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February 23, 2010

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

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

Dear Ms. Murphy:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendments to the regulatory requirements of the Securities Exchange Act of 1934 that apply to non-public trading interest, including "dark pools" of liquidity, issued in Release No. 34-60997 (the "Proposing Release").

Fidelity is the largest mutual fund company in the U.S. and a diversified financial services company with approximately $3.1 trillion in assets under management and administration, more than $700 billion of which is managed equities. These assets represent the cumulative investments in over 76 million customer accounts from individuals, retirement plan participants and institutions. Fidelity generally approaches any effort to regulate the equity markets from the perspective of a financial services firm representing millions of small investors saving to secure their financial futures, and as such, we support the Commission's goal of a fair and efficient equity marketplace.

Background

Over the past decade, the U.S. equity markets have been shaped by changes in technology and regulation. Technological enhancements have improved the speed and efficiency of the markets, fostered competition, and provided access to new and diverse sources of liquidity. On the regulatory front, Regulation ATS and Regulation NMS have helped modernize market structures and sparked a proliferation of market centers. In addition to the two traditional

[1] In addition to serving as investment adviser to over 400 mutual funds, Fidelity Investments is also a diversified financial services company that includes several registered investment advisers, registered broker-dealers, including a retail broker-dealer and a clearing firm, registered transfer agents, and a retirement plan services administrator.

exchanges, there are now multiple electronic communication networks ("ECNs") and dozens of SEC-registered alternative trading systems ("ATSs"). These venues compete on customer service, cost, liquidity, speed, and product innovation to the benefit of the entire investing community, including retail and institutional investors.[2]

Fidelity uses a wide variety of trading venues and trading strategies to execute client orders as efficiently as possible, and we do not favor one type of trading business model or trading venue over others. On balance, we believe that a framework that supports multiple, competing trading venues is good for the securities industry. Dark pools (and other dark sources of liquidity) enable large market participants to shield their trading objectives by placing orders without having to display their full trading intentions to the entire market.[3] As a result, dark pools can reduce transaction costs by limiting potential information leakage and associated market impact that can occur when trading significant blocks of stock. Fidelity believes that these dark pools are important tools that enable us to execute trades efficiently while protecting our long-term investors from potentially opportunistic trading strategies.[4]

The Commission's Proposals

As part of its broader market structure review, the SEC is proposing to address concerns about the transparency of dark pools by:

- treating actionable indications of interest ("IOIs") as quotes;

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[2] These technological and regulatory advancements have contributed to a marked improvement in market quality. Between January 2002 and June 2009, we have seen significant improvements in both execution quality (as measured by quoted and effective spreads) and execution times:

- Quoted spreads across the industry have fallen 57% during the period, from $.0371 to $.0158 per share.
- Effective spreads, or spreads actually experienced in a trade, have fallen 59%, from $.0461 to $.0188 per share.
- Execution times have fallen 88%, from an average of 17 seconds to 2.1 seconds.

Source: Fidelity Capital Markets, based on publicly-available data from Thomson Reuters

[3] There are currently more than 40 market centers that engage in some form of "dark" operations. Fidelity owns and operates one ATS, CrossStream, as part of its National Financial Services LLC broker-dealer. In addition, Fidelity's brokerage business routinely routes orders from retail and institutional brokerage customers to many of the other existing dark venues for execution.

[4] We appreciate the concern that the anonymity that dark pools provide could impair price discovery and transparency if they displaced the public equity markets to a significant degree. However, Fidelity is not aware of any quantitative analysis to date that suggests that dark pools at current trading volumes have had any such impact.

- lowering the trading volume threshold that triggers public display of orders by ATSs that otherwise display orders to more than one person from 5% to 0.25%; and
- requiring real-time disclosure of the identity of dark pools and other ATSs that execute a trade.

Each proposal contemplates an exception for block-size quotes or trades.

Fidelity generally supports the Commission's proposals with respect to the treatment of actionable IOIs and the public display of quotes. However, we believe that the Commission's proposals in respect of real-time, post-trade transparency would substantially increase the risk that Fidelity's trading activities would be prematurely signaled to the market, allowing opportunistic traders to front-run our investors. Finally, we believe that the Commission's proposed definition of block-size is too narrow to protect our customers' trading interests fully, and suggest that the exemption should be based on the percentage of a stock's average daily trading volume.

1. ***Actionable IOIs***. The Commission proposes to amend the definition of "bid" and "offer" in Rule 600(b)(8) of Regulation NMS to include actionable IOIs transmitted by dark pools and other ATSs to select market participants. The Proposing Release does not define the term "actionable indication of interest", instead it provides some guidance on the factors that the Commission would consider relevant to determining whether an IOI is actionable. These factors include whether the indication includes explicit information regarding: (1) symbol, (2) side (buy or sell), (3) size, and (4) price, and implicit factors such as the prior course of dealing between the parties.

Fidelity agrees with the principle that to the extent IOIs take on the characteristics of bids and offers, they should be treated as bids and offers.[5] Moreover, Fidelity believes that the Commission's proposal to treat actionable IOIs as quotes should apply in all trading venues, not just dark pools. We urge the Commission not to take a narrow view of actionable IOIs in this regard. If a broker-dealer operates an ATS, then any actionable IOI issued by that broker-dealer should be subject to the Commission's proposed rule, whether the actionable IOI is sent from the ATS or another venue within the broker-dealer.

[5] As marketable orders displayed only to a select group of market participants, actionable IOIs can operate similarly to flash orders, which the Commission has recently proposed banning. Elimination of Flash Order Exception from Rule 602 of Regulation NMS, Release No. 34-60684; File Number S7-21-09 (September 18, 2009) ("Flash Order Release").

2. *Public Display of Quotes*. The Commission proposes to lower the average daily trading volume threshold that triggers quote display and execution access requirements for ATSs from 5% to 0.25%. Because dark pools that do not display orders to more than one person would be unaffected by this proposal, Fidelity has no objections to lowering the display threshold to 0.25%.

Notably, the lower 0.25% threshold would apply only to the order display and execution access requirements – and not to the "fair access" and non-discrimination requirements – under Regulation ATS. Fidelity strongly supports the Commission's decision to leave "fair access" requirements intact. The "fair access" rule requires an ATS that exceeds the volume threshold in a security (e.g., 5%) to provide all market participants with fair access to its market in that security.[6] ATSs currently have far more regulatory leeway than exchanges to accept or decline participants in their trading venues. We believe that it is vital for ATSs to maintain that flexibility to guard against opportunistic traders "pinging" or probing for information.

3. *Real-Time, Post-Trade Transparency*. The Commission proposes to amend the joint-industry plans that provide for the dissemination of last sale information for stocks. While ATSs are required to report their trades for inclusion in the consolidated trade data, their activities are recorded generally as having occurred "over-the-counter." The proposal would require real-time disclosure of an ATS's identity on trade reports in the public data stream, in the same way that exchanges currently operate.

We think that the benefits of requiring the display of real-time, trade-by-trade identification of dark pools are quite limited. Although the Proposing Release states that post-trade transparency "should enhance the ability of broker-dealers and their customers to more effectively find liquidity and achieve best execution in the over-the-counter market,"[7] we believe that market participants already have access to technology that is designed to "source" liquidity. Although it is possible that, at the margins, real-time reporting of ATS trade execution may allow some market participants to find liquidity more easily, Fidelity believes that technological solutions already address this problem, and that new technologies and market practices will continue to improve investors' ability to find liquidity.

On the other hand, Fidelity strongly believes that there are substantial costs to real-time disclosure. We believe that there is substantial risk that market participants would use these disclosures to identify trading patterns of large institutions like Fidelity in near real-time, to the

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[6] 17 C.F.R. 242.301(b)(5).

[7] Proposing Release at p. 45.

detriment of our investors. If Fidelity loses the ability to execute large orders in thinly traded names anonymously, we believe that our clients will be harmed by opportunistic trading, and the overall efficiency of the equity markets could be impaired.

In particular, real-time disclosure of an ATS's identity has the potential to impact our trading of small- and mid-cap stocks significantly. Fidelity accumulates and disposes of large positions in small- and mid-cap stocks on behalf of our clients, often in very small trades or prints over a number of trading days to minimize the market impact of these trades. Dark pools, and the anonymity they provide, help Fidelity protect the interests of our investors in these situations by shielding our trading activity from potential gaming or front-running by opportunistic traders.

Therefore, while Fidelity supports efforts to enhance transparency when the benefits are clear and the costs reasonable, we do not believe this proposal would benefit our investors, and potentially would harm them. If the Commission nevertheless proceeds with some form of post-trade disclosure, we strongly urge the Commission to propose a reporting delay at least to the end of the trading day to partially protect investors' trading intentions.

4. *Block Trade Exemption*. As mentioned above, each proposal to enhance reporting has an exception for block-size quotes or trades. We strongly support efforts to preserve the ability of firms like Fidelity to protect their shareholders and retail and institutional customers by including pre- and post-trade disclosure exemptions for block-sized orders. Prior to execution, such an exemption will help guard against the information leakage that can increase transaction costs for large block trades. Following execution, the post-trade transparency exclusion may be helpful to ward off opportunistic traders looking to monitor and exploit investors' trading activity in specific dark pools.

However, while Fidelity supports an exception for block size trades, exempting only orders of $200,000 or more is insufficient to protect our customers' trading interests. This protection is particularly crucial if the Commission proceeds with requiring real-time, post-trade identification of an ATS's identity. An exemption based purely on some dollar threshold represents an out-dated view of the trading markets and how they have evolved over the last decade. For example, according to Fidelity's research, in the first nine months of 2009, only half of the stocks included in the Russell 3000® Index[8] had at least one print of over $200,000.

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[8] The Russell 3000® Index measures the performance of the largest 3000 U.S. companies representing approximately 98% of the investable U.S. equity market.

In today's trading environment, sizeable trades by either retail or institutional investors truly are few and far between, as block trades are often broken up into smaller orders whenever possible to minimize market impact and the risks of information leakage. Therefore, Fidelity believes a more effective exemption would be one based on the percentage of a stock's average daily trading volume, which would better reflect the realities of trading in today's equity marketplace.

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We thank the Commission for considering our comments. Please contact me should you have any questions concerning this letter.

Sincerely yours,

Scott C. Goebel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner

Mr. Robert W. Cook, Director, Division of Trading and Markets
Mr. James Brigagliano, Deputy Director, Division of Trading and Markets
Mr. David Shillman, Associate Director, Division of Trading and Markets