

*October 18, 2016*

*Via Electronic Mail*

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

RE: Disclosure of Order Handling Information (File No. S7-14-16)

Dear Mr. Fields:

TD Ameritrade, Inc.<sup>1</sup> (“TD Ameritrade” or “the Firm”) appreciates the opportunity to comment on the U.S. Securities and Exchange Commission’s (“Commission”) proposal to require brokers to make certain disclosures concerning the handling of customer orders (“Proposed Rule”). The Commission proposes to require brokers: (1) upon request of its customer, to provide specific disclosures related to the routing and execution of the customer’s institutional orders for the prior six months; (2) to make publicly available aggregated information with respect to its handling of customers’ institutional orders for each calendar quarter; and (3) to make additional order routing disclosures.

TD Ameritrade fully supports the Commission efforts to increase transparency of broker order handling practices. The Firm, however, believes that the Commission’s definition of “institutional order” is unnecessarily broad and will capture many orders that do not represent buy-side/institutional order flow for whom the extensive disclosures would be meaningful. Additionally, TD Ameritrade believes that the Commission should allow a *de minimis* exception from the institutional order disclosure requirement for retail brokers who generally do not handle institutional orders. TD Ameritrade also has further recommendations regarding other aspects of the Proposed Rule.

**I. The Definition of “Institutional Order” is Too Broad**

The Proposed Rule would require brokers, upon customer request, to provide specific disclosures related to the routing and execution of a customer’s institutional orders for the prior six months. Currently, Rule 606 of Regulation NMS limits the required public disclosure of a broker’s order routing information to non-directed orders in NMS securities that are in amounts less than (i) \$200,000 for NMS stock; and (ii) \$50,000 for option contracts. The Commission proposes to define “institutional order” as an order to buy or sell a quantity of an NMS stock having a market value of at least \$200,000.

In defining what constitutes an institutional order, the Commission has at least three options: (1) the type of customer sending the order (*e.g.*, pension fund, mutual fund, adviser, hedge fund, bank or

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<sup>1</sup> TD Ameritrade is a wholly owned broker subsidiary of TD Ameritrade Holding Corporation (“AMTD”). AMTD has a 40-year history of providing financial services to self-directed investors. TD Ameritrade, provides investing and trading services to 6.9 million client accounts that total more than \$736 billion in assets, and custodial services for more than 5000 independent registered investment advisors. During fiscal year 2015, TD Ameritrade’s clients placed approximately on average 462,000 trades per day.

insurance company); (2) the type of order submitted (*e.g.*, held or not held);<sup>2</sup> or (3) the size of the order (*e.g.*, over a set number of shares or market value).

While defining institutional order based on the market value of the order whereby under \$200,000 in market value is considered a “retail” order and above \$200,000 is considered an “institutional” order is a simple and straightforward approach, it fails to take into account the type of customer and how they trade. For example, an order to buy/sell 150 shares of Priceline Group, Inc. (“PCLN”) (at its current price of \$1449 per share) submitted by a retail customer would qualify as an “institutional” order. On the other hand, a traditional, buy-side firm purchasing PCLN in a 100 share lot would not qualify such order as “institutional.”

Given that the Commission’s proposed definition may not capture many, traditional buy-side orders, and will include retail orders, TD Ameritrade strongly believes the Proposed Rule regarding institutional orders reporting should be modified. Some commenters propose the Commission define institutional order not by the size of the order, but rather, by the type of order submitted. The logic is that institutional traders are more likely to submit “not held” orders, whereas retail customers are unlikely to do so. Under this proposal, institutional orders would be defined as orders submitted as not held, and retail orders would be considered those that are submitted as held orders. TD Ameritrade generally supports the use of the “held/not held” approach as retail investors rarely, if ever, use such order types.

## **II. The Commission Should Exempt Brokers With De Minimis “Institutional Order” Flow**

As noted above, TD Ameritrade provides financial services to a range of investors – long term investors, active traders and independent registered investment advisers. The Firm’s order flow, however, is overwhelmingly from retail customers, with a *de minimis* amount of institutional orders (as defined by the Commission’s proposal or the above proposed held/not held approach).

Given the above, TD Ameritrade believes that the costs incurred by retail brokers to create the systems and processes to generate reports for such a small number of orders greatly exceed any perceived benefits. TD Ameritrade believes that brokers that generally do not handle “institutional” order flow should not be required to create the reporting mechanisms. As such, TD Ameritrade agrees with other commenters<sup>3</sup> that the Commission should incorporate a *de minimis* exception for brokers that primarily route orders for retail customers.

The Firm believes that the Commission could define *de minimis* by using a threshold based on percentage of order flow. TD Ameritrade recommends brokers should not be required to produce institutional order disclosures if their percentage of institutional orders is less than 5% of total order flow. This would be consistent with the 5% threshold currently included in Rule 606, which requires the disclosure of at least ten market venues or those market venues receiving at least 5% of the broker’s order flow.<sup>4</sup>

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<sup>2</sup> A “not held” order is an order that gives the broker both time and price discretion to attempt to obtain the best possible price. A “held order” is a market order that must be immediately filled.

<sup>3</sup> See, *e.g.*, Letter to the Commission from John Russell and James Toes, Security Traders Association (Sept. 26, 2016).

<sup>4</sup> See Rule 606(a)(1)(ii).

At the same time, TD Ameritrade proposes that the Commission amend Rule 606 to require brokers to provide information specific to the routing of customer orders (as currently required) regardless of the size of the order. The Firm submits that retail customers are not looking for the highly technical disclosures that buy-side firms require. TD Ameritrade believes its proposal will ensure that brokers handling true institutional flow are providing the buy-side firms the necessary information they need to make routing decisions, without imposing unnecessary costs on brokers handling retail order flow.

Finally, TD Ameritrade believes that the Commission should require brokers to provide customer specific reports on institutional orders no more than once a quarter, and require that such reports be produced within ten business days. Under such an approach brokers would have the discretion, whether for customer service or competitive reasons, to issue reports more frequently and with a quicker turnaround.

### **III. Retail Order Disclosures**

TD Ameritrade applauds the Commission's efforts to update the Rule 606 order routing disclosure requirements as much has changed in the 16 years since they were promulgated. TD Ameritrade fully supports the Commission's goal of promoting transparency concerning broker's order routing choices and potential conflicts of interest. TD Ameritrade believes that requiring the disclosure based on Regulation NMS securities, rather than broken down by listing venue, and the additional breakout of market, marketable limits, non-marketable limits and other orders are sensible changes. In addition to the Commission's proposed changes, TD Ameritrade recommends that the Commission consider making the following changes to Rule 606:

#### **1. Market Venue – Routed versus Execution**

Current Rule 606 requires a broker to disclose the market venues for which orders "were routed for execution." TD Ameritrade believes that while the venue choice for routing is important, the more important information is where the order is executed. TD Ameritrade believes that the Commission should align Rule 605 and 606 and require the identification of market venue where the shares were executed and not where the orders were routed.

#### **2. Orders Over \$200,000**

As noted above, TD Ameritrade believes that brokers that handle retail orders should be required to disclose customer-specific information for orders over \$200,000. The Firm also recommends that the Rule 606 order routing disclosure requirements include all orders and not just those under \$200,000.

#### **3. Only Require Average Payment Per Share/Contract**

Rule 606 currently requires brokers to disclose the "material aspects" of its relationship with significant routing venues. When promulgating Rule 606, the Commission considered and rejected imposing a requirement for brokers to disclose the aggregate amount of payment for order flow from each venue. The Commission reasoned:

Rule 11Ac1-6<sup>5</sup> does not require that broker-dealers provide a quantitative estimate of the aggregate dollar amount of payment for order flow received during a quarter from each order execution venue. First, there are potentially a multitude of varying arrangements for payment for order flow. Estimating the amounts produced by such arrangements could be difficult, subjective, and costly. Second, the Commission is concerned that disclosure of the aggregate dollar amounts of payment for order flow, without requiring comparable disclosure of the dollar amount of trading profits that redound to the benefit of broker-dealers pursuant to profit-sharing relationships, potentially could paint an inaccurate picture of the relative financial incentives generated by the two types of relationships.

Although the Rule 11Ac1-6 does not require an estimate of the aggregate dollar amount of payment for order flow, a broker's description of a payment for order flow arrangement must include disclosure of the material aspects of the arrangement. These would include a description of the terms of the arrangement, such as any amounts per share or per order that the broker receives. Similarly, in describing a profit-sharing relationship, a broker would be expected to disclose the extent to which it could share in profits derived from the execution of non-directed orders. An example would be the extent of the ownership relation between the broker and execution venue.<sup>6</sup>

TD Ameritrade believes that the Commission analysis regarding the disclosure of aggregate payments per venue remains valid today. Moreover, the aggregate amounts per venue will vary by the amount of order flow handled by the broker and the amount routed to any one venue. TD Ameritrade submits that as in 2000, the more meaningful disclosure is the amount of payment received on a per share/contract basis.

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<sup>5</sup> The Commission re-designated Rule 11Ac1-6 as Rule 606 when adopting Regulation NMS in 2005. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37538 (June 29, 2005).

<sup>6</sup> Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414 at 75427.

**IV. Conclusion**

TD Ameritrade appreciates the opportunity to comment on the Proposed Rule. As noted above, the Firm believes that the Commission should revise its proposal to provide enhanced disclosures to the buy-side without imposing unnecessary costs on brokers that generally do not handle institutional orders. In addition, the Firm believes the Commission should make further modifications to Rule 606 disclosure requirements.

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TD Ameritrade appreciates the opportunity to comment. Please feel free to contact Joseph Kinahan, at [REDACTED], or John Markle, at [REDACTED], with any questions regarding our comments.

Respectfully Submitted,



Joseph Kinahan  
Managing Director, Client Advocacy and Market  
Structure

cc: The Honorable Mary Jo White, Chair  
The Honorable Kara M. Stein, Commissioner  
The Honorable Michael S. Piwowar, Commissioner  
Stephen Luparello, Director, Division of Trading and Markets  
David Shillman, Associate Director, Division of Trading and Markets