October 30, 2009

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street NW
Washington, D.C. 20549

Re: Proposed Elimination of Flash Order Exception from Rule 602 of Regulation NMS; Release No. 34-60684 File No. S7-21-09.

Dear Ms. Murphy:

The Commission should not ban flash orders if they serve a legitimate purpose but are being used improperly. Rather, the Commission should investigate any credible allegations of misuse immediately, and if it is determined that market participants acted in contravention of Commission or SRO rules then the appropriate disciplinary action should ensue. Exchanges are required to have rules designed to protect investors and the public interest. If flash orders could be misused such that investors could be disadvantaged, then the Commission should ensure that the Exchanges that offer flash orders had rules prohibiting such misuse and that the Exchanges and FINRA enforced those rules.

Over ten years ago, the Commission investigated certain market practices and found that some participants "often shared with each other customer information and other information that would normally be viewed as proprietary." The Commission's investigative report concluded, among other things, the following:

> the evidence demonstrates that these market makers regularly shared information concerning the size of customer orders .... These information sharing "courtesies" were typically not extended to customers and could conflict with the basic obligations owed by a broker-dealer to its customers. Investors may be deprived of benefits that would otherwise be available in a competitive market. Revealing the size of a customer order may be detrimental to the ability of the customer to obtain the best execution. The customer's interests often are best served by concealing the scope of its trading interest, especially if the customer is trading in large quantities. Market makers learning of the order could adjust the price and size of their quotations to force the customer to pay more or sell for less than would have been the case if the customer's confidentiality had been protected by its executing market maker.[*]

The current controversy surrounding flash orders appears to be the result of similar concerns. There have been allegations raised that market participants with pre-programmed systems capable of responding very rapidly to flash orders may have been able to, and did adjust their quotes on other exchanges, forcing customers to pay more or sell for less than would have been the case if the customers' confidentiality had been protected by their executing brokers and the exchanges flashing the quotes.

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[*] Report Persuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the NASDAQ Market

I don't know whether these allegations are well-founded or not. I think it is a reasonable assumption though, that the Commission would determine such activity, if true, would be against the interests of customers. On the previous occasion referred to above, the Commission found the activity was "inconsistent with the fair dealing obligations of market makers in a free and open market." The Securities Exchange ACT of 1934 similarly requires National Securities Exchanges to have rules designed "to promote just and equitable principles of trade ... and, in general, to protect investors and the public interest."

So, it seems there may already be rules against the improper use of flash orders, or that the Exchange ACT requires that rules be promulgated that would require that flash quotes may not be used by market participants to adjust their quotes on other exchanges, so that a customer is not forced to pay more or sell for less than would have been the case if the customer's confidentiality had been protected, or for any other purpose that is against the public interest.

If there are legitimate purposes for flash orders then they should be allowed. If there are credible allegations that flash orders have been used for improper purposes against the public interest they should be vigorously investigated, and if market participants are found to have violated Commission and SRO rules they should be subject to appropriate disciplinary action. They should not be given a free pass on the activity engaged in before exchanges stopped offering flash orders and before they are banned. If exchanges offering flash orders should have had rules prohibiting flash rules being used improperly, but did not, or had such rules, but did not enforce them, the Commission should take the appropriate action.

Regards,

J. Haberman