TD AMERITRADE Holding Corporation

November 23, 2009

Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090

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

Dear Ms. Murphy,

TD AMERITRADE, Inc.[1] ("TD Ameritrade" or "the Firm") appreciates the opportunity to comment on the proposed elimination of the Flash Order Exception from Rule 602 of Regulation NMS (the "Proposal"). As one of the largest providers of retail brokerage to the U.S. equities and options markets, and a Firm whose clients are benefactors of the practices under question, the Firm is uniquely qualified to comment on the proposal. Specifically, the firm's comments are focused on the listed options markets.

The Firm agrees with the Securities & Exchange Commission ("Commission") that two-tiered markets in which the public or individual investors are precluded access are detrimental to the integrity of our National Market System. The Firm, however, disagrees with the Commission that the exception from Rule 602 of Regulation NMS is no longer necessary and that the exception of Rule 602 leads to, or has led to, a two-tiered market. The Firm also cautions the Commission that the proposal if enacted "as is" will inflict higher costs, less liquidity and unintended and unforeseen consequences to the individual investor particularly to the listed options markets. The Firm therefore believes, at minimum, that the Commission

1 TD AMERITRADE is a wholly owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation ("TD AMERITRADE Holding"). TD AMERITRADE Holding has a 34-year history of providing financial services to self-directed investors. TD AMERITRADE Holding's wholly owned broker-dealer subsidiary, TD AMERITRADE serves an investor base comprised of over 5.2 million funded client accounts with approximately $302 billion in assets. TD Ameritrade continues to focus on serving individual investors, providing low-cost services, ranging from completely self-directed investors to those served by registered independent advisors. During the third quarter, TD Ameritrade handled investor trades that averaged 411,000 trades per day, representing an average of 478 million shares per day. We do not directly execute client orders, but rather act as agent in routing orders to the marketplace. We use our position in the marketplace to drive the markets to compete on price and cost. As a result of our efforts, we were able to obtain price improvement for 66% of our client share orders and saved our clients $12.5 million by getting them better than the then best price when they entered their order.

should permit the continued use of Flash or Step-up Mechanisms in the listed options markets and the Commission should enact access fee caps to the listed options markets[2].

Background

Innovative strategies that promote efficiency and reduce investor costs in the markets are critical if we are going to continue to level the playing field for individual investors. There has been much fanfare that flash trading is harmful to individual investors; however, little data is offered to back up these claims within the proposal. Defenders of Flash argue that it allows users to lower transaction costs and obtain better prices in both the equities and listed options markets. Interestingly, it is estimated that Flash trading in the equities and listed options markets accounts for less than 2% of all market activity; however, TD Ameritrade's experience is that the benefits of Flash *are* realized by the individual investor. Although the Firm can find no evidence that flash trading programs harm individual investors, our Firm believes that Flash is a symptom of our current market structure, and that in many ways the perception that it is unfair and predatory became the reality. Therefore, we fully support the Commission's goal of ensuring that Flash is not used to further the perception of two-tiered access and we support a comprehensive solution in this area We strongly believe, however, that the Commission must act based upon empirical data.

Concerns that flash orders create a two-tiered market in which the public does not have access

The Firm notes that Flash order types offer tremendous benefit to individual investors. In fact, individual investors are generally the benefactors of the Flash program process. The Firm notes that since August 2007 through various flash and price improvement mechanisms cited within the Proposal and offered in the listed options markets, our clients have realized $36,050,786.40 in direct price improvements. Another measure is one of liquidity improvements by which our clients have also reaped enormous benefits. To illustrate this point, we provide the following actual example of a client option trade which benefitted from the Step-up Program on the Chicago Board Options Exchange ("CBOE"):

- At 13:33:26 on November 16, 2009 our client requested to sell 50 contracts of QQQ Dec 2009 43 Puts at a limit price of $0.60 cents.
- At the time of client order entry the Bid / Ask spread on the security was $0.60 to $0.61 with PCX displaying 40 contracts available at $0.60.
- PCX Charges a $.45 per contract fee for accessing the quotation.
- The order was sent to the CBOE Step-up program.
- At 13:33:26 the CBOE executed 50 contracts at $0.60 cents which was 10 contracts more than the displayed market on the PCX.
- The CBOE charge was $0.00 for the Step-up process.

[2] *See* Release No. 34-60711; File No. SR-NYSEArca-2009-44 n. 49, "the Commission staff is currently considering the issue of access and access fees in the context of its ongoing consideration of a petition for rulemaking requesting that the Commission impose a cap of $.20 on certain transaction fees." (September 23, 2009)

The above is just one of thousands of examples that we have examined. The clear benefit is that not only did the client receive an immediate execution at the best available price in the market, but he also but received size improvement instead of than 40 contracts at one price and the remaining 10 at another price possibly cents away. The Firm utilized its power of choice to ensure that it's clients obtained the best execution of their offer – filling their order at the best (or better) price available, quickly and for the full amount. Moreover, in this case, there is a realized a savings in transaction fees of $22.50.

One could argue that the above example is a favorable one and that there are unfavorable examples where the order may miss the price. While this is certainly a possibility, the Firm notes that it's obligation to provide a regular and rigorous review of market center execution ensures that programs such as these are either utilized if favorable results are experienced or discontinued if the facts and circumstance analysis reveals otherwise. As previously stated, the Firm continues to experience favorable results with the program.

Concerns that Flash orders may discourage the public display of trading interests and harm quote competition.

The Firm notes that Flash order types have not discouraged public trading interests nor have they harmed quote competition. In the listed equities markets trading volume has grown significantly since the adoption of the language in 1978. During this period listed equities volume has grown from 11,591,953 to 2,115,729,732,055 in 2008[3]. There has also been a commensurate explosion of trading venues from just 5 in 1978 to over 35 exchanges and Alternative Trading Systems today. Conversely, the listed options markets' volume has grown from 57,231,018 contracts traded in 1978 to 2,785,282,458 contracts traded in 2008[4]. Quoting exchanges for listed options have grown from 4 to 7 with the prospects of three additional markets all quoting trading interests.[5] What this clearly demonstrates is that Flash programs have not discouraged the public display of trading interests, but rather they may have fostered growth of trading interests.

Concerns that Flashing of orders at marketable prices may undermine the purposes of Rule 610(d)

The Firm does not believe that flashing of orders at marketable prices has undermined the purposes of Rule 610(d), rather that the exception has incentivized liquidity traded on Dark Pools (markets which individual investors do not have access to) to display their interests on the public markets that retail has access to. The Firm believes that in order to ensure fair markets, the Commission should conduct rulemaking that increases surveillance across all markets to protect investors. The Firm also believes that increased disclosure regarding information as to when an order took part in a Flash process, and subsequently failed to receive the best price measured at

3 Source: Consolidated Tape Association "CTA" data from 1978 to 2008

4 Source: Options Clearing Corporation "OCC" data from 1978 to 2008

5 Bats to launch US Options Exchange, Philadelphia veterans plan launch of Miami options Market, CBOE to launch electronic options exchange.

time of receipt, would be extremely beneficial to a Firm in analyzing whether it is obtaining best execution while at the same time not impeding competition in the markets.

The impact to the Firm of a proposed ban.

If enacted, the Firm and its clients may suffer the following:

- A decrease in price improvement obtained for clients from Programs such as PIM, PIP, AIM Step-up and Flash and ELP programs to clients of approximately $14,400,000 annually.
- An increase in Firm costs of $2,173,516 annually[6] due to higher execution charges. The Firm expects that these costs would increase due to the lack of fee caps in the markets.
- The possibility that a client may not obtain the best displayed price on their options trade due to the lack of access fee caps in the listed options markets. The Firm notes that cost is a best execution consideration.
- Individual investors may be deprived of potential size enhancements to the displayed quotation.
- Could impact an investor's ability to transact in products such as SPX or OEX where the majority of trading is open out-cry.

Responses to Specific Questions raised within the Proposal

If adopted, would the proposal promote investor confidence by addressing the potential for a two-tiered market with respect to access to information about the best prices for listed securities?

Do Flash messages create a two-tiered market? Or did the media sensationalize Flash to create the perception that Flash creates a two tiered market? It would seem that since these programs have been in our equities and listed options markets since 1978, the latter would be correct. The Firm believes that in order to correct the perception that Flash creates a two-tiered market, the Commission should increase disclosure regarding information as to when an order took part in a Flash process and subsequently failed to receive the best price measured at time of receipt. This information would be extremely beneficial to a Firm in determining if it is obtaining best execution, while at the same time not impeding competition in the marketplace. The Firm believes that to ensure fair and orderly markets, the Commission should conduct rulemaking that focuses on increased surveillance across all markets to protect investors. Finally, the Firm believes that the Commission should require that market data be more broadly disseminated.

[6] Of the total increase in fees cited by the commission of $13,309,429 for options and $24,837,120 for equities the Firm executes approximately 7% of the options amount and 5% of the equity amount listed.

Would the proposal help to promote the display of quotations in public markets by eliminating one type of trading in which "dark" liquidity is provided that matches the prices of previously displayed public quotations?

As discussed above, trading volume has grown substantially and there is no evidence to the contrary that the elimination of Flash would promote limit order display. Again, Flash is a trading strategy utilized to lower transaction costs so its elimination would lead to higher costs in the marketplace as discussed in the Proposal.

Would the proposal reduce the potential for information leakage that could detract from the execution quality of marketable orders? Conversely, would the proposal deprive investors of a trading tool that, if used beneficially, can lead to improved quality of execution for marketable orders?

There is no evidence contained within Rule 605 reports or trade through reports, that information leakage is occurring. In fact, rather than detracting from execution quality as we discussed above, the strategies actually serve to improve execution quality.

What are some of the trading strategies that employ flash orders? Is the use of flash orders in the best interest of these traders and how would the inability to use flash orders affect these traders?

As noted above, the Firm utilizes flash orders in seeking best execution for its clients. In most instances, our clients realize direct savings. In the absence of these programs, the increased costs and fewer opportunities to receive price and size improvements would actually be borne by the investor.

How are market participants likely to change their behavior if unable to use flash orders? What are the likely effects of these changes? Which market centers are likely to benefit from any changes in order routing practices?

The Firm believes that the benefactors of a ban of flash trading in the listed options markets would be High Frequency Trading Firms which generally do not have long-term investor clients as they deploy their strategies for self profit. This unfortunately would come to the detriment of the individual long-term investor through higher costs and lower incidences of price improvement on their trades. The end result may actually serve to erode investor confidence rather than to inspire it.

Could concerns about information leakage be addressed by requiring brokers to provide detailed disclosure to a customer about the risks, or requiring the customer's affirmative consent, before allowing the customer's order to be flashed?

The Firm notes that it currently provides clients with a detailed disclosure that summarizes, among other items, that the Firm "considers a wide variety of factors in determining where to direct clients orders such as execution price, opportunities for price improvement, market depth, order size and trading characteristics of the security, efficient and reliable order handling systems and market center services levels, speed, efficiency, accuracy of executions and cost of executing orders at the market." Therefore, in effect, the Firm not only discloses the risks to clients, but also factors Flash into the myriad of factors that comprise best execution. As a result, we do not believe further disclosure or customer consent is necessary.

Would requiring the recipient of a flash order to offer price improvement ameliorate any of the concerns discussed above?

The Firm notes that there aren't provisions for fee caps in the listed options markets as there are in the equities markets, and believes that the Commission should enact Rule 610 in the listed options markets, as discussed in the adopting release No. 34-60711; File No. SR-NYSEArca-2009-44 n. 49.

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The Firm appreciates the opportunity to comment on the proposal. We would be pleased to discuss our concerns in greater detail with you and your staff. Please feel free to contact me.

Sincerely,

/S/

Christopher Nagy
Managing Director Order Strategy
TD AMERITRADE

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Kathleen Casey, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner
Robert W. Cook, Division of Trading and Markets
James A. Brigagliano, Division of Trading and Markets
Daniel Gallagher, Division of Trading and Markets
Elizabeth K. King, Division of Trading and Markets
David Shillman, Division of Trading and Markets
Daniel Gray, Division of Trading and Markets
Steve Williams, Division of Trading and Markets
Theodore S. Venuti, Division of Trading and Markets