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VIA EMAIL AND
FEDERAL EXPRESS

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

Re: File Number S7-27-09

Dear Ms. Murphy:

NYSE Euronext, on behalf of the New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), and NYSE Arca Inc. ("NYSE Arca"), appreciates the opportunity to comment on the proposal of the Securities and Exchange Commission ("Commission") to amend its regulatory requirements applicable to non-public trading interest (the "Proposing Release"). NYSE Euronext generally supports the proposals included in the Proposing Release, subject to our suggestions in response to the Commission's specific requests for comment, as described below.

More broadly, NYSE Euronext supports the Commission's commitment to undertake a comprehensive review of its market structure regulations and to adopt regulatory measures that address disparities in how registered exchanges and alternative trading systems ("ATSs") are regulated. In particular, NYSE Euronext appreciates the Commission's proposal on non-public trading interest as an initial step in its overall consideration of market structure issues and we look forward to providing more detailed comments in response to the Commission's Concept Release on equities market structure issues.

I. Background

As the operator of three registered U.S. national securities exchanges, NYSE Euronext welcomes innovation and competition in the U.S. markets. NYSE Euronext values the benefits associated with dark pools that are truly dark, i.e., market centers that do not include trading interest in the consolidated quote stream because they do not display trading interest to anyone. As the Commission recognizes in the Proposing Release, dark pools serve an important function for investors seeking to trade large blocks of securities without such transactions creating unnecessary price movements.[1] But while dark pools can add value for investors seeking size discovery, among other things, we believe that the policy justification for dark pools diminishes when a dark pool displays actionable interest to one or more participants. We agree with the Commission's conclusion that dark pools that display liquidity to only a select group create two-tiered level of access to information about the best prices and sizes for national market system ("NMS") stocks, with private markets restricted to insiders with access to marketable interest at or better than the national best bid or offer ("NBBO") to the exclusion, and detriment, of the general trading public.

We have an additional concern arising of the fact that, as the Proposing Release makes clear, dark pools have proliferated rapidly, and now represent more than ten percent of the total share volume in NMS stocks. Yet, dark pools that primarily specialize in block-sized activity represent less than one percent of the total share volume in NMS stocks. We believe this proliferation is due in part to the low regulatory barriers to begin and continue operations as an ATS, as compared to the lengthy registration process involved in becoming registered as a national securities exchange and the significant ongoing regulatory obligations imposed on registered exchanges. In our view, the requirements of Regulation ATS, as adopted in 1998, no longer reflect the realities of today's market structure: in December 2009, registered national securities exchanges represented only 63 percent of trading volume in NMS stocks, down over 10 percent from the trading volume of registered exchanges in December 2008.

As a stark reminder of how dramatically and quickly trading patterns have changed, consider that in 2005, NYSE traded approximately 79 percent of the volume in NYSE-listed securities. Today, NYSE trades approximately 25 percent of the volume of NYSE-listed securities, with approximately 40 percent of the volume in NYSE-listed securities trading off-exchange, whether through ATSs (including both electronic communications networks ("ECNs") and dark pools) or broker-dealer internalization.[2] Simply put, these statistics show that a

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1 NYSE Euronext operates dark pools and has entered into strategic alliances with existing dark pools. In 2008, NYSE Euronext launched NYSE MatchPoint®, which is a portfolio-based, point-in-time electronic exchange facility that matches aggregated orders at a pre-determined time in a non-displayed facility. In 2009, NYSE Euronext launched the New York Block Exchange ("NYBX") facility, a joint venture between the NYSE and BIDS Holding, L.P., which operates a dark pool. NYBX provides for the continuous matching and execution of securities traded on the NYSE, including both displayed and non-displayed interest, with the non-displayed interest entered directly into NYBX.

2 By comparison, over 50 percent of the trading volume in NYSE Amex-listed securities occurs off registered exchanges.

significant amount of trading in listed securities has shifted from registered exchanges, which are highly regulated and provide a transparent trading environment, to ATSs, which are subject to much less regulation than registered securities exchanges and generally are not required to display their trading interest.

These shifts in the marketplace are partially due to the significant regulatory disparity among entities providing effectively identical services. The more lightly regulated ATSs can claim to be more nimble and innovative than registered exchanges, but to the extent this is accurate at all, it is partly driven by regulatory arbitrage rather than quality of services. In particular, ATSs are able to bring new services and trading functionality to market without Commission approval, whereas registered securities exchanges must undergo a rigorous, and often time-consuming, vetting, refining, and approval process by the Commission each and every time they want to bring new ideas to market. Unfortunately, the lack of regulatory scrutiny of ATS's can lead to the proliferation of unfair trading practices, such as the flash order structure and the issues identified in the Proposing Release. In addition, exchanges face other burdens such as more stringent automation review policy requirements to test systems capacity and vulnerability and to maintain back-up facilities, which means that an ATS competes with a far lower cost base.

Given that ATSs now represent a significant share of trading volume in NMS stocks, NYSE Euronext believes that the time is ripe to move to a framework that has consistent regulatory requirements when the trading activity at issue is essentially the same. More specifically, NYSE Euronext believes that the Commission should address the regulatory disparity between registered exchanges and ATSs that currently do not display liquidity in the public quote stream, and yet engage in trading activities that are more akin to traditional exchange trading, including displaying actionable interest to one or more participants.

II. <u>Amending the Definition of Bid/Offer</u>

NYSE Euronext supports the Commission's proposal to extend the current definition of "bid" and "offer" to include actionable indications of interest ("IOIs"). In particular, NYSE Euronext agrees with the Commission's conclusion that when an IOI is actionable (i.e., the IOI conveys enough information that a response to such IOI will result in an execution), it should be treated as a traditional order and should be subject to public display requirements. We believe that this aspect of the Commission's proposal will promote both fairness and transparency because the trading public in general, and not just select participants, will have access to such marketable trading interest.

NYSE Euronext also supports the Commission's proposal to exclude large order actionable IOIs from the definition of a bid or offer, as well as the distinction between actionable and nonactionable IOIs, which are in fact typically invitations to negotiation of a larger trade.[3] Our view in this regard stems from what we believe to be primary benefit of dark pools to the general trading public – the ability to facilitate trading of large blocks of stock without creating market impact. In this regard, NYSE Euronext does not believe that "child" orders relating to a "parent" block order should be exempt from the display requirement, because child orders related to a block-sized parent order would not have the same market impact as the parent order. Put another way, if an ATS receives a block order and sends an IOI for the full amount, that IOI should not be required to be quoted. If, however, the ATS breaks the large order into smaller actionable IOIs, those IOIs should be considered a bid or offer that must be publicly quoted.

We also note that, as proposed, the revised definition of bid or offer may leave room for interpretation as to what constitutes an "actionable" IOI. Accordingly, NYSE Euronext believes that when the Commission adopts the proposal, it should provide clear guidance as to what constitutes an actionable IOI, perhaps in the form of a non-exclusive list of examples. For example, the Proposing Release notes that in certain circumstances, an IOI that does not explicitly specify the price and size of available trading interest may, because of the practical context in which such IOI is transmitted, in fact be considered "actionable" interest. Yet, the Proposing Release indicates elsewhere that actionable IOIs must specify price and size**.** Clear guidance on this point would enable market participants to understand when an IOI is actionable and thus must be publicly displayed.

Similarly, we encourage the Commission to take steps to minimize any loopholes in the new definitions of "bid" and "offer." For example, the Commission should consider whether the display requirement, which applies only to round lots, will spur the use of odd-lot-sized actionable IOIs. Given the already small size of order execution, market participants may seek to end-run the requirement to publicly display bids and offers by unbundling parent orders into multiple odd-lot-sized actionable IOIs. Similarly, to avoid the public display

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3 Actionable IOIs are also distinguishable from negotiated trades, whether on a trading floor of a registered exchange or upstairs trading location, that NYSE Euronext discussed in its comment letter on the Commission's proposal to ban flash orders. As we noted in that comment letter, negotiated trades are for not-held orders that are not immediately marketable, and thus do not meet the definition of a bid or offer that must be displayed.

requirement, participants may also increase the use of "pinging" a market center with immediate or cancel orders.

As noted in the Proposing Release, NYSE Arca operates a program through which it accepts IOIs from ATSs. Under this program, if NYSE Arca does not have available trading interest to execute orders at the best displayed prices, it provides its customers with the option to route orders to dark pools in response to such an IOI. NYSE Arca provides this functionality in part to respond to competitive pressures from dark pools that operate in a lit mode with respect to selected market participants. The NYSE Arca program provides a venue for public customers to access liquidity that, in today's regulatory framework, would otherwise be unavailable to them. If the Commission ultimately adopts the proposed amendments to definition of "bid" and "offer," NYSE Euronext would reconsider the continuation of the NYSE Arca IOI program.

III. Amendments to the Display Obligations of ATSs

NYSE Euronext supports the Commission's proposal to reduce the volume threshold at which an ATS must display best-priced orders from five percent to 0.25 percent. In particular, NYSE Euronext agrees with the Commission's conclusion that the five percent average daily trading volume threshold that triggers an ATS's order display and execution access requirements is too high. Because of the increased fragmentation among markets today, individual trading centers that trade less than five percent of the total trading volume in a security can nevertheless have a substantial impact on price discovery, even though they are not required to display best-priced bids or offers. Taken together, the omission of ATSs' combined information about NMS stocks from the consolidated quote stream means that significant portions of the available trading interest are not being publicly quoted. Simply put, we believe that the Commission's proposal to require public access to displayed trading interest is an important step in ensuring transparency in our markets.[4]

NYSE Euronext also concurs with the Commission's proposed amendment to clarify that when an ATS communicates a marketable bid or offer to anyone, whether a participant of the

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4 In addition to lowering the volume threshold, the Commission may want to consider whether it is still appropriate to continue applying the threshold on an individual symbol basis. The upfront cost for linking an ATS to the consolidated quote stream for one symbol would be defrayed if it is applicable to all symbols available for execution at the ATS. Requiring all symbols to be publicly displayed will also align ATSs more closely with registered exchanges, which publicly display quotes regardless of the trading volume of the security on that venue.

ATS or not, such bid or offer would trigger the public display requirements of Regulation ATS. In this regard, we agree with the Commission's preliminary view, as stated in the Proposing Release, that the quoting requirements of both Reg. NMS Rule 602 under the Exchange Act and Regulation ATS should clearly cover actionable IOIs. We urge the Commission to review the applicable requirements of Reg. NMS Rule 602 and Regulation ATS, and to make any amendments necessary to prevent an ATS from taking advantage in any gaps between the two rules. In particular, the Commission should clarify whether the requirement that actionable IOIs be treated as bids and offers should also apply to when a broker-dealer sends actionable IOIs to other participants. In such a scenario, actionable IOIs could be sent using outbound routers associated with the broker-dealer that operates an ATS, so that the orders are not technically routed by the registered ATS itself. The effect of transmitting orders directly from the broker-dealer or by using such outbound routers, however, is the same: a marketable order is displayed to limited participants for immediate execution, denying the trading public access to that marketable interest. In addition, we believe that the display requirement should be triggered if an ATS displays actionable IOIs to the outbound router of the broker-dealer that operates the ATS. Allowing a broker-dealer's outbound router to see trading interest in otherwise "dark" ATS similarly would provide users of the broker-dealer's router with information not available to the general trading public.

Because the Commission is proposing to reduce the volume threshold before display requirements are triggered, the Commission should also revisit the volume thresholds for when a registered ATS is required to register as an exchange. With ATS market share increasing and either equaling or exceeding the market share of several registered exchanges, depending on the class of security, there is no rational basis for permitting registered ATS to operate under a different regulatory scheme from registered exchanges.

IV. Publicly Disseminating Post-Trade Identity of ATSs

NYSE Euronext supports the Commission's proposal to require post-trade transparency that would identify the ATS venue that executes transactions. As proposed, the post-trade reporting that identifies the ATS that executed the transaction would occur in real-time, but the ATS would not need to be identified for transactions of $200,000 in market value or more. The Commission has requested comment on whether the post-trade reporting on the ATS venue should be real-time, or if it should be at a later time, i.e., end-of-the day reports. The Commission has also requested comment on whether the proposed exception for executions over $200,000 from this reporting requirement should be kept.

We do not support the exception from post-trade reporting for large-sized transactions. NYSE Euronext agrees that post-trade transparency is important because it gives market participants the ability to assess overall supply and demand and reduces the information gap between investors with differing degrees of sophistication regarding where such liquidity resides. Because of the difficulty of finding block liquidity in today's fragmented markets, knowing where large blocks are executing, as well as the execution quality of a particular trading venue, are a key components of post-trade transparency.

Moreover, it is unclear how after-the-fact knowledge of the execution venue of a large transaction would move the price of the stock. Presumably, any concerns about information leakage would apply equally to block-sized transactions on registered exchanges, yet there is no similar exception for reporting large-sized transactions for registered exchanges. In addition, simply identifying the ATS where the trade was reported does not raise the same concerns about information leakage that might arise if the reporting identified the party behind the transaction, how many orders were on the buy and sell sides of the large-sized transaction, or even whether that venue has additional interest in that symbol.

We also believe that all post-trade reporting of execution venues should be made public in real time. Providing real-time executions as identified by trading venue will provide the public with better insight concerning the execution quality of that trading center. Nevertheless, if the Commission were to determine, based on empirical evidence, that real-time identification of non-exchange execution venues of block-sized transactions would create a legitimate information leakage concern, a possible solution could be to move the post-trade execution venue reporting to an end-of-the-day report that includes block-sized transactions. This would serve the dual purpose of ensuring full post-trade transparency, while at the same time minimizing any possible impact that knowledge of the identity of an ATS that executes a block-sized transaction could have on the market.

V. <u>Conclusion</u>

NYSE Euronext recognizes and supports the Commission's ongoing leadership in reviewing market structure issues. In particular, NYSE Euronext supports the Commission's ongoing efforts to consider the regulatory disparities between registered exchanges and ATSs and believes that the current proposals move in the right direction to ensure fairness and transparency across all trading centers. NYSE Euronext agrees with the proposed rule changes, with the one caveat that the post-trade transparency for the identity of ATSs that execute transactions should include block-sized orders. NYSE Euronext also encourages the Commission to continue looking at how registered ATSs are regulated to level the playing field across registered exchanges and ATSs, including lowering the threshold for when a registered ATS must register as an exchange. In today's fragmented markets, registered exchanges, which are subject to greater regulatory scrutiny, are at a competitive disadvantage vis-à-vis registered ATSs. The goal of Regulation ATS to foster competition has moved beyond that goal, and now provides an advantageous forum for ATSs that both harms investors, by creating private markets, and makes for an uncompetitive landscape for market centers.

Very truly yours,

Janet M. Kissane

cc: The Hon. Mary Schapiro, Chairman
The Hon. Luis Aguilar, Commissioner
The Hon. Kathleen Casey, Commissioner
The Hon. Troy Paredes, Commissioner
The Hon. Elisse Walter, Commissioner
Mr. Robert W. Cook, Director of Trading and Markets
Mr. James Brigagliano, Deputy Director of Trading and Markets
Mr. David S. Shillman, Associate Director of Trading and Markets