev. 311 (2008).

contradictory to the principle that the institutional investors should not be allowed to profit at the expense of ordinary individual investors solely because of their size and position in the market.

Although many professionals might feel that reducing or eliminating a market footprint is an acceptable trading strategy, the practice goes against the Efficient Capital Market Hypothesis ("ECMH") that the current domestic market system and the laws that govern it are based. The ECMH is a theory of "relationship between the disclosure of financially significant information and changes in securities market price."[16] "A security's price can be seen as being established in an efficient market if, with respect to specific information, the price that exists for the security is the same as the price it would have been if everyone had the same information."[17] The desire to eliminate a market footprint is in direct contradiction to the pricing theory of the ECMH. "Securities markets rely on corporate disclosures, quotes, prices and indices, as well as the market structure, products and standards that give them context and meaning, for the efficient allocation of capital in the global economy."[18]

Institutional investors should not be able to profit at the expense of individual investors by operating and trading in secret markets and platforms. A valid justification for the continuing existence of ATS markets, including the Dark Pools, is the reduction of transactions costs that come with moving shares directly between institutional investors instead of routing the orders to the national markets. Savings in this manner make sense, and are an excellent example of technology increasing efficiency of the market and producing savings for customers, clients, and stakeholders of the institutions. On the other hand, savings that occur because of inequality of security price and volume information in what are supposed to be efficient markets is inherently unfair, and the SEC must take steps to address this inequity and mandate the full disclosure of this information.

IV. Foreign Regulation of Alternative Trading Systems and Actions Taken To Address Issues Presented By Their Existence In the Marketplace

The United States must amend the current regulation of alternative trading systems; specifically Dark Pools of liquidity, not only to protect US investors, but also to ensure our markets remain competitive in the global financial markets. Global markets, including the most sophisticated markets in the United Kingdom, Japan, and across the European Union are faced with transparency concerns, and are continuously working to ensure markets operate in a fair manner for all participants. Because of the current communication capabilities, and the relative ease that capital is able to flow across borders into foreign security markets, transparency issues affect security markets across

---

16 James D. Cox, Robert W. Hillman, Donald C. Langevoort, Securities Regulation: Cases And Materials 103 (6th ed. 2009).
17 Id. at 104.
18 Onnig Dombalagian, Licensing The Word On The Street: The SEC's Role In Regulating Information, 55 Buff. L. Rev. 1 (2007).

the globe and can dictate what markets are the recipients of significant amounts of wealth.

The European Union and the active markets that exist within its member nations was one of the first regulatory authority's to pass legislation that addressed these issues. Effective in 2007, the Markets in Financial Instruments Directive ("MiFID") regulation went into effect in Europe and was "designed to enhance investor protection, promote competition, and increase transparency across the financial services industry."[19] These regulations increased transparency obligations, which proponents argued would help create a stronger and more efficient market because of influx of new data being disseminated among investors.[20] This was achieved by, "[combining] mechanisms of wide transparency about quote and trades and best execution to sort out how orders should be allocated among exchanges, alternative trading systems, and dealers."[21] While the regulations created in Europe do not restrict Dark Pool activity, the pre-trade and post-trade transparency requirements indicate an awareness of the issues raised and the overall importance of available and accurate price information in a marketplace by this regulatory body. The United States should adopt a similar stance and institute regulations that would have a similar information dissemination effect as our foreign counterparts, not only for the betterment of the domestic markets, but to ensure that we stay competitive with other security markets around the world.

V. <u>The Public Image Of The Securities and Exchange Commission and The Security Markets Will Be Greatly Improved With Increased Regulation Of Dark Pools of Liquidity And Participating Institutional Investors</u>

Investor confidence is the key to maintaining an efficient marketplace. Numerous scandals and market-failures in the past ten years have shaken overall investor confidence in the security markets and the regulators in charge of ensuring their operation. A proactive approach by the SEC to implementing volume and price reporting requirements of Dark Pools will not only improve the efficiency of the markets, but will go a long way in terms of improving investor confidence and restoring faith in the ability of the SEC to regulate the markets.

In the early 2000's, after several well-known international corporations filed for bankruptcy, and a wave of financial reporting problems began to surface, public confidence in the reporting system created by existing securities laws began to waver. "The private enterprise system in the United States [was] under severe attack, not from people who advocate socialism or another philosophical alternative, but from many citizens appalled by widespread reports of unethical and illegal decisions made by high-

---

[19] Robert Barnes, MiFID Update 2008 and Liquidty Pools, Dark and Light, http://www.exchange-handbook.co.uk/index.cfm?section=articles&action=detail&id=78452 (last visited Apr. 17, 2010).
[20] <u>Id.</u>
[21] Stavros Gadinis, Article, <u>Market Structure For Institutional Investors: Comparing The U.S. and E.U. Regimes</u>, 3 Va. L. & Bus. Rev. 311 (2008).

level business executives."[22] Congress and the SEC addressed the image problems by passing the Sarbanes-Oxley Act of 2002. The Act imposed new reporting requirements of public companies, internal control review procedures, and a set of new rules and standards for the public accounting firms entrusted with attesting to the fairness of the financial reports prepared and released by public companies. The near-collapse of the financial markets in the Fall of 2008 due to over-leveraging and excess risk taking by the large institutional investors, the exposure of the Madoff Ponzi Scheme, and the downfall of Sanford Investment Group are three more recent examples of events that have again shaken confidence in the financial systems and the securities markets. Taking all of these events together, it is fair to say that despite Congressional and SEC action, ordinary investors have become increasingly skeptical of the regulations in place to protect their financial interests, and as a result are less likely to participate in the markets.

This is problematic because despite the size and financial power of the institutional investors, the source of their capital is still drawn from individuals in the form of investment, retirement and savings accounts. The benefits of individuals placing their accumulated wealth into the market in one form or another are well documented. It is in no ones best interest to see confidence in the market erode to a point where individuals and corporations are no longer willing to invest in the domestic markets. Not only will this hurt the institutional investors in the form of decreased commissions on trading activity and decreased deposits, but it will eventually have ramifications on the entire financial services sector, which is a critical component of our domestic economy.

While it may seem far fetched that transparency issues on Dark Pools could impact the US Economy in a material way, the secret trading platforms "where big investors and traders go to trade anonymously, away from the prying eyes of the mom and pops, the Joe Six Packs and the investors who might benefit from the information those markets keep hidden"[23] contribute to the notion that a different set of rules exists for the institutional investors. This sentiment held by ordinary investors must be eliminated if trust and confidence in the markets is to be restored.

VI. Conclusion

While the SEC has proposed several steps that will improve transparency in today's Dark Pools of liquidity that are operating in the market today, by taking a stronger stance and promoting equal access to information, the SEC will not only improve the efficiency of the market but will send a strong message to the investing public that individuals can have confidence in the market. It is important for the SEC to keep in mind a statement then-Commissioner Hanrahan made in 1947: "The important fact to remember in all this is that we all work toward the same general objectives toward removal of sharpers and swindlers form the securities business, and toward a market

---

[22] Murray Weidenbaum, Restoring Public Confidence in American Business, 26 Wash. Quarterly 1, 53-62 (2002).
[23] David Weidner, Making 'Their' Stock Market Ours, MarketWatch, Oct. 27, 2009, http://www.marketwatch.com/story/whos-telling-on-the-secret-stock-market-2009-10-27.

which is honest and orderly, a market in which investors may be encouraged to place their savings with greater safety, -- a market in which they may have confidence."[24]

I would like to thank the Securities and Exchange Commission for providing me with the opportunity to comment on future regulation of Dark Pools of Liquidity, and look forward to reviewing future proposals and rules which address some of the issues discussed.

[24] Edmond M. Hanrahan, Commissioner, Securities and Exchange Commission, Keynote Address at the National Security Traders Association, Inc. (August 14, 1947).