BINGHAM

September 30, 2009

Via Electronic Submission

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

Re: File No. S7-08-09; Release Nos. 34-59748 and 34-60509

Dear Secretary Murphy:

We are writing on behalf of several clients with respect to the Commission's proposals regarding the imposition of a price-based limitation on short sales[1] and appreciate the opportunity to submit these comments at this time. The clients on whose behalf we write include an executing and clearing broker-dealer as well as non-broker-dealers that provide information technology services to the securities industry, such as order management systems and back-office systems. Our clients are not convinced that any short sale price test is necessary, and that such a rule should be implemented only if supported by empirical evidence. Furthermore, if, after reviewing the evidence, the Commission were to decide that such a rule is in fact necessary, our clients believe that any of the Commission's original five proposals is far superior to its sixth proposal, the Alternative Uptick Rule.

Our clients do not believe the Commission should reinstate such a limitation solely on the basis of the number of people who are calling for such action. At this point in time, it does not appear that either the Commission or public commenters have provided any factual basis to believe reinstating any short sale price test would be beneficial to the U.S. equities markets. In fact, the most thorough analysis backed by relevant data continues to be the Commission's work in connection with its decision to eliminate short sale price tests. Any decision to reinstate price tests should be based on at least as solid a footing as the Commission's decision to eliminate them. Furthermore, and most importantly, to the extent the Commission does determine it should impose a price-test on short sales, our clients believe the Commission's latest proposal termed the "Alternative Uptick Rule" in its August Proposing Release is the least desirable (and most detrimental) of the Commission's six price test proposals. The Alternative Uptick Rule may fairly be summarized as a prohibition of short sales at or below the price of the current national best bid.

Comments on Short Sale Price Restrictions Generally

As a general matter, our clients oppose the implementation of any short sale price test absent a rational basis supported by empirical evidence of a benefit to be derived from such a rule. In 2007, after years of consideration and the gathering of empirical data, including a year-long pilot where price tests were eliminated for thousands of securities, the Commission determined that short sale price tests were neither necessary nor beneficial. This action was recommended by the Commission's staff and almost universally supported by experts from

[1] Exchange Act Release No. 59748 (Apr. 10, 2009) (the "April Proposing Release"); Exchange Act Release No. 60509 (Aug. 17, 2009) (the "August Proposing Release").

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the securities industry and academia, among others, who offered their opinions to the Commission. It is surprising then, that the Commission is considering re-imposing short sale price restrictions without any factual basis whatsoever for such action.

To the extent the financial crisis of 2008 has led the Commission to reconsider the wisdom of removing short sale price tests in 2007, neither the April Proposing Release nor the August Proposing Release provides any data suggesting that short sales were responsible for the market's problems in 2008. In fact, two studies by the Commission's Office of Economic Analysis suggest that short sales were not responsible for the market problems in 2008. For these reasons, our clients believe that the Commission has failed to conduct the necessary empirical fact gathering and analysis sufficient to support the imposition of any short sale price test.

Comments on the "Alternative Uptick Rule"

If, after thorough consideration of empirical data, the Commission determines it is necessary to adopt a rule that restricts short sales on the basis of price, the Commission should not adopt the Alternative Uptick Rule. Of the Commission's six proposed short sale price tests, the Alternative Uptick Rule would have the largest negative impact on pricing efficiency and liquidity. It would also have a very significant impact on market structure issues that the Commission is currently examining - in particular, it would effectively end certain high-frequency trading strategies.

Impact on Pricing Efficiency

The Alternative Uptick Rule would have a significant negative impact on pricing efficiency, more so than any of the Commission's other proposed short sale price tests.
The Commission has long recognized the pricing efficiency provided by short sales. The Alternative Uptick Rule would only permit long sellers to hit bids displayed as part of the national market system, meaning long sellers would exclusively dictate the market price of purchases, harming the pricing efficiency offered by short sellers hitting displayed bids.

If the Alternative Uptick Rule were to be adopted, short sellers that remained in the market can be predicted to act in one of two ways - either displaying offers to sell short or otherwise seeking to execute short sales above the best bid. Those short sellers seeking to execute above the best bid without displaying offers will be forced to transact either in market centers that do not display their better-priced bids as part of the national market system (*e.g.*, dark pools) or through broker-dealers that offer internalization. In either case, the efficient pricing fostered by driving executions to the market centers that display the best prices as part of the national market system would be negatively impacted.

Impact on Liquidity and Market Structure

The Alternative Uptick Rule, among the Commission's six price test proposals, also would have the largest negative impact on liquidity and would fundamentally alter today's market structure. Among other effects, the Alternative Uptick Rule would essentially eliminate the high-frequency trading (*e.g.*, algorithmic/program trading) that accounts for a significant amount (if not the majority of) the volume in NMS securities.[2] High-frequency trading strategies rely on speed - most often they are buying and selling at the displayed prices of others, not displaying bids and offers. High-frequency trading strategies that "hit" displayed bids and offers provide the liquidity that those willing to display bids and offers need in order to actually effect transactions. Not only do high-frequency traders provide liquidity by acting as willing counterparties to displayed interest, their activities also narrows spreads and reduce transaction costs.[3]

Overall, high-frequency traders buy and sell in roughly equal proportion which means they sell long as much as they sell short; preventing high-frequency traders from selling short at the national best bid at any time would likely prevent the continued operation of many such strategies resulting in a significant decline in volume and associated liquidity. For example, one of the most common program trading strategies is "pairs trading" which typically involves buying one security while shorting another, then unwinding through a long sale and a purchase; we believe the inability of such strategies to sell short with the speed and certainty enabled by hitting displayed bids (by virtue of the Alternative Uptick Rule) would possibly eliminate such strategies and the liquidity they provide.

Our clients believe the Alternative Uptick Rule would materially alter the functioning of today's U.S. securities markets by effectively banning many high-frequency trading strategies and its benefits. We understand that the Commission is examining broader market structure issues including flash orders, dark pools, and high frequency trading, and we agree that there is much to be learned and evaluated with respect to these matters. But the proper forum for considering measures that would greatly limit high-frequency trading ought not to be an invitation to comment on a short sale price test. We believe that a side-effect of the Alternative Uptick Rule will be to materially reduce volume and curtail liquidity, thereby fundamentally affecting the functioning of today's U.S. securities markets.

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[2] Estimates of the percentage of U.S. equity trading that is high frequency trading range from more than 40% up to 70%. *See*, Edgar Ortega and Eric Martin, "High-Frequency Trading Faces Challenge From Schumer, Bloomberg," July 27, 2009 (stating that "NYSE Euronext estimates that about 46 percent of daily volume is executed through high-frequency strategies") at
http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZwoslIGa5JQ#; *see also*, "High-frequency Trading to Dominate More Asset Classes – TABB", The Trade News, Sept. 17, 2009 (stating "In the report, 'US equity high-frequency trading: strategies, sizing and market structure', TABB revises down its estimate of the proportion of high frequency trading in US equities to 70% from the 73% it reported in July."), at
http://www.thetradenews.com/trading-execution/algorithmic-trading/3636.

[3] *See, e.g.*, "Small-Caps Are Missing Out On High-Frequency Trade Benefits," Wall Street Journal, Sept. 16, 2009; *see also*, "S3 Analysis Shows High-Frequency Trading Has No Impact on Retail Equity Prices-Data Indicates Concerns of Sen. Schumer and Others Appear Unfounded," Press Release distributed by MarketWire, July 30, 2009, at
http://www.marketwire.com/press-release/S3-1023779.html.

Preferred Price Test

If any price test is adopted, it should closely resemble the former NASD bid test (whether or not the Commission also chooses to couple such a restriction with a circuit breaker). First, bids are more indicative of the current price than are ticks, plus bids are not subject to the vagaries of trade reporting that are associated with a 90 second (or even FINRA's proposed 30 second) window to report trades. From a price efficiency perspective, a bid test that permits short sales that "hit" bids at least some of the time is better than the Alternative Uptick Rule as a bid test permits short sellers' input on the pricing of bids at least some of the time. Similarly, from a liquidity perspective, a bid test would also permit for the liquidity provided by short sellers hitting up-bids which we may reasonably assume to be half of the time during the day.

Finally, to the extent prior commenters have suggested that a short sale price test based on directional changes in the national best bid is not workable from a technology perspective, our clients (who have a great depth of experience in designing order management and execution systems) strongly disagree. The fact that the former NASD bid test operated effectively until mid-2007 when the Commission outlawed all short sale price tests (well after the implementation of Regulation NMS) is proof that a price test based on changes in the national best bid is technologically feasible.

Conclusion

For the reasons discussed above, our clients are not convinced that any short sale price test is necessary, and that such a rule should be implemented only if supported by empirical evidence. Furthermore, if, after reviewing the evidence, the Commission were to decide that such a rule is in fact necessary, our clients believe any of the Commission's original five proposals is far superior to its sixth proposal, the Alternative Uptick Rule.

Sincerely yours,

Michael R. Trocchio

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