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February 22, 2010

Elizabeth Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

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



Dear Ms. Murphy:

Global Electronic Trading Company (“GETCO”) appreciates the opportunity to comment on the above-captioned proposal by the Securities and Exchange Commission (the “Commission”) to amend the regulatory requirements that apply to non-public trading interest in National Market System (“NMS”) stocks.<sup>1</sup> GETCO supports to Commission’s goals of increasing the transparency of “dark pool” liquidity.

I. Introduction and Background

GETCO is a privately-held electronic trading firm that provides liquidity to exchanges and alternative trading systems in the United States, Europe, and Asia. From our offices in Chicago, New York, London, and Singapore, we engage in electronic market making for our own account on over 40 markets worldwide. GETCO is a registered market maker on various equity and option exchanges<sup>2</sup> and we engage in market making and liquidity provision to help investors efficiently transfer risk.<sup>3</sup>

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<sup>1</sup> Securities Exchange Act Release No. 34-60997 (November 13, 2009) 74 FR 61208 (November 23, 2009) (“Proposing Release”). As discussed in the Proposing Release, the term “dark pool” refers to non-exchange alternative trading systems that do not display their best priced bids or offers for inclusion in the consolidated quotation data.

<sup>2</sup> Registered Equity Market Maker: Nasdaq, NYSE Arca, and Bats.  
Designated Market Maker and Supplemental Liquidity Provider: NYSE.  
Registered Option Market Maker: Chicago Board Options Exchange, Nasdaq Options Market, and NYSE Arca Options.

<sup>3</sup> In GETCO’s view, one of the primary purposes of a financial market is to allocate risk to those persons or entities best able to bear it. As those entities do not necessarily meet in time, place, size and counter preference, market makers and liquidity providers such as GETCO commit their own capital and assume a variety of financial risks until a natural counterparty can be found.

While GETCO's primary business is electronic market making and liquidity provision on displayed markets, since March 2008 we have also operated our own alternative trading system, GETCO Execution Services, LLC ("GES"). GES is an SEC-registered ATS and a FINRA member broker-dealer and is the fourth largest ATS by volume.<sup>4</sup> GES provides subscribers with efficient and anonymous access to dedicated liquidity through the ATS's sole dedicated liquidity supplier, GETCO. Subscribers send immediate or cancel (IOC) orders to the ATS and receive a sub-millisecond response for a fill, partial fill, or cancel. All executions are at, or better, than the national best bid and offer (NBBO). GES is structured to eliminate subscriber risk for gaming or information leakage; it is a "fully dark" ATS and there are no IOI feeds or orders routed out of the ATS. GES maintains the full anonymity of both trading counter-parties and unexecuted individual order information is never disclosed.



We established GES ATS because GETCO believed there was considerable room for improvement in trade executions occurring off the public markets. A significant amount of volume (approximately 20-25% historically) never reaches a public venue and instead trades in dark pools or is internalized by broker-dealers. As an established and competitive liquidity provider in the displayed markets, we believed we could similarly compete and add value for non-displayed liquidity. In addition, GETCO's experience across the dark pools on which we traded had been inconsistent. Given these factors, GETCO decided to concentrate liquidity provision on one non-public venue, GES.

## II. GETCO's Overall View of the Dark Pool Proposal

The Commission notes in the Proposing Release the collective growth of ATS trading since the adoption of Regulations ATS (1998) and NMS (2005).<sup>5</sup> Despite this growth, most ATSs have not crossed the 5% volume threshold that triggers public display of quotes. Thus, the SEC is concerned that increased trading in dark pools may be harming the effectiveness and integrity of the public price discovery process and increasing market fragmentation. The Proposing Release seeks to increase transparency and mitigate fragmentation with three general proposals: (i) treating actionable IOIs as quotes; (ii) lowering the trading volume threshold for display from 5% to 0.25%; and (iii) requiring real-time disclosure of ATS trades.

In GETCO's view, publicly disseminated price discovery serves a vital purpose and should be protected. However, non-displayed pools of liquidity are also beneficial to the marketplace and serve numerous legitimate functions, including: improving fill prices relative to displayed quotations; reducing market impact; lowering transaction fees; lessening information leakage; and fostering innovation. Therefore, the Commission must strike the right balance in protecting the important role that public markets play in fostering

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<sup>4</sup> See Rosenblatt "Let There Be Light" survey, January 26, 2010.

<sup>5</sup> The Commission estimates there are approximately 32 dark pools that actively trade NMS stocks and they collectively executed approximately 7.9% of share volume in NMS stocks in the third quarter of 2009. See Securities Exchange Act Release No. 34-61358 (January 14, 2010) 75 FR 3594, 3598 (January 21, 2010) ("Concept Release").



price discovery, while also recognizing the interests served by dark markets. GETCO believes the Commission's specific proposals concerning actionable IOIs and the display threshold are appropriate measures that will ultimately serve to protect the integrity of the public price discovery process while not causing undue harm to non-displayed pools of liquidity. With respect to the Commission's real-time transparency proposal, we believe that post-trade transparency is important and needs to be improved, but should be limited to end-of-day reporting of volume by each venue that executes trades in the OTC market, including so-called dark pools, "upstairs" market makers and block trading desks.

Moreover, as the Commission noted in its recent Concept Release, there are often negative connotations associated with "market fragmentation" and dark pools are frequently cited as the primary reason liquidity is dispersed among various trading venues. GETCO fully supports the Commission's review of how order flow is dispersed among market centers—both lit and dark markets—as it evaluates the overall effectiveness of the current market structure. Nevertheless, it has been our experience that factors other than dark pools are the primary drivers of the current level of market fragmentation. Fragmentation has been fostered by a confluence of events including continued competition and innovation, increased automation of trading, and regulatory changes (decimalization, Regulation NMS). Both retail and institutional investors have generally benefited from these developments and the resultant fragmentation they have produced -- transaction costs have decreased and spreads have narrowed. In addition, technological improvements -- smart order routing -- have rendered fragmented markets more accessible than ever before. Finally, the proliferation of dark pools suggests that public exchanges cannot fully meet the assorted trading needs of all investors and that non-exchange venues, including dark pools, offer a viable alternative.

### III. Actionable Indications of Interest

The Quote Rule of Regulation NMS specifies the quoting obligations of market participants and specifically excludes "indications of interest" from the definition of "bid" or "offer."<sup>6</sup> However, because IOIs have never been defined in the Exchange Act, in many cases they have become essentially indistinguishable from displayed quotations. As a result, the Commission is proposing to extend the definition of bid or offer to apply explicitly to "actionable" IOIs.

As a leading liquidity provider on the public markets, GETCO supports transparency and the public price discovery process. As noted above, our dark pool GES is a "truly dark" ATS in that it does not display orders to any users of the trading system. Moreover, GES does not interact with IOIs, actionable or non-actionable, from other dark pools or other trading venues. We believe that immediately actionable IOIs -- those that explicitly or implicitly convey information that there is actionable trading interest in a symbol -- are essentially bids or offers and thus should be considered quotations and subject to the same obligations. If a message or IOI effectively represents a firm quote, it should be treated as one regardless of

<sup>6</sup> See Rule 600(b)(8) of Regulation NMS.

its label. Therefore, GETCO supports the SEC's proposal to eliminate the existing uncertainty about the status of immediately actionable IOIs or messages.

In our view, actionable IOIs are not dissimilar to flash order types, which we have opposed in previous comment letters<sup>7</sup> -- both are basically quotes privately disseminated to a select or limited group of market participants and both convey valuable information about available liquidity. When investors in dark pools have access to information about potential trades that other investors using the public quotations do not have, either actionable IOIs or flash orders, it creates the potential for two-tiered access to information. Sharing quote information among dark pools has the potential to create a private network that excludes public investors.

#### IV. Lowering the Threshold for Order Display and Execution Access

The Commission is proposing to lower the threshold at which alternative trading systems must display best priced orders in the public quote stream. Currently, if an ATS displays orders to more than one person, it must display its best-priced orders to the public when its average daily trading volume for a stock is 5% or more. The ATS is also required to provide broker-dealers the ability to execute against the displayed order. The proposal would lower that threshold to 0.25%, including dark pools that use actionable IOIs. The Commission preliminarily believes that lowering the volume threshold would reduce the potential for two-tiered markets and improve the quality of publicly available quotation data.

Given the concerns cited in the Release, GETCO believes reducing the volume threshold for display from 5% to 0.25% seems reasonable. As noted by the Commission, few if any dark pool ATSs have exceeded the current 5% threshold for any NMS stocks.

GETCO would also like to provide comments on the "fair access" requirements of Regulation ATS. GETCO notes that the Commission is currently reviewing the fair access threshold as part of its Concept Release on Equity Market Structure.<sup>8</sup> While the SEC did not propose in the Dark Pool Release to change the trading volume threshold that triggers the requirement of "fair access" to an ATS's full functionality, several market participants have publicly encouraged the Commission to also lower the fair access threshold in a similar fashion as the order display threshold (e.g., to .25%). In GETCO's view, no compelling reasons have been provided that would necessitate a change in the fair access threshold. As the Commission is aware, the display threshold and the fair access threshold do not need to be linked. When Regulation ATS was first adopted, the display threshold was 5% and the

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<sup>7</sup> See Letter to Elizabeth Murphy, Secretary, Securities and Exchange Commission, regarding SR-NASDAQ-2009-043 ("Flash Order"); BATS SR-BATS-2009-14 ("Bolt Order"); Direct Edge ECN's ELP Program (June 4, 2009). See also Letter to Elizabeth Murphy, Secretary, Securities and Exchange Commission, regarding Elimination of Flash Order Exception from Rule 602 of Regulation NMS, Release No. 34-60684 (November 23, 2009).

<sup>8</sup> The Commission has requested comment on whether the trading volume threshold in Regulation ATS that triggers the fair access requirement should be lowered from its current level of 5%.



fair access threshold was 20%. Fair access was subsequently lowered to 5% in with the adoption of Regulation NMS.

More importantly, lowering the fair access threshold could eliminate some of the benefits that ATSS bring to the marketplace. ATSS have been the greatest source of innovation in our markets. For example, some of the innovative concepts that now dominate the exchange space that were created on ATSS include: (1) maker-taker pricing (now used in some form by nearly all exchanges); (2) true price/time match; (3) immediately accessible firm quotes (auto-execution); (4) decimalization; (5) pegged orders; (6) iceberg orders; and (7) mid-point match. As such, lowering the fair access threshold could jeopardize the way ATSS operate, thereby minimizing new and creative ways for investors to access liquidity.

Simply put, if the fair access threshold was lowered, the role dark pools play in fostering innovation would likely be diminished as ATSS would take on similar responsibilities as exchanges.



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## V. Post-Trade Reporting

The Commission also proposes to amend the joint-industry plans for disseminating consolidated trade data to require real-time disclosure of “the identity of individual ATSS on trade reports in the public data stream, the same way exchange trades are identified.” At present, ATS activity is generically recorded as having occurred “OTC,” which the SEC appropriately characterizes as inadequate. The Proposing Release cites 38% of trading volume in NMS stocks as reported OTC and states a growing share of equity trading is occurring on ATSS, in support of the need to increase transparency of ATS trading.

GETCO supports the Commission in its goal to increase post-trade transparency through identification of individual ATS activity. GETCO, however, believes that summary information, such as end-of-day identification of ATS volume statistics, would accomplish the Commission’s goal of allowing the public to reliably identify the volume of executions in particular stocks on individual ATSS while protecting the nature of dark pools. In contrast, real-time, trade-by-trade identification would subject customer orders to potential information leakage and could be misused by market intermediaries to the disadvantage of investors. As noted in a Raymond James industry brief:

“... this proposal has the potential to create more trading opportunities for the much-maligned high frequency trader by mandating real-time posting. Delayed posting (such as end of the day) would still allow market participants to see exactly how much trading occurred on each dark pool, but real-time posting will allow sophisticated high-frequency traders to take advantage of this information.”<sup>9</sup>

Regardless of the transparency proposal adopted by the Commission, in GETCO’s view, post-trade transparency should apply equally to all forms of dark liquidity, including broker-

<sup>9</sup> See Raymond James, October 22, 2009, Patrick O’Shaughnessy.

dealer internalization by OTC market makers and block positioners. As the Commission notes, broker-dealer internalization accounts for approximately 17.5% of share volume in NMS stocks, which is more than double the volume attributable to dark pools.<sup>10</sup> Therefore, to exclude OTC market makers and block positioners from the reporting requirements would perpetuate the current level of ambiguity surrounding dark volume and fail to fully accomplish the objective of enhancing transparency for trades that occur on non-displayed venues.

## VI. Conclusion

GETCO supports the Commission in its efforts to find the right balance between protecting publicly disseminated price discovery without harming the beneficial attributes of non-displayed liquidity pools. We believe the proposals to treat actionable IOIs as quotes and to lower the display volume threshold from 5% to 0.25% are appropriate measures and respectfully suggests limiting post-trade transparency of ATS trades to end-of-day reporting.

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GETCO

GETCO appreciates the opportunity to submit these comments. Please do not hesitate to contact me at 312-242-4600 if you have any questions.

Sincerely,

  
John A. McCarthy  
General Counsel

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

<sup>10</sup> See Concept Release at 3598-3599.