



February 18, 2010

**By Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))**

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

Re: Regulation of Non-Public Trading Interest: Release No. 34-60997;  
File No. S7-27-09

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> welcomes the opportunity to comment on the Securities and Exchange Commission’s (“SEC” or “Commission”) recently proposed rule changes regarding non-public trading interest in national market system (“NMS”) stocks, including non-public trading interest in alternative trading systems (“ATs”) commonly known as “dark pools.”<sup>2</sup> In addition to the current proposal on non-public trading interest, the Commission has issued a number of releases related to equity market structure during the past seven months,<sup>3</sup> including, most recently, its concept release seeking comment on a number of broad and fundamental market structure issues (“Concept Release”).<sup>4</sup> We appreciate the Commission’s commitment to improving the NMS, and we look forward to discussing each of these regulatory initiatives with the Commission as it continues to examine the equity markets. Given the significance of each initiative to equity market structure, SIFMA asks that the Commission consider whether it would be beneficial to wait until it has

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<sup>1</sup> The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (“GFMA”). For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> Exchange Act Rel. No. 60997 (Nov. 13, 2009), 74 Fed. Reg. 61208 (Nov. 23, 2009) (“Proposing Release”).

<sup>3</sup> Exchange Act Rel. No. 60684 (Sept. 18, 2009), 74 Fed. Reg. 48632 (Sept. 23, 2009) (“Flash Order Release”); Exchange Act Rel. No. 61379 (Jan. 19, 2010) 75 Fed. Reg. 4007 (Jan. 26, 2010) (proposing risk management controls for broker-dealers with market access) (“Market Access Release”); Exchange Act Rel. No. 60388 (Jul. 27, 2009); 74 Fed. Reg. 38266 (Jul. 31, 2009) (adopting various amendments imposing the so-called “close-out” requirement in Interim Temporary Final Rule 204T of Regulation SHO).

<sup>4</sup> Exchange Act Rel. No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010) (“Concept Release”).

received comments on the Concept Release and other market structure rule proposals before acting on any single initiative, including the proposed rules impacting dark pools and other non-displayed trading interest.<sup>5</sup>

The Proposing Release sets forth a number of proposed amendments to the regulatory requirements under the Securities Exchange Act of 1934 (“Exchange Act”), including: real-time disclosure of the identity of ATSs on the public reports of their executed trades; lowering the trading volume threshold triggering public order display obligations for ATSs under Regulation ATS; clarifying that the Regulation ATS display rule may apply whenever an ATS displays orders to more than one person; amending the definitions of “bid” or “offer” in the Exchange Act to expressly include actionable indications of interest (“actionable IOIs”) transmitted by ATSs and other trading venues to selected market participants; and, the adoption of a large size or “size discovery” exclusion to most of these proposed amendments.

Section I of this letter discusses SIFMA’s comments regarding the Commission’s proposed real-time disclosure of ATS identity on trade reports. In summary, SIFMA supports increased transparency of ATS trade reporting, but we do not believe it is necessary to have real-time disclosure of the identity of ATSs on trade reports to achieve this goal. Instead, we believe the Commission can enhance transparency of ATS activity through delayed reporting of the identity of ATSs executing trades without inadvertently hindering the ability of market participants using ATSs to execute trades with minimal market impact. SIFMA also appreciates that regulators need adequate tools to surveil ATS trading activity. To the extent the SEC or self-regulatory organizations (“SROs”) seek real-time reporting of the identity of ATSs executing transactions for regulatory purposes, SIFMA would support such reporting.

Section II discusses SIFMA’s comments regarding the remaining proposed amendments. SIFMA supports lowering the current five percent (5%) average daily trading volume threshold triggering public order display obligations for certain ATSs, and suggests that a one percent (1%) volume threshold would be appropriate. We also support the SEC’s proposed clarification that the Regulation ATS display rule may apply whenever an ATS displays orders to more than one person, but would like additional guidance regarding the ability of broker-dealers with both ATSs and smart order routers (“SORs”) to utilize those systems together to facilitate best execution without triggering the display rule. SIFMA also believes that an actionable IOI that is truly firm and functionally equivalent to a quote should be subject to Rule 602 of the Exchange Act (the “Quote Rule”), but requests further discussions with the Commission to clarify the applicability of the proposed definition of “actionable” IOIs to non-ATS market participants in order to avoid any unintended consequences. Finally, we believe a size discovery exclusion to the proposed quoting amendments is appropriate, although the definition of block size used in the proposed exclusion should include a 10,000 share alternative. We note, however, that the size discovery exclusion may not be necessary in the trade reporting context (and elimination of

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<sup>5</sup> We note, for example, that the Market Access Release would require technological changes and related costs that also would impact ATS technology, expenditures, and resources. A coordinated adoption of any final rules regarding market access and non-displayed liquidity would help reduce the technological and financial impact of implementing such rules on market participants.

the exclusion for trade reports may better serve the Commission's transparency goals) so long as the SEC permits delayed public trade reporting of the identity of ATSS instead of real-time reporting.

In recognition of the Commission's continued broad examination of US equity market structure, of which these proposed amendments are merely one component, Section III offers SIFMA's general thoughts about market structure, as well as comments on certain statements made in the SEC's Flash Order Release. SIFMA plans to submit more detailed comments on the Concept Release and proposed rule regarding risk management controls for broker-dealers with market access in separate letters.

#### **I. The Commission Should Require Delayed Rather than Real-Time Reporting of the Identity of ATSS on Trade Reports**

The Commission proposes to amend the joint industry plans for publicly disseminating consolidated trade data ("Plans") to require real-time disclosure of the identity of an ATS on trade reports. The proposed amendments would require disclosure of the identity of individual ATSS on FINRA trade reports in the same way exchange trades currently are identified on trade reports. Currently, firms sponsoring ATSS report trades to FINRA with a Market Participant Identifier ("MPID") attached, but the MPID is not disseminated publicly on trade reports. Under the proposed rule, broker-dealers that have ATSS and currently are using an MPID for their firm generally when reporting ATS trades would need to apply for and be assigned a separate MPID for their ATS.

SIFMA supports the goal of providing additional transparency to market participants regarding ATSS that execute significant transactions in NMS stocks. However, this objective must be balanced against the interests of investors using ATSS to minimize market impact when effecting their transactions. Real-time trade reporting of ATS identity will lead to information leakage that ultimately will harm the ability of users of ATSS offering non-displayed liquidity to execute orders without market impact. As noted by the Commission in the Concept Release, many large "parent" orders are, in fact, executed as a series of smaller "child" orders in today's markets. Real-time reporting of the identity of ATSS executing such orders may well facilitate the ability of some market participants to identify the existence of the larger order and to trade in a manner harmful to the ATS user.<sup>6</sup>

Real-time reporting of the identity of an ATS in trade reports raises more concerns than does identifying executing exchanges on trade reports. As noted by the Commission in the Proposing Release, most ATSS have a relatively small percentage of overall market share.<sup>7</sup> ATSS also generally have fairly narrow business models, many with specific matching criteria and specific

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<sup>6</sup> For example, as described by the Commission, order anticipation strategies employed by proprietary trading firms attempt to ascertain the existence of a large buyer or seller in the market and to trade in the direction of that trading interest. Such strategies may include the use of sophisticated pattern recognition software to ascertain the existence of a large buyer or seller from publicly available information, or the use of orders to "ping" market centers to locate and trade in front of large buyers or sellers. Concept Release at 3609.

<sup>7</sup> Proposing Release at 61214.

types of users, as opposed to more broadly used exchanges. The combination of these factors means that sophisticated traders have a greater ability to ascertain information related to the activity in the ATS – specifically, the kinds of working orders likely to be active in the ATS at any given time – than they would for an exchange. Therefore, real-time identification of ATSs in trade reports would significantly enhance the ability of sophisticated traders to ascertain large orders within such systems, particularly orders in smaller ATSs. This information could then be used to trade in a manner to the ultimate detriment of the users of an ATS. By contrast, the identification of exchanges in real-time trade reports is less problematic because the trades are not identified by individual broker-dealer, but instead are attributed to the exchange more generally. It is important to note that the use of non-displaying ATSs is not limited to institutions or broker-dealers representing institutional orders. Rather, all types of order-sending firms within the broker-dealer community, including those handling retail orders, access such ATSs. As a result, the negative impact of providing real-time ATS identifying information will be felt across a broad spectrum of market participants, including retail investors.

Real-time disclosure of the identity of ATSs on trade reports is unnecessary because there are alternatives that would better achieve the SEC's transparency goals without inadvertently generating negative consequences for investors. Specifically, ATS trade data should be disclosed on an end-of-week and symbol-by-symbol basis for each ATS. If the Commission believes that end-of-week public trade reporting is insufficient, SIFMA believes end-of-day public reporting of the identity of ATSs executing trades in relatively liquid NMS stocks may achieve the SEC's goals while sufficiently protecting ATS users from adverse market impacts that would result from real-time disclosure of the identity of an ATS in trade reports. However, we believe that end-of-week public trade reporting would still be necessary for less liquid stocks (e.g., Nasdaq Capital Market stocks), because end-of-day trade reporting in such names likely would result in the same information leakage concerns raised by real-time reporting of an ATS's identity in trade reports. Should the Commission determine that end-of-day reporting of an ATS's identity in trade reports is preferable for relatively liquid stocks, SIFMA would be pleased to work with the Commission or SROs to clarify which stocks should be considered less liquid and therefore subject to end-of-week reporting.<sup>8</sup>

SIFMA appreciates that regulators may need increased transparency of the identity of ATSs effecting trades to effectively surveil the markets. If the SEC or SROs believe that real-time reporting of the identity of ATSs executing trades is necessary for regulatory purposes, we would support disclosure of such information to regulators. SIFMA's primary concern with the proposal centers on the negative consequences that likely would attend real-time reporting of the identity of an ATS executing trades to the public. We have no such concerns with respect to the availability of such reports to regulators for oversight purposes.

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<sup>8</sup> SIFMA notes that the Financial Industry Regulatory Authority, Inc. ("FINRA") has proposed its own rule regarding post-close trade reporting that would allow member firms the option of having trades executed within their ATS dark pools and reported to a FINRA Trade Reporting Facility ("TRF") included in aggregate daily trading volume data. The proposed FINRA rule would require member firms that opt to have their trading data published to obtain and use a separate MPID designated exclusively for reporting the member firm's ATS transactions. *See* Exchange Act Rel. No. 61361 (Jan. 14, 2010); 75 Fed. Reg. 3768 (Jan. 22, 2010).

SIFMA also believes the Commission should permit ATS trades to be flagged on MPIDs currently used by firms to report trades to the TRF, rather than requiring each ATS to acquire and use a separate MPID. Requiring a separate MPID will be unnecessarily costly to firms by impacting OATS reporting and clearing systems for each ATS, and will introduce changes to order management systems and execution management systems requiring extensive testing. Separate MPIDs also will require certifications with all existing clients and destinations, without any commensurate benefit to the market. Permitting firms to flag ATS trades as part of existing MPIDs will adequately identify ATSs executing trades without requiring broker-dealers to incur such costs and administrative burdens.

SIFMA notes that, in order for the Commission to achieve its goal, publicly reported ATS trading volume data must be consistently calculated by ATSs. We suggest that existing FINRA trade reporting rules be required for all ATS trade reporting to prevent inconsistent volume calculation methodologies from rendering trade volume data inaccurate or otherwise misleading.<sup>9</sup>

## **II. Other Proposed Amendments**

### **A. The Threshold for the Regulation ATS Display Requirement Should be Reduced to One Percent of Average Daily Trading Volume**

The Commission proposes to amend the display obligations of Regulation ATS by lowering the trading volume threshold that triggers public display of orders by ATSs that otherwise display orders to more than one person from five percent (5%) to 0.25 percent.

SIFMA supports a reduced threshold, but believes that a one percent (1%) threshold would be more appropriate than the proposed 0.25 percent threshold. Lowering the current threshold to one percent (1%) would promote the Commission's goal of improving the quality of public quotation data without imposing any costs – even the reduced linkage costs described in the Proposing Release – on ATSs that have, at most, a de minimis market share. A one percent (1%) threshold for the display rule also would be consistent with other Regulation NMS display requirements – in particular, the quote requirement applicable to OTC market makers pursuant to the so-called “One Percent Rule.”<sup>10</sup>

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<sup>9</sup> See FINRA Rules 7230A (FINRA/NASDAQ TRF trade report input), 7230B (FINRA/NYSE TRF trade report input), and 7330 (over-the-counter (“OTC”) reporting facility trade report input).

<sup>10</sup> See Exchange Act Rel. No. 51808 (Jun. 9, 2005), 70 Fed. Reg. 37496 (Jun. 29, 2005) (“Regulation NMS”). See also 17 CFR 242.602(a)(1)(ii); 17 CFR 242.600(b)(73)(ii)(A). The “One Percent Rule” requires an OTC market maker for an exchange-traded security to report its best bids, best offers, and quotation sizes for those securities in which the market maker is responsible for more than one percent (1%) of the aggregate trading volume for that security during the previous calendar quarter.

## **B. Elimination of “In the Alternative Trading System” Limitation**

The Commission proposes to clarify that the Regulation ATS display rule may apply whenever an ATS displays orders to more than one person by eliminating the phrase “in the alternative trading system” from Rule 301(b)(3)(ii). SIFMA believes eliminating the phrase “in the alternative trading system” will help ensure consistency in the application of the display rule when orders are displayed to either ATS subscribers or non-subscribers. We are concerned, however, that, absent further clarification, the proposed changes to the ATS display rule may impede the ability of broker-dealers to efficiently handle and match orders and, thereby, have unintended and detrimental consequences to efforts to achieve best execution. Therefore, as discussed below, SIFMA asks the Commission to clarify that the Regulation ATS display rule does not apply to interactions between a broker-dealer’s ATS and SOR.

A broker-dealer operating an ATS that offers non-displayed liquidity also may utilize smart order routing technology to facilitate optimal order routing decisions and best execution. For example, a broker-dealer’s SOR may route customer orders internally to the broker-dealer’s ATS, and the ability or inability of the ATS to provide an execution in any given instance may be taken into account by the SOR in executing or routing orders. In other instances, a broker-dealer’s ATS may provide information directly and systematically to the broker-dealer’s SOR regarding liquidity residing in the ATS to facilitate best execution and efficient interaction of orders. SIFMA does not believe that such interactions – solely between two systems of the same broker-dealer – raise the issues this rule was intended to address, given that there is no order information disclosed to the broker-dealer’s subscribers, customers, or other third parties. In many respects, interactions between an ATS and an SOR are not dissimilar from manual means by which broker-dealers traditionally have sought internal liquidity for an order – such as requests for a potential contra side on a desk handling a customer order. In light of the importance of these now automated interactions to achieving best execution of customer orders, SIFMA requests that the Commission clarify that the phrase “any person” in the display rule is not intended to include either ATS employees or internal systems of the broker-dealer operating the ATS, but instead is intended to capture orders and actionable IOIs sent to ATS subscribers, other customers of the broker-dealer, or third parties outside the broker-dealer.<sup>11</sup> Specifically, SIFMA suggests that the Commission amend Rule 301(b)(3)(i)(A) to state: “Displays subscriber orders to any person (other than alternative trading system employees, *or the direct display of such orders by the ATS to any internal routing system of the firm that does not display such orders to other firm personnel, customers, or third parties*); and...” (proposed language italicized).

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<sup>11</sup> The interaction of a broker-dealer’s ATS and SOR would not appear to implicate confidentiality concerns under Rule 301(b)(10) of Regulation ATS provided that information related to the ATS was not shared with other subscribers, customers, or third parties and, instead, was limited to employees operating the ATS or responsible for its compliance with applicable rules.

More generally, SIFMA notes that the communication of information among firm systems is not uncommon with respect to the handling of customer orders. Provided that these communications are not disseminated to other broker-dealers or customers, we do not believe they meet the definition of a “bid” or “offer” under Rule 600(b)(8) today, nor should they be deemed actionable IOIs under the proposed amendment to the rule (discussed below).

### **C. Inclusion of Actionable IOIs in the Definition of “Bid” or “Offer”**

The Commission proposes to amend the definitions of “bid” or “offer” in Rule 600(b)(8) of Regulation NMS of the Exchange Act so that they explicitly include actionable IOIs in NMS stocks. The proposal similarly would impact the scope of bids and offers subject to the display requirements under Rule 301(b)(3) of Regulation ATS. As a result of the proposals, actionable IOIs sent by ATSS and other trading venues would be deemed “bids” and “offers” and potentially subject to the public display requirements of the Quote Rule and Regulation ATS.

Although neither the Exchange Act nor the proposed rules define the term “actionable IOI,” the Proposing Release states that an IOI would be considered “actionable” if it explicitly or implicitly conveys all of the following information about the underlying trading interest: (i) symbol; (ii) side (buy or sell); (iii) a price that is equal to or better than the NBBO; and (iv) a size that is at least equal to one round lot. The SEC has explained that, in considering these factors, all of the facts and circumstances surrounding the IOI, including the course of dealing between the IOI sender and the IOI recipient, should be considered.<sup>12</sup>

SIFMA supports the general concept that an IOI sent by an ATS that is truly firm and functionally equivalent to a quote should be subject to the display requirements of Regulation ATS. However, SIFMA requests further discussions with the SEC to clarify the applicability of the proposed definition of “actionable” IOIs to non-ATS market participants in order to avoid any unintended consequences.

### **D. Size Discovery Exclusion**

The Commission has proposed that a quantity of NMS stock with a market value of at least \$200,000 that is communicated only to persons reasonably believed to represent current contra-side trading interest of at least \$200,000 (a large size or “size discovery” trade) would be excluded from the proposed ATS identity trade reporting, 0.25 percent average daily trading volume threshold for the Regulation ATS display rule, and modification of the definition of “bid” or “offer” to include actionable IOIs. This \$200,000 threshold is taken from the definition of “block size” in Rule 600(b)(9) of Regulation NMS; however, the SEC believes the 10,000 share alternative in the block size definition would not be appropriate, particularly for low-priced stocks where the aggregate dollar amount of a large order would be substantially lower than the proposed \$200,000.<sup>13</sup>

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<sup>12</sup> Proposing Release at 61212.

<sup>13</sup> Proposing Release at 61213.

As an initial matter, SIFMA believes the definition of block size used in the proposed size discovery exclusion should include the 10,000 share alternative as defined in Rule 600(b)(9). Although 10,000 shares of a low priced stock may amount to less than \$200,000, such amounts are all relative to the price of the underlying security and, in fact, executing an order for 10,000 or more shares of a low priced, less liquid security may present issues similar to those involving the execution of a similarly sized block of a liquid security. Therefore, we fail to understand the need for a distinction between the two standards for defining a block trade. Maintaining the Regulation NMS definition of a block trade also will promote greater consistency in the handling of block orders generally.

SIFMA supports the size discovery exclusion from the proposed modifications to the public quoting requirements (i.e., for the proposed reduction in the average daily trading volume threshold for the Regulation ATS display rule and the proposed modification of the definition of bids and offers to include actionable IOIs), but questions whether an exclusion is necessary with respect to ATS trade reports. Specifically, if the Commission were to permit delayed reporting of the identity of ATSs in trade reports, as described above, SIFMA believes there may not be a need for a size discovery exemption for such trade reporting. In fact, delayed public reporting of the identity of ATSs on all ATS trade reports, including reports of block trades, would provide more accurate information to market participants regarding liquidity offered by ATSs for a given NMS stock without imposing the risk of information leakage on ATS users and large investors. However, if the SEC does not permit delayed reporting of the identity of ATSs executing trades, retaining the size discovery exclusion for public trade reporting will be essential to protecting block trades from adverse market impact.

### **III. General Market Structure Concepts**

SIFMA plans to provide detailed comments regarding the various questions and issues outlined in the Commission's Concept Release. However, both the Proposing Release and the Flash Order Release discuss the SEC's goals of increasing price transparency and market efficiency, and discouraging the development of a two-tiered market. The following section provides our thoughts on certain aspects of the two proposals that address the current quality of the equity markets and the use of undisplayed liquidity more generally.

#### **A. Fundamental Principles**

SIFMA believes any proposed changes to the structure of the US markets should be based on careful consideration of certain fundamental principles, many of which are encompassed as NMS principles in the Exchange Act. We urge the SEC to consider these principles as it moves forward in promulgating NMS rules and regulations:

- **Regulation should encourage fair competition among brokers and dealers, and among markets, because such competition leads to innovation and greater choices for investors, and facilitates best execution of orders.** Regulation that unnecessarily limits competition dampens the incentive to innovate.<sup>14</sup>
- **Regulation should be based on sound empirical data, particularly to the extent proposed regulation would reduce investor choice.** For example, to the extent the SEC believes that the use of actionable IOIs and non-displayed liquidity have harmed the integrity of the public quote, such concerns and views should be supported by empirical data, and such data should be provided publicly so that commenters may provide informed responses to the Commission to help guide it in its policy making.<sup>15</sup>
- **Investors ultimately should control the manner in which their trading interest is handled.** Market transparency is an important regulatory goal and our markets are perhaps more transparent today than ever before. When assessing the benefits of proposals that might further enhance transparency, the Commission should carefully balance such proposals against other NMS goals, such as best execution and investor desires to minimize market impact and excessive market signaling.
- **Efficient and effective linkages among markets facilitate the ability of investors to receive the best prices with low transaction costs.** Congress long ago determined that the use of multiple, competing markets was the best way to facilitate NMS goals in the US equity markets.<sup>16</sup> “Fragmentation” or the dispersion of order flow among competing markets is a natural result of competition, and competition benefits the markets and investors. Provided that there are appropriate and efficient linkages among disparate market centers and market participants have reasonable access to such linkages, fragmentation of order flow alone should not necessarily suggest the need for further regulation.<sup>17</sup> Since the adoption of Regulation NMS, the equity markets have been characterized by extremely efficient linkages.
- **Absent empirical evidence of an adverse impact on the integrity of public quotations, internalization of orders should not raise undue regulatory concerns provided best execution is observed.**

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<sup>14</sup> See Commissioner Troy Paredes, Statement at Open Meeting to Propose Amendments to Eliminate Flash Orders (Sept. 17, 2009), available at <http://www.sec.gov/news/speech/2009/spch091709tap-flash.htm>.

<sup>15</sup> To this point, SIFMA is considering participating in an academic study of the impact of dark pools on market quality, the results of which we hope to provide in SIFMA’s comments regarding the Concept Release.

<sup>16</sup> See 1975 Amendments to the Securities Exchange Act of 1934, S. Rep. No. 94-75, at 190, 94th Cong., 1st Sess. 7 (1975) (*accompanying* S. 249, 94th Cong., 1st Sess. (1975)).

<sup>17</sup> See SIFMA Paper on Displayed and Non-Displayed Liquidity (Aug. 31, 2009), available at <http://www.sifma.org/regulatory/pdf/SIFMA-Paper-Displayed-Non-Displayed-Liquidity.pdf> (“SIFMA Dark Pools Paper”). See also Regulation NMS at 37539 (“Rule 610 reflects the Commission’s determination that fair and efficient access to markets can be achieved without a collective intermarket linkage facility such as ITS, if baseline intermarket access rules are established.”); Regulation NMS at 37540 (“The Commission believes that the benefits of private linkages, including their flexibility to meet the needs of different market participants and the scope they allow for competitive forces to determine linkages, justifies reliance on this model rather than a single intermarket linkage.”); Exchange Act Rel. No. 42450 (Feb. 23, 2000) 65 Fed. Reg. 10577 (Feb. 28, 2000) (requesting comment on issues relating to market fragmentation).

## **B. The Commission's Flash Order Release**

SIFMA is concerned that certain statements in the Flash Order Release, taken out of context, might be inconsistent with some of the principles outlined above. For example, the Flash Order Release suggests that institutional investors who respond to flash orders are not representing their trading interest appropriately because they are not displaying limit orders.<sup>18</sup> While recognizing concerns about two-tiered markets in the flash order context, we think more generally that it is important for investors to decide how best to represent their trading interest in the markets, and that firms should be permitted to offer various alternatives to investors to allow them to achieve their trading goals. In this regard, we also believe that use of the term “two-tiered” market should be more clearly explained. It is one thing when market centers create mechanisms to provide some but not all members with advantages such as “better” market data or access; however, it is another thing when a customer or market participant makes a determination as to with whom its orders should interact or to whom its IOIs should be made visible. Broker-dealers historically have had discretion to interact with different customers in different ways, so long as that discretion has been exercised in accordance with applicable regulatory requirements. For example, some clients may be offered an opportunity to cross with another client (e.g., via an IOI) in scenarios where that activity is considered safe from creating information leakage. Other clients may trade in such a manner that sharing natural order interest would be considered disadvantageous (i.e., could create information leakage).

The Flash Order Release also suggests that the consolidated data stream is preferable to “forcing” investors to use multiple data feeds.<sup>19</sup> The availability of consolidated data undoubtedly is extremely useful to market participants. However, in adopting Regulation NMS, the SEC acknowledged that private data feeds also offer benefits to market participants.<sup>20</sup> The availability and use of multiple private data feeds does not automatically result in an “unfair” or “two-tiered” market. To one degree or another, market participants have always had the option to access differing levels of data (e.g., Nasdaq Level I and Level II data).<sup>21</sup> That some market participants may choose to access different levels of information and technology should not raise concerns as long as alternatives are made reasonably available to all market participants.<sup>22</sup>

At various points involving the discussion of technological advances often utilized by short-term investors, the Flash Order Release states that where the interests of long-term and short-term investors conflict, the Commission will promote the interests of long-term investors.<sup>23</sup> SIFMA believes the interests of long- and short-term investors coincide more often than they conflict. We are concerned about statements that may be read to suggest that technological advances in trading and order routing are typically inconsistent with the interests of long-term investors.

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<sup>18</sup> Flash Order Release at 48633.

<sup>19</sup> Flash Order Release at 48633, 48636, 48641.

<sup>20</sup> See discussion in Regulation NMS at 37566-67.

<sup>21</sup> See descriptions of Nasdaq data, available at <http://www.nasdaqtrader.com/Trader.aspx?id=mdataproducts>.

<sup>22</sup> SIFMA Dark Pools Paper. With respect to market data fees, SIFMA continues to believe that the SEC should impose more transparent methods for establishing market data fees and require a cost-based system for determining the appropriate level of market data fees, among other things.

<sup>23</sup> Flash Order Release at 48635-6, 48638.

Indeed, the use of technological improvements in trading by short-term investors is a key reason for the liquidity available in the market for long-term investors.<sup>24</sup> The Commission notes in the Concept Release, for example, that “from an operational standpoint, the equity markets performed well during the world-wide financial crisis in the Autumn of 2008 when volume and volatility spiked to record highs,” and that “unlike some financial crises in the past, the equity markets continued to operate smoothly and participants generally were able to trade at currently displayed prices (though most investors likely suffered significant losses from the general decline of market prices).”<sup>25</sup>

More generally, SIFMA is concerned that the Flash Order Release may be read as unnecessarily and incorrectly disparaging the quality of US markets and the use of undisplayed liquidity. The Release states, for example, that “[g]iven the importance of displayed quotations for market efficiency...the Commission is particularly concerned about additional marketable order flow—orders that are immediately executable at the national best bid or offer—that may be diverted from the public quoting markets and that could further reduce the incentives for the public display of quotations.”<sup>26</sup> Later, the Flash Order Release notes that “displayed liquidity is a public good that benefits investors and traders generally. When the market participants that generate this public good are harmed by a missed trading opportunity, it creates an externality that can detract from the efficiency of the securities markets.”<sup>27</sup> While the importance of displayed liquidity is self-evident, SIFMA believes that such statements do not give appropriate weight to improvements in equity execution quality in recent years and may not be supported empirically. We look forward to providing more detailed comments regarding the performance of US equities markets in our response to the Commission’s Concept Release.

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<sup>24</sup> See, e.g., Commissioner Troy A. Paredes, Statement at Open Meeting Regarding Concept Release on Equity Market Structure (Jan. 13, 2010), available at <http://www.sec.gov/news/speech/2010/spch011310tap-concept.htm> (“technological advances and other innovations that link trading venues by facilitating the search for liquidity can contribute to high-quality performance, even though the sheer number of trading venues might suggest a fragmented market structure at odds with the goals of a national market system.”).

<sup>25</sup> Concept Release at 3611.

<sup>26</sup> Flash Order Release at 48636 (citation omitted).

<sup>27</sup> *Id.* at 48638 (citations omitted).

SIFMA appreciates this opportunity to comment on the Proposing Release regarding non-displayed liquidity, as well as to offer its thoughts generally on market structure principles. Again, in light of the importance and interconnectedness of many of the Commission's recent market structure initiatives, we ask the Commission to consider whether delaying action on any one proposal or set of proposals until it receives and considers all comments on each of the proposals related to equity market structure it has issued during the past seven months would be useful. We also ask the Commission to consider how these proposed changes may affect the competitiveness of US securities markets within the global marketplace. We look forward to discussing each of these proposals with the Commission and its staff. If you have any comments or questions, please do not hesitate to contact me at 202.962.7300.

Sincerely,



Ann Vlcek  
Managing Director and  
Associate General Counsel  
SIFMA

cc: Mary L. Schapiro, Chairman  
Luis A. Aguilar, Commissioner  
Kathleen L. Casey, Commissioner  
Troy A. Paredes, Commissioner  
Elisse B. Walter, Commissioner  
Robert W. Cook, Director, Division of Trading and Markets  
James Brigagliano, Deputy Director, Division of Trading and Markets  
David Shillman, Associate Director, Division of Trading and Markets