Gregory A. Baer
Deputy General Counsel
Corporate Law

February 22, 2010

Via Email (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
U.S. 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 dated November 23, 2009

Dear Ms. Murphy:

Bank of America ("BAC") greatly appreciates the opportunity to provide comments on the Securities and Exchange Commission's ("SEC") proposed rule changes regarding non-public trading interest.[1] Bank of America is one of the world's largest financial institutions, and is actively engaged in facilitating the provision of credit to individual consumers, small and middle market businesses, and large corporations, as well as helping to transfer the risks associated with this credit to end investors. Bank of America Merrill Lynch ("BAML") is the global markets business within BAC providing securities, strategic advisory and other investment banking activities. BAML manages over $1.2 trillion in client assets and retains approximately 16, 0000 financial advisors who serve clients around domestically and internationally.

In the Proposing Release, the SEC proposes rule changes in three related areas: (1) amendments to the definition of "bid" or "offer" in Exchange Act quoting requirements to apply expressly to actionable indications of interest ("IOIs") that may be privately transmitted by so-called "dark pools" and other trading venues to selected market participants, subject to a large order exception; (2) amendments to the display obligations of alternative trading systems ("ATSs") under Regulation ATS so as to reduce the trading volume threshold, from 5% to 0.25%, at which ATS must publicly display priced interest reflected in such venues; and (3) a requirement for real-time public disclosure of the identity of certain ATSs, including dark pools, on trade executions effected within such systems, also subject to an exception for large orders.

We recognize that while the particular elements of the Proposing Release are important issues to be addressed, we also urge the SEC to consider the broader implications of these proposals in the context of the evolving equity market structure. These proposals are inextricably linked to a broad array of developments taking place in the U.S. as well as globally, from a technological and regulatory perspective. To that end, we applaud the SEC's efforts in conducting a fresh review of current equity market structure by also issuing its recent concept release.[2]

[1] Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208 (Nov. 23, 2009) ("Proposing Release").
[2] Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) ("Concept Release").

We respectfully suggest that the SEC consider following the approach it took during its last major initiative to comprehensively examine the equity market structure, when it issued a similar concept release that ultimately led to the publication of its Market 2000 report[3], a seminal study that helped to enhance the foundation for today's market structure. At that time, the SEC initially issued a series of analytical studies accompanied by a variety of related proposals for action, thus providing the industry with a framework that was then pursued methodically, rather than addressing related issues on a case-by-case basis, which could lead to unintended consequences or dislocations.

We note that virtually all of the proposals contained in the Market 2000 Report were ultimately adopted in a manner that has inured to the benefit of all investors and market participants, and we sincerely believe those initiatives have resulted in a fair, efficient and more competitive market structure. We are confident that, similar to the findings and statements of the staff at that time, the markets today also are "…operating efficiently and effectively in the existing market structure… despite suggestions that the regulatory framework has not kept pace with market developments…and do not believe that a major revision of equity market regulation is needed."[4]

To the extent the SEC feels compelled to act on the instant proposals at this time, we offer the following specific comments, which first and foremost are offered in the spirit of fair and balanced treatment for all investors, both retail and institutional, but also with the intent to preserve fair competition amongst all types of trading venues. As a general matter, we also support the comments made by the Securities Industry and Financial Markets Association ("SIFMA") in response to the Proposing Release although we highlight below some key points from our perspective.

I. Defining Bids and Offers to Include "Actionable IOIs"; Exception for Blocks

The SEC has proposed to amend the definition of "bid" and "offer" in the quoting requirement of the Exchange Act to expressly apply to actionable IOIs transmitted from dark pools and other trading venues to selected market participants. While the proposal does not outline specific rule language in this context, an IOI would be considered actionable under the proposal if it explicitly or implicitly conveys all of the following information about available trading interest at the IOI sender: (1) symbol; (2) side (buy or sell); (3) a price that is equal to or better than the NBBO; and (4) a size that is at least equal to one round lot. We agree that an "actionable" IOI in most cases can be the functional equivalent of a quotation and should be treated as such under the current definitions of "bid" and "offer" found in Rule 600(b)(8) of Regulation NMS.

We also believe that, in light of the complexity of today's routing and trading technologies, the SEC should clarify that the rule would apply only to IOIs that emanate from an ATS directly to external parties, and not IOIs that may arise from internal systems within a broker's infrastructure, such as a smart router, that may in turn be used for generating orders in an ATS. We do not believe it was the SEC's intent to capture within the scope of the rule such situations where messaging is purely internal to a particular broker-dealer's systems and does not involve transmitting such IOIs to external parties or systems

Finally, we support the notion of an exemption for IOIs of block size.[5] We believe, however, that for technological, operational, and supervisory consistency, and to avoid confusion, the definition for blocks should

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[3] Division of Market Regulation, *Market 2000, An Examination of Current Equity Market Developments* (January 1994)("Market 2000 Report").

[4] See Market 2000 Report, Introduction and Executive Summary, at 1.

[5] The Proposing Release provides an exception for IOIs for a quantity of NMS stock having a market value of at least $200,000 that are communicated only to those who are reasonably believed to represent current contra-side trading interest of at least $200,000 ("size-discovery IOIs"). Proposing Release, at 115.

track the traditional definition referenced in many other rules and regulations that firms must incorporate into their compliance infrastructure.[6] Thus the exemption should not only apply to IOIs with a market value of $200,000 but also to IOIs of 10,000 shares or more.

We acknowledge the SEC's concerns of the potential for an overly expansive definition in the context of some low-priced stocks. We suggest that the SEC avoid complicating the implementation of this well-intended rule change in light of the complexity of a host of compliance, surveillance and supervision policies and procedures that must be brought to bear on the many trading systems that exist in many firms and trading venues. The rationale for incorporating a block size exemption in this proposal is not sufficiently distinct from the panoply of other rules and regulations that provide a similar size-based exemption and thus we see no compelling need to foster definitional inconsistency at this time in this limited context. We suggest that the SEC provide an opportunity for some study and empirical analysis under a uniform rule definition before attempting to conclude that it must define blocks differently in this context. In this context we point out that by our own analysis, adding back the 10,000 share element to the definition would only capture a marginal increase in notional dollar volume that would be excluded under the exception, increasing it from approximately 20.8% to 22.8% of total dollar volume during the last quarter of 2009.[7]

II. Lowering the ATS threshold for quoting from 5% to 0.25%

The SEC has proposed to lower the current Regulation ATS quoting and fair access threshold from 5% to 0.25% of volume measured over four of the previous six months. We generally do not object to this proposal for registered ATSs, particularly given the fact that market share in recent years has become less concentrated and is now distributed over a larger number of trading venues. We agree with others participants however, that a threshold level of 1% is appropriate as it would amply accomplish the SEC's goals without compromising the ability for new entrants to launch ATSs, would facilitate meaningful transparency for all investors, and would maintain consistency with the current 1% test for OTC Market Makers.[8]

III. Real-Time Trade Volume Attribution for ATSs

The SEC has proposed real-time attribution of the identity of each registered ATS on the public tape reporting of transactions effected within such venues. All registered ATSs would also have to register for a new and unique market participant identifier (e.g., MPID) for the ATS, as most ATSs just report to FINRA with the sponsoring broker's MPID.

More than any of the proposals contained in the Proposing Release, this initiative has engendered the most attention and debate, and unfortunately, has also led to a significant amount of misinformation in the media and public domain. As the SEC and other SROs are well aware, and contrary to some suggestions, the trade reporting regime that exists today is characterized by virtually instantaneous reporting and public dissemination of all transactions that take place within the National Market System, including those that may be executed within an

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[6] See, e.g., Exchange Act Rules 600(b)(9) and 604(b)(4) of Reg NMS (exception to display requirements); NYSE Rule 92(b) (exception to limitations on members trading because of customer orders); FINRA IM-2110-3 (front running policy); NYSE Rule 127 (block crosses).

[7] Data for October 1 through December 22, 2009: Average Daily Notional Value reported to TRF/ADF for executions >= $200,000 amounted to $12,808,859,388 or 20.8% of total reported value. Executions >= 10,000 shares or $200,000 reported during same period amounted to $13,700,694,939 or 22.2% of total reported value.

[8] See Exchange Act Rules 600(b)(73) and 602(a)(1)(i).

ATS or so-called "dark pool."[9] More importantly, while the identity of a particular ATS may not be publicly self evident as reflected on the tape, the identity of all parties to the transaction (not only the ATS, but potentially the participants or investors trading through them) can and is often easily obtained by applicable regulators, including the SEC and FINRA by virtue of existing surveillance and record retention and request protocols. Even if enhanced identity information was made publicly available immediately, we question whether the general public would be able to make use of the data in that timeframe in any meaningful way, particularly given how fast the high-speed tape processes and publishes the high volume of transactions taking place today. The only distinction being highlighted by this proposal is that the general public cannot discern which of the registered ATSs was involved in executing that transaction in real-time. The question before the staff then is really whether the lack of that temporal transparency is sufficiently problematic in today's market structure.

We believe that it is helpful to enhance transparency around executions in ATSs, however we feel that real time attribution would be detrimental to participants executing in the ATS. Instead, we suggest that bulk attribution at end of day would be sufficient to provide the public with aggregate volume data while reducing the potential for gaming. With market share being distributed across more trading venues, the potential for predatory reverse engineering of institutional customer identity or trading strategy could be increased. We suggest that the limited benefit in providing that level of granularity on the public tape is outweighed, on balance, with the risk of inferior execution quality or information leakage of customer identity or strategies when utilizing the ATS. We would of course support, however, enhancing the extent to which such information would be useful for real-time regulatory surveillance at the SRO or SEC level.

Finally, we support the $200,000 exemption for block executions in this context, but has similar concerns about consistency in the definition of block size discussed in section II above.
Alternatively, we note if the SEC relies on aggregated, or end-of-day reporting for each identified ATS, that model may be an even more effective method for providing transparency into total ATS volume, as the block size exemption could be determined to be unnecessary, thereby facilitating a regime where the publicly-reported statistics would reflect the total volume in each ATS.

We thank you for the opportunity to provide these comments. If you have any questions, please feel free to contact Andrew S. Margolin, Associate General Counsel, at 646.855.1736, Michael J. Lynch, Managing Director, at 646.855.3627 or Oliver Sung, Vice President, at 646.855.0216.

Respectfully submitted,

Deputy General Counsel

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

[9] By FINRA's own account of recent activity, and as referenced in a recent proposed rule change to revise trade reporting requirements, 99.9% of trades are reported in 30 seconds or less. See SR-FINRA-2009-061, 74 FR 59272 (November 17, 2009).

David Shillman, Associate Director, Division of Trading and Markets
Dan Gray, Senior Special Counsel, Division of Trading and Markets